IN THE HIGH COURT OF ZAMBIA **2021/HP/0085**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF: **ORDER 53 OF THE RULES OF THE SUPREME COURT OF ENGLAND, 1999 EDITION (WHITE BOOK)**

AND

IN THE MATTER OF: **THE SECURITIES ACT NO. 41 OF 2016**

AND

IN THE MATTER OF: **AN APPLICATION FOR JUDICIAL REVIEW**

BETWEEN:

STANDARD CHARTERED BANK ZAMBIA PLC — **1st APPLICANT**
STANDARD CHARTERED ZAMBIA SECURITIES NOMINEES LIMITED — **2nd APPLICANT**

AND

THE SECURITIES AND EXCHANGE COMMISSION — **RESPONDENT**

BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 5th DAY OF AUGUST, 2021

For the Applicants : *Mr P. Chomba, Mulenga Mundashi Legal Practitioners*

For the Respondent : *Ms D. Mulondiwa, In House Counsel*

RULING

CASES REFERRED TO:

1. ***IRC v National Federation of Self Employed and Small Businesses Ltd 1898 1QB 802,804***
2. ***Collet v Van Zyl 1966 ZR 65***

3. ***Zinka v The Attorney- General 1990–1992 ZR 73***
4. ***Derrick Chitala (Secretary of the Zambia Democratic Congress) v The Attorney General 1995 S J***
5. ***New Plast Industries v The Commissioner of Lands and the Attorney General SCZ No 8 of 2001***
6. ***Jacob Nyoni v The Attorney General SCZ Judgment 11 of 2001***
7. ***Dean Namulya Mung'omba & Ors v Peter Machingwa Golden Mandandi & Anor SCZ Judgment No. 3 of 2003***
8. ***Zambia Consolidated Copper Mines and Jackson Munyika Siame and 33 others 2004 ZR 193***
9. ***Post Newspaper Limited v Rupiah Bwezani Banda SCZ Judgment No. 25 of 2009***
10. ***North-Western Energy Company Limited v Energy Regulation Board 2010/HP/0786***
11. ***Jennifer Nawa vs. Standard Chartered Bank Zambia Plc SCZ Judgment Number 1 of 2011***
12. ***William Harrington v Dora Siliya and the Attorney General SCZ Judgment No. 14 of 2011***
13. ***Kansanshi Mining PLC v Zambia Revenue Authority SCZ Judgment No 143 of 2014***
14. ***Concrete Pipes Products Limited v Kingsley Kabimba and Christopher Simukoko Appeal No. 014/2015***
15. ***Anheuser-Bush Inbev and two others v The Attorney General, Minister of National Planning and the Securities and ExchangeCommission2017/HP/1245***
16. ***KCM v Martin Nyambe and 24 Others Appeal No. 12 of 2018***

LEGISLATION REFERRED TO:

1. ***The Rules of the Supreme Court of England, 1999 Edition***
2. ***Securities Act No. 41 of 2016***

OTHER WORKS REFERRED TO:

1. ***Guidelines for Trustees and Custodians in Collective Investment Scheme, No.1 of 2016***
2. ***Maxwell on Interpretation of Statutes, Eleventh Edition***

1. This is a Ruling on an application made by the Respondent on 26th February, 2021, for an Order to discharge the leave that was granted to apply for judicial review, which application is

made pursuant to Order 53, Rule 14 subrule 3 of the Rules of the Supreme Court of England, 1999 Edition, White Book.

BACKGROUND

2. The background leading to the application is that the Applicants filed an ex-parte summons for leave to commence judicial review proceedings on 2nd February, 2021, pursuant to Order 53 Rule 3 (2) of the Rules of the Supreme Court of England, 1999 Edition, which application was supported by an affidavit and skeleton arguments, and a notice containing a statement in support of the application for leave to apply for judicial review.
3. The decision pursuant to which the application is made is;
   i. *The decision of the Respondent directing the 1st Applicant to recompense the sum of Three Million Four Hundred and Fifty-Two Thousand, Two Hundred and Eighty-Two Only (ZMW3, 452, 282.00)(the Recompense Amount) to Laurence Paul Unit Trust Investors for funds that were placed under the 2nd Applicant's custody.*
   ii. *The decision of the Respondent imposing an administrative fine of ZMW19, 126.00 on the 1st Applicant for failing and/or neglecting to comply with the directive to recompense the Laurence Paul Unit Trust Investors.*
4. The relief sought is;
   i. *An Order of certiorari for the purposes of quashing the decision by the Respondent directing the 1st Applicant to pay the Recompense amount to Laurence Paul Unit Trust*

Investors for funds that were placed under the 2nd Applicant's custody.

ii. *A declaration that the method, procedure and process used by the Respondent to arrive at the decision to direct the 1st Applicant to pay the recompense amount to Laurence Paul Unit Trust investors for funds that were placed under the 2nd Applicant's custody is in excess of the Respondent's powers under the Securities Act or any other laws and otherwise unlawful, illegal, procedurally improper, unreasonable and mala fides, as the Respondent does not have the authority under the Securities Act or any other laws.*

iii. *An Order of certiorari for the purposes of quashing the decision by the Respondent as contained in the letter dated 28th January, 2021, imposing an administrative fine of ZMW19, 126.00 on the 1st Applicant for failing and/or neglecting to comply with the directive to recompense the Laurence Paul Unit Trust Investors.*

iv. *Damages.*

v. *Further or other relief the Court may deem just; and*

vi. *An Order for costs.*

5. The grounds upon which the relief is sought is illegality, and unreasonableness and bad faith. Leave was granted to commence the judicial review proceedings, ex-parte on 5th February, 2021, which leave was directed to operate as a stay of the decisions and their enforcement. The Respondent as already seen, thereafter filed the application to discharge the leave to commence the judicial review proceedings.

AFFIDAVIT IN SUPPORT OF THE APPLICATION TO DISCHARGE THE LEAVE TO COMMENCE JUDICIAL PROCEEDINGS

6. The affidavit filed in support of the application, is deposed to by Phillip Katali Chitalu, the Chief Executive Officer of the Respondent. He avers that the Respondent is the regulator of capital markets, and has the mandate to regulate the activities of custodians, promote high standards of investor protection, and to take all reasonable steps to safe guard the interests of persons who invest in securities and guard against illegal and improper practices in the capital markets.
7. He further deposes that the 2nd Applicant is duly authorised by the Respondent to provide custodial services to authorised collective investment schemes in the capital market. It is stated that the 2nd Applicant is the custodian of the Laurence Paul Unit Trust (LPUT), a collective investment scheme that is authorised by the Respondent and managed by the Laurence Paul Investment Services Limited (LPIS).
8. The deponent states that on diverse dates, the LPIS as manager of the LPUT, wrote to the 2nd Applicant instructing the 2nd Applicant to purchase the securities of a fixed term deposit on behalf of the LPUT to be kept in the 2nd Applicant's custody, which letters are exhibited as 'PKC1 – PKC3'. The tenure of the said investments was for a period of 365 days.
9. The averment is that the deponent is reliably informed and verily believes that at the end of the investment tenure, the 2nd Applicant failed and/or neglected to exercise its duties as

custodian to ensure that the maturity proceeds were paid back into the custodian bank account.

10. He goes on to state that he has been verily advised by Counsel that although the Applicants have produced documents to show that they received instructions to make the fixed term investments on behalf of the LPUT, they have failed and/or neglected to show any proof of the steps that they took to ensure that the LPUT were secured by making follow ups once the investment in fixed term deposits had matured.

11. The deponent also deposes that the 2nd Applicant had been filing periodic reports with the Respondent indicating that the assets of the LPUT were in its custody when in fact not. He also states that he is reliably informed, and believes that due to the 2nd Applicant's failure and/or neglect to ensure that the assets of the LPUT were secured, the said funds were misapplied and dissipated.

12. It is his position that after conducting investigations into the matter, and after holding several meetings with the 2nd Applicant, the Respondent directed the 2nd Applicant to recompense the funds belonging to the LPUT. Exhibit as 'PKC4' to the affidavit, is a copy of a letter dated 12th November, 2020 directing the 2nd Applicant to recompense the funds belonging to the LPUT.

13. The averment is that on 16th December, 2020, the Respondent wrote to the Applicant re-affirming its directive to recompense the funds belonging to the LPUT, and directing that the

recompense should be done on or before 23rd December, 2020, which letter is exhibited as 'PKC5'.

14. Still in averment, the deponent states that the Applicant failed and/or neglected to comply with the directives of the Respondent within the stipulated time frame. Then by the letter dated 28th January, 2021, and exhibited as 'PKC6', the Respondent imposed an administrative fine on the 2nd Applicant for failing to comply with its directive to recompense. It is deposed that the deponent is reliably informed by Counsel, and verily believes that the Respondent has the statutory mandate to issue the directive to recompense and impose an administrative fine against the 2nd Applicant for failing to comply with the directive that the Respondent issued.

15. Further, the said decisions were made within the confines of the law, and the 2nd Applicant has not complied with the decisions or directives, but has instead commenced these judicial review proceedings against the decisions of the Respondent.

16. It is stated that the Applicants have obtained leave to commence judicial review proceedings without exhausting all the alternative avenues of appeal against the decision of the Respondent. The deponent deposes that he is reliably informed by Counsel, and verily believes that this matter is improperly before this Honourable Court by way of judicial review, as the Applicants should have appealed to the Capital Markets Tribunal.

17. He also states that when the Applicant applied for the stay of the decisions and enforcement of the decisions of the

Respondent, they failed and/or neglected to inform the Respondent of the *ex parte* application for interim relief of stay. It is contended that the Respondent was first notified of these proceedings on 8th February, 2021, after the Applicant had already obtained the *ex parte* Order for stay, as shown by the letter exhibited as 'PKC7'.

18. The averment is that the stay of enforcement of the decision of the Respondent adversely impacts on the Respondent's ability to effectively discharge its statutory functions.

SKELETON ARGUMENTS AND LIST OF AUTHORITIES IN SUPPORT OF THE SUMMONS TO DISCHARGE LEAVE TO COMMENCE JUDICIAL PROCEEDINGS

19. In the skeleton arguments and list of authorities filed on 26th February, 2021, the Respondent has raised four (4) grounds for determination.

GROUND ONE

20. This ground relates to the Applicants' failure to notify the Respondent of the *ex parte* application for interim relief. Reference is made to ***Order 53/14/48 of the Rules of the Supreme Court,*** and it is stated that the said provision governs the practice and procedure relating to applications for interlocutory relief, and that an application for *ex parte* interim relief should adopt the approach of applications for interlocutory injunctions, pursuant to ***Order 29 of the Rules of the Supreme Court***.

21. The Respondent argues that based on the guidance given in ***Order 53/14/48***, the Applicants should have notified it of the *ex parte* application for a stay of enforcement of its' decisions, to allow it to attend the hearing and make representations. The Respondent contends that ***Order 53/14/48*** is couched in mandatory terms, and failure to notify the Respondent negates the stay that was obtained by the Applicants.

22. Also relied on, is the Supreme Court case of ***Dean Namulya Mung'omba & Ors v Peter Machingwa Golden Mandandi & Anor*** [(7)] where the Court stated that;

    "The matter or circumstances to be considered are more than the balance of convenience as between parties directly concerned, a very important consideration will be the public interest involved".'

23. The Respondent further refers to ***Sections 9(2)(k),*** as read together with ***Section9(2)(m)*** of the ***Securities Act No. 41 of 2016***, stating that the said provisions bestow upon the Respondent an investor protection mandate, that empowers it to take reasonable steps to safeguard the interests of persons who invest in securities by guarding against illegal and improper practices in the capital market.

24. Thus, in furtherance of its' investor protection mandate, the Respondent has been taking steps to recover the assets belonging to the LPUT that should have been in the custody of the Applicants.

25. It is argued that a stay of the decisions of the Respondent will operate to frustrate the process. Therefore, in determining where

the balance of convenience lies, the Court must weigh the mere inconvenience caused to the Applicants, as a regulated capital market operator, to comply with decisions of the Respondent as the capital markets' regulator, against the real public interest of ensuring that the interests of the investing public are protected and secured.

26. The Respondent submits that the balance of convenience weighs in its favour, because the injury that may be caused by restraining it from discharging its statutory obligations cannot be atoned for by damages, while the cost to the Applicants, should the stay be discharged, can be ascertained with mathematical accuracy, and fully remedied with damages.
27. Further, the public consideration and requirement to protect the interests of the investing public as by law mandated of the Respondent, overrides the mere inconvenience to be suffered by the Applicants.

GROUND TWO

28. The second ground raised is that the avenues of appeal have not been exhausted. In support of this ground, reliance is placed on ***Order 53/14/19*** and ***Order 53/14/27of the Rules of the Supreme Court of England,*** with the Respondent arguing that these provisions state that a party must exhaust all other avenues of appeal on the merits of a decision of a body concerned, before the Courts may entertain an application for judicial review.

29. Also relied on, is ***Section 184 (3)(a) of the Securities Act***, with the argument being that it provides the Applicants with an avenue of appeal against the decision of the Respondent to the Capital Markets Tribunal. It is contended that there are no exceptional circumstances in the present case, that warrant the grant of judicial review before the alternative avenues of appeal are attempted.
30. The Respondent also argues that there has been no inordinate delay in the Respondent's decision-making process, and the Applicants were afforded ample opportunities to make their representations before the Respondent, before it made its decisions.

GROUND THREE

31. The third ground is that the application is improperly before the Court. In support of this position, the case of ***New Plast Industries v The Commissioner of Lands and the Attorney General*** (5) is relied on, as well as the cases of ***Kansanshi Mining PLC v Zambia Revenue Authority*** (13) and ***Anheuser-Bush Inbev and two others v The Attorney General, Minister of National Planning and the Securities and Exchange Commission***(15).
32. It is stated that ***Section 184 (3)(a) of the Securities Act,*** provides that appeals against the decisions of the Commission are to be heard by the Capital Markets Tribunal, and in line with the case of ***New Plast Industries v The Commissioner of Lands and Attorney General*** (5) case, where the Applicants

similarly approached the High Court by way of judicial review, when the Lands and Deeds Registry Act provided that the matter should have been commenced by way of appeal, even though in this matter, the Applicants are seeking the relief of certiorari, it does not mean that the mode of commencement is correct.

33. It is argued that the Applicants should have complied with the statutory procedure of appeal, as laid set out in Section ***184 (3) (a) of the Securities Act,*** and the Respondent emphasises that where a statute lays down the mode of commencement, the parties are bound to strictly follow the procedure laid down by the said statute.

34. The Respondent states that the cases of ***Kansanshi Mining PLC v Zambia Revenue Authority***[13], ***Anheuser-Busch Inbev and 2 Others v Attorney General and Minister of National Planning and Securities and Exchange Commission*** [15] held that where a wrong mode of commencement is used, a matter is improperly before the Court, and the Court has no jurisdiction to grant the reliefs.

GROUND FOUR

35. On this final ground, the Respondent contends that the substantive application will clearly fail. It is argued that contrary to the assertions by the Applicants, the power to issue the directive to recompense was not derived from the ***Guidelines for Trustees and Custodians in Collective Investment Scheme, No1 of 2016*** but from the Securities Act

itself. The Respondent submits that in discharging its investor protection function, ***Section 212 of the Securities Act*** grants it, the power to issue directives at its discretion, that are necessary or desirable for the administration of the Act.

36. Thus, the contention is that the Respondent was well within its power to issue the directive to the Applicants to recompense the funds belonging to the investors in the LPUT, whose investments had been dissipated because of the Applicants' dereliction of duty, as custodian of the assets of LPUT.

37. The argument is further that the Respondent used ***Section 212 (2) of the Securities Act*** to impose an administrative penalty as stipulated in ***Section 218 (2) of the Act***. It is stated that the decisions of the Respondent were justified, because the Applicants had failed and/or neglected to discharge their duties as custodian of the LPUT to the requisite standard, and that the said decisions were made within the confines of the Act.

38. Reliance is placed on the case of ***Zinka v The Attorney-General***[(3)], arguing that the Supreme Court in that matter declared that where the exercise of a power is traceable to a legitimate source, the fact that the power is purportedly exercised under a wrong source does not invalidate the action. The Respondent further argues that there is no obligation to publish directives issued pursuant to Section 212 of the Securities Act.

AFFIDAVIT IN OPPOSITION

39. In an affidavit in opposition filed on 10th March, 2021, and deposed to by Rose Nyendekazi Kavimba, the Head Legal and Company Secretary for the 1st and 2nd Applicants, she deposes that the 2nd Applicant began offering custodial services to the LPIS sometime in 2010, following the novation of Barclays Bank Zambia Plc's Custody Agreement with the LPIS to the 2nd Applicant. She states that the assets held in custody by the 2nd Applicant belong to the LPUT which is a collective investment scheme managed by the LPIS, as shown by exhibit 'RNK1' a copy of the Custody Agreement which was novated to the 2nd Applicant.

40. She also deposes that by the letter exhibited as 'RNK3', dated 13th March, 2019, the LPIS instructed the 2nd Applicant to transfer a sum of ZMW 1,000,000.00 from their Laurence Paul Prime Balance Fund Account to an account in the name of African Banking Corporation (Z) Limited held at Bank ABC T/A Atlas Mara ('Atlas Mara').

41. Further, on 9th April, 2019, and 5th July, 2019, the LPIS instructed the 2nd Applicant to transfer ZMW 1,000,000.00 and ZMW 700,000.00, respectively from their Laurence Paul Prime Balanced Fund account to an account in the name of the LPUT held at Stanbic Bank Zambia Limited ('Stanbic'), as the LPIS had negotiated for fixed deposit placements with the two Registered Commercial Banks. These instructions are contained in the letters exhibited as 'RNK4' and 'RNK5'.

42. The deponent states that the 2nd Applicant on receipt of the instructions from the LPIS to purchase securities, transferred the funds to Atlas Mara and Stanbic. She adds that deposit confirmations were received by the 2nd Applicant, advising that the LPIS had entered into three fixed deposit placements, each for a one-year period, as shown on exhibits 'RNK6', 'RNK7' and 'RNK8'.The averment is that the 2nd Applicant took receipt of the fixed deposit confirmations, and recorded them as 'Free of Payment' receipts, in its core Custody System.
43. Thereafter, on the respective dates of each fixed deposit's maturity, the 2nd Applicant's System Custody automatically vaulted out each of the matured records with the expectation, as per market practice, that the LPIS gave Atlas Mara and Stanbic instructions to either roll over the funds or transfer the principal amounts together with the interest earned back to the Laurence Paul Prime Balance Fund Account held by the 2nd Applicant.
44. It is deponed that at the month end following the maturity of each of the three fixed deposits, the 2nd Applicant requested the LPIS to share the statement of the positions they held as at the last day of the month. Upon receipt of the same, the 2nd Applicant performed a reconciliation of the positions held by the LPIS against the records of the LPIS's holdings in the 2ndApplicant's custody system, and the results of the reconciliation were returned to the LPIS by the tenth day of the month following the just ended month.
45. The averment is that the results were copied to the supervision department of the Respondent, along with a CIS return which

was filed with a Respondent. The deponent contends that the reconciliations revealed that there were no breaks in respect of these deposits between the records of the LPIS as the Fund Manager and the 2ndApplicant, confirming that the LPIS had taken receipt of the funds pending the re-investment.

46. Still in averment, the deponent states that the 2nd Applicant made enquiries with Atlas Mara and Stanbic, and found that the principal and interest procedures for the three fixed deposits had been credited into accounts in the name of 'Laurance Paul Investment Services' at Atlas Mara and 'Laurence Paul Unit Trust' at Stanbic bank.

47. Then sometime in September 2020, the Respondent conducted a review of the assets held in custody by the 2ndApplicant for the LPUT, and noted that the maturity proceeds for the three fixed deposits belonging to the Laurence Paul Prime Balanced Fund (a sub-Fund and other LPUT) that had been recorded in custody had not been paid back into the custodial bank account for the fund.

48. It is further deposed that on 12th November 2020, the Respondent wrote to the 1st Applicant detailing its findings from the investigation, with the letter stating that part of its' investigation sought to ascertain the following;

   i. *Whether the 1st Applicant took the necessary steps to facilitate the repayment of the said investment to it upon maturity; and*

   ii. *Whether the 1st Applicant carried out its obligations as spelt out under Section 124 of the Securities Act, as read with the*

Respondent's guidelines and the role of the Trustees and Custodians.

49. A copy of the said letter is exhibited as 'RNK9'.It is averred that the Respondent found that the 1st Applicant did not exercise the necessary duty of care and diligence in safeguarding the assets that were placed under its' custody, and directed the 1st Applicant to pay the recompense amount to the LPUT investors for funds that were placed under the 1stApplicants' custody.
50. The contention is that the basis of this directive was that the 1st Applicant had failed to act in accordance with its obligations under Clause 12.1 on the Guidelines for Trustees and Custodians in the Collective Investment Scheme, No. 1 of 2016, exhibited as 'RNK10'.The deponent goes on to aver that the Respondent in a letter dated 16thDecember, 2020, exhibited as 'RNK11' affirmed the directive in its letter dated 12thNovember, 2020, that the 1stApplicant recompenses the funds belonging to the LPUT, and that the recompense should be done on or before 23rdDecember, 2020, to avoid enforcement action being taken against the 1st Applicant.
51. She also deposes that on 22ndDecember, 2020, the 2nd Applicant wrote to the office of the Registrar of the Capital Markets Tribunal seeking guidance on whether it could appeal against the decision of the Respondent before the Capital Markets Tribunal, as evidenced by the letter exhibited as 'RNK12'. On 23rd December 2020, the office of the Registrar responded to the 2nd Applicant advising that the Capital Markets Tribunal was not in a position to hear any grievances, as it had no rules

regulating the mode of commencing proceedings before the Tribunal, which letter is exhibited as 'RNK13'.

52. Further in the affidavit, the deponent states that by a letter, exhibited as 'RNK14' dated 7th January, 2021, the 1st Applicant wrote to the Respondent disputing the Respondent's decision to direct the Applicants to recompense the LPUT the recompense amount. It is stated that in addition to the directive that the Applicants pay to the LPUT the recompense amount, the Respondent also incessantly made verbal demands that the 1stApplicant should pay penalties to the Respondent which, as advised by the Applicant's Advocates and verily believing the same to be true, has no basis at law.

53. The averment is that on 8th January, 2021, the Applicants wrote back to the office of the Registrar outlining the background of the matter and notifying the Capital Markets Tribunal of the Respondent's insistence on the administrative penalty, and Applicants' decision to launch judicial review proceedings before the High Court for Zambia, which is exhibited as 'RNK15'.

54. She deposes that by the letter, 'RNK16', dated 28th January 2021, the Respondent informed the 1st Applicant that the law bestows the Respondent with the power to impose an administrative penalty for failure to comply with the directives issued by the Respondent. That based on the foregoing, the Respondent imposed an administrative fine of ZMW19, 126.00 on the 1st Applicant for failing and/or neglecting to comply with the directive to recompense the LPUT, to be paid on or before Thursday 4th February, 2021.

55. It is stated that the letter further stated that should the 1st Applicant fail and/or neglect to pay the administrative fine before the stipulated deadline, a penalty of ZMW100.00 would be levied against the 1st Applicant with effect from Friday 5th February, 2021, for each day that the failure and/or neglect to pay the administrative fine continued.
56. The deponent avers that on 4thMarch, 2021, the Applicants wrote back to the office of the Registrar, Capital Markets Tribunal as evidenced by the letter exhibited as 'RNK17',to confirm if the Tribunal had formulated any Rules, allowing an aggrieved party by the decision of the Respondent to appeal before the Tribunal.
57. The deponent states that she is advised by the Applicants' Advocates, Mulenga Mundashi Legal Practitioners, and verily believes the same to be true, that the Respondent's actions as regards the directive are not supported by any law, and that the law cannot leave a party without a remedy. Therefore, the Applicants are within their rights to institute judicial review proceedings before this Honourable Court, in the absence of any Rules regulating the Capital Markets Tribunal.
58. It is also the deponent's averment that the Respondent was not required to appear for the hearing of the Applicant's *ex parte* application for leave to commence judicial review proceedings.

SKELETON ARGUMENTS AND LIST OF AUTHORITIES IN OPPOSITION

59. In the skeleton arguments and list of authorities in opposition, the Applicants oppose the four grounds raised by the Respondent in their arguments.

GROUND ONE

60. In response to ground one, which alleges the Applicants' failure to notify the Respondent of the *ex parte* application for interim relief, and thereby enable it make representations, relying on ***Order 53/14/48 of the Rules of the Supreme Court of England***, and that a stay of the decisions of the Respondent will frustrate its' statutory mandate, the Applicants submit that the Respondent has clearly misapprehended the facts before this Court.

61. It is contended that on account of this, the arguments are anchored on factual inaccuracies and unmoored to legal reality, and are intended to mislead this Honourable Court. The Applicants' position is that a thorough reading of the Respondent's arguments, shows that it is inviting this Court to pronounce itself on issues that must only be raised at an *inter parte* hearing of the judicial review proceedings.

62. In this regard, ***Order 53, Rule 3 (1) of the Rules of the Supreme Court of England*** is noted as the law that regulates the commencement of judicial review proceedings, stating that it is couched in succinct terms, and requires an Applicant to obtain leave of this Court before commencing judicial review

proceedings. Further, the said Order requires the application for leave to be made *ex parte*, in line with ***Order 53, Rule 3 of the Rules of the Supreme Court of England***, and the Court is endowed with discretionary power to make a determination on the issue of leave without a hearing.

63. The argument is further that at the leave stage, the requirement before this Court is simply to satisfy itself that the Applicant has an arguable case, or that the Applicant has a case that would require further interrogation by this Honourable Court. As authority, the cases of ***Derrick Chitala (Secretary of the Zambia Democratic Congress) v The Attorney General***[4], ***William Harrington v Dora Siliya and the Attorney General***[12] and ***North-Western Energy Company Limited v Energy Regulation Board***[10] are relied on.

64. The Applicants also state that at the leave stage, the Court is not under an obligation to hear the Respondent, and this Court having exercised its discretion, and made a determination that the case was fit for further investigations, it has become *functus officio* on the aspect of leave to commence judicial review proceedings. Therefore, that the Respondent cannot at this stage re-invite the Court to re-open the issue of leave and make a fresh determination.

65. The provisions of ***Order 53/14/48 of the Rules of the Supreme Court of England*** are called to aid as authority, and the Applicants state that the nature and purpose of an ex-parte application for leave to grant judicial review proceedings

envisaged under ***Order 53 Rule 3(1) of the Rules of the Supreme Court of England*** is clear that it is;

a) To eliminate at an early stage any applications which are frivolous, vexatious or hopeless;

b) To ensure that an Applicant is only allowed to proceed to a substantive hearing if the Court is satisfied that there is a case fit for further investigation.

66. Further, the nature of an ex-parte Order for leave to commence judicial review is akin to an Order for leave to commence contempt proceedings under ***Order 52 Rule 2 of the Rules of the Supreme Court of England***, in that such *ex parte* Order is final in nature, and its purpose is simply to confirm that this Court is satisfied that there is a case fit for further investigation. The Applicants also rely on the case of ***Post Newspaper Limited v Rupiah Bwezani Banda*** (9), as authority.

67. ***Order 53 Rule 3(10) of the Rules of the Supreme Court of England*** is also referred to, which provides that;

"(10) Where leave to apply for judicial review is granted, then-

(a) if the relief sought is an Order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise Orders;

(b) if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ."

68. The argument is that in line with the above provision, where the relief sought by an Applicant is an Order of certiorari, subject to this Honourable Court's direction, the grant of an Order for leave to commence judicial review proceedings automatically operates as a stay of the proceedings to which the application, relates until the determination of the application.

69. Further, interim stay of relief under ***Order 53, Rule 3(10) (a) of the Rules of the Supreme Court of England*** is a creation of the law, and is not as a result of an interlocutory application by the Applicant, which must require an *inter-parte* hearing. It is also submitted that the purpose of such relief is to ensure that the application is not rendered nugatory through the enforcement of the decision subject of the judicial review proceedings. The Applicants also argue that the record clearly shows that the Respondent has on numerous times, threatened the Applicants to enforce its decision.

70. It is noted that the Respondent imposed an administrative fine of ZMW 19,126.00 on the 1st Applicant, and an administrative penalty of ZMW 100.00 for each day that the failure to pay the administrative fine continued with effect from 5th February, 2021. The Applicants argue that all these enforcement avenues were required to be stayed until the determination of the judicial review proceedings.

GROUNDS TWO AND THREE

71. As regards the assertion that the Applicants have not exhausted the avenue of appeal, and therefore the application is improperly

before the Court, the Applicants submit that indeed as a general position, a party may only institute judicial review proceedings where there are no other available remedial avenues. They argue that they are properly before this Court having exhausted all the remedial avenues available to them, and to this end reiterate the steps taken, as stated in the affidavit in opposition.

72. It is argued that it is a settled position in this jurisdiction that the law cannot leave a party without a remedy, and therefore, having exhausted all the administrative remedial avenues of appeal available to them under the Securities Act, the Applicants are well within their rights to institute the judicial review proceedings. It is further their argument that ***Order 53/14/27 of the Rules of the Supreme Court of England*** provides that save for exceptional circumstances, the jurisdiction to grant judicial review will not be exercised where other remedies available have not been used.

73. It is stated that the Applicants have addressed their minds to the alternative remedy available under the Act by way of the letters to the Tribunal. However, the Tribunal guided that in the absence of the rules regulating the manner of conduct of the proceedings before the Tribunal, it could not proceed to hear the Applicants.

74. Therefore, it was on that basis, that the Applicants approached the Court for judicial review. Reference is made to the case of ***Concrete Pipes Products Limited v Kingsley Kabimba and Christopher Simukoko***(14) stating that the Supreme Court in that matter, addressed the effect of exhaustion of the

administrative procedures of appeals on a cause of action by the party. The Applicants submit that they are not under an obligation to subject themselves to an administrative channel or remedial avenue of the grievances.

75. The Applicants' argument is that the case of ***New Plast Industries v The Commissioner of Lands and the Attorney General*** *(5)* relied on by the Respondent, is distinguishable from this matter.

GROUND FOUR

76. On the submission that the substantive application will clearly fail, the Applicants argue that the Respondent is indirectly inviting this Honourable Court to address itself on the substantive matters relating to the *inter-parte* hearing of judicial review proceedings, which may result in this Court pre-empting its decision.

77. The Applicants admit that ***Order 53/14/4 of the Rules of the Supreme Court of Engalnd*** allows the Respondent to apply for the discharge of an *ex parte* order for leave to commence judicial review proceedings, but contend that such is highly discouraged, and may only be made where the Respondent can show that the substantive case will clearly fail.

78. In support of the argument, reliance is placed on the case of ***IRC v National Federation of Self Employed and Small Businesses Ltd*** *(1)* and the words of the learned authors of Supper stone QC and Goudie in the book Judicial review.

AFFIDAVIT IN REPLY

79. The affidavit in reply deposed to by Phillip Katali Chitalu, the deponent of the affidavit in support of the application, states that it is not dispute as to how the 2nd Applicant came to be the custodian of the LPUT. The deponent denies that the Fund Manager instructed the 2nd Applicant to transfer funds to either African Banking Corporation or Stanbic Bank Zambia Limited as alleged by the Applicants.
80. Rather, as shown by the letters exhibited as 'RNK3' to 'RNK5' to the affidavit in opposition, the 2nd Applicant was expressly instructed to purchase securities on behalf of the LPUT to be kept in the 2nd Respondent's custody. The deponent goes on to state that while the Applicants have shown evidence of the instructions that they received from the Fund Manager, they have failed to show that they took steps to secure custody of the assets of the LPUT, once the fixed term deposits matured.
81. It is also averred that contrary to the assertions by the Applicants, they were unaware of the assets of the LPUT that should have been in their custody until the Respondent contacted the 2nd Applicant as part of its investigations into the misapplication of the assets belonging to the LPUT. The deponent deposes that neither the Registrar of the Capital Markets Tribunal nor the Respondent have power to issue Rules governing the procedure of the Capital Markets Tribunal, and that this is the exclusive province of the Hon Chief Justice.
82. It is stated that the Applicants have not exhibited any evidence to show that they petitioned the Hon Chief Justice to expedite

the promulgation of the Rules of procedure, and that while the deponent is advised that the Respondent has been adversely affected by the non-operation of the Capital Markets Tribunal, as the Respondent has no recourse against persons in the capital market that contravene the securities framework, the Respondent has a statutory mandate to regulate.

83. The contention is that the letters that the Applicants wrote enquiring from the Registrar cannot be equated to lodging an appeal, as envisaged in the Securities Act. Thus, the Applicants have not exhausted all the avenues available to them. It is also averred that contrary to the averments in the affidavit in opposition, the Respondent's power to issue directives to persons operating in the capital market is sanctioned by law.

84. The Respondent while agreeing that the Applicants have a right to apply for leave to commence judicial review proceedings, state that they oppose the grant of interim relief of stay of enforcement, without according the Respondent opportunity to be heard before the relief is granted.

RESPONDENT'S SUBMISSIONS AT THE HEARING

85. When the matter came up for hearing on 1st June, 2021, Counsel for the Respondent relied on the documents filed in support of the application. She augmented the arguments by submitting that the substantive application is bound to fail, as this Hon Court has no jurisdiction to hear an appeal against the decision of the Respondent. The case of ***Anheuser-Busch Inbev and two others v The Attorney General, Minister of***

National Planning and the Securities and Exchange Commission[15] was reiterated as authority in that regard.

86. Counsel further submitted that pursuant to ***Section 190(5) of the Securities Act No. 41 of 2016***, the promulgation of the rules of the Tribunal remains the exclusive province of the Chief Justice, which was done on 23rd April, 2021. She therefore argued that the issues to be reviewed had been overtaken by events.

RESPONSE BY THE APPLICANTS

87. In response, Counsel for the Applicants stated that they relied on the affidavit in opposition, as well as the skeleton arguments and list of authorities filed into Court. He augmented the same by submitting that contrary to the Respondent's submission, the application was not an appeal of the decision, but an application for judicial review.

88. He stated that the law relating to judicial review is provided for in Order 53 of the Rules of the Supreme Court of England, 1999 Edition, which must be followed in substantial terms, and that the jurisdiction that this Court exercises under that Order is supervisory in nature.

89. Counsel for the Applicants reiterated the arguments in the skeleton arguments, and added that applications for judicial review are required to be made promptly, if anything, within three (3) months of the decision complained against. Thus, the Applicants were within their rights to approach the High Court, as there was no alternative remedy available at the time.

90. He stated that the case of ***New Plast Industries v Commissioner of Lands and the Attorney General*** (5) is distinguishable from this matter, as in that case, there was a remedy that was available to the Applicant, which was disregarded. Counsel noted that the Respondent had argued that the Chief Justice has now promulgated rules for the Capital Markets Tribunal, which came into force 23rd April, 2021, but his position was that this was more than two (2) months after the Applicants approached the Court.
91. His submission was that it is trite that the law does not apply retrospectively, and the case of ***KCM v Martin Nyambe and 24 Others*** (16) was relied on. It was further argued that in that case, the Court of Appeal stated that it was not the intention of the formers of the law to invalidate agreements that were perfectly legal at the time when the acts were done. Therefore, that was not the intention with the Capital Markets Tribunal.
92. Still in submission, Counsel stated that the Respondent has not brought anything material to allow the Court to relook its decision and discharge the leave, and that the Supreme Court has in a plethora of authorities stated in what instances, the Court's discretion can be interfered with. As authority, the case of ***Collet v Van Zyl*** (2) was relied on.

REPLY BY THE RESPONDENT

93. In reply, Counsel for the Respondents argued that although the Applicant had shown several letters enquiring from the Registrar whether the appeal could be heard by the Tribunal, they could

not be equated to lodging an appeal, as envisaged in the Act. Further, the Applicant ought to have known that the Rules of procedure could only be created by the Chief Justice, and not the Registrar of the Tribunal, and by failing to show that the Chief Justice was petitioned, showed that the Applicants did not exhaust all the avenues of appeal.

94. It was also stated that the Applicants' argument that the Tribunal had not yet been constituted, did not justify commencing this action in any other way than that provided by statute, and that by stare decisis, this Court is bound to follow the decision in ***Kansanshi Mining PLC***. Counsel further argued that the rule on retrospectiveness of the law does not apply in this instance because the jurisdiction is granted by the Act, and not by the Capital Markets Tribunal Rules that were published on 23rd April, 2021.

95. It was also submitted that the Respondent was not criticising the decision to grant leave to commence the judicial review proceedings, but that exception was taken to the grant of the interim relief of stay, as a result of the application for leave to commence the judicial review proceedings. Counsel went on to state that the documents showed that the Applicant had drafted an order for the Court's endorsement, in which one relief expressly stated a grant of interim relief for stay.

96. The submission was that the Applicant ought to have known that ***Order 53/14/48 of the Rules of the Supreme Court of England***, clearly outlines the procedure for interlocutory relief in judicial review proceedings, and that the obligation to notify

the Respondent is couched in mandatory terms. Therefore, the failure to notify the Respondent negated the stay.

DECISION BY THIS COURT

97. I have considered the application. It has been brought pursuant to Order 53 Rule 14 (3) of the Rules of the Supreme Court of England, 1999 Edition. However, a perusal of that Rule shows that it deals with renewal of an application for leave to commence judicial review proceedings. The Order that deals with discharge of leave is Order 53/14/4, which provides as follows;

    "It is open to a Respondent (where leave to move for judicial review has been granted ex parte) to apply for the grant of leave to be set aside; but such applications are discouraged and should only be made where the Respondent can show that the substantive application will clearly fail".

98. In this application, it has been seen that the Respondent has advanced four (4) grounds on which they rely, in applying that the leave to commence judicial review that was granted, should be discharged.

GROUND ONE

99. The first ground alleges that there was failure by the Applicants to notify the Respondent of the *ex parte* application for leave to commence judicial review proceedings, which negates the stay of its decision. In support of this position, ***Order 53/14/48 of the***

Rules of the Supreme Court of England, has been relied on. The said Order provides as follows;

> ***"Practice and procedure relating to applications for interlocutory relief.***
>
> ***In R. v. Kensington & Chelsea Royal London Borough Council, ex p. Hammell 1989 QB 518; 1989 1 All ER 1202, the Court of Appeal held:***
>
> ***The jurisdiction to grant interim relief in judicial review proceedings arises on the grant of leave to move for judicial review. An application for an interlocutory injunction or other interim relief can be made ex parte with the application for leave. In deciding whether to grant interlocutory relief at the ex parte stage, the Judge should consider whether the urgency and the other circumstances of the case warrant the grant of ex parte relief and should have regard to the approach adopted in the case of applications under O.29 for ex parte relief. Unless the Judge is satisfied that the urgency and other circumstances of the case justify the grant of ex parte relief, he should adjourn the application for interlocutory relief for inter partes hearing.***
>
> ***With a view to avoiding two hearings, the applicant should give notice to the Respondent (s) of any ex parte application for interim relief, so that the Respondent (s) can consider whether to attend the ex parte hearing and make representations.***

...

The power to grant an interlocutory injunction or other interim relief in judicial review proceedings is ancillary to the application for leave to move for judicial review, or the substantive application for judicial review. The Judge can grant an interlocutory injunction or other interim relief on granting leave to move for judicial review, or subsequent to the grant of such leave. Where the case is so urgent as to justify it, he could grant an interlocutory injunction or other interim relief pending the hearing of the application for leave to move for judicial review."

100. The Respondent's argument is that in line with this Order, the Applicants should have notified it of the *ex parte* application for a stay of enforcement of its' decisions to allow it to attend the hearing and make representations. It has also been argued that ***Order 53/14/48*** is couched in mandatory terms, and failure to notify the Respondent negates the stay.

101. However, the Applicants' response to that argument is that ***Order 53 Rule 3 of the Rules of the Supreme Court of England*** provides that the Judge may grant leave to commence judicial review proceedings without a hearing. Further, ***Order 53/3/10 of the said Rules of the Supreme Court of England*** states that the grant of such leave operates as a stay of the proceedings to which the application relates, until the determination of the application, or until the Court otherwise orders.

102. A reading of ***Order 53 of the Rules of the Supreme Court of England*** which deals with judicial review, shows that it states that an application for leave to commence judicial review proceedings does not require a hearing, as provided in ***Order 53 Rule 3***. As rightly argued by the Applicants, in line with ***Order 53/3/10***, where leave has been granted, it operates as a stay of the proceedings to which the application has been brought before the Judge.

103. That provision states as follows;

> ***"3. (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this Rule.***
>
> ***(2) An application for leave must be made ex parte to a Judge by filing in the Crown Office –***
>
> ....
>
> ***(10) Where leave to apply for judicial review is granted, then -***
>
> ***(a) if the relief sought is an Order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise Orders;***
>
> ***(b) if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ".***

104. An analysis of ***Order 53/14/48*** relied on by the Respondent shows that an Order for leave to commence judicial

review proceedings can be made together with other applications for interim relief. These are the applications that the Order refers to which, require the attention of the Respondent, as can be seen in the wording of the Order when it states that interlocutory injunctions and other interim reliefs are ancillary to the application for leave, and the Judge can grant such injunction or interim relief on granting the leave, or even pending the hearing of the application for leave.

105. Therefore, the Applicants would only have been required to give the Respondent notice of the hearing, had the application for leave been accompanied by another application for an interlocutory injunction or other interim relief, and not where the application was only for leave to commence judicial review proceedings, as the procedure for the same is already provided for under ***Order 53 Rule 3*** and ***Order 53/3/10*** of the Rules of the Supreme Court of England.

106. Counsel for the Respondent submitted that they took issue with the interim relief for stay that was granted as a result of the application for leave for judicial review. In that regard, it was submitted that in the Order that the Applicants drafted for the Court's endorsement, one of the reliefs was for interim stay of the Respondent's decision, and therefore this is not in accordance with ***Order 53/14/48*** which requires that the Respondent be notified of interlocutory relief.

107. However, this argument is not viable because ***Order 53/3/10*** already provides that a grant of leave for judicial review operates as a stay of the application to which it relates.

Therefore, there was no requirement that the Applicant should have made a separate application for stay of the decision to which the application relates. A perusal of the record shows that the Applicants did not make a separate application for stay, and consequently, there was no duty placed on the Applicants to notify the Respondent of the *ex parte* application for leave.

108. The case of ***Dean Namulya Mung'omba & Ors v Peter Machingwa Golden Mandandi &The Attorney – General***[7] relied on by the Respondent is not applicable in this matter, because that case was in relation to an interlocutory injunction, which was not sought in this matter. The first ground therefore fails.

GROUNDS TWO AND THREE

109. The second ground raised by the Respondent is that the Applicants did not exhaust the available avenues of appeal, while the third is that the application is improperly before the Court. In support of ground two, ***Order 53/14/19 of the Rules of the Supreme Court*** has been relied on, which provides that;

> ***"Normally, even where there are grounds for judicial review, the Court will not allow an applicant to proceed by way of judicial review until he has availed himself of any alternative remedy. There may, however, be exceptional cases where the Court would grant relief by way of judicial review without requiring the applicant to pursue the alternative remedy available to him"***

110. Further reliance has been placed on ***Order 53/14/27of the Rules of the Supreme Court,*** which provides that the Court will in exceptional circumstances exercise its jurisdiction to grant judicial review where other avenues of appeal have not been exercised. The Respondent has further referred to ***Section 184 (3) (a) of the Securities Act*** which provides that the Capital Markets Tribunal has the jurisdiction to hear appeals from the Respondent, and argues that there are no exceptional circumstances in this matter.

111. The argument in relation to ground three is that this matter is improperly before Court, as the rules of the Tribunal have now been promulgated, and therefore, the issues to be reviewed have been overtaken by events. The cases of ***New Plast Industries v The Commissioner of Lands and the Attorney General***(5), ***Kansanshi Mining PLC v Zambia Revenue Authority***(13) and ***Anbheuser-Bush Inbev and two others v The Attorney General, Minister of National Planning and the Securities and Exchange Commission***(15) have been relied on as authority. The gist of these cases is where a statute provides for a mode of commencement of an action, a party has no option but to abide by that procedure.

112. The Applicants' response is that they wrote to the Tribunal on 22nd December, 2020, seeking guidance on whether they could appeal against the decision of the Respondent, which letter is exhibited as 'RNK12' to the affidavit in opposition. The Tribunal replied by letter dated 23rd December, 2020, exhibited as 'RNK13' stating that it could not hear the Applicants

grievances, as it had no rules regulating the mode of commencement of the proceedings before the Tribunal.

113. The Applicants also contend that they disputed the Respondent's decision by a letter dated 7th January, 2021, exhibited as 'RNK14', that directed them to recompense the LPUT, the recompense amount. Further, the Applicants wrote to the Tribunal informing it of the Respondent's insistence on the administrative penalty, and the Applicants' decision to launch the judicial review proceedings. Therefore, they exhausted the options that were available to them at the time, being dissatisfied with the Respondent's decisions.

114. The Applicants' argument with respect to ground three, is that the Rules for the Tribunal only came into effect on 23rd April, 2021, after they had obtained leave to commence judicial review proceedings. It is their position that it is trite that the law does not operate retrospectively, and therefore, they are in order to commence these proceedings.

115. As regards the Respondent's contention that the Applicants have not exhausted all the avenues of appeal, it will be seen that the law on judicial review in ***Order 53/14/19,*** is clear that a party has to first resort to an avenue of appeal, if available, before resorting to judicial review, and that this is so even where there are grounds for judicial review.

116. ***Order 53/14/27 of the Rules of the Supreme Court*** provides that the Court may only Rule otherwise where there are exceptional grounds. In this matter, it will be noted that ***Section***

184 (3) (a) of the Securities Act provides that appeals from the decision of the Respondent lie to the Tribunal.

117. However, as is noted, and not disputed, when this matter arose, the Tribunal did not have Rules governing the commencement of proceedings before it, and the same only came into effect on 23rd April, 2021.

118. The Applicants have demonstrated by the letters exhibited to their affidavit that they first resorted to the Tribunal before making the decision to ask this Court for leave to commence Judicial Review proceedings. Therefore, it cannot be argued that the Applicants did not exhaust other avenues of appeal, or that they did not dispute the Respondent's decision as alleged.

119. In the ***Kansanshi Mines PLC v Zambia Revenue Authority***[13] case,the Appellant, in seeking to challenge the Respondent's assessment of tax payable to the Respondent, commenced an action before the High Court by writ of summons, accompanied by a statement of claim. The Respondent entered conditional appearance and took out summons to set aside the writ of summons and statement of claim for irregularity, contending that the matter should have been commenced by way of judicial review. It was argued that according to Section 109 of the Income Tax Act, Chapter 323 of the laws of Zambia, a party aggrieved by an assessment undertaken by the Respondent ought to appeal to the Revenue Appeals Tribunal, (now the Tax Appeals Tribunal), but since the Tribunal had not yet been established at the time of institution of the proceedings, and considering that the Appellant was

seeking an order against the decision of a public body, the Appellant ought to have applied for judicial review.

120. The appellant opposed the application, stating that since the Tribunal had not been constituted, the Appellant could not be denied its right to challenge the decision of the Respondent and since by Article 94 of the Constitution, Chapter 1 of the Laws of Zambia, the High Court had original and inherent jurisdiction, the mode of commencement was the general one provided under Order 6 of the High Court Rules, Chapter 27 of the laws of Zambia.

121. The High Court found that it was not in dispute that the Revenue Appeals Tribunal had not been constituted and that, therefore, the Appellant was entitled to commence proceedings before the High Court. The only issue to be determined, in the Court's view, was whether the mode of commencement was correct.

122. The High Court found that the mode of commencement was provided for under Section 109, which was by way of an appeal to the High Court, and not by way of writ of summons. With regard to the Respondent's contention that owing to the non-existence of the Tribunal, the Appellant ought to have applied for judicial review, the High Court found that judicial review was not the correct mode of commencement as there was no lacuna in the law to resort to Order 53 of the Rules of the Supreme Court, 1999 Edition (White Book).

123. In the High Court's view, the change of forum had no bearing on the mode of commencement prescribed by statute. It

held that it had no jurisdiction to entertain the application before it, as it was only clothed with jurisdiction to determine a dispute on appeal in accordance with Section 6 of the Revenue Appeals Tribunal Act No. 11 of 1998, and Section 111 of the Income Tax Act. The High Court accordingly set aside and dismissed the entire action for irregularity.

124. The Supreme Court on appeal, and with reference to the case of ***New Plast Industries v The Commissioner of Lands and the Attorney General***(5), noted that where a statute provides for a particular procedure to be adopted where a party is unsatisfied with a decision, that party ought to apply the procedure provided for under the applicable statute. It was noted that the appeal was filed in August, 2014, and at that point, the Revenue Appeals Tribunal Act was operational.

125. The Supreme Court further noted that the said Act had since been repealed and replaced by the Tax Appeals Tribunal Act No. 1 of 2015. It stated that this however, did not subtract from the contestation of the parties in this appeal. The provisions of Sections 109 and 111 of the Income Tax Act were noted, and it was stated that said provisions do not at all present to an aggrieved party, any discretion on the type or nature of the dispute that person may commence by way of appeal or otherwise. That to the contrary, it provides only for the appeal procedure to be adopted when one is not satisfied with a decision on assessment.

126. The Supreme Court went on to state that the provisions clearly stipulate that the High Court has only appellate

jurisdiction to entertain the matters referred to it. Consequently, the Court did not agree that a person who is aggrieved by the decision of the Respondent arising out of the exercise of its power, can apply any other mode of commencement of an action other than by way of appeal.

127. On the argument by the Appellant that the Tribunal had not yet been constituted, and hence there was no decision upon which the Appellant could appeal to the High Court, the Supreme Court stated that this did not, in their considered view, justify commencing an action by writ of summons under Order 6, or any other mode, other than that prescribed by statute.

128. They reiterated their decision in the ***New Plast*** case, that the mode of commencement of an action is not dependent on the relief sought, but on what the statute provides, as a mode of commencing an action. It was stated that the High Court only has jurisdiction if a matter is correctly commenced before it, and on that basis, the appeal was dismissed.

129. With regard to this matter in terms of appeals against decisions of the Respondent, ***Section 184 (3) (a) of the Securities Act No of 2016*** states that;

> ***"184. (1) There is established the Capital Markets Tribunal.***
>
> ***(2) The Tribunal shall be a superior court of record and have an official seal 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 such other matters as may be specified in, or prescribed in terms of this Act or any other written law".

130. In terms of the procedure adopted by the Tribunal, Section 190 (5) of the Securities Act provides that;

"(5) The Chief Justice may, by statutory instrument, make Rules relating to the following:

(a) prescribing the forms to be used in proceedings before the Tribunal;

(b) issuing of notices for the attendance at, and hearings of, the Tribunal, including time periods;

(c) procedure for the attendance and examination of witnesses, the production and inspection of documents, the enforcement of the Tribunal orders, the entry on and inspection of property and other matters necessary or proper for the due exercise of the Tribunal's mandate;

(d) written submissions to be filed in addition to, or in the place of, an oral hearing;

(e) the carrying on of the functions of the Tribunal and the practice and procedure on appeals and disciplinary hearings; and

(f) awarding of costs of proceedings before the Tribunal".

131. The Rules promulgated by the Hon Chief Justice in line with above, provide for how proceedings are instituted at the Tribunal. It has been seen that the letters that the Applicants wrote to both the Respondent and Tribunal show that the Applicants made an effort, and as is required under the Act, to first resort to the Tribunal. However, the response that they got was that the Rules of the Tribunal on the commencement of proceedings before it had not yet been promulgated.

132. The case of ***Kansanshi Mining PLC v Zambia Revenue Authority*** emphasised that where the mode of commencement of an action is prescribed by statute, a party has no option but to follow that procedure, but it will be noted that the appeal against the Respondent's decisions in this matter, could not be lodged before Tribunal, as the Rules regulating the commencement of actions before the said Tribunal had not been promulgated by the Hon Chief Justice.

133. However, going by the provisions of ***Order 59/14/19*** and ***Order 53/14/27*** of the Rules of the Supreme Court of England, which apply in this jurisdiction, when there is default in our laws, proceedings may be commenced by way of judicial review, even where an appellate procedure has not been exhausted. In this case, the appellate procedure was not exhausted by the Applicants as they could not appeal to the Tribunal against the decision of the Respondent as the Rules for the Tribunal had not yet been promulgated.

134. The Applicants were dissatisfied with the decision of the Respondent, and could not be left without a remedy, and the Respondent does not dispute that the Applicants could apply for leave to commence judicial review proceedings. The argument by the Respondent that the Applicants should have petitioned the Hon Chief Justice for promulgation of the Rules, is without merit, as the Applicants approached the Tribunal which is the organ that is vested with the jurisdiction to hear appeals from the Respondent. Ground two therefore fails.

135. As regards the argument that the matter is improperly before Court, as the Rules of the Tribunal have since been promulgated, and events have been overtaken, it is trite that laws do not operate retrospectively. This position was reiterated in the case of ***KCM v Nyambe and Others*** [16] referred to by the Applicants, as well as the cases of ***Jennifer Nawa v Standard Chartered Bank Zambia Plc***[11] and ***Jacob Nyoni v The Attorney General*** [6].

136. When the issues in this matter arose, which are the subject of this application, the Hon Chief Justice had not yet promulgated the Rules of the Tribunal, as provided in Section 184 (3) of the Securities Act, which would have enabled the Applicants to appeal against the decisions of the Respondent to the Tribunal.

137. The Rules only came into effect on 23rd April, 2021, which is after the Applicants had already approached this Court for leave to commence judicial review. Therefore, there was no way for the Applicants to proceed to the Tribunal, and this was also

communicated to the Applicants by the Tribunal. I note that the Securities (Capital Markets Tribunal) Rules, 2021 do not indicate that they have retrospective effect.

138. In the case of ***Zambia Consolidated Copper Mines and Jackson Munyika Siame and 33 others***[8], the Applicants who were employed by the Respondents in various capacities had their services terminated at the same time, and in the same manner as another group (who were applicants in the case, Zambia Consolidated Copper Mines v Moses Phiri and Others).

139. The former group of employees had taken the matter to the High Court and had successfully litigated against the respondents in the case of Zambia Consolidated Copper Mines v Moses Phiri and Others. The Applicants who were not party to those proceedings, when they realized that their colleagues, the former group, had successfully litigated, and had been awarded redundancy packages, they lodged complaints before the Industrial Relations Court.

140. This complaint was lodged more or less seven years after the services were terminated. The initial complaint was filed on 9th July 1990, without seeking leave of the court.The Respondents raised a preliminary point before the learned Deputy Registrar of the Industrial Relations Court challenging the lodgement of this complaint, as they argued that the action was statute barred, as provided in Section 69(3) of the Industrial and Labour Relations (Amendment) Act. The learned Deputy Registrar of the Industrial Relations Court refused to grant the

application for extension of time in which to lodge the complaint, as the delay was inordinate.

141. He refused to accept the argument that the Industrial Relations Court being a Court of substantial justice was not bound by statutory limitation. The Applicants appealed then to the learned Deputy Chairman of the Industrial Relations Court, who treated their application as an application for leave to file the complaint out of time.

142. He ruled on 6th January, 2002, that the provisions of Act No. 30 of 1997 did not apply to the case before him, because the Applicants rights had accrued long before the amendment, and as such the Applicants had accrued rights, and therefore, they were at liberty to lodge their complaint without seeking leave of Court. It is this ruling which was appealed against to the full bench of the Industrial Relations Court.

143. The full bench ruled on 11th October 2002, upholding the ruling of the learned Deputy Chairman holding that the provisions of Act No. 30 Of 1997, did not apply to the rights of the Applicants, as those rights accrued long before the amendments enacted in Act No. 30 1997.

144. On appeal, the Supreme Court, referred to ***Maxwell on Interpretation of Statutes, Eleventh Edition, 205,*** which refers to the maxim, *"Nova Constitutio futuris foruam imponere devet, non praeteritis – upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation."*

145. The Supreme Court stated that side by side with this presumption of prospective application, is the well-established principle of law that all statutes must be construed as operating only on the cases where or on facts which came into existence after the statutes were passed, unless the retrospective effects are clearly intended.

146. It also noted that Halsbury's Laws of ***England 4th Edition Vol. 44(1) paragraph 287***provides that;

> ***"The general presumption against retrospection does not apply to legislation concerned with matter of procedure; on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of parliament. For this purpose, procedure includes matters relating to remedies, defence, penalties, evidence..."***

147. In relation to the above, the Supreme Court noted as follows;

> ***"But there is another well-established principle of law which is that any enactments which relate to procedures and practice of the Court have retrospective application, vide the Halsbury's Laws of England. This rule of law has harsh implications especially when the enforcement takes away vested rights, or where its application brings on a disadvantage to one or two parties, who were not disadvantaged before. The application of this rule of***

> ***law 'prima facie' is contradictory to the sounds principle of law against punishing a person for what he or she did or did not do at the time when such was not against the law. This principle of law makes it possible for the rules of procedures to be applicable to past as well as future transactions. This is a gray area".***

148. In the case of ***KCM v Martin Nyambe and 24 others***[16] relied on by the Applicants, the matter centred on an amendment to the retirement age for employees, which had an effect on accrued rights. In this matter, the right to appeal against the Respondent's decision to the Tribunal, is guaranteed by Section 184 (3) of the Securities Act, and it is only the Rules relating to the commencement of actions at the Tribunal which were not in force when the Applicants sought to do so.

149. The Rules relating to the commencement of actions before the Tribunal which are procedural, only came into effect on 23rd April, 2021, after these proceedings had been instituted. However, as seen from the case of ***Zambia Consolidated Copper Mines v Jackson Munyika Siame and 33 others***[8]cited above, procedural rules are construed as having retrospective effect, unless they expressly state that they do not.

150. There being no such express provision in the Securities (Capital Markets Tribunal) Rules, 2021,and as the judicial review proceedings have not actually commenced, following the grant of leave to do so, I accordingly discharge the leave to commence judicial review proceedings. This is more so, as the

matters giving rise to this action fall within a specialized field, which has provided an appropriate appellate process. Ground three succeeds.

GROUND FOUR

151. The fourth ground raised by the Respondent is that the substantive application will clearly fail. Having found that the Applicants have an available remedy of appealing to the Tribunal, as the Rules are now in force, it is irrelevant to consider this ground, and I will not proceed to do so.

152. Looking at the fact that when the Applicants commenced these proceedings, the appellate remedy could not be invoked, due to lack of the procedural Rules, I Order that each party bears their own costs. Leave to appeal is granted.

DATED AT LUSAKA THIS 5th DAY OF AUGUST, 2021

S. KAUNDA NEWA
HIGH COURT JUDGE