IN THE COURT OF APPEAL OF ZAMBIA **CAZ/08/503/2021**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

SECURITIES EXCHANGE COMMISSION **APPLICANT**

AND

STANDARD CHARTERED BANK ZAMBIA PLC **1ST RESPONDENT**

STANDARD CHARTERED ZAMBIA SECURITIES NOMINEES LIMITED **2ND RESPONDENT**

Before: Hon. Mr Justice Justin Chashi

ON: 28th January 2022

For the Appellant: *D. Mulondiwa (Ms) and K.N Sakala – In House Counsel*

For the 1st and 2nd Respondents: *P. Chomba, Messrs Mulenga Mundashi Legal Practitioners*

RULING

Cases referred to:

1. **NFC Africa Mining Plc v Techro Zambia Limited (2009) ZR, 236**
2. **Shimonde and Another v Meridian Biao Bank (Z) Limited (1997) ZR, 47**

Legislation referred to:

1. **The Court of Appeal Act, No. 7 of 2016**
2. **The Securities Act, No 41 of 2016**

Rules referred to:

1. **The Court of Appeal Rules, Statutory Instrument No. 65 of 2016**
2. **The Supreme Court Practice (White Book) 1999**
3. **The Securities (Capital Markets Tribunal) Rules 2021**

1.0 INTRODUCTION

1.1 There are two applications before me, by the Applicant. The first one is for an Order for leave to appeal to the Court of Appeal against the Ruling by the Capital Markets Tribunal *(the Tribunal)* delivered on 2nd November 2021. The second is for a stay of proceedings before the Tribunal pending determination of the appeal.

1.2 The applications have been made by a consolidated summons, supported by a consolidated affidavit, deposed to by Kalonga Numero Sakala, the Legal Officer in the employ of the Applicant.

1.3 The applications are made pursuant to Section 12 of **The Court of Appeal Act[1] (CAA)** as read with Order 10/4/(5) of **The Court of Appeal Rules[1] (CAR)** as well as Order 59/13 of **The Rules of the Supreme Court[2] (RSC)**

2.0 BACKGROUND

2.1 Sometime in November 2020, the Applicant directed the 1st Respondent to pay K3,452,282.00, recompense amount to Lawrence Paul Unit Trust. The basis for the directive was that the 1st Respondent had failed to act in accordance with its obligations under clause 12.1 of the Guidelines for Trustees and Custodians in a Collective Investment Scheme, No 1 of 2016

2.2 Despite affirming the directive, the Applicant on 22nd December 2020 wrote to the Registrar of the Tribunal seeking guidance on whether it could appeal to the Tribunal against the decision of the Applicant. In response the Registrar advised that the Tribunal was not in a position to hear the appeal as it had no rules regulating the mode of commencement

2.3 The aforestated prompted the Applicant to make an application to the High Court for leave to commence judicial review. Leave was granted *ex parte*. On an application by the Applicant to have the same discharged, on account of lack of jurisdiction, the High Court reversed its decision.

2.4 On 30th April 2021, the Registrar confirmed that the Tribunal was in a position to entertain the appeal as the Tribunal's Rules were now in place. The Respondents then made an application before the Registrar for leave to appeal out of time.

2.5 On 30th August 2021, the Registrar dismissed the application. According to the Registrar, although the Respondents had a reasonable cause for not appealing within a reasonable time, they unreasonably delayed in instituting the appeal.

2.6 Disenchanted with the ruling, the Respondents appealed to the Tribunal. In its ruling delivered on 13th December 2021, the Tribunal set aside the ruling of the Registrar in the interest of justice and on the need of the parties to be

given an opportunity to be heard on the merits. Furthermore, that the case will go a long way in the developing of jurisprudence. The Respondents were allowed to file the appeal out of time.

2.7 Dissatisfied with the ruling, the Applicant, pursuant to Rule 39 of **The Securities (Capital Markets Tribunal) Rules[3] (the Rules)** applied to the Tribunal for leave to appeal to the Court of Appeal. The Tribunal on 13th December 2021 ruled that, in accordance with Section 195 (1) of **The Securities Act[2] (the Act)**, it had no jurisdiction to entertain an application for leave to appeal to the Court of Appeal. That the application should be made directly to the Court of Appeal. The Tribunal in addition refused to grant an order for stay of proceedings as the application was made *viva voce* and as such offended the Rules which required that it must be made by summons in accordance with Rule 24(3). The Applicant was directed to make a formal application before the Tribunal. This is what prompted the two applications before me.

3.0 APPLICANT'S ARGUMENTS IN SUPPORT OF THE APPLICATIONS

3.1 In arguing the application, Counsel for the Applicant submitted that this Court is clothed with jurisdiction to hear an application for leave to appeal where such application was not granted by a lower court or Tribunal. Our attention was drawn to Rule 39 of the Rules which states that;

> *"An appeal against a decision of the Tribunal shall be made in accordance with the Act, and the Court of Appeal Act"*

3.2 Reliance was also placed on Section 12 **CAA** and Order 10/4(5) **CAR**. Further reference was made to Order 59/14 (18) **RSC** which provides as follows;

> *"The general test which the court applies in deciding whether or not to grant leave is this; leave will normally be granted unless the grounds of appeal have no realistic prospects of success. The Court of Appeal may also grant leave if the question is one of the general principle, decided for the first time or a question of importance upon which further argument*

and decision of the Court of Appeal would be to the public advantage"

3.3 It was submitted that the grounds raised have prospects of success. Further that the Tribunal erred in law in denying leave to appeal on the basis that it did not have jurisdiction to grant leave to appeal. It was in addition submitted that a party cannot seek leave of the Court of Appeal without having first demonstrated that such leave was sought and denied in the Tribunal. That, in that regard, the Tribunal erred in finding that it did not have jurisdiction to hear an application for leave to appeal to the Court of Appeal.

3.4 Our attention was drawn to Section 23(1) (e) **CAA** which provides as follows:

"23 (1) An appeal shall not lie-(e) from an Order made in Chambers by a Judge of the High Court or by a quasi-judicial body, without the leave of that Judge or quasi-judicial body or, if that has been refused, without the leave of a Judge of the Court."

3.5 However, Counsel noted that Section 23 (1) (e) **CAA** is in contrast with the provisions of Section 195 (1) of the **Act**, which provides that;

> *"An Appellant, Respondent or the Commission, if dissatisfied with an Order or decision of the Tribunal, as being erroneous in point of law or fact or both law and fact may, within twenty-one days after the delivery of the Order or decision or within such other time as may be prescribed by the rules issued by the Chief Justice, appeal against such order or decision, with leave of the Court of Appeal, except that the Appellant may appeal to the Supreme Court against the refusal of the leave to appeal."*

3.6 It was contended that, although this provision is seemingly conflicting, it does not however take away the requirement provided in **CAA** and **CAR** that require as a prerequisite, that a party seeking leave to appeal before, the Court of Appeal must first demonstrate that such leave was denied. The case of **NFC Africa Mining Plc v Techro Zambia Limited**[1] was cited in which the Supreme Court

considered Section 24 (10) (e) of the Supreme Court Act, which is similar to section 23 (1) (e) **CAA**

3.7 As regards the stay of proceedings, it was submitted that an appeal does not operate as a stay of execution or stay of proceedings. Order 10/5 **CAR** and Order 59/13 (1) **RSC** were relied upon in seeking an Order of this Court to stay proceedings of the Tribunal. According to the Applicant, in the absence of an Order, the appeal would be rendered a mere academic exercise and nugatory.

4.0 RESPONDENTS' ARGUMENTS IN OPPOSING THE APPLICATIONS

4.1 In opposing the applications, the Respondents filed into Court an affidavit and skeleton arguments. The affidavit was deposed to by Rose Nyendekazi Kavimba, the Head Legal and Company Secretary in the employ of the Respondents.

4.2 Counsel for the Respondents argued that, the Tribunal has no jurisdiction to entertain and grant an application for leave to appeal to the Court of Appeal, against its own decision. Further that, this Court has no jurisdiction to hear and grant a renewal application for leave to appeal to

this Court as the Applicant is now outside the prescribed period of time within which to appeal to this Court. Further that, the renewed application for leave to appeal having been couched as an appeal is irregular and incompetently before this Court.

4.3 Reference was made to Section 195 (1) of the **Act** and submitted that, it is couched in succinct terms. That it allows the Applicant to appeal to the Court of Appeal within 21 days with leave of the Court of Appeal. It was contended that the application for leave to appeal should precede the lodgment of the appeal.

4.4 It was further submitted that, the Applicant cannot find solace in Rule 39, as the provision clearly shows that an appeal against the decision of the Tribunal is in accordance with the **Act** and **CAA**. It was in that respect submitted that the application for leave to appeal which was filed before the Tribunal was misplaced and the Tribunal had no jurisdiction to deal with the application. I was on that basis implored to dismiss the Applicant's renewal application for want of jurisdiction.

4.5 It was in addition submitted that the Rules, as subsidiary legislation, cannot alter the substantive legislation or Act. That the purpose of subsidiary legislation, such as the Rules, is to amplify or speak to the provisions of the Act. The case of **Shimonde and Another v Meridian Biao Bank (Z) Limited**[2] was cited, where the Supreme Court stated that;

> *"The decisions of this Court such as **Bank of Zambia v Anderson, SCZ Judgment No. 13 of 1993, Attorney General v Mooka Mubiana, Appeal No. 38 of 1993,** made it clear that provisions of an Act of parliament could not be ignored or overridden by their Statutory Instrument."*

4.6 It was further submitted that on the basis of Section 23 (1) (a) **CAA**, which states that "an appeal shall not lie from an order allowing an extension of time for appealing from a Judgment, the appeal the Applicant intends to lodge is not tenable at law. That in view of that provision, it is not possible for an Applicant to appeal such an order before this Court.

4.7 On the application for stay of proceedings, it was submitted that the Tribunal rendered an extempore ruling dismissing the application which was made orally and directed the Applicant to make a formal application for stay of proceedings, before the Tribunal in accordance with the Rules. That the Applicant ignored the directive and applied to the Court of Appeal for stay. It was submitted that the application is incompetently before this Court.

5.0 CONSIDERATION AND DECISION

5.1 I have considered the affidavit evidence and the arguments by the parties. From the arguments, I have been asked to determine the following issues;

(i) Whether the Tribunal has jurisdiction to hear applications for leave to appeal to the Court of Appeal.

(ii) Whether the renewal application for leave to appeal to the Court of Appeal is properly before this Court.

(iii) Whether the application for stay of proceedings is properly before this Court

(iv) Whether an appeal against the ruling of the Tribunal allowing extension of time can lie to this Court.

5.2 As regards the first issue, my first port of call is **The Securities Act**[3], which is the enabling Act and its attendant Rules. Section 195 (1) is clear and unambiguous. It provides that an appeal shall lie to the Court of Appeal with leave of the Court of Appeal. Rule 39 provides that an appeal against the decision of the Tribunal shall be in accordance with the **Act** and **CAA**. In my view, Rule 39 does not take anything away from the Act. Neither does it contrast, contradict or usurp Section 195 (1).

5.3 What perhaps is of interest are the **CAA** provisions, in particular Section 23 (1) (e), which provides that an application for leave to appeal to the Court of Appeal shall in the first instance be made to the High Court or quasi-judicial body which made the decision being impugned.

This means, an application for leave to appeal to the Court of appeal can only be made by way of renewal if the High Court or the quasi-judicial body has refused to grant the same. This has been the standard legislative procedure attaining in most statutes.

5.4 Section 195 (1) of the **Act** therefore seems to be a total departure from the norm and seemingly conflicting Section 23 (1) (e) **CAA.** This in my view, is a matter which the legislature needs to correct and bring Section 195 (1) of the **Act** in line with the **CAA** provisions. That said, as the law as it stands at the moment, Section 195 (1) prevails. In addition, Section 6 of the Act states that *"Where there is an inconsistency between the Act and any other written law, the provisions of the Act shall prevail to the extent of the inconsistency"*

5.5 That superiority provision entails that we have to abide by what is provided for by Section 195 (1) and not **CAA** and **CAR** on the issue of leave to appeal. What Section 195(1) has done, is that it has taken away the jurisdiction from the Tribunal to hear applications for leave to appeal to the

Court of Appeal and placed it in the hands of the Court of Appeal. In short, the Tribunal has no jurisdiction to hear applications for leave to appeal its decisions. The same lies to the Court of Appeal

5.6 What that entails is that applications for leave to appeal must be made directly to this Court. Therefore, the applications should not come by way of appeal or renewal. The application will be heard by a single Judge of this Court. If the application is refused, the affected party may renew the application before the full Court. If the full Court refuses the application, according to Section 195 (1), the affected party cannot renew the application before the Supreme Court. The affected party can only go to the Supreme Court by way of appeal.

5.7 In the view I have taken, the Tribunal was correct in its interpretation and understanding of Section 195 (1) in arriving at the decision that it had no jurisdiction to hear applications for leave to appeal to the Court of Appeal.

5.8 As regards the second issue, I note that, the Applicant came to the Court of Appeal as a result of the Tribunal's

refusal to grant it an order for leave to appeal on account of lack of jurisdiction. In view of what I have earlier alluded to, in determining the first issue, we have ended up where we are now, because the Applicant by applying for leave to appeal before the Tribunal, did not follow the correct procedure. Therefore, the application in the manner it has been brought, it is incompetently before me.

5.9 As regards the third issue, the application for stay of proceedings could only have come to this Court, by way of renewal if the same had been refused by the Tribunal. The Tribunal made a directive to the Applicant to make a formal application to the Tribunal in accordance with Rule 24 (2). The Applicant instead of adhering to the directive, ignored it and elected to come directly to this Court. That was an anomaly, which resulted in the application being incompetently brought before this Court. The application can only come to this Court by way of renewal and not by a direct application.

5.10 I now turn to the last issue. The Respondents in their arguments on this issue relied on Section 23 (1) **CAA** which provides that:

> **"An appeal shall not lie- (a) from an order allowing for extension of time for appealing from a Judgment."**

5.11 My view is that the extension which was granted by the Tribunal was for an extension of time within which to commence appeal proceedings before it, in relation to the decision of the Applicant, which decision in my view does not qualify as a Judgment. Therefore, Section 23 (1) is inapplicable to this matter.

5.12 In the view that I have taken, both applications are incompetently before me. They are both accordingly dismissed with costs to the Respondents to be paid forthwith. Same are to be taxed in default of agreement.

J. CHASHI
COURT OF APPEAL JUDGE