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

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RULING

Legislation referred to:

1. The Securities Act, No. 41 of 2016

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

Cases referred to:

1. Zega Limited v Zambia Revenue Authority – Appeal No. 96 of 2018
2. Guardall Security Group Limited v Reinford Kabwe – Appeal No. 44 of 2019
3. Anheuser-Busche and Two Others v Attorney General and Two Others – 2017/HP/1243
4. Standard Chartered bank Zambia PLC and Another v Securities and Exchange Commission – 2021/CMT/A/005
5. Chimanga Changa Limited v Export Trading Limited – 2017/HPC/0433

Introduction

1. On 28th July, 2021, the Applicants filed Summons for Leave to file Originating Notice of Motion out of time. The application was made pursuant to rule 10 of the Securities (Capital Markets Tribunal) Rules, Statutory Instrument No. 32 of 2021 ("the CMT Rules"). The Summons are supported by an Affidavit sworn by Mercedes Kumoyo Imasiku Mwansa, the Chief Executive Officer of the First Applicant, and Skeleton Arguments filed on 28th July, 2021.

2. On 11th August, 2021, the First Respondent filed an Affidavit in Opposition to Summons for Leave to file Originating Notice of Motion out of time sworn by Phillip Katali Chitalu, the Chief Executive Officer of the First Respondent; and List of Authorities and Skeleton Arguments against application to file out of time. The First Respondent,

on the same day, also filed an application for misjoinder, which was set for hearing on 30th August, 2021.

3. Three days before the date set for hearing the application for misjoinder, the Applicants filed an application to raise preliminary questions on a point of law. On 30th August, 2021, I directed the Applicants to serve on the Respondents the application to raise preliminary questions on a point of law and adjourned the matter to 8th September, 2021, for hearing of the preliminary issues. The application to raise preliminary questions on a point of law was disposed of by way of my ruling of 2nd November, 2021, which set 19th November, 2021, as the date for hearing the applications for permission to file Originating Notice of Motion out of time and for misjoinder of parties. The two applications were heard as scheduled and rulings were to be delivered within fourteen days from date of hearing. However, it was not possible to deliver the said rulings until now for various reasons which have been recorded and a copy thereof forwarded to the Chairperson of the Tribunal in terms of rule 3 (2) of the CMT Rules as read with Order 36 rule 2 (3) of the High Court Rules, Cap. 27, as amended by the High Court (Amendment) Rules, Statutory Instrument No. 58 of 2020 (the HCR).

4. Rule 10 (9) of the CMT Rules requires the Registrar to – within thirty days after hearing the parties – render, and communicate to the parties, a decision granting or rejecting an application for permission to commence an appeal or originating application out of time. More than thirty days have gone by since the application for permission to file out of time was heard. In the premises, the first question I must address is

whether or not I have jurisdiction to render a ruling on the said application.

Jurisdiction to Render Ruling

5. In two recent decisions, the Court of Appeal has taken the view that a decision or ruling delivered after the expiry of the statutory period prescribed for its delivery is null and void. In the case of **Zega Limited v Zambia Revenue Authority (1)** at J7, the Court of Appeal held that in their considered view, ***"... a decision delivered outside the time specified by a statutory provision is null and void"***. Moreover, the said Court stated the following at J27 in the case of **Guardall Security Group Limited v Reinford Kabwe (2):**

> ***"...the effect of a limitation provision in an Act of Parliament is to limit jurisdiction of the Court as to the matter before it to within that stipulated period ...Failure to act within the set time limit robs the Court of jurisdiction to take any further action in that matter. Whether or not the non-compliance has been caused by the Court or other players is immaterial as the cesser of jurisdiction is by act of law".***

6. Rule 10 (9) of the CMT Rules, like section 10 of the Tax Appeals Tribunal Act, No. 1 of 2015, does not state what the effect of the expiry of the prescribed timeframe for delivery of decision is with regard to jurisdiction. In terms of the case law cited above, it would follow that a ruling delivered after the expiry of the statutory thirty days prescribed by rule 10 (9) of the CMT Rules would be rendered a nullity. However, it is my considered view that the Capital Markets Tribunal practice and procedure framework is distinguishable from that of the Tax Appeals Tribunal. This is because, unlike the Tax Appeals Tribunal Act, the

CMT Rules provide for recourse, with necessary changes, to the practice and procedure applicable in the High Court where the CMT Rules do not provide for the manner in which jurisdiction as to practice and procedure may be exercised by the Tribunal (rule 3 (2) of the CMT Rules).

7. Moreover, it is also my considered view that – to the extent that it involved a timeframe fixed by primary legislation and in any event was heard before the High Court (Amendment) Rules, Statutory Instrument No. 58 of 2020, were issued – the **Guardall Security Group (2)** case is distinguishable from the present case in so far as the effect of expiry of timeframe for delivery of decision.

8. Order 36 rule 2 (3) of the HCR is instructive on the practice and procedure where the High Court fails to deliver a ruling within the prescribed ninety days period after conclusion of the hearing. Order 36 rule 2 (3) of the HCR, in its effect, allows the High Court to validly exercise jurisdiction beyond the prescribed timeframe for delivering a ruling when certain conditions, including notification of the parties' Advocates of the new date on which the Court would deliver its ruling, are met. I am of the considered view that Order 36 rule 2 (3) of the HCR applies, with necessary changes, to the Capital Markets Tribunal by virtue of rule 3 (2) of the CMT Rules. This being the case, and the conditions – as modified to suit the Capital Markets Tribunal set up – set out in Order 36 rule 2 (3) of the HCR having been met, I find and accordingly hold that I have jurisdiction to deliver my ruling on the application to file originating application out of time despite the expiry of the thirty days prescribed by rule 10 (9) of the CMT Rules.

Evidence

9. According to the Affidavit in support of the summons for permission to file originating notice of motion out of time, the First Respondent made a number of decisions in relation to the First Applicant; these decisions include the issuance of Directive No. 10 of 2018; enforcement action as communicated to the First Applicant by First Respondent's letter dated 30th May, 2019; possession of the First Applicant as communicated to the First Applicant by First Respondent's letter dated 2nd March, 2020; and steps or actions taken pursuant to the said possession.
10. It was also the Applicants' evidence that they had no means of pursuing redress as the Tribunal had not become operational; and that further delay in commencing proceedings before the Tribunal was occasioned by the absence of certain vital documents, such as the file containing all reports and correspondence exchanged between the First Applicant and the First Respondent in relation to the subject matter of the intended originating notice of motion. Despite making this claim, the affidavit in support did not exhibit any documentary proof of seizure of the said vital documents.

11. The Applicants' affidavit exhibited the draft originating process the Applicants intended to file in the event that permission to file the same out of time was granted.

12. In the affidavit in opposition, it was deposed that the First Respondent is the regulator of capital markets in Zambia; that the First Applicant is a licensed securities dealer and authorised as a fund manager; and

that the Second Applicant is the parent company of the First Applicant, whose securities are registered with the First Respondent.

13. It was also the First Respondent's evidence that it issued a directive to capital market operators to the effect that deposit-taking was not an authorised activity under dealers' licences issued by the First Respondent.

14. The affidavit in opposition states that, contrary to paragraph 10 of the Applicants' affidavit in support, the First Applicant sought relief from its liabilities to its investors and entered into a scheme of arrangements with investors in its Fixed Income Fund.

15. Moreover, the affidavit in opposition states, the First Respondent took supervisory possession of the First Applicant on 2nd March, 2020, and appointed the Third Respondent as a joint interim manager (without personal liability) of the First Applicant.

16. It was also the First Respondent's evidence that, contrary to the Applicants' assertion in paragraph 13 of the affidavit in support, no documents belonging to the First Applicant were seized or removed by the First Respondent or the First Respondent's agents, employees or servants.

17. Furthermore, the affidavit in opposition states that the First Applicant did not obtain the approval of the interim managers to commence these proceedings on behalf of the First Applicant.

18. The affidavit in opposition added that the power to implement supervisory possession of the First Applicant was delegated to the deponent of the said affidavit.

19. The Second and Third Respondents did not file an affidavit in opposition. The Applicants did not file an affidavit in reply despite being given the leeway to do so by my ruling on the application to determine preliminary questions on points of law.

20. It is not in dispute that the First Respondent issued a directive to capital market operators in 2018; that it took enforcement action against the First Applicant; and that it took possession of the First Applicant and appointed joint interim managers (without personal liability).

21. It is also common cause that the First Applicant is a licensed securities dealer; and that the First Respondent is the regulator of capital market operators in Zambia.

22. Moreover, it is undisputed that the First Applicant did not obtain the approval of the joint interim managers before launching the present proceedings.

Skeleton Arguments and Hearing

23. At the hearing of the application on 19th November, 2021, Counsel relied on their respective process filed on 28th July, 2021, and 11th August, 2021; and augmented their Skeleton Arguments with oral submissions.

24. The Applicants premised their application on section 192 (2) of the Securities Act, No. 41 of 2016, which – they contended – extended to originating applications despite the non-mention of the said applications in the said section. They argued that the drafting of the CMT Rules, which referred to commencement of appeal out of time in the same sentence as commencement by way of originating notice of motion out of time pointed to similarity of considerations when dealing with out of time applications for commencement of proceedings before the Tribunal.

25. Additionally, the Applicants pointed out that it was held, in the High Court case of **Anheuser-Busche and Two Others v Attorney-General and Two Others (3)**, that a person aggrieved at a decision of the Securities and Exchange Commission had to appeal to the Tribunal and not any other forum.

26. The thrust of the Applicants' Skeleton Arguments was that permission be granted to file originating notice of motion out of time on the strength of the principles applicable to appeals to the Tribunal out of time. This, it was posited, is because the Applicants could not commence an action earlier due to the Tribunal only becoming operational in April, 2021, when the CMT Rules were made; and due to challenges they had accessing certain key documents required to commence proceedings. It was also contended that the present application was made at the earliest possible opportunity.

27. In his oral submissions at the hearing of the application augmenting the Skeleton Arguments in support of the application, Captain Chooka

argued that at this stage the Tribunal was not engaged in an early evaluation of evidence or analysis of prospects of success. The Tribunal's concerns at this point were whether there was a reasonable cause for not filing the originating application within the prescribed period and whether the application was filed thereafter without unreasonable delay. He contended that the Applicants met the two-pronged test for a grant of permission to file originating process out of time in that the Tribunal not yet being operational was reasonable cause for not commencing proceedings within the prescribed period and the Applicants moved speedily after the CMT Rules were made and filed process on 28th July, 2021.

28. The contentions in the Skeleton Arguments in opposition centred partly on non-compliance by the Applicants with what were presented as conditions precedent to the institution of proceedings by persons in circumstances the Applicants were in. It was argued that, being under supervisory possession, the First Applicant was precluded from commencing process without first obtaining the approval or permission of the joint interim managers; and that this being the case, the Applicants' present application could not be sustained.

29. Additionally, it was posited that an appeal against a decision made in the performance of delegated functions ought, in terms of the Securities Act, 2016, to be made to the Board of the First Respondent first; and that it was, therefore, irregular for the Applicants to approach the Tribunal.

30. It was also contended in opposition that the application should not be allowed because the originating notice of motion and affidavit the

Applicants intended to file contained scandalous matters that should not grace the Tribunal's record; and that the application was an abuse of process because it was intended to frustrate the sale of ringfenced properties and cast derogatory light on the Second and Third Respondents using baseless allegations that were scandalous and irrelevant to the adjudication of issues in the application to be filed.

31. In augmenting the Skeleton Arguments in opposition at the hearing, Ms Mulondiwa argued that, since the First Applicant was undergoing a type of insolvency proceeding under the Corporate Insolvency Act, No. 9 of 2017, it ought to have sought the permission of the joint interim managers before coming to the Tribunal. That the First Applicant did not seek the said permission and this meant that the present application was irregular and ought to be struck down. She prayed for costs.

32. In reply, Captain Chooka submitted that regulatory action did not limit the Applicants' right to commence legal proceedings; and failure to obtain the joint managers' permission could not be the basis on which the present application could fail. In any case, he posited, the First Respondent's letter taking possession of the First Applicant clearly advised the First Applicant of its right to appeal. It was his position that the said advice was legally sound.

Issues for Determination

33. I have considered the application, the Affidavit in support of the application, skeleton and oral arguments advanced in support of, and in opposition to, the application. The issue for determination, as I see it, is whether this is a proper case for the grant of permission to file

originating process out of time. In making this determination, it is necessary to establish whether –

i. section 192 (2) of the Securities Act, 2016, applies to applications for permission to commence originating applications out of time;
ii. originating notice of motion is the proper originating process where a person seeks to challenge a decision of the Securities and Exchange Commission; and
iii. a person the Securities and Exchange Commission takes possession of or that is under an insolvency proceeding requires the permission of an interim manager or equivalent person prior commencing an action before the Tribunal.

Applicability of section 192 (2) of the Securities Act, 2016, to Originating Applications

34. Counsel for the Applicants contended that section 192 (2) of the Securities Act, 2016, which provides for criteria to be employed by the Tribunal in determining whether or not to allow the institution of an appeal out of time, extends to originating applications on the basis that the words appeal and originating application appear in the same sentence in rule 10 (1) of the CMT Rules relating to appeal or originating application out of time. Counsel for the Respondents appeared to tacitly concur with this line of reasoning in that she did not counter it, save to state that the present case was based on special circumstances; and the special circumstances she alluded to said nothing about whether section 192 (2) of the Securities Act, 2016, applied to originating applications out of time.

35. Section 192 of the Securities Act, 2016, in so far as is material provides that

> ***(1) An appeal, to the Tribunal shall be instituted by filing with the Registrar of the Tribunal, a notice of appeal, accompanied with the prescribed fee, and by serving a copy of the notice on the Commission, within twenty-eight days of the notification to, or the service on, the respondent, or within such other time as may be required by the rules prescribed by the Chief Justice.***
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> ***(2) Notwithstanding subsection (1), an appeal may be instituted out of time if the Tribunal is satisfied that there was a reasonable cause for not appealing within the time prescribed and that the appeal was filed thereafter without unreasonable delay.*** (underlining mine for emphasis).

36. It is quite evident that section 192 deals with originating process in the nature of appeals and not an originating application. It stands to reason that the prescription in several provisions of the Securities Act, 2016, of timeframes within which appeals against decisions of the First Respondent ought to be instituted before the Tribunal[1] necessitated the inclusion of section 192 (2) in the Securities Act, 2016, so as to allow for appeals out of time in circumstances specified in the said section.

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[1] Provisions in the Securities Act, 2016, that stipulate appeal timeframes include sections 28 (1) and 43 (1) providing for appeals relating to licensing decisions of the First Respondent under Part III (Licensing of Securities Exchanges and Clearing and Settlement Agencies) and Part V (Licensing and Regulation of Capital Markets Operators); section 54 (1) providing for appeals relating to credit rating agency licences; section 63 (1) providing for appeals by securities exchange against decisions of the First Respondent touching on matters such as investor protection or proper regulation of trade on securities exchange; section 92 (1) providing for appeals by clearing and settlement agencies against directions of the First Respondent touching on public interest and proper operation of such agencies' affairs; section 129 (6) providing for appeal by an aggrieved person against the First Respondent's refusal to authorize the establishment of a venture capital fund; and section 191 (1) on appeals to the Tribunal relating to various kinds of decisions specified in the said section.

37. On the other hand, and in so far as I could ascertain, the bulk of the provisions in the Securities Act, 2016, on originating process other than appeals do not prescribe timeframes within which they should be commenced before the Tribunal[2]. It is unsurprising then that Parliament was not minded to provide a section 192 equivalent in respect of originating applications.

38. It is apparent, in my view, that Parliament could not have intended section 192 of the Securities Act, 2016, to apply to originating applications. In other words, section 192 (2) of the Securities Act, 2016, cannot be invoked in determining whether or not to grant an application for permission to file originating application out of time.

39. In the absence of a provision in the Securities Act, 2016, setting out the test to be applied in determining an application for permission to file originating application out of time, recourse must be made to the CMT Rules for guidance. But, while rules 8 and 10 of the CMT Rules respectively stipulate the timeframe for instituting originating applications and provide for institution of said applications out of time, the said rules do not state the test to be applied or criteria to be employed in arriving at a decision to grant or refuse permission. In the premises, rule 3 (2) of the CMT Rules requires that recourse be made to the practice applicable in the High Court with regard to the grant or refusal of applications for leave to file process out of time. Before I delve into a consideration, if I will have to, of the practice in the High

[2] Timeframes for institution of proceedings are not prescribed in sections 30 (3) and 65 (4) relating to originating applications for determination of certain decisions of self-regulatory organisations and securities exchanges, respectively; section 119 (1) relating to originating applications for rectification of records of a clearing and settlement agency; and section 194 relating to market misconduct proceedings. Note, however that originating application in a disciplinary action in terms of section 209 (5) ought to be instituted within a prescribed timeframe.

Court with regard to such applications, it is imperative that I determine the propriety or otherwise of instituting the intended proceedings by way of originating notice of motion.

Is Originating Notice of Motion appropriate for challenging decisions of the First Respondent?

40. It is abundantly clear from the application that decisions of the First Respondent and its agents in taking possession of the First Applicant are at the centre of the intended originating application. In his oral submissions, Captain Chooka acknowledged that the advice given by the Second Respondent on behalf of the First Respondent to the First Applicant contained in exhibit "MKIM-3" of the Applicants' affidavit in support of the present application to the effect that the First Applicant had the right in terms of section 191 of the Securities Act, 2016, to appeal against the decision of the First Respondent to take possession of the said First Applicant and appoint interim managers.

41. I find it quite surprising that even in the face of advice he readily accepted as legally sound, Counsel for the Applicants opted to bring an application for permission to file originating notice of motion out of time instead of applying for permission to institute appeal out of time. Be this as it may, there is no doubt that the decision of the First Respondent to take possession of the First Applicant and appoint interim managers is appealable to the Tribunal. The question is whether I have jurisdiction to order that the application be treated as being for permission to appeal out of time as opposed to being for permission to file originating application out of time.

42. Rule 22 (1) (d) of the CMT Rules, in so far as is material, empowers me to – on application by a party or at my instance – take any course which in my opinion may help determine a matter in a just, speedy and inexpensive manner. Dismissing the application on the basis that the mode of commencement intended is wrong would not be in keeping with doing substantive justice. Ordering the Applicants to file a fresh application would be at variance with speedy and inexpensive determination of the matter. In the premises, it is my considered view that treating the present application as an application for permission to appeal out of time is a course that aligns with helping to determine the matter in a just, speedy and inexpensive manner. I accordingly order that the present application is an application for permission to appeal out of time.

43. The import of my order in the immediately preceding paragraph is that the test laid down in section 192 (2) of the Securities Act, 2016, applies. Therefore, it is necessary to consider whether or not the Applicants had reasonable cause for not appealing within the prescribed period of time and whether they approached the Tribunal thereafter without unreasonable delay.

44. It is not in dispute that prior to the issuance of the CMT Rules, persons aggrieved at decisions of the First Respondent could not commence proceedings before the Tribunal. It is, therefore, undoubted that the Applicants had reasonable cause not to appeal within the prescribed period.

45. On the question whether the Applicants approached the Tribunal without unreasonable delay after the CMT Rules came into operation,

the Tribunal in its ruling on an interlocutory appeal in the case **Standard Chartered Bank Zambia PLC & Another v Securities and Exchange Commission (4)** effectively qualified this statutory test to the principle in favour of having disputes determined on their merits. It is my considered view in the light of the cited Tribunal decision that, despite what I consider to be unreasonable delay by the Applicants to file their application for permission to file originating process out of time (it took the Applicants about 96 days after the publication of the CMT Rules to present the application), the dispute as evidenced by the Applicants' dissatisfaction with the First Respondent's decisions should be determined on its merits.

46. But what about Ms. Mulondiwa's assertion that because the First Applicant is undergoing a type of insolvency proceeding in terms of the Corporate Insolvency Act, 2017, the Applicants were precluded from taking out the present proceedings without first seeking the permission of the interim managers?

Is Permission of Interim Manager required to institute Proceedings under the Securities Act, 2016?

47. According to Ms Mulondiwa, the effect of a supervisory possession is that legal proceedings, other than proceedings challenging the validity of the possession, cannot be commenced without the permission of the interim managers. The basis of this argument appears to be partly the contents of exhibit "MKIM-3" of the affidavit in support of the present application which, it was contended, clearly stipulated that legal proceedings on behalf of the First Applicant could not be commenced during the pendency of the possession without the permission of either interim manager.

48. The Skeleton Arguments filed by Legal Counsel in the First Respondent's employ referred to the case of **Chimanga Changa Limited v Export Trading Limited (5)** and argued that the powers of an interim manager in a supervisory possession were similar to the powers of a business rescue administrator in business rescue proceedings. In the cited case, the Court of Appeal recognized that directors of a company undergoing business rescue remain in situ. There is neither a requirement in the Corporate Insolvency Act, 2017, nor in the case cited for the permission of a business rescue administrator to be sought before the company undergoing business rescue proceedings can commence legal proceedings.

49. Further, my perusal of the Securities Act, 2016, revealed that the First Respondent is empowered by section 11 (4) to, among other things, take possession of, or appoint a manager to run, the affairs of the licensed person in certain instances. However, there is no provision in the Securities Act, 2016, that requires the permission, consent or approval of an interim manager before the company under supervisory possession can commence legal proceedings. In the circumstances, I do not accept the argument that the application is irregular for want of the permission of the interim managers for the First Applicant to commence legal proceedings. I do not think the right to appeal against decisions of the First Respondent in terms of the Securities Act can be limited or qualified in the manner suggested by Counsel for the Respondents.

Final Orders

50. For the avoidance doubt, the present application is deemed to be an application for permission to file appeal out of time, which application is granted as it meets the requirements for the grant of permission to appeal out of time. The Applicants are ordered to file the appeal within fourteen days of this ruling.

51. As it appears that only the First Respondent can be the Respondent to an appeal in terms of section 184 (3) (a) of the Securities Act, 2016, as read with the CMT Rules, there is no need for me to render a detailed ruling on the application for misjoinder as doing so would be an academic exercise since the Second and Third Respondents will not be parties to the appeal to be filed by the Applicants should they decide to file same.

52. Similarly, it is not necessary for me to delve into specifically addressing the contentions by the First Respondent regarding the contents of the draft intended originating process the Applicants exhibited to the affidavit in support and arguments attacking the application for permission to file originating process out of time as being an abuse of process. This is because my order that the Applicants should file an appeal as opposed to an originating application necessarily entails that a notice of appeal and supporting affidavit – as opposed to the exhibited draft intended originating notice of motion and supporting affidavit – will have to be filed before the Tribunal.

53. Moreover, I am of the considered view that the order for the Applicants to file an appeal effectively renders inconsequential a consideration of the contention that the application was prematurely before the Tribunal as the Applicants should have first sought a review by Board of the

First Respondent as the Second Respondent was performing a delegated function. As I stated earlier, the decisions of the First Respondent relating to possession of the First Applicant and appointment of interim managers is really what is at the centre of the Applicants' grievances; and an appeal to the Tribunal is the recourse prescribed by law. In any case, even if consideration were to be given that the Applicants should have first a review by the Board in terms of section 14 (4) of the Securities Act, 2016, the Respondents did not produce the minutes by which the Board delegated the functions in relation to supervisory possession in general or in relation to the First Applicant. In the circumstances, I am not persuaded by the Respondents arguments on this aspect.

54. Costs shall be in the cause.

55. Leave to appeal is granted.

DELIVERED THIS 25TH DAY OF FEBRUARY, 2022

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M. CHOLA

REGISTRAR