

IN THE CAPITAL MARKETS TRIBUNAL
HELD AT LUSAKA

2021/CMT/A/002

BETWEEN:

PANEX COMMODITY EXCHANGE ZAMBIA LIMITED

AND

SECURITIES AND EXCHANGE COMMISSION

APPLICANT

RESPONDENT



Before: The Registrar, Mr M. Chola, in Chambers
For the Appellant: Mr S. Chikuba, Messrs. Paul Norah Advocates
For the Respondent: Mrs D. Sichone and Ms D. Mulondiwa, In-House
Counsel, Securities and Exchange Commission

RULING

Legislation referred to:

1. The Securities Act, No. 41 of 2016
2. The Companies Act, No. 10 of 2017
3. The High Court Act, Chapter 27 of the Laws of Zambia
4. The Penal Code Act, Chapter 87 of the Laws of Zambia
5. The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia
6. The Securities (Capital Markets Tribunal) Rules, Statutory Instrument No. 32 of 2021
7. The Rules of Supreme Court, 1999 edition

Cases referred to:

1. Blake v the Albion Assurance Society (1876) 45 L.J.C.P. 663

R1



2. Tebuho Yeta v African Banking Corporation ABC (Zambia) Limited – SCZ Appeal No. 117/2013
3. Chief Mwanatete v Innocent Muyikwa Lushato and Mweene Mutondo – 2014/HP/1043
4. Sawekema v Watson Ng’ambi – 2004/HP/166
5. Myers v Ellman (1942) AC 282

Introduction

1. The Respondent has applied for an order to expunge matter from the Affidavit in Reply to Affidavit in Opposition to Appeal. The application has been made pursuant to rule 24 of the Securities (Capital Markets Tribunal) Rules, Statutory Instrument No. 32 of 2021 (“the CMT Rules”). The application is supported by an Affidavit deposed by Thomas Thole, an Investigations Officer in the employ of the Respondent, and Skeleton Arguments filed on 3rd September, 2021.
2. The Appellant opposed the application by filing an Affidavit in Opposition deposed by Siakamwi Chikuba, a shareholder and former director in the Appellant, and Skeleton Arguments filed on 13th September, 2021.
3. The application was heard on 20th 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. However, it has not been 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. The CMT Rules do not stipulate the timeframe within which a ruling on an interlocutory application, other than an application for permission to file originating process out of time, should be delivered. However, Order 36 rule 2 (2) (c) of the HCR – which applies to the Tribunal by virtue of rule 3 (2) of the CMT Rules – requires that a ruling be delivered within ninety days after conclusion of the hearing.

5. 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.

Affidavit in Support and Affidavit in Opposition

6. The Respondent's Affidavit in Support of Summons for an Order to Expunge Matter from Appellant's Affidavit in Reply to the Respondent's Affidavit in Opposition to Appeal states, in paragraph 7, that paragraphs 7 and 8 of the Appellant's Affidavit in Reply do not respond to facts contained in the Respondent's Affidavit in Opposition to Appeal. Paragraphs 7 and 8 of the Appellant's Affidavit in Reply are reproduced later.

7. Paragraph 9 of the Respondent's said Affidavit further states that paragraphs 17, 19, 20, 22, 23, 28, 29 and 33 of the Appellant's said Affidavit contain conclusions, opinions and beliefs held by the deponent of the Appellant's said Affidavit. The mentioned paragraphs of the Appellant's said Affidavit are reproduced later.

8. The Appellant's Affidavit in Opposition to the Respondent's application states that the contents of paragraphs 7 and 8 of the Appellant's Affidavit in Reply respond to the Respondent's Affidavit in Opposition to Appeal; and that the contents of the said Affidavit in Reply are stemming from the capacity and identity of the deponent in the Affidavit in Opposition filed by the Respondent on the 3rd of September, 2021.
9. According to the Appellant, the deponent of the Respondent's Affidavit in Opposition to Appeal was a substantial shareholder of a company regulated by the Securities and Exchange Commission named and styled Bond and Derivative Exchange, which company deals with commodities, bonds and derivatives, the same business as the Appellant in this matter; and the said deponent dealt with issues pertaining to the Appellant and the Board of the Respondent without disclosing his conflict of interest to the Appellant and the said Board.
10. It is also the Appellant's evidence that the Appellant demanded the resignation of the deponent in a letter dated 7th September, 2021, on the ground that the deponent was not a 'fit and proper person' to run with matters pertaining to the markets. The Appellant also complained to the Board of the Respondent against the deponent's handling of the Appellant's case in another letter also dated 7th September, 2021. The two letters are exhibited to the Appellant's Affidavit in opposition to the present application and marked "SC1" and "SC2", respectively.
11. Moreover, the Appellant's Affidavit in Opposition to the present application states that paragraphs 17, 19, 20, 22, 23, 28, 29 and 33 of the Appellant's Affidavit in Reply consist of facts stemming from

specified backgrounds and foundation, and support the contents of paragraphs 7 and 8 of the said Appellant's Affidavit in Reply.

12. Lastly, the Appellant's Affidavit states that the Respondent had not produced signed minutes where the deponent's conflict of interest was disclosed to the Board of the Respondent.

Skeleton Arguments and Hearing

13. At the hearing of this application on 20th September, 2021, Counsel relied on their respective process filed on 3rd September 2021, and 13th September 2021; and augmented their Skeleton Arguments with rather lengthy oral submissions.

14. In its Skeleton Arguments, the Respondent relied on rule 3 (2) of the CMT Rules as a basis for calling in aid of its case the provisions of the High Court Act, Chapter 27 of the Laws of Zambia, and the Rules of the Supreme Court (White Book) 1999 edition ("the RSC 1999"). The thrust of the Respondent's Skeleton Arguments was that the attacked portions of the Appellant's Affidavit in Reply consisted of matter that ought not to be in an Affidavit. In the premises, the Respondent prayed that extraneous and scandalous matter in the said Affidavit in Reply be struck off and expunged from the record with costs to the Respondent; and that new information that did not serve the purpose of replying to the Respondent's Affidavit in Opposition and unsubstantiated information or beliefs be struck out of the Affidavit for being prejudicial and contrary to the rules of procedure.

15. In response, the Appellant's Skeleton Arguments also referred to provisions of the High Court Act and the RSC 1999, and posited that the Affidavit in Reply did not contain extraneous matters because it spoke to the capacity of the deponent of the Respondent's Affidavit in Opposition. It was also contended that the attacked portions of the Appellant's Affidavit in Reply contained only relevant facts which stemmed from the said Affidavit's deponent's personal knowledge or information he believed to be true; and that this being the case, the attacked portions of the said Affidavit could not be said to be extraneous opinions or beliefs. Moreover, it was argued, on the strength of the case of **Blake v the Albion Assurance Society (1)**, that the Appellant's challenge to the deponent of the Respondent's Affidavit in Opposition did not make the issues raised scandalous.

16. Counsel for the Respondent, in augmenting Respondent's Skeleton Arguments, opened her oral submissions by addressing the issue of beliefs and information being sworn to in an Affidavit. She stated that paragraph 41/5/4 of the explanatory notes to Order 41 rule 5 of the RSC 1999 clearly required a deponent not to include in an Affidavit any beliefs or information that was not based on facts known to him unless the sources of such information and beliefs were clearly stated in the said Affidavit. Contrary to the said rule, she argued, the deponents of the Appellant's Affidavits continued to include extraneous beliefs and information in their Affidavits.

17. It was Counsel's submission that such information and beliefs must be struck out from the Affidavits in Reply to Appeal and in Opposition to this application for being contrary to the rules of procedure. She specifically singled out paragraphs 10, 11, 12, 13, 14 and 15 of the

Appellant's Affidavit in Opposition to this application as containing information and beliefs that were not in compliance with the rules of procedure as outlined in Order 5 rules 15 to 18 of the HCR and Order 41 of the RSC 1999.

18. In reacting to the Appellant's Skeleton Arguments in opposition to the present application, Counsel contended that the main qualification for information to be admitted as evidence was that the information was relevant to prove or disprove a matter in dispute between the parties. She argued that the Appellants were trying to have admitted into the Tribunal, documents that spoke to the capacity of the deponent of the Respondent's Affidavit in Opposition to Appeal as a shareholder that was quite removed to related party.

19. Ms Mulondiwa submitted that the veil of incorporation existed for a reason and that the said veil of incorporation could only be lifted in very limited circumstances where the company was a façade or was used by a shareholder to perpetuate a fraud or avoid legal obligations. The grounds for lifting or piercing the veil of incorporation, Counsel contended, did not exist in this matter; and the evidence that the Appellant sought to gain from lifting the veil of incorporation had no probative value to prove or disprove the matters in dispute between the parties as the Notice of Appeal showed that the issues to be determined at trial merely related to the breach of natural justice in the manner the Appellant's Exchange Licence was cancelled.

20. Moreover, Counsel argued, there was no issue in dispute that touched on the capacity as a shareholder of the deponent of the Respondent's Affidavit in Opposition to Appeal; and that, as the Appellant was not

seeking any reliefs on the said capacity, the cited paragraphs in the Affidavit in reply were scandalous as their sole purpose was to discredit the deponent of the Affidavit in opposition to appeal and thereby prejudice the fair trial of the substantive issues herein. She pointed out that the prejudicial nature of the contentious paragraphs in the Affidavit in Reply greatly outweighed their promotive value.

21. Counsel went on to argue that paragraph 18/19/15 of the explanatory notes to Order 18 rule 19 of the RSC 1999 clearly outlined some scenarios that were similar to the circumstances herein in which the English courts struck out extraneous matters for being scandalous. She urged me to apply the spirit and tenor of the said explanatory note to Order 18 rule 19 of the RSC 1999 and have the said extraneous matters struck out from the Affidavit in Reply for being scandalous.

22. It was Counsel's further argument that it was not illegal for the deponent of the Respondent's Affidavit in Opposition to Appeal to be a shareholder; that the only statutory requirement was that every conflict of interest must be declared to the Board of the Respondent; and that there was no further obligation to declare conflict of interest to the Appellant or the capital markets at large. Therefore, she submitted, the Appellant's argument that they should have been informed of the conflict of interest was misplaced and not supported by the law. She pointed out that section 8 (1) (a) of the Securities Act, No. 41 of 2016 ("the Securities Act") imbued the exercise of the statutory functions of the Respondent in its Board; and that section 16 (4) of the said Securities Act, expressly stated that the Chief Executive Officer of the Respondent had no voting power or rights on any matters before the Board. She added that the role of the Chief Executive

Officer of the Respondent in terms of section 16 (2) (b) of the Securities Act was limited to implementing Board decisions and as such his capacity as a shareholder twice removed was irrelevant to the matters in issue herein because the decisions complained of were made by resolution of the Board of the Respondent.

23. Ms Mulondiwa referred to the case of **Tebuho Yeta v African Banking Corporation ABC (Zambia) Limited (2)** in which the Supreme Court of Zambia stated that substantial justice meant justice not only for the complainant and the Respondent but also for any person mentioned in the proceedings. She stated that in the said case, the Supreme Court struck out allegations of a personal nature that had been made against a non-party to the proceedings on the basis that the non-party could not defend themselves against the allegations and their reputation could be seriously damaged. She argued that the deponent of the Respondent's Affidavit in Opposition was in a similar position as he was not party to these proceedings and would not have an opportunity to defend himself against the prejudicial statements contained in the Appellant's Affidavit in Reply.

24. Counsel also insisted that the case of **Chief Mwanatete v Innocent Muyikwa Lushato and Mweene Mutondo (3)** was applicable in the present case because the deponent of the Affidavit in Opposition to Appeal was the author of the majority of the letters to the Appellant and as such the Appellant should have anticipated that the Respondent's Chief Executive Officer would be the deponent of the Respondent's Affidavits in the Tribunal; and should have brought their complaint in the lack of capacity to the attention of the Tribunal through their Affidavit in Support of Appeal. She contended that, having failed

to do so, and since the issue of the Chief Executive Officer's capacity was not critical to the determination of the substantive issues, this Tribunal should adopt the holding in the case of **Chief Mwanatete** and strike out the extraneous matters in the Affidavit in Reply.

25. Ms Mulondiwa concluded her oral submissions by addressing the conduct of the Appellants in copying exhibits "SC1" and "SC2" to the Registrar of the Tribunal among other offices. She referred to paragraphs 52/1/22 and 52/1/23 of the explanatory notes to Order 52 rule 1 of the RSC 1999, submitting that written words or actions calculated to interfere with or prejudice the course of justice may be grounds for the issue of contempt proceedings; and arguing that copying the Registrar of the Tribunal in the said "SC1" and "SC2" was highly improper. She contended that the deponent of the Appellant's Affidavit in Opposition to the present application was the most senior partner in the firm of Advocates representing the Appellant herein. She urged the Tribunal to remind the deponent of the said Affidavits of his professional duties on the basis of the following dictum in the case of **Sawekema v Watson Ng'ambi (4)**:

"...in every sphere of practice, Counsel must be courteous. Counsel must at all times be courteous to the court and all those with whom he has professional dealings".

26. She added that in **Myers v Ellman (5)**, the court directed that an Affidavit placed on the court record that contained any false matter must be corrected by Counsel of record. She submitted that the Respondent discovered some extraneous matter and averments in the Affidavit in opposition to the present application that could potentially

entitle the Registrar to exercise his powers pursuant to rule 22 (5) of the CMT Rules to invoke chapter 11 of the Penal Code Act, Chapter 87 of the Laws of Zambia, to punish for offences related to administration of justice such as false swearing, perjury and contempt. She urged me to allow Counsel for the Appellant to purge the contempt contained in the Affidavit in Opposition to the present application by ensuring that the Tribunal's record was put straight and all potentially false averments were removed from the Tribunal's record.

27. She reiterated the Respondent's prayer that scandalous and extraneous matter contained in the Affidavits in Reply and in Opposition to the present application be struck off and expunged from the Tribunal's record with costs to the Respondent.

28. Mr Chikuba opened his oral response to the Respondent's oral submissions by addressing Ms Mulondiwa's submissions on alleged falsehoods in the Appellant's Affidavit in Opposition to the present application, arguing that the said submission was general in nature and did not point out specifically what was false about the said Appellant's Affidavit. He urged me to ignore the said submission as the Tribunal had not been pointed to any specific contemptuous issue or perjury arising from the Appellant's Affidavit in Opposition to this application.

29. He also maintained that the issue of capacity of the deponent of the Respondent's Affidavit in Opposition to Appeal could not have arisen at any time other than after the said deponent deposed to the Affidavit in Opposition to Appeal. He contended further that there were other people from the Board of the Respondent who could have deposed to

the said Affidavit and, on this basis, insisted that the said deponent had a conflict of interest not only at the time of deposing to the Affidavit but also during the whole time that he was dealing with the Appellant.

30. Counsel also contended that the fact that the Appellant did not raise the issue of the capacity of the deponent of the Respondent's Affidavit in opposition to appeal in proceedings that were in the High Court could not be a basis for precluding the Appellant from raising the said issue in the appeal before this Tribunal because these proceedings were different from those that had been in the High Court; and that the Appellant had presented evidence it had in the appeal before the Tribunal. In the premises, he submitted, it would have been premature for the Appellant to come up with an issue in the Affidavit in Support of Appeal when the issue had not arisen at that point.

31. Mr Chikuba referred to the exhibits to the Appellant's Affidavit in Reply and stated that the said exhibits showed that section 106 of the Companies Act, No. 10 of 2017 ("the Companies Act") placed some duties on directors in general, one of which was that they should exercise independent judgment; and that based on this provision and section 16 (4) of the Securities Act (which allowed the Chief Executive Officer of the Respondent as a member, *ex officio*, of the Board of the Respondent to address meetings of the said Board) placed the Chief Executive Officer in a position of influence over the Board. This position of influence raised the possibility of crowded judgment or negative influence based on other personal interests the Chief Executive Officer could harbour as a shareholder and director in a player in the capital markets. He argued that this was a necessary consideration which the Tribunal should not overlook, adding that

dealing with the issue would ensure clean and proper regulation on the part of the regulator now and in the future. He pointed out that the conflict of interest highlighted on the part of the deponent of the Respondent's Affidavit in Opposition to Appeal was not a malicious or scandalous fact but was a fact whose existence had not been denied. Therefore, according to Counsel, the presented conflict of interest offered the Tribunal an opportunity to address such issues for the benefit of the capital markets.

32. Moreover, Counsel submitted that the Respondents did not avail the Appellant any form of minutes or declaration indicating that the deponent to the Affidavit in Opposition to Appeal had declared interest at any point in time; and no exhibit had been provided by the Respondent regarding this issue. Counsel argued that expunging the contents of the Appellant's Affidavits attacked by the Respondent would be prejudicial to the Appellant and the capital markets in Zambia.

33. On the Respondent's submissions regarding the lifting of the veil of incorporation, Mr Chikuba contended that the Appellant was not applying to lift the corporate veil but was just pointing out the conflict that the deponent to the Affidavit in Opposition to Appeal harboured vis-à-vis his duties as the Chief Executive Officer of the Respondent. In the premises, he stated, there was nothing scandalous or personal about the Appellant's Affidavit in Reply but the issues brought out were issues which the Tribunal would be interested to have addressed in detail at trial. He added that the deponent to the Respondent's Affidavit in Opposition to Appeal was not brought into the matter in his personal capacity but the Appellant was concerned with the regulator's mode of

operation, which the Appellant felt could be properly explained at trial. Therefore, he contended, the application to expunge matters from the Affidavit in Reply was not only premature but also misconceived in the sense that there was nothing scandalous or irrelevant about the said Affidavit in Reply; and the contents of the said Affidavit in Reply spoke to the market in general and if addressed by the Tribunal, they would satisfy not only the Appellant but other market players who might come across this information.

34. Further, Counsel maintained that paragraphs 17, 19, 20, 22, 23, 28, 29 and 33 of the Affidavit in Reply did not contain averments of beliefs which were not supported by evidence. He submitted that the mentioned paragraphs of the Affidavit in Reply satisfied the requirements of Order 5 rules 16 and 17 of the HCR. It was Mr Chikuba's contention that the statements in the Affidavit in Reply could be traced to the Affidavit in Support of Appeal, which needed not be reproduced in the Affidavit in Reply. He gave as an example paragraph 19 of the Affidavit in Reply relating to the Respondent not responding to the Appellant's letters and responses to regulatory concerns raised by the Respondent and submitted that the background and circumstances that led to the belief or averment in the said paragraph 19 of the Affidavit in Reply were contained in the Affidavit in Support of Appeal. In the premises, Counsel contended that the beliefs or averments in paragraph 19 and the other attacked paragraphs of the Affidavit in Reply were not baseless but were rather proper and should not be expunged from the record.

35. Mr Chikuba concluded his oral submissions by addressing Ms Mulondiwa's arguments regarding letters exhibited as "SC1" and

“SC2”. He stated that the said letters were neither intended to influence the decision of the Tribunal nor meant to litigate or manufacture evidence; the letters were intended to bring to the attention of the Tribunal, an issue which was prevailing in the markets by virtue of the Tribunal’s position as an overseer of the capital markets in general. He submitted that the matter before the Tribunal was generally important and should be considered for purposes of setting straight the mode of regulation of the capital markets. He then urged that the Respondent’s application should be dismissed with costs as same was calculated to limit the evidence that was intended to be submitted at trial and it would not be in the interest of justice that the attacked matters be expunged from the record.

36. In reply, Counsel for the Respondent submitted that the Affidavit in Reply and the Affidavit in Opposition to this application contained contemptuous matters.

37. With regard to conflict of interest, Counsel argued that paragraph 5 (1) of the First Schedule to the Securities Act provided for declaration of interest by members of the Board of the Respondent; that the law clearly stated the procedure to be followed when there was a conflict of interest. She submitted that the deponent to the Affidavit in Opposition to Appeal had declared interest and did not participate in decision making on the matter relating to the Appellant. Moreover, she contended, paragraph 5 (2) of the First Schedule to the Securities Act required a declaration of interest to be recorded in the minutes of the meeting at which the declaration was made; and Board members, including the deponent to the Affidavit in Opposition to Appeal, were bound to comply with the said requirement. She contended that, in the

premises, assertions that the said deponent would influence decisions of the Board were baseless. She reiterated the Respondent's prayer for extraneous matters to be expunged from the record.

38. On the Appellant's submission that the need for the mode of regulating the capital markets to be set straight was the motivation for inclusion of the information which the Respondent was seeking to expunge from the record, Counsel argued that the mode of regulating the capital markets was not one of the issues to be determined at trial and as such any information on the same was irrelevant to prove or disprove, or in any way settle, the matters in dispute between the parties. In view of its irrelevance, she submitted, such information ought to be struck out for non-compliance with Order 5 rule 15 of the HCR, which required that an affidavit should not contain extraneous matter.

39. Counsel further pointed out that the assertion that the Tribunal was the overseer of the capital markets was misleading as the Tribunal was merely a centre for dispute resolution in the market. She added that parties ought to confine themselves to their filings and matters in dispute between them and could not act as mini Attorneys-General by placing before the Tribunal issues that they were not specifically interested in or issues that were not directly in dispute between the parties. Accordingly, and on the basis of Order 53 RSC 1999, Counsel contended that the Appellant's submissions claiming that the Tribunal was an overseer of the capital markets ought to be ignored.

40. Further, Counsel reiterated her submission, on the authority of the **Chief Mwanatete case**, that the Appellant should have anticipated the issues around the capacity of the deponent to the Affidavit in

Opposition to Appeal and included them in its Affidavit in Support of Appeal; and that having failed to do so, the Appellant could not be given a second bite at the cherry through its attempt to sneak this information onto the Tribunal's record through the Affidavit in Reply.

41. Ms Mulondiwa further submitted that the Companies Act did not apply to the Respondent as a statutory body as well as in terms of section 6 (1) of the Securities Act which rendered the Securities Act's provisions superior to other Acts where there was an inconsistency between the Securities Act's provisions and those of other Acts. Therefore, she argued, the Appellant's reliance on the Companies Act was misplaced and inapplicable to matters in dispute herein.

42. She also contended that the failure by the deponent to the Affidavit in Reply to cite in the said Affidavit the source of the information and beliefs set out therein rendered the said Affidavit irregular and amenable to be struck down.

43. Counsel summed up her submissions in reply by arguing that it would be impossible for the Tribunal to be made aware of the capacity of the deponent to the Affidavit in Opposition to Appeal without lifting the corporate veil of the capital market operator as well as that of the shareholder of the capital market operator. She urged that the critical doctrine of corporate personality be upheld by not lifting the veil of incorporation or considering any capacities existing behind the corporate veil. She reiterated the Respondent's prayer that the extraneous matter in the Affidavit in Reply be struck down with costs to the Respondent.

Issues for Determination

44. I have anxiously considered the summons, Affidavit in Support, Affidavit in Opposition, the Skeleton Arguments filed by the parties, and the parties' oral submissions augmenting their respective Skeleton Arguments. The main issue for determination, as I see it, is whether the challenged portions of the Affidavit in Reply and the Affidavit in Opposition to the present application constitute extraneous, scandalous or irrelevant matters. An ancillary issue is whether the conduct of the Appellant's Advocates in copying the Registrar in the complaint against the Chief Executive Officer of the Respondent was contemptuous.

Whether challenged portions of Affidavit in Reply are Extraneous, Scandalous or Irrelevant

45. In terms of the form of an Affidavit, the CMT Rules do not have exhaustive provisions relating to Affidavits. The CMT Rules only provide for what content must be captured in an Affidavit in support of Appeal (see rule 7(1)(b) of the CMT Rules); an Affidavit in support of originating notice of motion relating to market misconduct proceedings (see rule 8(2) of the CMT Rules); an Affidavit in support of an application for permission to commence the appeal or originating application out of time (see rule 10(2)(b) of the CMT Rules); and an Affidavit in opposition to appeal (see rule 12(1)(a) of the CMT Rules). It is noteworthy, however, that rule 20 (1) of the CMT Rules empowers the Tribunal or the Registrar to receive, as evidence, a statement, document, information or other thing which, in the opinion of the Tribunal or Registrar may assist in dealing with a matter effectively.

46. Further, rule 3(2) of the CMT Rules 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.

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

“The 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”.

48. The CMT Rules do not define the word ‘Court’ as used in rule 3(2) of the CMT Rules. However, section 2 of the Securities Act defines ‘Court’ as the High Court. On the basis that terms and expressions used in a statutory instrument shall have the same meaning as in the written law under which the instrument was made per section 2 of the Interpretation and General Provisions Act, Cap. 2, the meaning of the term ‘Court’ in the CMT Rules is the same as the meaning of the said term in the Securities Act. This is because, the CMT Rules are a statutory instrument made under the Securities Act.

49. At this point, I now turn to the questions whether paragraphs 7 and 8 of the Affidavit in Reply are **irrelevant** in that, according to the Respondent, they do not respond to facts in its affidavit in opposition to appeal; and whether paragraphs 17, 19, 20, 22, 23, 28, 29 and 33 of the said Affidavit contain **extraneous matter**.

50. Order 5 rules 15 and 16 of the HCR provide, respectively, that

“15. An Affidavit shall not contain extraneous matter by way of objection or prayer or legal argument or conclusion.

16. Every Affidavit shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true”.

51. According to paragraph 41/6/1 of the explanatory notes to Order 41 rule 6 of the RSC 1999, an Affidavit must be pertinent and material and may be ordered to be taken off the file if scandalous and irrelevant matter is inserted or the scandalous matter may be expunged. Additionally, paragraph 18/19/15 of the explanatory notes to Order 18 rule 19 of the RSC 1999 makes the points that allegations of dishonesty and outrageous conduct are not scandalous, if relevant to the issue; and that the mere fact that a paragraph in an affidavit states a scandalous fact does not make that paragraph scandalous. In other words, relevance of a fact is an overriding consideration in relation to scandalous allegations in an affidavit.

52. Paragraphs 7 and 8 of the Affidavit in Reply are framed in the following terms:

“7. That it is within my personal knowledge that the said Philip Katali Chitalu is a shareholder in a Capital Markets Company referred to as Bond and Derivatives Exchange Limited by virtue of him holding shares and

being Director to a Bond and Derivatives Exchange Limited shareholding company referred to as Dejavu Financial Services Corporation Limited, and hence he has and has had a conflict of interest in this matter, and his Affidavit should be viewed as such. Attached hereto confirming this fact is a copy of a Patents and Companies Registration Agency (PACRA) print out for Bond and Derivatives Exchange Limited marked “SC2”.

8. That further in confirming the conflict of interest referred to above, there is attached hereto a copy a Patents and Companies Registration Agency (PACRA) Print out for Dejavu Financial Services Corporation Limited marked “SC3” indicating that the said Philip Katali Chitalu is a Director and Shareholder.”

53. In the Respondent's view, these paragraphs are irrelevant because they do not respond to facts in the Respondent's Affidavit in opposition. However, one of the facts in the Affidavit in Opposition is the identity and capacity of the deponent thereof. It is a fact that the Affidavit in Opposition to Appeal was sworn by Phillip Katali Chitalu, who is a subject of the contents of paragraphs 7 and 8 of the Affidavit in Reply. Therefore, paragraphs 7 and 8 does, to that extent, respond to facts in the Affidavit in Opposition to Appeal. The issue is whether the said paragraphs are pertinent and material or, put differently, whether they are relevant and compliant with other requirements for contents of an Affidavit.

54. It is my considered view that, save for the underlined portions that draw conclusions and constitute a prayer, the said paragraphs 7 and 8 are relevant in helping the Tribunal arrive at a just decision. However, I tend to agree with the Respondent that the matters raised in the said paragraphs should have been anticipated by the Appellant and should have been part of its Affidavit in Support of Appeal as the Appellant was long in possession of correspondence authored by the deponent of the Affidavit in Opposition to Appeal. In any case, the Respondent will not have an opportunity to file an affidavit in response as the law does not provide for that. In the premises, I must accordingly order that the said paragraphs be expunged from the Affidavit in Reply.

55. Further, it is my considered view that paragraphs 17, 22, 23, 28 and 29 of the Affidavit in Reply contain extraneous matters by way of conclusions, contrary to the requirements of Order 5 rule 15 of the HCR. The conclusions in the said paragraphs, which I consider to be so material as to render the remaining portions thereof incapable of standing on their own, are underlined in the reproduced said paragraphs as follows:

17. That as already stated in the Appellant's Affidavit in support of Appeal, the actions by the Respondent were not in the spirit of dialogue and were against the growth of the Capital Markets.

22. The opposition to the said paragraphs 31 to 35 is testimony of the fact that the Respondent was bent on cancelling the licence and not regulation because

instead of addressing the initial concerns and any subsequent concerns properly, they utilized every opportunity they had to interact with the Appellant for purposes of fault finding and not resolution.

23. That paragraphs 36 to 45 of the Respondent's Affidavit in Opposition are noted but the Appellant maintains that the contents of the said paragraphs are a mere attempt on the part of the Respondent to run away from the fact that it did not offer the Appellant an opportunity to be heard because to date there is no record of the Respondent's response to the regulatory concerns which the Appellant addressed and further the said paragraph instead bring out mere complaints to sway the attention of this honourable tribunal from looking into the Respondent's failure to regulate.

28. That it was unfair and a breach of its regulatory procedure, for the respondent to write to the Appellant and warn them to pay back investors knowing very well that they had blocked the Bank Accounts from which the refunds were to be done.

29. That the excuse given by the Respondent in paragraph 53 alleging that they did not inform the Appellants of the blocking of the Accounts is not only justified but constitutes what I believe is a lame excuse for a regulatory breach and unfair, biased conduct

because notifying the Appellant of the blocking would not in any way put the investors' funds at risk but would instead demonstrate transparency on the part of the Regulator.

It follows that the above paragraphs cannot stand as part of the Affidavit in Reply; they too must be expunged therefrom.

56. Moreover, as the underlined portion thereof below shows, paragraph 19 of the Affidavit in Reply constitutes extraneous matter by way of a prayer, contrary to Order 5 rule 15 of the HCR. It cannot stand as part of the Affidavit and must accordingly be expunged therefrom.

19. That paragraphs 29 to 30 of the Respondent's Affidavit in Opposition should be treated as an admission to the fact that the Respondent did not attend to the Responses to the regulatory concerns responded to by the Appellant and that the fact that the Respondent did not respond but proceeded to suspend the licence should be treated as a breach of its regulatory duty because their actions simply show that the notice of intention to suspend licence was an academic exercise meant to fulfil a premeditated position on the part of the Respondent.

57. In paragraph 20 in the Affidavit in Reply, the deponent deposes to what on the face of it looks like a belief but is really an opinion that informs the drawing of a conclusion as the whole said paragraph shows below:

59. At the hearing of this application, Ms Mulondiwa attacked paragraphs 10, 11, 12, 13, 14 and 15 of the Appellant's Affidavit in Opposition to the present application as being in contravention of the legal requirements for Affidavit. I am disinclined to pronounce myself on this attack as it has no bearing on my determination of the present application.

Whether Respondent's conduct in copying the Registrar in Correspondence Contemptuous

60. I am constrained to pronounce myself on the viva voce attempt by the Respondent's Advocate to invite me to allow Counsel to purge what she alleged was the contempt in copying certain correspondence addressed to the Respondent to my office. This is because there are well established procedures to be followed in moving a court or tribunal on alleged contempt of court.

Final Orders

61. For the avoidance of doubt, it is ordered that –

- i. paragraphs 7, 8, 17, 19, 20, 22, 28 and 29 of the Appellant's Affidavit in Reply be expunged in their entirety for containing extraneous matters;
- ii. the underlined portions of paragraphs 23 and 33 of the Appellant's Affidavit in Reply be expunged for being extraneous matters and leave is accordingly granted to the Appellant to amend the said paragraphs so as to exclude the extraneous matters;

- iii. the Appellant files its amended Affidavit in Reply within five days from the date of this ruling;
- iv. costs shall be in the cause; and
- v. permission to appeal is granted.

DELIVERED THIS 25TH DAY OF FEBRUARY, 2022



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M. CHOLA
REGISTRAR