IN THE HIGH COURT FOR ZAMBIA **2018/HPC/323**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Commercial Jurisdiction)

BETWEEN:

SECURITIES AND EXCHANGE COMMISSION	**1ST PLAINTIFF**
LUSAKA SECURITIES EXCHANGE PLC	**2ND PLAINTIFF**

AND

FINSBURY INVESTMENT LIMITED	**1ST DEFENDANT**
RAJAN LEKHRAJ MAHTANI	**2ND DEFENDANT**
CREDIT SUISSE INVESTMENTS (NEDERLAND) BV	**3RD DEFENDANT**
JOB ALBERT SAMUEL (*Sued in his capacity as nominee for John Graven*)	**4TH DEFENDANT**
PATRICK SIMUNTALA CHAMUNDA	**5TH DEFENDANT**
CLARKWELL LIMITED	**6TH DEFENDANT**
THE ADMINISTRATOR OF THE ESTATE OF LATE PATRICK BWALYA PUTA	**7TH DEFENDANT**
ATLAS MARA (Z) LIMITED	**8TH DEFENDANT**

Before the Honourable Mr Justice W.S Mweemba at Lusaka in Chambers.

For the 1st Plaintiffs:	*Mr. L. Ngala – In House Counsel.*
For the 2nd Plaintiff:	*Mrs. V. Uputa – Sichone - In House Counsel*
For the Defendants:	*Mr. J. Chimakanta – Messrs Simeza Sangwa and Associates.*

RULING

LEGISLATION REFERRED TO:

1. ***Order 3 Rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia.***
2. ***Order 33 Rule 3 of the Rules of the Supreme Court of England (1965) (The White Book) 1999 Edition.***

3. ***The Securities Act No. 41 of 2016.***
4. ***The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia.***
5. ***Order 14A of the Rules of the Supreme Court of England 1965 (the White Book) 1999 Edition.***

CASES REFERRED TO:

1. ***Godfrey Miyanda v The High Court (1984) ZR 62.***
2. ***Godfrey Miyanda v The Attorney General (1985) ZR 185.***
3. ***Lusaka City Council v Adrian S. Mumba (1977) ZR 313.***
4. ***N.B Mbazima and Others Joint Liquidators of ZIMCO Limited (in liquidator) v Reuben Vera (2001) ZR 43.***
5. ***Newplast Industries v The Commissioner of Lands and Another SCZ Judgment No. 8 of 2001.***
6. ***Anheuser-Busch Inbev, Zambia Breweries PLC and National Breweries PLC v Attorney General, the Minister of Finance and National Planning and the Securities and Exchange Commission 2017/HP/1243.***
7. ***Zambia National Holdings Limited and UNIP v The Attorney General (1993) ZR 115 at 120.***
8. ***JCN Holdings Limited v Development Bank of Zambia (2013 Vol 3) ZR 299 at 325.***
9. ***Mukelabai v Esther Nalwamba (2013 Vol2) ZR 312.***

OTHER WORKS REFERRED TO:

1. ***Black's Law Dictionary, 8th Edition.***

The 1st Plaintiff has raised a preliminary issue which is:-

> **"Whether the High Court has Jurisdiction to determine the matter between the parties herein on the basis that the rights accrued and obligations or liabilities incurred, arose under the repealed *Securities Act, Chapter 354 of the Laws of Zambia* which provided for the determination of disputes and matters arising under it, by the High Court for Zambia and not the Capital Markets Tribunal established under the *Securities Act, No 41 of 2016.*"**

The background leading to the preliminary issue is that on 15th August, 2018 the 2nd Plaintiff issued a Writ of Summons and Statement of Claim claiming inter alia the following:

1. The sum of K3,566,074.26 from the Defendants jointly and severally being the full market trade commission representing:
   (a) K1,783,037.13 due and payable to the 2nd Plaintiff by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th Defendants on the sell side of the securities transaction; and
   (b) The sum of K1,783,037.13 due and payable to the 1st Plaintiff by the 8th Defendant on the buy side of the Securities transaction involving the sale by the 1st, 2nd,3rd,4th,5th,6th,7th Defendants and the purchase by the 8th Defendant of a total of 310,000,000 Finance Bank PLC shares, registered on the 2nd Plaintiffs Securities Exchange.
2. Interest on the sum claimed.

On 10th October, 2018 the Plaintiffs issued an Amended Writ of Summons and Statement of Claim under which

1. The 1st Plaintiff's claim for the following relief:
   (i) The sum of US$184,675.00 from the Defendants being the authorisation fee for the takeover or merger being the prescribed payment of 0.25% of the value of the transaction as fee for authorisation of the takeover or merger
   (ii) An Order for costs.
   (iii) Interest on the sum claimed.
   (iv) Further or other relief as the Court may deem fit.
2. The 2nd Plaintiff's claim is for the following relief:

(i) The sum of K3,566,074.26 from the 1st,2nd,3rd, 4th 5th, 6th and 7th Defendants jointly and severally being the full market trade commission representing K1,783,037.13 due on the sell side of the securities transaction.

(ii) The sum of K1,783,037.13 due and payable to the 2nd Plaintiff by the 8th Defendant on the buy side of the securities transaction involving the sale by the 1st,2nd, 3rd,4th,5th,6th, and 7th Defendants and the purchase by the 8th Defendant of the total of 310,000,000 Finance Bank Zambia PLC shares, registered on the 2nd Plaintiffs Securities Exchange.

(iii) Interest on the sum claimed

(iv) Any other relief the Court may deem fit.

(v) Costs.

The 2nd Plaintiff had on 15th August,2018 filed summons for determination of a preliminary question on a point of law which was similar to the one raised by the 1st Plaintiff. That application was made pursuant to ***Order 3 Rule2 of the High Court Rules, Chapter 27 of the Laws of Zambia*** as read with ***Order 33 Rule 3(1) of the Rules of the Supreme Court of England 1965(White Book) 1999 Edition.***

Order 3 Rule 2 of the High Court Rules provides as follows:

> **"Subject to any particular rules, the Court or a Judge may, in all causes and matters make any interlocutory Order which it or he considers necessary for doing justice, whether such order**

has been expressly asked by the person entitled to the benefit of the Order or not."

Order 33 Rule 3 of the White Book 1999 Edition provides as follows:

> **"The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."**

The 2nd Plaintiff submitted that the interlocutory order which is being sought is an order that the High Court has jurisdiction to entertain the Plaintiffs action against the Defendants. That although the Plaintiffs ought to have commenced these proceedings before the Capital Markets Tribunal, it is in the interest of justice for this Court to order that it has jurisdiction to hear and determine the Plaintiffs' action in view of the fact that the Capital Market Tribunal has not yet been established.

It was submitted that ***Order 33 Rule 3 of the White Book*** allows the High Court to consider such a question as has been put forward by the Plaintiffs.

It is contended that the Plaintiffs' claims against the Defendants fall within the realm of what are called market misconduct proceedings. That it is clear from ***Section 184(1),(2),(3) and (c) of the Securities Act, 2016*** that proceedings relating to market misconduct must be brought before the Capital Markets Tribunal which is the appropriate forum which is vested by law with jurisdiction to hear and determine the Plaintiffs' claims against the Defendants. It is

submitted however that in view of the fact that the Capital Markets Tribunal is not yet operational, the High Court is the only alternative forum for commencing such an action. That the High Court is clothed with sufficient jurisdiction to hear and determine the Plaintiffs action. As authority for this submission reliance was placed on the case of **GODFREY MIYANDA V THE HIGH COURT (1)** in which the Supreme Court, in considering the meaning of the word 'jurisdiction' stated that:

> **"The term jurisdiction should first be understood. In one sense, it is the authority which a Court has to decide matters that are litigated before it; in another sense, it is the authority which a Court has to take cognisance of matters presented in a formal way for its decision. The limits of authority of each of the Courts in Zambia are stated in the appropriate legislation. Such limits may relate to the kind and nature of the actions and matters of which the particular Court has cognisance or the area over which the jurisdiction extends, or both. Faced with a similar question of jurisdiction, two of their Lordships in CODRON V MACINTYRE AND SHAW(1), had this to say:**
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> > **Tredgold C.J., cautioned, at page 420. It is important to bear in mind the distinction between the right to relief and the procedure by which such relief is obtained. The former is a matter of substantive law, the later of adjective or procedural law."**

Counsel for the 2nd Plaintiff submitted that whether the High Court has jurisdiction to hear a matter which is reserved for the Capital Markets Tribunal must be answered in the affirmative, in view of the

circumstance of this case. That the Plaintiffs are entitled, in the absence of an operational Capital Market Tribunal, to bring an action before the High Court for determination of the matters set out in the ***Securities Act, No. 41 of 2016***.

It is submitted that in keeping with the position taken by the Supreme Court in the **GODFREY MIYANDA** case cited above, the authority which the High Court has to decide matters that are before it is conferred on it by ***Article 134 of the Constitution*** which provides that the High Court has (subject to the jurisdiction of the Constitutional Court), inter alia, appellate and original jurisdiction in Civil and Criminal matters.

On the strength of the authorities cited above it is submitted that the proceedings commenced by the Plaintiffs against the Defendants are not beyond the competence and authority of the High Court. That the jurisdiction of the High Court is unlimited. It is conceded however that the High Court is not exempt from adjudicating in accordance with the law including complying with procedural requirements, as well as substantive limitations such as the types of the reliefs or remedies available to litigants under the various laws or causes of action. That the authority of the High Court to hear and determine this matter is circumscribed by both the ***Securities Act No. 41 of 2016, the High Court Act*** and any other law which governs the exercise of the High Court's jurisdiction. It was submitted that this is a proper case for the Court to make a favourable order as to its jurisdiction to hear and determine the plaintiffs' action.

On 2nd November, 2018 the 1st Plaintiff filed a Notice of Motion to Raise Preliminary Issue on a point of law pursuant to ***Order 14A*** as read with ***Order 18 Rule 19 of the Rules of the Supreme Court (White Book) 1999 Edition.***

The Notice of Motion is supported by an Affidavit Sworn by **DIANA SICHALWE SICHONE** the Director, Legal and Enforcement Services for the 1st Plaintiff.

It is deposed that the 1st Plaintiff is seeking, inter alia, the payment of a takeover fee from the Defendants for the takeover or merger that occurred during the period 11th May, 2016 to 30th June, 2016. That the takeover or merger occurred before the enactment of the ***Securities Act, No. 41 of 2016*** which was assented to on 19th December, 2016.

That at the time the takeover or merger occurred the legislation regulating capital market and securities transactions, such as the Defendants' takeover or merger was the repealed ***Securities Act, Chapter 354 of the Laws of Zambia*** and the Rules made thereunder.

She deposed further that she believes that the 1st Plaintiff's rights to the authorization fee from the Defendants accrued and the Defendants' obligation or liability to pay the same was incurred under the repealed Securities Act as read with the Rules made thereunder. That due to the refusal of the Defendants to pay the authorisation fee to the 1st Plaintiff, the 1st Plaintiff's right to bring action before this Court to claim the said authorisation fee from the Defendants arose under the repealed Securities Act as read with the

Rules made thereunder. That the enactment of the ***Securities Act in 2016*** does not affect the 1st Plaintiff's accrued or the Defendants' obligations or liabilities, under the repealed Securities Act and the Rules made thereunder.

It is stated that the enactment of the ***Securities Act in 2016*** does not affect any proceeding or remedy in respect of the 1st Plaintiff's rights or the Defendants obligations or liabilities. That any legal proceedings or remedy may be instituted against the Defendants herein as if the repealing ***Securities Act, 2016*** has not been made. That the High Court has jurisdiction to determine and grant the reliefs prayed for.

In the 1st Plaintiffs Skeleton Arguments filed on 2nd November, 2018 Counsel submitted that the 8th Defendant prior to the repeal of the ***Securities Act, Chapter 354 of the Laws of Zambia (Securities Act, 1993)*** failed or neglected to pay, to the 1st Plaintiff, the authorisation fee being the equivalent of 0.25% of the value of the transaction amounting to US$ 184,675.00. That this was contrary to the Third Schedule to the ***Securities (Licensing, Fees and Levies) Rules, Statutory Instrument No. 165 of 1993***, as amended.

That the ***Securities Act, 1993*** was repealed and replaced by the ***Securities Act No. 41 of 2016 (the Act)*** which Act ushered in the establishment of the Capital Markets Tribunal ***(the Tribunal).*** The Tribunal has been clothed with an expansive jurisdiction pursuant to ***Section 184(3)*** to determine any matter arising under the Act upon which all grievances arising thereunder are to be submitted for adjudication to the Tribunal. However, the Act has not provided any

transitional provisions permitting matters that should have been commenced before the High Court under the repealed ***Securities Act 1993*** to be commenced before the Tribunal. That the Tribunal is not yet operational as the staff have not yet been appointed in spite of it being established.

It is contended that the appropriate forum for the 1st Plaintiff to take legal action against the Defendants for the recovery of the sum of US$ 184,675.00 owed to it is the High Court of Zambia as provided under **Section 63(1)** as read with the definition of "Court" under Section 2 of the repealed Securities Act 1993. That the Plaintiffs position is anchored on the provisions of **Section 14(3)(c)(d) and (e)** ***of the Interpretation and General Provisions Act*** which is couched as follows:

> **"where a written law repeals in whole or in part any other written law, the repeal shall not: -**
>
> **(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed; or**
>
> **(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or**
>
> **(e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceedings or remedy may be instituted continued or enforced, and any such penalty forfeiture or punishment may be imposed, as if the repealing law had not been made." (Emphasis added)**

That the legal effect of ***Section 14(3)(c) and (e) of the Interpretation and General Provisions Act*** is that in the event of a repeal of a prior written law which is repealed and replaced by a new law, any breach of the repealed law does not extinguish any right, liability, obligation, punishment or penalty arising thereunder and an offender under the repealed provisions of law may be pursued as if the repealing law had not been made. Equally, the Plaintiffs are of the considered view that the procedure to be adopted for the enforcement of that right (the forum) is equally unaffected as the repealed law operates as if the repealing law had not been made. Consequently, the substantive and procedural steps required to be taken for the enforcement of the right or obligation will be pursued in accordance with the repealed law without any exceptions or reservations. That the question of the enforceability of acquired/accrued rights under a repealed statute have been the subject of judicial adjudication before the Supreme Court in the case of **GODFERY MIYANDA V THE ATTORNEY GENERAL(2)** wherein the Supreme Court held as follows:

(i) **Generally speaking, the law preserving rights acquired or accrued does not preserve abstract rights conferred by the repealed statute but only applies to specific rights given on the happening of events specified in the statute;**

(ii) **Section 14(3)(c) of the Interpretation and General Provisions Act does not preserve rights of the public at large; it preserves the specific rights of individuals who have, before the repeal, satisfied any conditions necessary for acquisition.**

It is submitted that the pronouncements expressed by the Supreme Court above have equally been exemplified in the seminal case of **LUSAKA CITY COUNCIL V ADRIAN S. MUMBA (3)** involving an accrued right to appeal a decision from the Local Government Service Commission in terms of the repealed Local ***Government Officers Act, Cap 477***, which had been replaced by the ***Local Government Service Act (No. 33 of 1974).*** The Supreme Court found that Mr. Mumba had accrued the right to appeal to the High Court as he had a contingent right vested under the repealed Act in the event of an adverse decision being delivered against him. The Supreme Court reiterated the position that ***Section 14(3)(c) of the Interpretation and General Provisions Act*** preserves the specific rights of individuals who have, before the repeal, satisfied any conditions necessary for their acquisition to survive. The legal principles therefore emanating from the foregoing Supreme Court decisions are that, firstly, the law preserves specific rights which accrue to a party on the happening of an event prior to the repeal of the law. Secondly, once the conditions necessary for the acquisition of the right have been made, a party is able to enforce the rights even in the event of a repeal of that law.

It is contended that in the present circumstances, the happening of the event required to trigger the provisions of the repealed ***Securities Act 1993*** and the payment of the transaction fee amounting to US$184,675.00 arose prior to the repeal of the ***Securities Act 1993*** thereby giving the 1st Plaintiff an acquired/accrued or contingent right under the ***Securities Act 1993*** as if the Repealed ***Securities Act 1993*** had had not been

repealed and replaced. The repealed Securities Act defines "Court" under ***Section 2 (1)*** in the following terms:

"Court" means the High Court of Zambia."

That it therefore follows that the 1st Plaintiff's claim for the sum of US$ 184,675.00 is captured by the definition of a commercial action and will therefore be regarded as such since the claim arises from a "***transaction relating to commerce, trade or industry and as such it will fall within the jurisdiction of the Commercial Division of the High for Zambia."*** The Plaintiffs are of the considered view that at the time that the rights accrued or were acquired at the happening of the event in which the Bank breached the provisions of the repealed Securities Act, the appropriate forum for recourse was and remains the High Court for Zambia specifically the Commercial Division as opposed to the Tribunal established in terms of the Act as the 1st Plaintiff had already acquired/accrued rights enforceable under the repealed ***Securities Act***.

It is submitted that the Plaintiffs are fortified by the unassailable position as adumbrated under the Interpretation and General Provisions Act as read with Supreme Court decisions cited herein in respect of the proper interpretation of the provisions of ***Section 14(3) (c) of the Act*** which it is contended apply equally to ***Section 63(1)*** of the repealed ***Securities Act 1993***. Consequently, that the High Court for Zambia is the appropriate forum for the Plaintiff to recover the sum of US$ 184,675.00 owed to it by the Defendants and not the Capital Market Tribunal as establish under the Act.

The Defendants Skeleton Arguments in Opposition were filed on 10th January, 2019.

In opposing the Plaintiffs Notice of Motion to, Raise Preliminary Issues it was pointed out that the threshold requirements for invoking ***Orders 14A and 33 of the Rules of the Supreme Court of England 1965, (White Book) 1999*** have not been met.

It was submitted that ***Order 14A of the RSC*** cannot be casually invoked as has been done by the Plaintiff because there is a threshold test that has to be met. Reference was made to the Explanatory Note 14A/2/3 appearing at page 200 of the White Book which provides as follows:

> "**14A/2/3**
>
> **Requirements of Order 14A**
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> **The requirements for employing the procedure under this Order are the following:**
>
> **(a) The defendant must have given notice of intention to defend:**
> **(b) .....;**
> **(c) .....and**
> **(d) ....."**

It is submitted that the record will show that the Plaintiffs did not wait for the Defendants to give notice of intention of Defend. On the 2nd of November, 2018, the 1st Plaintiff filed a notice of motion to raise preliminary issue pursuant to ***Order 14A*** soon after filling an amended Writ of Summons. Therefore, since at the time of taking out the notice of motion to raise preliminary issue, the Defendants had not filed any documentation to defend the Writ of Summons and

Statement of Claim on the merits, the Plaintiffs have effectively failed to meet the threshold requirement for an ***Order 14A*** application which renders the motion procedurally handicapped and doomed to fail without further consideration.

It is further submitted that the Plaintiffs' reliance on ***Order 33, Rule 3 of the RSC*** is equally misplaced. The said provision has been quoted above.

That under this rule it is the preserve of the Court to direct that a question or issue shall be stated by or in the form of a special case but no party under this rule can, without obtaining the Order of the Court, state questions to be decided by the Court.

The Plaintiffs should have made the necessary application to Court to have the questions they have outlined in the motion stated by the Court. It is only after the questions have been so stated that the same can be heard and decided by the Court. It is contended that the Defendants are fortified by the explanatory notes appearing under 33/3/1 of the Rule of the Supreme Court of England at pages 643 to 644 of the white Book which provides thus:

> "**33/3/1**
>
> **Effect of Rule**
>
> **Under this rule, the Court can, if necessary, direct that a question or issue shall be stated by or in the form of a special case (see Duncan v. Lambeth London Borough Council [1968] 1 Q.B. 747; [1968] 1 All E.R. 84) but the parties cannot under this rule agree between themselves, without obtaining the order of the Court, to state questions of law in the form of a special case. If a special case**

is directed by the Court, it should be signed by counsel if settled by him, otherwise it should be signed by the solicitors or by the parties if appearing in person. The former practice with regard to the filing of a special case and its entry for argument no longer prevails.

This should be read with *Order 14A* (Disposal of case of point of law) *Order 18 Rule 11*(raising a point of law on the pleading) and with *Rule 4 (2)* (trial of preliminary issues)." (Emphasis added)

In this case the 1st Plaintiff has raised a question, which it has determined on its own without consulting the Court to frame it. The first step in having any question determined by the Court under *Order 33* is for the party wishing to do so to first seek the relevant order of the Court to set the question(s) in issue for determination.

It is only after the Court has accepted the application that the question or issue will be set down for determination by the Court. Since this has not been done, the Plaintiff's application in so far as it relies on the provisions of ***Order 33 Rule 3 of the Rules of the Supreme Court*** should fail.

The Defendants counsel pointed out that in the Skeleton Arguments filed on 15th August, 2018, the 2nd Plaintiff made reference to ***Order 3 Rule 2 of the High Court Rules, Chapter 277 of the Laws of Zambia.*** He submitted that ***Order 3 Rule 2*** is a general provision giving authority to a Court or Judge to make interlocutory orders which it considers necessary for doing justice in a particular case in civil proceedings before the High Court. That ***Order 3 Rule 2*** does however carry a caveat to its use as it states that *"Subject to any*

particular Rules," the High Court or a Judge may make the interlocutory order. ***Order 3 Rule 2*** has been quoted above.

That therefore ***Order 3 Rule 2*** gives the High Court general power to make Orders necessary for doing justice. However, the exercise of the power under ***Order 3 Rule 2*** is subject to particular rules of Court that provide for the specific order sought. The power under ***Order 3 Rule 2*** therefore is not wholesale as it is not unfettered. It is exercisable subject to specific rules of Court which provide for the particular orders sought like in this case the requirements set out in ***Order 14A of the Rules of the Supreme Court of England 1965.***

It is submitted that ***Order 3 Rule 2*** cannot be employed in a cavalier manner as authority for seeking any imaginable orders from the High Court even without meeting the specific thresholds set out in the particular orders under which the application can be made.

It is further contended that in the unlikely event that this Court holds that the Notice to Raise Preliminary Issue is properly before Court the Defendants would submit that the High Court does not have jurisdiction to handle alleged or purported Market Misconduct Proceedings. That the golden thread that runs throughout the Zambian jurisdictions is that forum goes to jurisdiction that is to say, where the Court is not the appropriate forum for resolution of a particular dispute, it has no jurisdiction to deal with the matter.

That there are various judicial decisions on the point that forum goes to jurisdiction and in the case of **N.B MBAZIMA AND OTHERS JOINT LIQUIDATORS OF ZIMCO LIMITED (IN LIQUIDATION) V RUEBEN VERA (6)** the Supreme Court observed:

"Quite clearly *Section 85 (2) and 108* of the Industrial and Labour Relations Act show that the jurisdiction of the Industrial Relations Court is limited to Settling of labour disputes falling under the Act. It is an alternative forum to the High Court only in cases of labour disputes. The IRC has limited but exclusive jurisdiction in such labour disputes as provided in *Section 85 (2) and 108 of the Industrial and Labour Relations Act, Chapter 269.*

In our view, in those proceedings before the Industrial Relations Court and even the present proceedings before us, the Respondents were and are impugning the Certificate of Title issued to miss Charity Kowa... the Industrial and Labour Relations Court has no jurisdiction in conveyancing matters, such issues can only be dealt with by the High Court. In KAWANA MWANGELA V RONALD BWALE NSOKOSHI AND NDOLA CITY COUNCIL we considered the jurisdiction of the lands tribunal. In that case we made the same point and held that:-

In our opinion a reading of *Section 18 and 22 of the Lands Act* shows quite clearly that the jurisdiction of the Land Tribunal is limited to the settlement of "land disputes" under the Acts and is not an alternative forum to the High Court where parties can go to, even for issuance of prerogative writs such as mandamus. In these proceedings the appellant was seeking to impugn a certificate of title issued to the 1st Respondent and under the *Lands and Deeds Registry Act, Chapter 185* of the Laws, only the High Court has jurisdiction to entertain such proceedings."

It is submitted that the question of forum regarding any question that may arise as to whether or not market misconduct is well settled in the ***Securities Act No. 41 of 2016.*** Accordingly, ***Section 184 (1),(2),(3)*** provides that proceedings relating to market misconduct must be brought before the Capital Markets Tribunal which is established by law as the appropriate forum for determining such a matter. The Sections enact as follows:

(1) There is established the Capital Markets Tribunal.

(2) The Tribunal shall be a Superior Court of record and have an official sale which shall be judicially noticed.

(3) The 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;

  (b) Proceedings relating to misconduct in the Securities Market;

  and

  (c) Such other matters as may be specified in, or prescribed in terms of the Act or any other written law.

That quite clearly therefore, the Capital Market Tribunal is the appropriate forum vested with jurisdiction to hear and determine the Plaintiffs' claims, as could be seen from the Statement of Claim the claims therein spin around alleged Market Misconduct in Securities.

That accordingly, ***Section 194 of the Securities Act*** provides as follows:

Market Misconduct Proceedings

194. (1) The Commission may institute proceedings before the Tribunal, if it appears to the Commission that any licensed person has committed an act of misconduct in the Capital Markets, as prescribed

(2) The commission shall institute proceedings by giving the tribunal a notice, in writing, as prescribed, which notice shall contain a statement specifying the grounds being relied on and the matter specified in subsection (3)."

The only way the Plaintiffs or any other person may come to the Court is via an appeal to the Court of Appeal. ***Section 195 of the Securities Act*** states as follows:

Appeals the Court of Appeal

(1) 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 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.

(2) An appeal shall be instituted by filling with the Registrar a notice, in writing, the prescribed form and serving a copy of the notice on the Respondent.

(3) A Notice of Appeal shall set forth the facts and the determination of the tribunal and the appellant shall

transmit the case to the Court of Appeal within twenty-eight days after receiving the same.

(4) The Appellant shall, at or before the time of transmission the case to the Court of Appeal serves a copy of the case to the other party."

That quite clearly therefore, the Commission only upon been dissatisfied with the decision of the Tribunal can it appeal to the Court of Appeal with leave of the Court of Appeal. The High Court has no jurisdiction to handle any matter or dispute over alleged Market Misconduct Proceedings such as the dispute herein. The action is therefore improperly before the Court.

It is submitted that in commenting on the jurisdiction of the Court, the High Court recently in the case of **ANHEUSER-BUSCH INBEV, ZAMBIA BREWRIES PLC AND NATIONAL BREWERIES PLC V ATTORNEY GENERAL, THE MINISTER OF FINANCE AND NATIONAL PLANNING AND THE SECURITIES AND EXCHANGE COMMISSION (6)** stated as follows:

> **"Having established the circumstances in which the Order of Mandamus can be issued, a perusal of the facts of this case shows that the salient facts are commons cause, that is that the Applicants are aggrieved by a decision of the 3rd Respondent and they seek to appeal that decision to the Tribunal. It is not in dispute from the 2nd Respondent's Affidavit that the Applicants wrote to inquire on whether the tribunal had been set up and that the 2nd Respondent has averred that it's in the process of setting up the said Tribunal as per paragraph 7 of the said Affidavit. However, the 2nd**

Respondent contends in Paragraphs 8 and 9 its Affidavit in Opposition that: -

"...the Applicants have a forum in which their statutory appeal can be processed and heard in accordance with the provisions of the Securities Act although not fully operational...that the decision of the 3rd Respondent is not final as the Applicants can still appeal to the tribunal when it is in place and are not prejudiced in any way.

A perusal of the relevant provisions of the Securities Act shows that Section 184(1) establishes the Capital Markets Tribunal while subsection (2) states: "The Tribunal shall be a superior Court of record and shall have an official seal which shall be judicially noticed." In addition, subsection (3) states: "The Tribunal shall have jurisdiction to hear and determine-

(a) Appeals from decisions of the Commission, or a person exercising the functions or power of the Commission;
(b) proceedings relating to misconduct in the Securities market; and
(c) such other matters as may be specified in, or prescribed in terms of this Act or any other written laws.

The above provisions make it clear that any person aggrieved by a decision of the Commission has to appeal that decision to the Tribunal, contrary to the assertion by the 2nd Respondent that the Applicants have a "forum in which their statutory appeals can be processed and heard in accordance with the provisions of the Securities Act"

I am fortified in holding this view, based on the trite position of the law as alluded to in plethora of authorities including in the case of NEWPLAST INDUSTRIES V THE COMMISSIONER OF LANDS it was held that: "It is not entirely correct that the mode of commencement of any action largely depends on the reliefs sought. The correct position is that the mode of commencement of any action is generally provided by statute."

Therefore, this Court can borrow from its sister Judge and indeed follow the Supreme Court Judgment in **NEWPLAST INDUSTRIES** wherein it was stated that where a statute so provides, a party has no option but to abide by the procedure.

It is further submitted that the jurisdiction vested in the High Court must be exercised in accordance with the law. The High Court can therefore not usurp the authority vested by law on a Tribunal upon itself. The Supreme Court in the case of **ZAMBIA NATIONAL HOLDING 7LIMITED AND UNIP V THE ATTORNEY GENERAL (7)** stated the following in the Judgment delivered by Ngulube CJ;

"The expression 'unlimited jurisdiction' should not be confused with the power of the High Court under various laws. As a general rule, no cause is beyond the competence ad authority of the High Court: no restriction applies as to type of cause and other matter as would apply to lesser Courts. However, the High Court is not exempt from adjudicating in accordance with the law including complying with procedural requirements as well as substantive limitations such as those ones found in mandatory sentences or other specifications of available penalties or, in civil matter, the

type of choice of relief or remedy available to the litigant under the various laws or causes of action."

Counsel contended that allowing this matter to proceed before this Court will be endorsing an illegality. The Supreme Court in the case of **JCN HOLDINGS LIMITED V DEVELOPMENT BANK OF ZAMBIA (8)** ordered a retrial of a matter in which the transfer of the record between Judges had not been done in accordance with the law and thus the other Judge had not jurisdiction to handle the matter. Chibesakunda, Acting CJ stated the following:

"Also, it is settled law that if a matter is not properly before a Court has no jurisdiction to make any orders or grant any remedies. This was the position we established in CHIKUTA V CHIPATA RURAL COUNCIL. In brief, the facts of that case were that the Appellant was the Secretary of the Chipata rural council. On the 28th August, 1972, he was convicted on two counts of forgery and uttering. Consequently, on the 5th October, 1972, the Council, by resolution, dismissed him from employment with effect from the date of his conviction. He commenced an action in the High Court, by means of an Originating Summons seeking a declaration that he was still employed by the Council. The High Court refused to make the declaration on the ground that the Council had the power to dismiss him by reason of his conviction. On Appeal to this Court, we held that:-

"...for procedural reasons the appeal must in fact fail. The matter was brought before the Court by means of an Originating Summons... it is clear.. that there is no case

where there is a choice between commencing an action by a Writ of Summons or by an Originating Summons. The procedure by way of an Originating summons only applies to those matters referred to in *Order 6 Rule 2* and to those matters which may be disposed of in chamber. It is clear that these proceedings have been misconceived. As the matter was not properly before him the Judge had no jurisdiction to make the declarations requested even if he had been so disposed."

We came to similar conclusion in NEWPLAST INDUSTRIES V THE COMMISSIONER OF LANDS AND THE ATTORNEY GENERAL. In that case the High Court dismissed the Appellant's action on the ground that it was commended by way of Judicial Review when it should have been brought by way of an appeal from the decision of the *Registrar of Lands and Deeds Registry*. On appeal to this Court, we said the following:

"We therefore hold that this matter having been brought to the High Court by way of Judicial Review, when it should have been commenced by way of an appeal, the Court had no jurisdiction to make the reliefs sought. This was the stand taken by this COURT IN Chikuta V CHIPATA RURAL COUNCIL where we said that there is no case in the High Court where there is a choice between commencing an action by a writ of Summons. We held in that case that where any matter is brought to the High Court by means of an Originating Summons when it should have been commenced by a Writ, the Court has no jurisdiction to make any declaration. The

same comparison is applicable here. Thus, where any matter under the Lands and Deeds Registry Act, is brought to the High Court by means of Judicial Review when it should have been brought by way of an appeal, the Court has no jurisdiction to make any matter under the Lands and Deeds Registry Act, is brought to the High Court by means of Judicial Review when it should have been brough by way of an appeal, the Court has no jurisdiction to grant the remedies sought."

That it is clear from the foregoing, that if a Court has no jurisdiction to hear and determine a matter, it cannot make any lawful orders or grant remedies sought by a party to that matter. Quite clearly therefore, allowing these proceedings to continue in light of the Securities Act as amended will be casting a blind eye on the law and endorsing an illegality.

The Defendants Counsel further pointed out that the 1st Plaintiff has argued in its Skeleton Arguments dated 2nd November, 2018 that the 8th Defendant prior to the repeal of the ***Securities Act 1993***, failed or neglected to pay, to the 1st Plaintiff, the authorisation fee being the equivalent of 0.25% of the value of the transaction amounting to US$ 184,675.00. This was contrary to the Third Schedule to the ***Securitise (Licencing, Fees and Levies) Rules, Statutory Instrument No. 165 of 1993*** as amended.

The Plaintiffs' have further argued that the appropriate forum for the 1st Plaintiff to take legal action against the Defendants for the recovery of the sum of US$ 184,675.00 owed to it is the High Court

of Zambia as provided under *Section 63(1)* as read with the definition of "Court" under Section 2 of the repealed ***Securities Act 1993***.

That notably however, the ***Securities Act 1993*** was repealed and replaced by the ***Securities Act No. 41 of 2016***. Thus, the reliance by the 1st Plaintiff on ***Section 63 of the Securities 1993*** is misplaced. This Act was repealed and replaced by the Securities Act.

Under the **Securities Act No. 41 of 2016**, matters to do with the breach of any part of the Securities Act are to be commenced before the Tribunal established under **Section 184(1)** which has been quoted above.

That it is therefore clear from the provisions of ***Section 184 of the Securities Act*** that the Capital Market Tribunals is the forum clothed with authority to hear matters in relation to the Securities Act which is a Superior Court of record.

That the Plaintiffs have concluded by stating that they are fortified by the unassailable position as adumbrated under the Interpretation and General Provisions Act as read with the Supreme Court decisions cited therein in respect of the proper Interpretation of the provisions of ***Section 14 (3)(c) of that Act*** which they contend apply equally to ***Section 63(1)*** of the repealed ***Securities Act 1993***. It has been argued that the rights the Plaintiffs seek to enforce were conferred by the repealed Securities Act and by virtue of ***Section 14 of the Interpretation of General Provisions Act***, the rights accrued are to be enforced under the repealed law as though the same was not repealed.

The Defendants submitted that the gist of the action is based on the Third Schedule to the ***Securities (Licencing Fees and Levies) Rules, Statutory Instrument No. 165 of 1993*** as amended. ***Rule 11 of SI No. 165 of 1993*** states as follows:

> **"11. The fees prescribed in the Third Schedule shall be payable to the commission, with respect to-**
>
> **(a) The grant and renewal of licences;**
>
> **(b) The registration Securities under Part V of the Act;**
>
> **and**
>
> **(c) The authorisation of Collective Investment Schemes under Part X of the Act."**

It is contended that the foregoing ***Statutory Instrument No. 165 of 1993*** is the basis of the Plaintiff claims and is not by any extension based on either Section 63 of the repealed Securities Act or any other Section therein. The Plaintiffs are claiming that they were never paid the authorisation fee.

It is submitted that it is trite that the repeal of an Act does not automatically repeal a Statutory Instrument. ***Section 15 of the Interpretation and General Provisions Act*** provides as follows:

> **"Where an Act, applied Act or Ordinance or any part thereof is repealed, any statutory instrument issued under or made in virtue thereof shall remain in force, so far as it is not inconsistent with repealing written law, until it has been repealed by a statutory instrument issued or made under the provisions of such repealing written law, and shall be deemed for all purpose to have been made there under."**

Section 222 of the Securities Act No. 41 of 2016 provides in subsection (1) that the ***Securities Act, 1993*** is hereby repealed. In no way does the Securities Act repeal the Statutory Instruments that were made under the ***Securities Act, 1993***. It follows therefore that ***Statutory Instrument No. 165 of 1993*** was not repealed and is therefore very much part of the ***Securities Act No. 41 of 2016.***

The Plaintiffs have therefore with the greatest of respect misapprehended the provisions of the law in so far as they assert to have an accrued right when in fact the position that they intend to assert was never repealed and replaced.

The Defendants contend that the action as was commenced on 10th October, 2018 is not based on repealed law (as alleged) nor is it based on any right emanating from the *Securities Act, 1993* for the Plaintiff to claim an accrued right. That in essence, the Plaintiffs seek to invoke the provisions of a valid Statutory Instrument No. 165 of 1933 to resurrect a repealed statute. The Defendants submit that that is untenable at law.

That it is therefore a misdirection for the Plaintiffs to assert their purported rights in a Statutory Instrument using a repealed Act (Via ***Section 63 of Securities Act, 1993)*** when any rights purportedly existing from the Statutory Instrument can be properly asserted under the new Act ***(Securities Act No.41 of 2016).***

It is submitted in conclusion that the Defendants have demonstrated that the Plaintiffs Notice of Intention to Raise Preliminary Issue is irregular for non-compliance with the provisions of ***Order 33 Rule3***

of the RSC as well as Order 14A of the RSC cited as authority for the notice.

More importantly that the Defendants submit that the High Court has no jurisdiction to deal with a matter emanating from the Securities Act or any rules made thereunder as the same is the preserve of the Capital Markets Tribunal.

It is prayed that the Notice of Motion to Raise Preliminary Issue should therefore be dismissed for lack of merit with the net effect of also dismissing the action before Court as the same are both based on misapprehension of the law.

I have considered the Affidavit Evidence, Skeleton Arguments, Authorities cited and oral submissions of Counsel for the Parties.

The law governing this application is contained on ***Order 14A and Order 33 Rule 3 of the RSC***.

Oder 14A RSC empowers the Court to determine any question of law or construction of any document arising without full trial of the action where it appears to the Court that such determination will finally determine the proceeding or an issue in the proceedings. The requirements for employing the procedure under Order 14A are as follows:

(a) The Defendant must have given notice of intention to defend;
(b) That question of law or construction is suitable for determination without a full trial of the action;

(c) Such determination will be final as to the entire cause or matter or any claim or issue therein;

and

(d) The parties had an opportunity of being heard on the question of law or have consented to an order or judgment being made on such determination.

Counsel for the Defendants argued that since at the time of taking out the Notice of Motion to Raise Preliminary Issue on 2nd November, 2018, the Defendant had not filed any documentation to defend the Writ of Summons and Statement of Claim on the merits, the Plaintiffs have effectively failed to meet the threshold requirement for an Order 14A application which renders the motion procedurally handicapped and doomed to fail without further consideration.

At the hearing Mrs. Sichone Counsel for the 1st Plaintiff argued that the Writ of Summons and Statement of Claim were taken out on 15th August 2018 and the Memorandum of Appearance and Defence or the Conditional Appearance ought to have been filed with 14 days after service but the Defendants failed to do so and only filed Conditional Memorandum of Appearance on 13th November, 2018. That the Defendants, are therefore seeking to rely on their own default to defeat the Plaintiff's application. It was also submitted that the absence of Notice to defend is not fatal as Order 14A Rule 1 of the RSC gives the Court power to hear the application on the application of a party or its own motion. That therefore the failure by the Defendants to file a Memorandum of Appearance and Defence in accordance with ***Order 11 Rules 1 and 2 of the High Court Rules,***

Chapter 27 of the Laws of Zambia does not preclude the Court from determining the issue.

The Plaintiffs also relied on *Order 33 Rule 3 of the RSC* which has been quoted above. This is so because the notes to *Order 33 Rules 3* state that Rule 3, should be read, inter alia with *Order 14 A*. It is to be noted however that the effect of the two orders is clearly explained in the Editorial Notes to the respective Rules.

Order 33 Rules 3 relates to, primarily, the place and mode of conducting a trail, that is to say, the Court may order any question or issue whether of fact or law or both, to be tried before, at, or after the trial of the cause or matter. Conversely, *Order 14A* relates to the disposal of a case on a point of law.

In casu, as the Plaintiffs did not obtain the order of the Court to state questions of law in the form of a special case, the procedure under *Order 33 Rule 3* is inapplicable and the application in so far as it relies on the provisions of *Order 33 Rule 3* of the Rules of the Supreme Court fails.

As regards the 2nd Plaintiffs reliance on ***Order 3 Rule 2 Of the High Court Rules, Chapter 27 of the Laws of Zambia***, *I* agree with the Defendants that ***Order 3 Rule 2*** is a general provision giving authority to a Court or Judge to make interlocutory orders which it (or he) considers necessary for doing justice in a particular case in civil proceedings before the High Court. That although the Order gives the High Court general power to make orders necessary for doing justice, the exercise of the power under ***Order 3 Rule 2*** is

subject to particular rules of Court that provides for the specific order sought. The power under ***Order 3 Rule 2*** is not wholesale as it is not unfettered. It is exercisable subject to specific rules of Court which provide for the particular order sought like in this case the requirements set out in ***Order 14 A of the RSC.***

Before employing the procedure under ***Order 14 A*** one of the 4 requirements is that the Defendant must have given notice of intention to defend. It is therefore clear that giving of notice of intention to defend as explained in the case of **MUKELABAI V NAMLWAMBA AND OTHER (9),** is an essential condition precedent, before resorting to the procedure under *Order 14A.*

Although the action was commended by Writ of Summons on 15th August 2018 and the Writ of Summons amended on 10th October, 2018 the Defendants only filed conditional Memorandum of Appearance on 13th November, 2018 instead of within 14 days from date of service. It is clear that the Defendants were well out of time in entering appearance. I find therefore that it is inequitable for the Defendants to seek to rely on their own default to prevent the Plaintiff from having their application under ***Order 14A of the RSC*** from being heard and determined.

In order to obtain justice, the Plaintiffs have invoked the provisions of *Order 3 Rule 2 of the High Court Rules.* ***Order 3 Rule 2 of the High Court Rules*** as well as ***Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia*** are sufficiently expansive to include the application before the Court. The intention of both the Sub-rule and the Section is clear. They give the Court a lot of discretion to do

justice. Although the Plaintiffs did not wait for the Defendants to file notice of intention to defend (i.e. file a Memorandum of Appearance and Defence) when on 2nd November, 2018 the 1st Plaintiff filed a Notice of Motion to Raise Preliminary Issue pursuant to *Order 14A* I am satisfied that the matter was properly launched under the provisions of ***Order 14A of the RSC*** as read with ***Order 3 Rule 2 of the High Court Rules.***

I am of the view that it would be inequitable to allow the Defendants to rely on their own default in failing to file Memorandum of Appearance and Defence to prevent the Plaintiffs application under *Order 14A* being heard and determined. And in any event, I can make the determination that the matter is properly before me on my own motion. I therefore find and hold that the Plaintiffs' application is properly before me and I will proceed to consider the application.

Having found and held that the Notice to Raise A Preliminary Issue is properly before the Court, I must now determine whether the High Court has jurisdiction to deal with the alleged or purported market misconduct proceedings.

It is common cause that forum goes to jurisdiction, that is to say, where the Court is not the appropriate forum for the resolution of a particular dispute, it has no jurisdiction to deal with the matter.

It is also common cause that under the ***Securities Act No. 41 of 2016*** the Capital Markets Tribunal which is established thereunder is the appropriate forum for holding proceedings relating to market misconduct. However, *in casu* the Plaintiffs contend that the

appropriate forum for them to take legal action against the Defendants for recovery of the sums of US$ 184,675.00 and K3,566,074.26 owed to them is the High Court of Zambia because the takeover or merger for which payments ought to have been made by the Defendants occurred prior to the repeal of the ***Securities Act Chapter 354 of the Laws of Zambia.***

It is submitted that this contention is anchored on the provisions of Section 63(1) as read with the definition of "Court" under Section 2 of the repealed ***Securities Act 1993*** and also the provisions of ***Section 14(3)(c), (d) and (e) of the Interpretation and General Provisions Act.*** They also relied on the Supreme Court decisions in **GODFREY MIYANDA V THE ATTORNEY GENERAL (2)** and **LUSAKA CITY COUNCIL V ADRIAN S. MUMBA (3)** on the Interpretation of the provisions of ***Section 14 (3)(c) of the Interpretation and general Provisions Act.***

It has been argued by the Plaintiffs that the rights the Plaintiffs seek to enforce were conferred by the repealed Securities Act and by virtue of ***Section 14 of the Interpretation and General Provisions Act***, the rights accrued are to be enforced under the repealed law as though the same was not repealed.

The Defendants submitted that the High Court has no jurisdiction to deal with a matter emanating from the Securities Act or any Rules made thereunder as the same is the preserve of the Capital Market Tribunal.

The Defendants urged this Court to borrow from its sister Judge in the case **ANHEUSER-BUSCH INBEV, ZAMBIA BREWERIES PLC AND**

NATIONAL BREWERIES PLC V ATTORNEY GENERAL, THE MINISTER OF FINANCE AND NATIONAL PLANNING AND THE SECURITIES AND EXCHANGE COMMISSION (6) and to follow the Supreme Court judgment in **NEWPLAST INDUSTRIES V COMMISSIONER OF LANDS AND ANOTHER (5)** wherein it was stated that where a statute provides the mode of commencement of any action, a party has no option but to abide by that procedure.

It was submitted that the jurisdiction vested in the High court must be exercised in accordance with the law and that the High Court cannot usurp the authority vested by law on a Tribunal upon itself. That allowing the proceeding to continue in light of the Securities Act as amended will be casting a blind eye on the law and endorsing an illegality.

The Defendants also contend that the Plaintiffs can not rely on ***Section 14(3)(c) of the Interpretation and General Provisions Act*** and the Supreme Court decisions cited in respect thereof because the Plaintiff's action is based on the Third Schedule to the Securities ***(Licencing Fees and Levies) Rules, Statutory Instrument No. 165 of 1993*** as amended. That the Statutory Instrument is the basis of the Plaintiffs claims and is not by any extension based on wither Section 63 or any other Section of the repealed **Securities Act 1993**. It was argued that as ***Statutory Instrument No. 165 of 1993*** has not been repealed the Plaintiffs have no accrued rights because the positions that they intend to assert were never repealed and replaced. That the action commenced on 10th October, 2018 is not based on repealed law as alleged nor is it based on any right

emanating from the repealed Securities Act for the Plaintiffs to claim accrued rights.

I have considered the Affidavit Evidence, Skeleton Arguments, Authorities cited and oral submissions of learned Counsel for the parties.

From the outset I wish to state that I have considered the Affidavit Evidence and Skeleton Arguments filed in support of Summons for Determination of a Preliminary Question on a point of law filed by the 2nd Plaintiff on 15th August 2018 in addition to those filed by the 1st Plaintiff on 2nd November, 2018 and the Defendants on 10th January, 2019.

The parties are agreed that the jurisdiction of the High Court is unlimited but not limitless. They are also not in dispute as regards the fact that by virtue of ***Section 184 of the Securities Act No. 41 of 2016***, any proceedings relating to misconduct in the Securities Market must be brought before the Capital Market Tribunal which is established as a superior Court of record with jurisdiction to hear and determine any such matters. The point of departure is whether or not the High Court of Zambia can hear and determine claims set out in the Statement of Claim on the basis that the rights accrued, and obligations or liability incurred arose under the repealed ***Securities Act, Chapter 354 of the Laws of Zambia.***

The legal effect of ***Section 14(3)(c) and (e) of the Interpretation and General Provisions Act*** is clear – it is that where a written law repeals in whole or in part any other written law, the repeal shall not affect

any right, obligation or liability acquired, accrued or incurred under any written law so repealed; or affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability and any such investigation, legal proceeding, or remedy may be instituted, continued or enforced as if the repealing law had not been made. In the case of **GODFREY MIYANDA V THE ATTORNEY GENERAL (2)** the Supreme Court guided that Section 14(3)(c) aforesaid does not preserve rights of the public at large but preserves the specific rights of individuals who have before the repeal, satisfied any conditions necessary for acquisition. The case of **LUSAKA CITY COUNCIL V ADRIAN S. MUMBA (3)** is authority for the principle that one can acquire or accrue a contingent right under a repealed statute to pursue enforcement of an accrued right in the forum provided for by the repealed statute.

Counsel for Defendants advanced the argument that the gist of the Plaintiffs action is based on Statutory Instrument No. 165 of 1993 which is not based on either Section 63 or any other Section of the repealed Securities Act. That by virtue of Section 15 of the Interpretation and General Provisions Act the repeal of the ***Securities Act 1993*** did not repeal the Statutory Instruments made thereunder and as such Statutory Instrument No. 165 of 1993 was not repealed and is therefore part of the Securities Act No. 41 of 2016. It was submitted that the Plaintiffs misapprehended the provisions of the law is so far as they assert to have accrued rights when in fact the position that they intend to assert was never repealed and replaced.

The question to be decided in this case is whether the Plaintiffs' action is based on the repealed Securities Act 1993 or put in another way, whether the Plaintiffs action is based on any rights emanating from the repealed Securities Act 1993 as alleged by the Plaintiffs.

The Plaintiffs' claims against the Defendants arise from the takeover or merger of Finance Bank Zambia PLC by the 8th Defendant that occurred during the period 11th May, 2016 to 30th June, 2016 when the ***Securities Act 1993*** was in force. The ***Securities Act No. 41 of 2016*** was assented to on 19th December, 2016 thus repealing the ***Securities Act 1993*** under ***Section 222***.

I therefore find that at the time the takeover or merger occurred (that is when Atlas Mara Zambia Limited took over Finance Bank Zambia PLC) the legislation regulating Capital Markets and Securities Transactions was the ***Securities Act, 1993***.

Section 63 of the repealed ***Securities Act, 1993*** provided that:

> **"63. (1) Where, on the application of the Commission, it appears to the Court that a person has contravened this Act or any conditions of his licence, or is about to do an act with respect to dealing in Securities that, if done, would be such a contravention, the Court may, without prejudice to any order it would be entitled to make otherwise than pursuant to this Section, make one or more of the following orders:**
>
> **(a) An order restraining a person from acquiring, disposing of, or otherwise dealing with any securities specified in the order;**

(b) In relation to a licensed dealer, an order appointing a person to administer the property of the dealer;

(c) An order declaring a contract relating to securities to be void or voidable;

(d) For the purpose of securing compliance with any other order under this Section, an order directing a person to do or refrain from doing a specified act; or

(e) Any ancillary order which it considers necessary in consequence of the making of any other order under this section.

(2) The Court shall, before making an order under this Section satisfy itself, so far as it reasonably can, that the order would not unfairly operate to the detriment of any person.

(3) The Court may, before making an order under subsection (1) direct that notice of the application be given to such persons as it thinks fit or direct that notice of the application be published in such manner as it thinks fit, or both.

(4) The Court may reverse, vary, or discharge an order made by it under this Section or suspended the operation of such an order."

The repealed Securities Act defines "Court" under *Section 2 (1)* in the following terms:

"Court" mean the High Court of Zambia.

It is clear that Section 63 of the repealed ***Securities Act 1993*** gave the High Court of Zambia jurisdiction to deal with any contraventions or violations of the Act. I also note that the Third schedule of the ***Securities (Licensing, fee and Levies) Rules, Statutory Instrument No. 165 of 1993*** was made pursuant to Section 78 of the repealed Securities Act 1993.

Quite clearly Sections 63 and 78 of the repealed Securities Act is the basis of the Plaintiffs claims and as such the Plaintiffs have correctly asserted to have accrued rights because the *Securities Act 1993* was repealed on 19th December 2016. I find and hold that the Plaintiffs rights to receive payment of the transaction authorization fee and the securities trade commission from the Defendants arose when the takeover or merger took place between 11th May, 2016 to 30th June, 2016.

I further find that the Plaintiffs met the conditions necessary for the acquisition of their respective individual rights to be paid authorisation fee and securities trade commission when they made demand for payment but the Defendants neglected or refused to make payment. I also find and hold that the Plaintiffs having acquired the specific rights to be paid the authorisation fee and the securities transaction commission pegged at US$184,675.00 and K3,566,074.26 respectively, they are entitled to enforce the rights by bringing legal action against the Defendants in the High Court of Zambia pursuant to ***Section 14(3)(e) of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia***.

The authorities cited by learned Counsel for the Defendants including the case of **N.B. MBAZIMA AND OTHER JOINT LIQUIDATORS OF ZIMCO LIMITED (IN LIQUIDATION) V RUBEN VERA (4)** clearly state the law with regard to the point that forum goes to jurisdiction. These authorities do not however aid the Defendants because although ***Section 186(1),(2), (3) of the Securities Act No. 41 of 2016*** provides that proceedings relating to market misconduct must be brought before the Capital Markets Tribunal the Plaintiffs claims arise from market misconduct which occurred between 11th May, 2016 to 30th June, 2016, that is some 6 months before the Capital Market Tribunal was established and for which the appropriate forum with jurisdiction to deal with the same is the High Court of Zambia. The High Court has jurisdiction to handle the dispute between the Plaintiffs and the Defendants because the rights the Plaintiffs seek to enforce were conferred by the repealed Securities Act 1993 and by virtue of ***Section 14 of the Interpretation and General Provisions Act***.

I have perused the Judgment in the **ANHEUSER-BUSCH INBEV** case **(6)** and find that it can be distinguished from the instant case. The said case involved an appeal against the decision of the Securities and Exchange Commission under the ***Securities Act 2016*** and not accrued rights under the repealed ***Securities Act 1993***. That case could not be enforced pursuant to Section 14 of the Interpretation and General provisions Act.

For the foregoing reasons, I find that this Court has jurisdiction to determine the matter between the parties herein on the basis that

the rights accrued and the obligations or liabilities incurred arose under the repealed ***Securities Act, Chapter 354 of the Laws of Zambia*** which provided for the determination of disputes and matters arising under it, by the High Court of Zambia and not the Capital Markets Tribunal established under the ***Securities Act, No. 41 of 2016.***

The Preliminary Issue is thus allowed with costs to the Plaintiffs which are to be taxed in default of agreement.

It is further directed and ordered that the Defendants shall file a Defence within 14 days of the date hereof.

Leave to appeal is granted.

DELIVERED AT LUSAKA THE 28TH DAY OF APRIL, 2021.

WILLIAM S. MWEEMBA
HIGH COURT JUDGE