

IN THE CAPITAL MARKETS TRIBUNAL  
HELD AT LUSAKA

2021/CMT/A/001

BETWEEN:

XYLEM TRADING (PTY) LIMITED

AND

SECURITIES AND EXCHANGE COMMISSION

INTENDED APPELLANT

INTENDED RESPONDENT



**Before:**

The Registrar, Mr. M. Chola in Chambers

**For the Applicant:**

Mr. M. Musukwa, Messrs Andrew Musukwa &  
Company

**For the Respondent:**

Ms. T. Sakala, In-House Counsel, Securities  
and Exchange Commission

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## RULING

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**Legislation referred to:**

1. The Constitution of Zambia, Chapter 1 of the Laws of Zambia
2. The Securities Act, No. 41 of 2016
3. The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia
4. The Securities (Capital Markets Tribunal) Rules, Statutory Instrument No. 32 of 2021
5. The Securities (Registration of Securities) Rules, Statutory Instrument No. 164 of 1993

**Cases referred to:**

1. Muyawa Liuwa v Attorney-General – SCZ Judgment No. 38 of 2014
2. Amphill Peerage Case (1977) AC 547
3. Oswald Chulu v Moses Muteteka & Electoral Commission of Zambia – SCZ/8/051/2013
4. Stanley Mwambazi v Morester Farms Limited (1977) Z.R. 108
5. Panex Commodity Exchange Zambia Ltd v Securities and Exchange Commission – 2021/CMT/A/002

**Other Works referred to:**

Garner, B (2019) Black’s Law Dictionary, 11<sup>th</sup> Edition

**Introduction**

1. On 11<sup>th</sup> May 2021, the Intended Appellant (in this ruling referred to as “the Applicant”) applied by summons for permission to commence appeal out of time pursuant to rule 10 of the Securities (Capital Markets Tribunal) Rules, Statutory Instrument No. 32 of 2021 (in this ruling referred to as “the Rules”). In support of the summons, the Applicant filed on the same day an Affidavit sworn by Mpwani Musukwa, the Advocate seized with the conduct of this matter. A list of authorities and skeleton arguments were also filed in support of the said summons.
2. The Intended Respondent (in this ruling referred to as “the Respondent”) signified its opposition to the application by filing, on 28<sup>th</sup> May 2021, an Affidavit in opposition to the summons for permission to commence appeal out of time. The Affidavit was sworn by Phillip Katali Chitalu, the Chief Executive Officer of the

Respondent. Also filed with the said Affidavit was a list of authorities and skeleton arguments in opposition to the summons.

3. The application came up for hearing on 29<sup>th</sup> June 2021. At the said hearing the parties relied on the process filed on 11<sup>th</sup> and 28<sup>th</sup> May 2021, respectively, and augmented their respective skeleton arguments with oral submissions. At the conclusion of the hearing, I reserved my ruling to a date to be communicated to the parties. This is that ruling.

### Evidence

4. According to the Applicant, the Respondent granted it initial approval to proceed with transactions for its purchase of a total shareholding of 72.05% in Madison Financial Services PLC (in this ruling referred to as “MFS”). The approval, the Appellant stated, was granted through exhibit “MM2”, being a letter dated 3<sup>rd</sup> February 2021 written by the Respondent to the Applicant advising, among other things, that the Respondent’s no objection granted for the market announcement of 24<sup>th</sup> December 2020 signified its initial approval of the transaction of between the parties (in this ruling referred to as “the transactions” or “the agreements”).
5. It was also the Applicant’s evidence that the Respondent, through exhibit “MM3” (a letter dated 5<sup>th</sup> March 2021), revoked the initial approval granted for the transactions. In the said letter, the Respondent informed MFS of its decision not to grant approval for further announcements in respect of the transactions due to what the Respondent termed as the failure to meet regulatory requirements. The Respondent’s letter read, in part, as follows:

***“For clarity’s sake, please be advised that the intended acquisition of shares in MFS Plc cannot be supported by the Commission on the basis of the aforementioned and the failure by Xylem to meet security clearances.”***

6. On 19<sup>th</sup> March 2021, the Applicant sought to file before this Tribunal a Notice of Appeal against the decision referred to in paragraph 5 hereof. However, the Notice of Appeal could neither be filed before, nor processed by, the Tribunal because rules to govern the practice and procedure of the Tribunal had not been promulgated.
7. The Applicant stated, finally, that the rules were published in the Gazette on 23<sup>rd</sup> April 2021.
8. In its Affidavit in opposition, the Respondent stated that it was not aware of any agreements between the Applicant and MFS. The Respondent added that what it was aware about was the intention to enter into the said agreements when MFS requested the Respondent’s approval to publish a market announcement. The Respondent went on to state that it approved the publication of a market announcement and the announcement was published on or about 24<sup>th</sup> December 2020.
9. It was also the Respondent’s evidence that it had only granted its initial approval for the intended transactions when it approved the market announcements subject to the Applicant and MFS meeting all legal and regulatory requirements.

10. Moreover, it was the Respondent's evidence that its letter of 5<sup>th</sup> March 2021 to MFS did not revoke any approval for the transactions but informed MFS that the Respondent would not grant approval for further market announcements due to failure to meet various legal and regulatory requirements.
11. Lastly, the Respondent admitted that the rules governing the practice and procedure of the Tribunal were published in the Gazette on 23rd April, 2021.

### **Submissions**

12. In its skeleton arguments, the Applicant started off by pointing out that the application was premised on rule 10 (1) of the Rules which, according to the Applicant, empowered the Registrar to hear applications to commence appeal out of time.
13. The Applicant also argued that one of the purposes served by the law was to settle disputes and grievances that parties may have; and that, in this regard, the law allowed for appeals to be heard out of time in exceptional circumstances. The Applicant cited the case of **Muyawa Liuwa v Attorney-General (1)** in which the Supreme Court adopted a passage from the **Amphill Peerage Case (2)** highlighting the importance of limiting persons' rights to open or reopen disputes and emphasising that for such a policy to be compatible with justice, safeguards such as allowing – among other things – appeals out of time were necessary. Based on these authorities, the Applicant contended that it had a grievance against the Respondent which it sought to appeal to the Tribunal.

14. Moreover, the Applicant contended that the present application was neither caused by mala fides nor improper conduct on its part but rather that the delay was occasioned by the absence of rules for the governance of proceedings before the Tribunal. Additionally, the Applicant submitted that there was no unreasonable delay on its part in that it promptly made the present application after the rules were published in the Gazette. The Applicant referred to the case of Oswald Chulu v Moses Muteteka & Electoral Commission of Zambia (3) purporting that the Supreme Court in that case set out principles regarding the treatment of bona fide interlocutory applications where there was default on the part of the parties. In reality the passage cited in the Applicant's skeleton arguments was an extract from the case of Stanley Mwambazi v Morester Farms Limited (4) and not a holding in the Chulu case (3).
15. My attention was also drawn to article 118 (2) (e) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia, which enjoins courts to administer justice without undue regard to technicalities. The Applicant's submission in this regard, it appears, was that the justice would be administered in this case if the appeal were to be heard.
16. Lastly, the Applicant relied on section 43 (1) of the Securities Act, No. 41 of 2016 (in this ruling referred to as "the Act" or "the Securities Act") to assert its right to appeal to the Tribunal; a right it could not exercise prior to the publication of the Rules but which it was now desirous of exercising in view of the publication of the Rules.

17. On the basis of the foregoing arguments, the Applicant urged me to grant its application for permission to commence appeal out of time.
18. In its skeleton arguments, the Respondent contended that the exercise by the Registrar of the power to permit a person to commence an appeal out of time in terms of rule 10 (1) of the Rules ought to be done once an applicant establishes their right to appeal to the Tribunal under section 191 of the Securities Act. The said section, argued the Respondent, was specific on matters that may be appealed to the Tribunal; adding that the facts set out in the Applicant's Affidavit did not fall within the circumstances provided in section 191 of the Act. The Respondent, it was argued, did not revoke or cancel any authorisation granted to the Applicant; all it did was to notify MFS (whose securities are registered with the Respondent) that the Respondent would not grant permission for further market announcements in respect of intended transactions involving the Applicant. The Respondent added that refusal to grant permission to publish further market announcements could not be equated to revocation of permission to publish such announcements because permission was never granted.
19. The Respondent contended further that rule 24 (b) of the Securities (Registration of Securities) Rules, statutory instrument number 164 of 1993 (in this ruling referred to as "SI 164"), requires that market announcements are approved by the Respondent; and that approval can only be granted if a proposed announcement has been submitted to the Respondent. In the absence of such a

submission, the Applicant is not entitled to institute an appeal before the Tribunal.

20. The Respondent concluded its skeleton arguments by urging me to dismiss, with costs to the Respondent, the application for being devoid of merit.
21. In oral submissions augmenting the skeleton arguments, Counsel for the Respondent argued that the Applicant was not the right party to take out this action because the decision made by the Respondent was directed to MFS – a capital market operator – which would be the right person to institute an appeal before the Tribunal. Counsel contended further that, in as much as section 191 (2) of the Securities Act appears to grant every aggrieved person the right to appeal, the said section ought to be viewed or interpreted in tandem with section 191 (1) of the Act. In summing up her oral submissions, Counsel reiterated that the application be dismissed as it lacked merit.
22. Counsel for the Applicant, in reply, submitted that it was trite law that any person affected by a decision of a body or another person has a right to be heard; and that section 191 (2) of the Act brings this out in that it allows an aggrieved person to seek redress before the Tribunal. Counsel added that the Tribunal could, after hearing the aggrieved person, order that another person should be added. Moreover, Counsel drew my attention to the last but one paragraph of exhibit “MM3” in the Applicant’s Affidavit (which cited a failure by the Applicant as one of the reasons, according to him, for refusing the transaction from going forward) and contended that exhibit



“MM3” affected the Applicant directly and that this being the case the Appellant ought to be allowed to appeal the Respondent’s decision. Counsel concluded by reiterating the Applicant’s prayer that the application be granted.

**Issues**

23. I have considered the summons, Affidavit evidence and arguments advanced in support of, and in opposition to, this application. The issues for determination, as I see them, are –
- i. whether the decision at the centre of the application is appealable to the Tribunal;
  - ii. in the event that the first issue is resolved in the affirmative, whether the Applicant is entitled to appeal the said decision; and
  - iii. in the event that the second issue is resolved in the affirmative, whether the Applicant has satisfied other criteria for the grant of permission to commence appeal out of time.
24. I turn now to a discussion of the above issues in the light of the applicable law, the facts in the present application and the parties’ submissions.

**Appealability of Respondent’s Decision**

25. It is clear from the review of Affidavit evidence adduced by the parties that exhibit “MM3” of the Applicant’s Affidavit is the decision of the Respondent that the Applicant is seeking to appeal. The question is whether or not this decision is appealable to the Tribunal.

26. It appears to be the understanding of the Applicant that the said decision is appealable. This is evident from the step taken by the Applicant to apply for permission to commence an appeal against the said decision out of time. The Respondent, however, contends in one breath that the decision is not appealable and, in another breath, that the Applicant is not the right party to an appeal against the decision. The latter breath is discussed later.

27. The Respondent cited section 191 of the Securities Act as authority for its assertion that the decision is not appealable. Section 191 of the Act provides as follows:

***“(1) Where—***

- (a) an application of a person for a licence, made in accordance with this Act, is refused or denied;***
- (b) a licence, registration, authorisation or recognition, granted in accordance with this Act, is subject to conditions which the applicant is dissatisfied with;***
- (c) conditions are attached to, or varied for, a license, registration, authorisation or recognition, and the licensed person, self-regulatory organisation or other person is dissatisfied with the conditions or variation;***
- (d) a licence, registration, authorisation or recognition, granted in accordance with this Act, is revoked or cancelled in accordance with this Act;***
- (e) the Commission declines to register any securities in accordance with this Act; or***
- (f) the Commission declines to authorise the establishment of a collective investment scheme in accordance with this Act;***

*the applicant, person, licensed person or self-regulatory organisation may appeal to the Tribunal, within thirty days of receipt of the decision.*

*(2) Notwithstanding subsection (1), the Tribunal shall hear an appeal on any matter specified in this Act, being a matter that an aggrieved person, licensed person, scheme or organisation is entitled to appeal on in accordance with this Act.”*

28. The scope of Respondent's decisions that can be appealed to the Tribunal under section 191 (1) of the Securities Act undoubtedly excludes the decision in question. However, is the said decision appealable to the Tribunal in terms of section 191 (2) or any other provision of the Act?
29. The import of section 191 (2) of the Securities Act appears to be to extend the scope of decisions beyond those listed in section 191 (1) of the Act. In terms of section 191 (2) of the Act, for a matter to be appealable to the Tribunal that matter must be –
- i. specified in the Act; and
  - ii. one that an aggrieved person, licensed person, scheme or organisation is entitled to appeal on in accordance with the Act.
30. In my considered view, section 184 (3) (a) of the Act is the anchor on which decisions of the Respondent constitute the appealable specified matters referred to in section 191 (2) of the Act. This is so because the said section 184 (3) (a) clothes the Tribunal with jurisdiction to hear and determine appeals from decisions of the

Respondent, or a person performing the functions of the Respondent. It is couched in the following terms:

***“[t]he Tribunal shall have jurisdiction to hear and determine –***

***(a) appeals from decisions of the Commission, or a person exercising the functions or powers of the Commission ...”***

31. For the avoidance of doubt, sections 184 (3) (a) and 191 (2) have the effect of generally rendering appealable to the Tribunal decisions the Act empowers the Respondent to make in respect of persons, licensed persons, schemes or organisations. Respondent's decisions in respect of which the Act specifies recourse other than an appeal to the Tribunal would obviously be an exception to the general effect of the said sections.
32. The Respondent's decisions made in terms of rule 24 (b) of SI 164 of 1993 are among decisions sections 184 (3) (a) and 191 (2) render appealable to the Tribunal in that, apart from being decisions of the Respondent, the rule pursuant to which they are made does not expressly provide for recourse in the event that one is aggrieved at any such decisions. The said rule provides that an issuer must submit for the approval of the Respondent – before they are issued – copies of drafts of any documents issued in connection with mergers or offers.
33. In view of the above discussion on appealability or otherwise of the decision in question, I tend to disagree with the Respondent's submission that the facts in the Applicant's Affidavit do not fall within the circumstances provided in section 191 of the Act. In other

words, the decision (which is among the facts stated in the Applicant's Affidavit) in question is appealable to the Tribunal.

34. It should be noted that in terms of section 3 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia, an Act includes statutory instruments made under that Act; and it is on the basis of this section that decisions of the Respondent in terms of SI 164 of 1993 are counted among those rendered, by sections 184 (3) (a) and 191 (2) of the Act, appealable to the Tribunal.
35. The Respondent took the view that, contrary to the Applicant's claim that the Respondent had revoked its approval of the transactions, the Respondent only notified MFS that it would not approve further market announcements relating to the transactions. I am of the considered view that the issue raised hinges on each party's interpretation of the decision in question. As such the issue is best suited for determination in the appeal should permission to commence appeal out of time be granted and the Applicant proceed to institute the appeal.
36. Having established that the decision in question is appealable to the Tribunal, it remains to be determined whether or not the Applicant is entitled to appeal the decision to the Tribunal.

### **Right to Appeal**

37. In its skeleton arguments, the Applicant argued that section 43 (1) of the Securities Act entitled the Applicant to appeal the Respondent's decision. However, the said section is inapplicable as a basis for the Applicant's assertion of a right to appeal. This is

because the section cited relates to the right to appeal the Respondent's licensing decisions in respect of dealers, investment advisers, and share transfer agents and representatives; and the Applicant did not provide evidence that it is any of these. In short, the Applicant cannot assert the right to appeal based on section 43 (1) of the Act. Be that as it may, I have already established that the decision in issue is appealable to the Tribunal; and by necessary implication, the addressee of the decision would be entitled to appeal the decision to the Tribunal. The question is really whether, not being the addressee of the decision in issue, the Applicant has a right to appeal the decision to the Tribunal.

38. For the Respondent, the contention is that the Applicant is not the right party to appeal the decision in issue as the decision was directed to MFS and not the Applicant. The Applicant's reply is that it is trite law that any person affected by a decision of a body or another person has a right to be heard; and that section 191 (2) of the Act embodies that right.
39. The relevant provisions of the Securities Act appear to envisage that a person other than an addressee of the Respondent's decisions can also appeal those decisions to the Tribunal. The use of the phrase "aggrieved person" in the category of those entitled to appeal the Respondent's decisions in terms of section 191 (2) is a clear indication that the right to appeal is not restricted only to an addressee of the appealable decision. A look at the meaning of the word "aggrieved" in relation to a person or an entity would be useful to test the soundness of this view. According to Black's Law Dictionary at page 83 "aggrieved" means –

***“having legal rights that are adversely affected; having been harmed by an infringement of legal rights...; angry or sad on grounds of perceived unfair treatment.”***

40. It is apparent from the above definitions that it is not only an addressee of a decision of the Respondent that has a right to appeal; any person whose legal rights have been adversely affected by a decision of the Respondent has a right to appeal that decision. In other words, a person needs only demonstrate that their legal rights have been adversely affected by the Respondent's decision to be entitled to appeal. In the circumstances, I find the Respondent's submission that the category of aggrieved persons should be limited to the categories of persons mentioned in section 191 (1) of the Act to be untenable.
41. In the present application, it is not in dispute that one of the reasons advanced by the Respondent for resolving not to grant approval for further market announcements in the transactions was failure to meet security clearances on the part of the Applicant. In my view, that is sufficient standing to entitle the Applicant to seek redress before the Tribunal by way of an appeal as the decision affects the Applicant directly. On the face of things, the Applicant has demonstrated that it has a grievance despite not being the addressee of the decision giving rise to the grievance; the Applicant appears to be an aggrieved person and thus entitled to appeal the decision in issue. It also follows that the Respondent's argument that the Applicant is not the right party to take out this action fails.

42. It now remains to be determined as to whether or not the Applicant has satisfied the criteria for the grant of permission to appeal out of time.

**Appeals out of time**

43. The Applicant started off by indicating that the Registrar was empowered by rule 10 of the Rules to permit the commencement of appeal out of time. The Respondent held the same view.

44. Rule 10 (1) of the Rules provides in so far as is material that:

***“[a] person may, where the period for commencing an appeal ...has expired, apply to the Registrar for permission to commence the appeal ...out of time”.***

45. The above rule quite clearly empowers the Tribunal, through the Registrar, to hear and determine applications for permission to commence appeal out of time.

46. The Applicant also pointed out that the delay in taking steps to commence appeal was not occasioned by the default or mala fides of the Applicant. The absence of the requisite rules of practice and procedure were responsible for the delay. It was also the Applicant's submission that it promptly made the present application after the rules of practice and procedure were published. The Respondent made no submissions in response to these arguments.



47. In the case of Panex Commodity Exchange Zambia Ltd v Securities and Exchange Commission (5), I had occasion to deal with the two-pronged test laid down by section 192 (2) of the Securities Act with regard to appeals out of time. In that case, it was held on the basis of section 192 (2) of the Act that there should be a reasonable cause for not appealing within the prescribed period; and the appeal should be filed after the expiry of the period for appealing without unreasonable delay.

48. It is quite evident that the Applicant had reasonable cause for not appealing within the prescribed period; the reasonable cause being the absence of rules of practice and procedure. It is also clear that the Applicant started the appeal process without unreasonable delay as it filed this application within eighteen days of the publication of the said rules.

49. In the premises, I find that this is a proper case for the grant of permission to commence appeal out of time.

#### Determination

50. I find and accordingly hold that –
- i. the decision of the Respondent to not grant approval for further market announcements in the transactions between the Applicant and MFS is appealable;
  - ii. the Applicant has the right to appeal the said decision;
  - iii. the Applicant had reasonable cause for not filing the appeal within the prescribed period; and

iv. the Applicant did not delay unreasonably in filing this application.

51. The application for permission to commence appeal out of time is granted. The Applicant is ordered to commence the appeal within fourteen days from the date of this ruling.

52. As the delay in appealing was not occasioned by the Applicant, costs of this application shall be in the cause.

53. Leave to appeal is granted.

**DELIVERED THIS 29<sup>TH</sup> DAY OF JULY, 2021**



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M. CHOLA  
**REGISTRAR**