

IN THE CAPITAL MARKETS TRIBUNAL
HELD AT LUSAKA



BETWEEN:

**MADISON ASSET MANAGEMENT COMPANY
LIMITED**

1ST APPELLANT

MADISON FINANCIAL SERVICES PLC

2ND APPELLANT

AND

SECURITIES AND EXCHANGE COMMISSION

RESPONDENT

Before:

The Registrar, Mr. M. Chola, in Chambers

For the Appellants:

Mr. A.S. Kokowe, Messrs. Milimo Chooka &
Associates

For the Respondent:

Mrs. D. Sichone and Mr. K. Sakala, In-
House Counsel, Securities and Exchange
Commission

RULING

Legislation referred to:

1. The High Court Act, Chapter 27 of the Laws of Zambia
2. The Securities (Capital Markets Tribunal) Rules, Statutory Instrument No. 32 of 2021
3. The Rules of Supreme Court, 1999 edition

Cases referred to:

1. Tebuho Yeta v African Banking Corporation ABC (Zambia) Limited
– Appeal No. 117/2013
2. Winstone Chibwe v Attorney-General and Another – 2012/HP/0830
(Unreported)

3. African Banking Corporation Limited (T/A Atlas Mara) v Mattaniah Investments Limited and Others [2020] ZMCA 51
4. Isaac Tantameni C. Chali (Executor of the Will of the late Mwalla Mwalla) v Liseli Mwala (Single Woman) – SCZ Judgment No. 6 of 1997

1. INTRODUCTION

- 1.1. By Summons, Affidavit sworn by Thomas Thole, an Investigations Officer in the Respondent's employ, and Skeleton Arguments in support filed on 23rd March, 2022, the Respondent applied to set aside for irregularity and abuse of court process the Notice of Appeal and its supporting Affidavit herein. The application was expressed to have been made pursuant to rule 22 (1) (d) of the Securities (Capital Markets Tribunal) Rules, Statutory Instrument Number 32 of 2021 (the CMT Rules) as read together with Order 18 rule 19 and Order 12 rule 8 of the Rules of the Supreme Court of England (White Book) 1999 Edition (RSC 1999). The Respondent did not file an Affidavit of Service.
- 1.2. The Appellants opposed the application through an Affidavit sworn by Andrew Shamulenje Kokowe, an Advocate in the employ of the Appellant's Advocates, and Skeleton Arguments filed on 26th April, 2022.

2. EVIDENCE

- 2.1. According to the Affidavit in support of the application the Appellants – pursuant to my ruling delivered on 25th February,

2022 – filed a Notice of Appeal and supporting documentation on 14th March, 2022 seeking 22 reliefs from the Tribunal.

- 2.2. It is also the Respondent's evidence that my ruling of 25th February, 2022, determined that the Chief Executive Officer of the Respondent and the Interim Manager could not be parties to an appeal to be filed by the Appellants.
- 2.3. The Respondent's Affidavit also states that the reliefs under paragraphs 2, 16 and 17 of the Notice of Appeal were directed at, and/or materially require the Tribunal to pronounce itself on the interests and rights of, the Chief Executive Officer of the Respondent and the Interim Manager.
- 2.4. Moreover, the Respondent's Affidavit states that the Affidavit in support of appeal is irregular in form and an abuse of the process of the Tribunal.
- 2.5. The Appellants' Affidavit in opposition to the application states that the Appellants filed the Notice of Appeal in line with my ruling of 25th February, 2022.

3. ARGUMENTS

- 3.1. In its Skeleton Arguments, the Respondent cited rule 22 (1) (d) of the CMT Rules and Order 18 rule 19 of the RSC 1999 and invited me to set aside or dismiss the Notice of Appeal and the Affidavit in support thereof for being an abuse of court process. No reference was made to Order 12 rule 8 of the RSC despite the same being referred to in the caption of the summons. The Respondent also contended – citing Order 5

of the High Court Rules, Chapter 27 of the Laws of Zambia (HCR) and Order 41 of the RSC 1999 – that the Affidavit in support of appeal ought to be set aside for irregularity on the ground that much of the said Affidavit was worded as submission, legal arguments and conclusions; and that allegations worded as beliefs in the said Affidavit did not state the sources for the beliefs and the deponent's grounds for holding those beliefs.

- 3.2. The Respondent prayed that the Appellants' appeal be set aside for irregularity and for being an abuse of court process; and that costs be for the Respondent.

- 3.3. The Appellants', in their Skeleton Arguments in opposition to the application, posited that the Respondent's Affidavit in support of the present application did not specify which paragraphs of the Appellants' Affidavit in support of appeal were wanting; and that it was neither open to the Tribunal to speculate as to which portions of the Appellants' Affidavit were being attacked nor to assume that the objection related to the entire Affidavit. The Appellants also contended that, in the unlikely event that their Notice of Appeal and Affidavit in support were found to be at variance with my ruling of 25th February, 2022, an order to amend the said process would be more appropriate than striking out the entire process. It was argued that striking out the process on the basis that 3 out of 21 reliefs were irregular would be at variance with the provisions of rule 22 (1) (d) of the CMT Rules; and that striking out should only be resorted where the circumstances merit it.

- 3.4. The Appellants stressed that their Notice of Appeal and Affidavit in support thereof were proper and prayed that the Respondent's application be dismissed with costs.
- 3.5. At the hearing of the application, the parties relied on their respective process filed before the Tribunal. Counsel for the Respondent augmented their Skeleton Arguments with oral submissions while Counsel for the Appellants elected to rely entirely on process filed on behalf of the Appellants.
- 3.6. Counsel for the Respondent argued that the appeal was attempting to circumvent my ruling of 25th February, 2022, to the effect that the appeal related to the appointment of the Interim Manager and not the Interim Manager's character. I was referred to the case of **Tebuho Yeta v African Banking Corporation ABC (Zambia) Limited (1)** in which, Counsel submitted, the Supreme Court of Zambia stated that justice was not only for the parties but also any person mentioned in the proceedings and struck out allegations of a personal nature made against a non-party on the basis that they could not defend themselves and their reputation could seriously be damaged. It was posited that in the present case, some of the allegations made by the Appellants were scandalous in abrogation of my ruling of 25th February, 2022, which limited the Appellants to the possession and appointment of the Interim Manager.
- 3.7. Moreover, Counsel submitted that the import of my ruling of 25th February, 2022, was that the actions and conduct of the

Respondent's employed agents could not be challenged in the Tribunal; and that this being the case, facts or reliefs that sought to challenge or invoke a pronouncement on findings of fact in respect of the Chief Executive Officer of the Respondent and the Interim Manager should not be entertained or grace the Tribunal's record. Counsel referred to paragraphs 19.6.2, 98.2, 98.6, 98.9, 98.10 and 98.14 of the Affidavit in support of appeal and argued that the contents of the said paragraphs would require the Tribunal to focus on the conduct of the Interim Manager as opposed to the merits or demerits of the Respondent's decision to appoint the Interim Manager. It was Counsel's submission that the process of the Tribunal was being abused and setting aside the appeal was the appropriate step to take against the Appellants' conduct of undermining my ruling of 25th February, 2022.

- 3.8. Counsel further contended that it was sufficient in an application such as the present one for the applicant to merely state that an Affidavit being challenged contains extraneous matters. For this assertion, Counsel stated that reliance was being placed on a ruling of the High Court in the case of **Winstone Chibwe v Attorney-General and Another (2)**. Counsel then pointed out that paragraphs 15, 18, 19, 19.3, 19.4, 19.6.3, 19.7.2, 103, 103.7.1, 104.8.1 and 104.10.1 of the Affidavit in support of appeal contained legal arguments and conclusions; and did not state the basis of the beliefs in those paragraphs.

3.9. Counsel further submitted that in the case of **African Banking Corporation Limited T/A Atlas Mara v Mattaniah Investments Limited and Four Others (3)**, the Court of Appeal held that it is not enough for an Affidavit to state that the deponent has been informed of the belief; the deponent must name the source of the information and state facts that form the basis of the grounds on which the statement is made.

3.10. In conclusion, Counsel argued that the Respondent's application had merit and reiterated its prayer that the appeal be set aside with costs.

4. DETERMINATION

4.1. I have considered the respective process filed by the parties and the oral submissions made at the hearing of this application. The issue for determination, as I see it, is whether the Notice of Appeal and its supporting Affidavit are irregular and an abuse of process.

4.2. The Respondent premised its application on rule 22 (1) (d) of the CMT Rules and Order 18 rule 19 of the RSC 1999. Rule 22 (1) (d) of the CMT Rules provides, in so far as is material, that

***(1)...the Registrar may, on application by a party
or at the instance of ...the Registrar –***

...

***(d) subject to the Act and these Rules, take any
course which, in the opinion of ...the Registrar,***

may help determine a matter in a just, speedy and inexpensive manner.

The material portions of Order 18 rule 19 (1) (d) of the RSC 1999 provide that

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –

....

(d) it is otherwise an abuse of the process of the Court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

- 4.3. The Respondent contended that the Appellants are abusing the process of the Tribunal by including in their Notice of Appeal reliefs that seek to have the Tribunal pronounce itself on the legal position, rights and status of persons that are not party to the proceedings before the Tribunal contrary to my holding in the ruling of 25th February, 2022, to the effect that the Appellants were precluded from commencing action against the Chief Executive Officer and the former Interim Manager. The reliefs in question are set out in the following terms:

2. An Order that, in view of the placement of funds in the Fixed Income Fund by the Respondent (on its own behalf) and by the Interim Manager

(through Care Cooperative Savings and Credit Society Limited) the Respondent is estopped from alleging (as stated in the Inspection Report prepared by Abraham Alutuli on 11th March 2019) that the 1st Appellant was in abrogation of the Securities Act when it collected a total of ZMW324,828,332.00 held under the Fixed Income Fund as funds collected from the public to be repaid with a return.

16. An Order that Abraham Alutuli was disqualified and precluded from being appointed as Interim Manager of the 1st Appellant by virtue of being an insider as defined by section 2 under part (a) (v) and (b) of the definition of 'insider' in the Securities Act No. 41 of 2016.

17. An Order that the Code of Ethics for the Public Service is applicable to officers employed by the Respondent and that the Respondent failed to demand the highest standards of ethical conduct from its Interim Manager, Mr. Abraham Alutuli.

4.4. In terms of rule 22 (1) (d) of the CMT Rules, the taking of any course by the Registrar is conditioned on, among other considerations, the need to help determine a matter in a just

manner. In the present application the Respondent is seeking an order to set aside or dismiss the appeal in its entirety because, in the Respondent's view, the reliefs being sought by the Appellants at paragraphs 2, 16 and 17 of the Notice of Appeal constitute an abuse of the process of the Tribunal. It is noteworthy that the Respondent is not challenging all the reliefs being sought by the Appellants; only three out of twenty-two reliefs have been challenged. On a cursory review of the Notice of Appeal, it appears to me that the Notice of Appeal would still be tenable if the three challenged reliefs were to be struck out from the said Notice of Appeal. In the premises, I would not be helping to determine this matter in a just manner if I were to set aside or dismiss the appeal on the ground only that some of the reliefs sought in the appeal amount to abuse of the process of the Tribunal.

- 4.5. But what is the fate of the challenged reliefs considering that the Respondent's prayer is for an order to set aside process for irregularity and for abuse of the process of the Tribunal and not necessarily to strike out the alleged offending reliefs? It is my considered view that allowing the relief set out in paragraph 16 of the Notice of Appeal would not help in determining the matter in a just manner. This is because, it clearly invites the Tribunal to make an adverse order against a person who is not a party to the appeal. Additionally, the said relief is not one which can be cured by amendment as it is specific to a non-party to the appeal. Therefore, in the interest of justice and on the authority of rule 22 (1) (d) of the CMT Rules and the principle – laid down in the case of *Isaac*

Tantameni C. Chali (Executor of the Will of the late Mwalla Mwalla) v Liseli Mwala (Single Woman) (4) – that courts are legally and effectively precluded from considering the interests of non-parties to an action, it is ordered that the said relief be struck out from the Notice of Appeal.

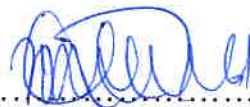
- 4.6. As to the fate of the relief set out in paragraph 17 of the Notice of Appeal, I am of the considered view on the strength of the authorities referred to in paragraph 4.5. hereof that the portion that imputes unethical conduct on the part of a non-party to the appeal be struck out from the Notice of Appeal. In other words, the Appellants are ordered to amend the said paragraph so as to remove the imputation of unethical conduct on the part of the non-party to the appeal.
- 4.7. The relief set out in paragraph 2 of the Notice of Appeal appears to me to be proper as it is directed at the Respondent. In the circumstances, the said paragraph ought not to be struck out from the Notice of Appeal and I order accordingly.
- 4.8. Apart from challenging portions of the Notice of Appeal, the Respondent's Affidavit states that the Appellants' Affidavit in support of appeal is irregular in form and content. However, the said Respondent's Affidavit does not specify which paragraphs or portions of the Appellant's Affidavit in support of appeal are irregular. Counsel for the Respondent only mentioned the alleged offending paragraphs of the Appellants' Affidavit in support of appeal during oral augmentation of Respondent's Skeleton Arguments.

- 4.9. The failure by the Respondent to state, in its Affidavit in support of the present application, the irregular paragraphs in the Appellants' Affidavit in support of appeal is fatal to their quest to set aside the said Appellants' Affidavit for irregularity for at least two reasons. Firstly, the Respondent's approach effectively deprived the Appellants of the opportunity to respond adequately to the challenge as the Respondent did not stipulate the offending paragraphs of the Appellants' Affidavit. Secondly, the said approach would have meant my going on a fishing expedition as to which paragraphs of the Appellants' Affidavit the Respondent was challenging. As the Appellants' correctly pointed out in their Skeleton Arguments, the Respondent was basically asking me to speculate on the matter or make assumptions.
- 4.10. Moreover, and as far as I could ascertain from the **Winstone Chibwe** case (2), the Respondent's assertion purportedly on the strength of the said case is flawed. This is because the Affidavit of the 1st Respondent in the said case specified the paragraphs that were believed to be irregular. In other words, it is not sufficient to simply make a blanket statement in an Affidavit such as the Respondent's Affidavit that the Affidavit being challenged contains legal arguments, submissions and conclusions; it is equally not sufficient to simply state that expressions of belief are not compliant with relevant rules.
- 4.11. In view of paragraphs 4.9. and 4.10. above, the application to set aside the Appellants' Affidavit in support of appeal is declined.

4.12. In summary, the following orders are made:

- 4.12.1. The application to set aside or dismiss the appeal in its entirety is declined;
- 4.12.2. The relief set out in paragraph 2 of the Notice of Appeal is proper;
- 4.12.3. The relief set out in paragraph 16 of the Notice of Appeal is struck out in its entirety;
- 4.12.4. The Appellants to amend the relief set out in paragraph 17 of the Notice of Appeal so as to remove the imputation of unethical conduct by a non-party to the appeal;
- 4.12.5. The Appellants to file and serve on the Respondent the amended Notice of Appeal within fifteen days of this ruling if no appeal is filed against the ruling;
- 4.12.6. The Respondent to file its Affidavit in Opposition to appeal within seven days of being served with the amended Notice of Appeal;
- 4.12.7. Costs of this application are awarded to the Appellants;
and
- 4.12.8. Permission to appeal is granted.

DELIVERED THIS 6TH DAY OF MAY, 2022



M. CHOLA
REGISTRAR

