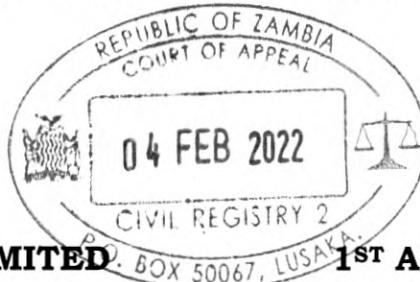


**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

APPEAL NO. 193/2021

BETWEEN:



FINSBURY INVESTMENTS LIMITED	1ST APPELLANT
RAJAN LEKHRAJ MAHTANI	2ND APPELLANT
CREDIT SUISSE INVESTMENTS (NEDERLAND) BV	3RD APPELLANT
JOB ALBERT SAMUEL	4TH APPELLANT
PATRICK SIMUNTALA CHAMUNDA	5TH APPELLANT
CLARKWELL LIMITED	6TH APPELLANT
THE ADMINISTRATOR OF THE ESTATE OF THE LATE PATRICK BWALYA PUTA	7TH APPELLANT
ATLAS MARA (Z) LIMITED	8TH APPELLANT

AND

SECURITIES EXCHANGE COMMISSION LUSAKA SECURITIES EXCHANGE PLC	1ST RESPONDENT
	2ND RESPONDENT

CORAM: CHASHI, CHISHIMBA AND NGULUBE, JJA.
On 24th September, 2021 and 4th February, 2022.

For the Appellants: Mr. J. Chimakanta, Messrs. Simeza Sangwa & Associates.

For the 1st Respondent: Mrs. D. Sichone, In-House Counsel.

For the 2nd Respondent: Captain I. M. Chooka appearing with Mr. A. S. Kokowe, both of Messrs. Milimo Chooka & Associates.

J U D G M E N T

NGULUBE, JA, delivered the judgment of the Court.

Cases referred to:

1. *Godfrey Miyanda vs Attorney General (1985) ZR 185.*
2. *Lusaka City Council vs Adrian S. Mumba (1977) ZR 313.*
3. *New Plast Industries Limited vs Commissioner of Lands, SCZ Judgment No. 8 of 2001.*
4. *John Lemm vs Thomas Alexander Mitchell (1912) AC 400.*
5. *Turnkey Properties vs Lusaka West Development Company and Other (184) ZR 85.*
6. *Hambali M. Hatontola vs The Council of the University of Zambia, SCZ Appeal No. 215/2014.*
7. *Zamsort Zambia Limited and Mumena Mushinge vs Consolidated Advisory Services and Edward Sefuke, SCZ Appeal No. 151/2016.*
8. *Mususu Kalenga Building Limited, Winnie Kalenga and Richmans Money Lenders Enterprises, SCZ Judgment No. 4 of 1999.*
9. *Saban & Another vs Milan (2008) 1 ZR 233.*
10. *Harrington vs Dora Siliya (2011) 2 ZR 253.*
11. *Mumba vs Lungu (2014) 3 ZR 351.*
12. *Tulani Chisenga vs MTN Zambia Limited & Another, CAZ Appeal No. 151 of 2020.*
13. *Young vs Adams (1897) 1 QB 702.*
14. *Premesh Bhai Megan Patel vs Rephidim Institute Limited, SCZ Judgment No. 3 of 2011.*
15. *Shoprite Holdings Limited, Shoprite Checkers (Pty) Limited vs Lewis Chisanga Mosho & Lewis Nathan Advocates (sued as a firm), SCZ Judgment No. 40/2014.*
16. *Admark Limited vs Zambia Revenue Authority (2006) ZR 43.*
17. *Road Transport and Safety Agency vs First National Bank Zambia Limited & Josephine Milambo, SCZ Appeal No. 127/2016.*

18. *N. B. Mbazima and Others Joint Liquidators of ZIMCO Limited (in Liquidation) vs Reuben Vera (2001) ZR 43.*
19. *Central Electricity Board v Halifax Corp (1963) AC 785.*

Legislation referred to:

1. *The repealed Securities Act, Chapter 354 of the Laws of Zambia.*
2. *The Securities Act No. 41 of 2016.*
3. *The Third Schedule to the Securities (Licensing, Fees and Levies) Rules, Statutory Instrument No. 165 of 1993.*
4. *The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia.*
5. *The High Court Rules, Chapter 27 of the Laws of Zambia.*
6. *The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.*
7. *The Limitation Act 1939.*

Other works referred to:

1. *The Rules of the Supreme Court, 1965 (White Book) RSC, Volume 1, 1999 Edition.*
2. *Halsbury's Laws of England, 4th Edition, Reissue, Volume 44(1).*
3. *The Textbook on Zambian Civil Procedure: Commentary and Cases.*

INTRODUCTION

1. This is an appeal against a Ruling of the Commercial Division of the High Court, delivered by Mweemba J, who held that the High Court has jurisdiction to determine the dispute between the appellants and the respondents.

BACKGROUND

2. The ruling appealed against was delivered following an application to raise a preliminary issue on a point of law that was made by the first respondent pursuant to ***Order 14A as read with Order 18 Rule 19 of the Rules of the Supreme Court***. The first respondent was seeking determination of the following question:

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, Cap 354 of the Laws of the 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.

3. The application was supported by an affidavit sworn by the first respondent's Director of Legal and Enforcement Services, who deposed that this matter was commenced by the respondents by way of a Writ of Summons and Statement of Claim on 15th August, 2018. The first respondent was seeking, inter alia, the payment of a takeover fee from the appellants for the takeover or merger that occurred during the period 11th May, 2016 to 30th June, 2016. The takeover or merger occurred before the enactment of the ***Securities Act 2016*** which was assented to on 19th December, 2016.

4. She further testified that at the time the takeover or merger occurred, the legislation regulating the capital markets and securities transactions was the repealed **Securities Act 1993** and the Rules made thereunder. It was her evidence that the first respondent's right to the authorization fee from the appellants accrued, and the appellants' obligation or liability to pay the fee was incurred, under the repealed **Securities Act 1993** as read with the Rules made thereunder. She stated that due to the refusal of the appellants to pay the authorization fee to the first respondent, the first respondent's right to commence an action to claim the authorization fee from the appellants arose under the repealed **Securities Act 1993** as read with the Rules made thereunder.
5. She stated that the enactment of the **Securities Act 2016** does not affect any legal proceeding or remedy in respect of the first respondent's rights or the appellants' obligations or liabilities. It was her further evidence that any legal proceedings or remedy may be instituted against the appellants as if the repealing **Securities Act 2016** had not been made. This was therefore a proper case in which the High Court has jurisdiction to determine and grant the reliefs sought.

6. In support of the application, the respondents had also filed skeleton argument in which it was submitted that prior to the repeal of the **Securities Act 1993**, the eighth appellant failed to pay an authorization fee equivalent of 0.25% of the value of the transaction to the first respondent. This was contrary to the **Third Schedule to the Securities (Licensing, Fees and Levies) Rules** as amended.
7. It was submitted that the **Securities Act 1993** was repealed and replaced by the **Securities Act 2016**, which established the Capital Markets Tribunal. The Tribunal had been clothed with expansive jurisdiction to determine any matter arising from the Act. However, the Act has not provided any transitional provisions permitting matters that should have been commenced before the High Court under the **Securities Act 1993**, to be commenced before the Tribunal. The Tribunal was not yet operational as the staff had not been appointed despite having been established.
8. The argument that was put forward was that the appropriate forum for the respondents to commence their action is the High Court as provided under **Section 63(1) as read with Section 2** of the repealed **Securities Act 1993**. The thrust of the respondents'

contention was that they had accrued rights under the repealed **Securities Act 1993**. In support of this argument, the respondents had relied on **Section 14(3)(c) and (e) of the Interpretation and General Provisions Act**, the case of **Godfrey Miyanda vs Attorney General**¹ and the case of **Lusaka City Council vs Adrian S. Mumba**².

9. The appellants opposed the application by way of skeleton arguments in which they had argued that the Capital Markets Tribunal is the appropriate forum vested with jurisdiction to hear and determine the respondents' claims which span around alleged market misconduct in securities. They argued that the respondents' reliance on **Section 63 of the Securities Act 1993** was misplaced as that Act was repealed and replaced by the **Securities Act 2016**.
10. They submitted that the gist of the respondents' action was based on the **Third Schedule to the Securities (Licensing, Fees and Levies) Rules** as amended and is not by any extension based on either **Section 63** or any other section of the repealed **Securities Act 1993**. It was further submitted that by virtue of **Section 15 of the Interpretation and General Provisions Act**, the repeal of an Act does not automatically repeal a Statutory Instrument made thereunder. Therefore, **Statutory Instrument No. 165 of 1993** was

not repealed and it is part of the **Securities Act 2016**. They argued that the respondents had misapprehended the provisions of the law in so far as they asserted to have an accrued right.

DECISION OF THE HIGH COURT

11. The issue that was considered by the lower court after hearing the application was whether the High Court had jurisdiction to hear and determine the claims set out in the respondents' statement of claim on the basis that the rights accrued and the obligations or liability incurred arose out of the repealed **Securities Act 1993**. The court referred to **Section 14(3)(c) and (e) of the Interpretation and General Provisions Act**, the case of **Godfrey Miyanda vs Attorney General¹**, together with the case of **Lusaka City Council vs Adrian S. Mumba²**, which 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.
12. The lower court was of the view that the respondents' claims arise from the takeover or merger of Finance Bank Zambia Plc by the eighth appellant, which occurred from 11th May, 2016 to 30th June, 2016 when the **Securities Act, 1993** was still in force. The court observed that the **Securities Act 2016** which was assented to

on 19th December, 2016, repealed the **Securities Act 1993**. It expressed the view that the legislation regulating capital markets and securities transactions at the time the takeover or merger occurred, was the repealed **Securities Act 1993**.

13. The lower court reasoned that **Section 63** when read together with **Section 2 of the Securities Act 1993** gives the High Court jurisdiction to deal with any contraventions or violations of the Act. It noted that the **Third Schedule to the Securities (Licensing, Fee and Levies) Rules** was made pursuant to **Section 78 of the Securities Act 1993**. The court found that the basis of the respondents' claims was **Sections 63 and 78 of the Securities Act 1993** and the respondents had correctly asserted to have accrued rights since the **Securities Act 1993** was repealed on 19th December, 2016. The court was of the view that the respondents' rights to receive payment of the transaction authorisation fee and the securities trade commission from the appellants arose when the takeover or merger took place between 11th May, 2016 and 30th June, 2016.
14. The lower court also found that the respondents met the conditions necessary for the acquisition of their respective individual rights to be paid the transaction authorisation fee and

the securities trade commission, when they demanded for payment but the appellants neglected or refused to pay. The court therefore held that the respondents having acquired the specific rights to be paid the transaction authorisation fee and the securities transaction commission, they were entitled to enforce their rights by bringing legal action against the appellants in the High Court pursuant to **Section 14(3)(e) of the Interpretation and General Provisions Act.**

15. The lower court found that the High Court has jurisdiction to handle the dispute between the parties in this case because the rights that the respondents were seeking to enforce were conferred by the **Securities Act 1993** and by virtue of **Section 14 of the Interpretation and General Provisions Act.** The basis was that the rights accrued and the obligations or liabilities incurred, arose under the **Securities Act 1993** which provided for the determination of matters arising under it by the High Court and not the Capital Markets Tribunal.

THE APPEAL TO THIS COURT

16. Dissatisfied with the ruling of the court below, the appellants appealed to this Court advancing five grounds of appeal as follows-

1. *That the court below erred in law when it held that Section 63 of the repealed Securities Act 1993 clothed the High Court with authority to adjudicate on any contravention or violations of the Act, which included the respondents' claims against the appellants;*
2. *That the court below erred in law and fact when it held that the respondents' claims against the appellants were founded on Sections 63 and 78 of the repealed Securities Act and that the court had jurisdiction to entertain the respondents' claims against the appellants;*
3. *That the court below misdirected itself when it held that it has jurisdiction to adjudicate on the respondents' claims against the appellants notwithstanding the repeal of the Securities Act, Chapter 354 of the Laws of Zambia by the Securities Act No. 41 of 2016;*
4. *That the court below erred when it found that the High Court has jurisdiction to handle the dispute between the respondents and the appellants because the rights the respondents seek to enforce were conferred by the repealed Securities Act 1993 and by virtue of Section 14 of the Interpretation and General Provisions Act; and*
5. *That the court below erred on a point of law by holding that:*
 - (a) *The respondents' rights to receive payment of the transaction authorized fee and the securities trade commission from the appellants arose when the takeover or merger took place between 11th May, 2016 to 30th June, 2016;*
 - (b) *The respondents met the conditions necessary for the acquisition of their respective individual rights to be*

paid authorization fee and securities trade commission when they made the demand for payment but the appellants neglected or refused to make payment; and

- (c) *The respondents having acquired the specific rights to be paid the authorization fee and the securities transaction commission pegged at US\$184,675.00 and K3,566,074.26 respectively, are entitled to enforce the rights by bringing legal action against the appellants 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.*

17. The appellants through their advocates filed heads of argument in support of this appeal. The appeal was opposed by the respondents by way of heads of argument which were filed by their respective advocates. Counsel for the parties relied entirely on the heads of argument, when this matter came up for hearing.

THE APPELLANTS' CONTENTIONS

18. On behalf of the appellants, Mr. Chimankata argued grounds one, two, three and four together. The main argument advanced by counsel under these grounds of appeal is that the High Court does not have jurisdiction to hear and determine the respondents' case against the appellants, for two main reasons. The first is that the nature of the respondents' case against the appellants does

not come within the ambit of **Section 63 of the Securities Act 1993**.

The second is that even assuming that it did, the **Securities Act 1993** had been repealed by the **Securities Act 2016** at the time this action was commenced.

19. In respect of the first reason, Mr. Chimankata submits that before the amendment of the Constitution in 2016, **Article 94 of the Constitution** conferred on the High Court unlimited and original jurisdiction to hear and determine any civil or criminal matters, except for matters reserved for the Industrial Relations Court. The Constitution also empowered Parliament through statutes, to confer jurisdiction in the High Court and therefore Parliament passed the **Securities Act** in 1993 to regulate the securities market.

20. He however argued that the court below did not interrogate **Section 63 of the Securities Act 1993**, although the court found that the said provision gave the High Court jurisdiction to deal with any contraventions and violations of the Act. He contends that whilst **Section 63** conferred jurisdiction on the High Court, that jurisdiction is limited. To support his argument, counsel drew our attention to the following part of **Section 63** which says 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: ..."

21. On the strength of the foregoing, counsel argued that in order for the Court to exercise authority under **Section 63**, the court must ensure that: (a) it is moved in the manner prescribed by the section; (b) it is moved on grounds set out in the section; and (c) the applicant seeks relief contained in that section. He argues that these issues are cumulative and failure to satisfy any of them will deny the court jurisdiction over a case.
22. The appellants' counsel submitted that only the first respondent could move the High Court under **Section 63 of the Securities Act 1993** by way of an application and not any other means. He stated that the mode of moving the High Court is reinforced in **Section 63(3)** which says:

"(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.

23. Mr. Chimankata submitted that contrary to ***Section 63(1) of the Securities Act 1993***, the first respondent did not move the High Court by way of an application but by writ of summons pursuant to ***Order 6 of the High Court Rules***. Therefore, the failure to follow the mode of moving the court prescribed by Parliament renders the action a nullity and deprives the High Court of jurisdiction to adjudicate over the merits of this case and to grant the reliefs sought. For this argument, he relied on the case of ***New Plast Industries Limited vs Commissioner of Lands***³.
24. Counsel further submitted that that ***Section 63 of the Securities Act 1993*** sets out the grounds upon which an application moving the High Court must be made and these are limited to where a person: (a) has contravened the Act; (b) has contravened any condition of his license or (c) is about to do an act with respect to dealing in securities that, if done, would be such a contravention.
25. It was his submission that if the High Court is to assume jurisdiction in this matter, the application must be based on any of these three grounds. If not, the court has no jurisdiction to entertain such an application. According to him, the writ of

summons in this case does not set out the grounds in **Section 63** alleged to have been contravened by the appellants. The allegations that the respondents made against the appellants in their statement of claim do not come within the ambit of **Section 63(1)**.

26. Mr. Chimankata further submitted that the reliefs which the High Court can grant pursuant to **Section 63** are specified as follows:

- 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 license dealer, an order appointing a person to administer the property of the dealer;*
- c. *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*
- d. *any ancillary order which it considers necessary in consequence of the making of any other order under this section.*

27. Counsel's argument was that the reliefs sought by the respondents are outside the scope of **Section 63** and therefore, the High Court has no jurisdiction to adjudicate over this case.

28. Mr. Chimakanta further submitted that the High Court has no jurisdiction to adjudicate over this case because after the amendment of the **Constitution** on 5th January, 2016, **Article 94**

was repealed and replaced by **Article 134** and the **Securities Act 1993** was repealed and replaced by the **Securities Act 2016**.

29. He stated that under **Article 134** of the amended **Constitution**, the High Court has, subject to Article 128, unlimited and original jurisdiction in civil and criminal matters; appellate and supervisory jurisdiction, as prescribed; and jurisdiction to review decisions, as prescribed. He said apart from vesting in the High Court unlimited and original jurisdiction in civil and criminal matters arising under any other law, the **repealed Article 94 of the Constitution** allowed Parliament to confer '*such jurisdiction and powers as may be conferred on it by the Constitution or any other law*'.
30. The point counsel made, was that whilst the jurisdiction and powers of the High Court to be conferred by any other law were broad under the repealed **Article 94 of the Constitution**, the jurisdiction and powers of the Court under **Article 134** was now limited to appellate, supervisory and review jurisdiction. He therefore argued, that statutes that confer jurisdiction on the High Court which is not appellate, supervisory or review in nature are null and void to the extent of their inconsistency with **Article 134**.

31. Mr. Chimankata further argued that the conclusion by the court below that it has jurisdiction over the case on account of **Sections 63 and 78 of the Securities Act 1993** is unsound law. It was his argument that the court's jurisdiction can only be ascertained on the date when the court is moved. He stated that this action was commenced in 2018, by which date the **Securities Act 1993** had been repealed by the **Securities Act 2016**.
32. Counsel went on to submit that once an Act of Parliament has been repealed, it is as though it never existed. It is only relevant to actions which were commenced, prosecuted and decided before it was repealed. In respect of this argument, counsel relied on Paragraph **1296 of the Halsbury's Laws of England, 4th Edition, Reissue, Volume 44(1)** and the case of **John Lemm vs Thomas Alexander Mitchell⁴**.
33. As regards cases that are commenced and not concluded by the time an Act of Parliament is repealed, Mr. Chimankata submitted that the law preserving rights acquired or accrued does not preserve abstract rights conferred by the repealed Act, but only applies to specific rights given on the happening of the events specified in the statute. We were referred to the case of **Godfrey**

Miyanda vs the Attorney General¹. He argued that the lower court misapplied **Section 14(3)(e) of the Interpretation and General Provisions Act** and sought to preserve an abstract right.

34. Counsel further argued that the court below misdirected itself by holding that **Section 63** gave the High Court jurisdiction to deal with any contravention or violation of the Act and that **Sections 63 and 78 of the Securities Act 1993** were the basis for the respondents' claims. According to him, the pronouncements by the lower court were factually inaccurate and legally unsound.
35. He contends that the conclusion by the court that the respondents' rights to receive payment of the transaction authorization fee and the securities trade commission from the appellants arose when the takeover or merger took place between 11th May, 2016 to 30th June, 2016, is factually incorrect because it is not supported by the averments in the statement of claim. There was nowhere in the statement of claim where the respondents averred that the takeover or merger took place between 11th May, 2016 to 30th June, 2016. The statement of claim showed that representations concerning the transaction were first made on the 11th May, 2017 and by then, the **Securities**

Act 1993 had been repealed by the **Securities Act 2016** which came into effect on the 27th December, 2016.

36. Mr. Chimankata submitted that the conclusion by the court was legally unsound, because the court claimed jurisdiction based on the repealed **Securities Act 1993**. He reiterated that the effect of a repealed statute is that such an Act is treated as though it never existed and if the provisions of a repealed statute are to be in force, there must be an express saving clause preserving the particular sections of that statute beyond their repeal.
37. He said there is no provision in the **Securities Act 2016** which saves **Sections 63 and 78 of the Securities Act 1993**, for the jurisdiction of the High Court under those provisions to subsist beyond the date of the repeal of the Act. What had been saved, despite the repeal of the **Securities Act 1993**, is set out in **Section 222(2) of the Securities Act 2016** and it does not include the issues covered in the **Sections 63 and 78 of the Securities Act 1993**. Therefore, there was no basis for the court to claim jurisdiction to determine this matter based on **Sections 63 and 78 of the Securities Act 1993**, as these provisions were neither saved nor preserved by the **Securities Act 2016**.

38. Mr. Chimankata also argued that the lower court misdirected itself by holding that **Section 14(3) (e) of the Interpretation and General provisions Act** entitled the respondents to enforce their rights under the **Securities Act 1993** by commencing the action in the High Court. This was because the issue the court was called to determine was which forum, between the High Court and the Capital Markets Tribunal, had jurisdiction to adjudicate on the claims set out in the respondents' statement of claim. The notice of motion to raise a preliminary issue had nothing to do with the accrued rights of the respondents under the **Securities Act 1993**. Also, that **Section 14(3) of the Interpretation and General Provisions Act** had nothing to do with the jurisdiction of the High Court conferred under **Section 63 of the Securities Act 1993**.
39. On the fifth ground of appeal, Mr. Chimankata submitted that the combined effect of the court below's pronouncements was that the court had at an interlocutory stage, determined the merits of the matter. Counsel submitted that a court cannot, at an interlocutory stage, make pronouncements that have the effect of pre-emptying the issues to be decided on the merits after trial.

40. Counsel submitted that available case law suggests that whenever an interlocutory issue has been raised, the court must confine itself to that issue alone. To substantiate his submission, he extensively quoted from the following cases which espouse the foregoing principle: ***Turnkey Properties vs Lusaka West Development Company and Other***⁵, ***Hambali M. Hatontola vs The Council of the University of Zambia***⁶, and ***Zamsort Zambia Limited and Mumena Mushinge vs Consolidated Advisory Services and Edward Sefuke***⁷.
41. Counsel stated that the preliminary issue raised by the respondents was whether the High Court as opposed to the Capital Markets Tribunal had jurisdiction to adjudicate over this matter. Therefore, the court below exceeded the remit of the issue that was raised.
42. Mr. Chimankata contended that the issue of when the respondents' rights to receive the transaction authorization fee and the securities trade commission from the appellants arose was beyond the scope of the preliminary issue set out in the notice of motion. He submitted this was one of the issues which could only be resolved at trial. The same was also true regarding the question of whether the respondents met the conditions necessary for the acquisition of their individual rights to be paid a

transaction authorization fee and a securities trade commission when they demanded payment.

43. Counsel submitted that the lower court effectively decided the main case at the interlocutory stage, when it held that the respondents having acquired the specific rights to be paid the transaction authorization fee and the securities trade commission, were entitled to enforce the rights by bringing legal action against the appellants in the High Court pursuant to **Section 14(3)(e) of the Interpretation and General Provisions Act.**

RESPONDENTS' CONTENTIONS

44. The first respondent opposed this appeal. Mrs. Sichone who appeared for the first respondent submitted that the argument which the appellants raised, on the mode of moving the court, the grounds for moving the court and the reliefs can be sought under **Section 63 of the Securities Act 1993**, were new issues which were not adjudicated upon by the lower court. Therefore, this court should not entertain them as the lower court did not have an opportunity to consider them before rendering its ruling.

45. Our attention was drawn to the case of **Mususu Kalenga Building Limited and Another vs Richmans Money Lenders Enterprises⁸**, where it was held that matters not raised in the court below

cannot be raised for the first time on appeal because doing so would be ambushing the other party to litigation. The other cases she cited on this principle are: **Saban & Another vs Milan**⁹, **Harrington vs Dora Siliya**¹⁰, **Mumba vs Lungu**¹¹ and **Tulani Chisenga vs MTN Zambia Limited & Another**¹².

46. She further referred to **Page 1532 of the Textbook on Zambian Civil Procedure: Commentary and Cases**, which says that the exception to this rule is that if all the facts have been established beyond controversy or where the point is one of construction of law, an appellate court may find it expedient and in the interests of justice to entertain the point but otherwise the rule is strictly applied. She argues that this exception does not apply to this case.
47. She submitted that the appellants, by raising new arguments on an interlocutory appeal, are essentially asking this court to make comments that will have the effect of pre-emptying the issues to be decided on the merits at trial. In support of this argument, she relied on the case of **Turnkey Properties vs Lusaka West Development Company Ltd, B.S.K. Chiti (Sued as Receiver) and Zambia State Insurance Corporate Ltd**⁵.

48. Mrs. Sichone however submitted that should the court decide that the new matters were competently raised before this court, the first respondent's argument is that moving the High Court by way of writ of summons was the correct mode of commencing this action.
49. She expressed the view that the case of **New Plast Industries vs The Commissioner of Lands**³ is distinguishable from this case, because in that case **Sections 87 and 89 of the Lands and Deeds Registry Act** required a person aggrieved by the decision of the Registrar to appeal to the court and outlined the procedure to be followed in the conduct of an appeal from the Registrar to the court. She explained that in this case, **Section 63 of the Securities Act 1993** merely outlined the orders that the court may make on "*an application by the Commission*".
50. The point she made, was that unlike **Sections 87 and 89 of the Lands and Deeds Registry Act, Section 63 of the Securities Act 1993** does not make provision for the mode of commencement or the form that the application is supposed to take. The procedure to be followed when an application is made has not been set out.

51. Mrs. Sichone submitted that where a statute is silent as to the mode of commencement to be used, ***Order VI Rule 1 of the High Court Rules***, which says except for petitions under the Constitution and Matrimonial Causes Act and applications for writs habeas corpus, every action in the High Court shall, notwithstanding the provisions of any other written law, be commenced by writ of summons endorsed with or accompanied by a full statement of claim. It was her contention that the writ of summons filed by the respondents in this matter was competently and regularly filed in the lower court.
52. On the question of whether the respondents had any grounds for moving the High Court under ***Section 63***, Mrs. Sichone argued that the respondent satisfied the test set out in ***Section 63(1)*** as the appellants contravened the ***Securities Act 1993***. She submitted that when the takeover was effected in 2016, the appellants had a statutory obligation to pay transaction authorization fees to the first respondent for the sale of registered shares. She stated that the appellants contravened the ***Securities Act 1993*** by failing to notify the first respondent of the completion of the transaction and to pay the attendant authorization fees.

53. On the reliefs sought, Mrs. Sichone submitted that the dispute relates to the disposal of securities, the registered shares of Finance Bank Plc that were sold to the eighth appellant without the authorization of the first respondent and its attendant fees pursuant to **Section 63(1) (a) of the Securities Act 1993**. She further stated that the court has discretion pursuant to Section **63 (1)(e)** to make any ancillary order that is necessary as a consequence of any other order made under **Section 63**.
54. Mrs. Sichone argued that the arguments that the 2016 amendment to the **Constitution** limits the jurisdiction of the High Court under statute to appellate, supervisory and review jurisdiction are plausible but flawed. Counsel submitted that notwithstanding the amendment of the **Constitution** in 2016, **Article 134(a)** maintains the High Court's unlimited and original jurisdiction to handle civil matters at first instance. She said this is a civil case to which the High Court could trace its jurisdiction pursuant to **Section 63 as read with section 2 of the Securities Act 1993**.
55. As regards the effect of the repeal of the **Securities Act 1993**, Mrs. Sichone submits that the appellants' arguments seek to pre-empt the matters to be adjudicated upon the evaluation of the evidence

that will be placed before the trial court. She however submitted that the cause of action did not accrue when the respondents became aware of the transaction. She said time starts to run when a cause of action accrues and relied on **Section 2(1) of the Limitation Act 1939** for her submission. As such the cause of action to claim the transaction authorization fee arose as soon as the transaction was completed despite that a formal demand had not been made by the first respondent against the appellants.

56. Counsel submitted that Finance Bank Plc was taken over by Atlas Mara Zambia Limited between May and June 2016, before the **Securities Act 1993** was repealed and replaced by the **Securities Act 2016**. It was her submission that the law that should govern this vested right is the **Securities Act 1993**, which subsisted when the cause of action accrued. She further stated that the Capital Markets Tribunal was only brought into existence when the **Securities Act 2016** was enacted on 19th December, 2016. It was not in existence at the time the cause of action accrued to the first respondent when the takeover was completed in 2016.
57. Mrs. Sichone cited the case of **Young vs Adams**¹³, where it was observed that retrospective operation of the law ought not to be given to a statute, unless an intention to that effect is expressed

in plain and unambiguous language. Her argument was that an adjudicating body that did not exist when the cause of action arose cannot have original jurisdiction to adjudicate over the matter. She said if Parliament had intended the **Securities Act 2016** to have retrospective operation, it would have stated so. She accordingly argued that the Tribunal does not have the jurisdiction to adjudicate on a right of action that accrued prior to 19th December, 2016 before it was established at law.

58. She further submitted that the **Securities Act 2016** has not provided any transitional provisions permitting matters that should have been commenced in the High Court under the **Securities Act 1993** to be commenced before the Tribunal. Therefore, the appropriate forum for the first respondent to take legal action against the appellants for recovery of the transaction authorization fee is the High Court as provided under **Section 2 of the Securities Act 1993 Act**. She also relied on **Section 14(3)(c), (d) and (e) of the Interpretation and General Provisions Act** and **Section 222 (2) of the Securities Act 2016**, for this argument.
59. Mrs. Sichone submitted that the legal effect of **Section 14(3)(c),(d) and (e) of the Interpretation and General Provisions Act** as read with **Section 222 (2) of the Securities Act 2016**, is that in the event of a

repeal and replacement of a prior written law by a new law, any breach of the repealed law does not extinguish any right, liability, obligation, punishment or penalty arising from the repealed law and an offender under the repealed law may be pursued as if the repealing law had not been made. She said the procedure to be adopted for the enforcement of that right 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 will be pursued in accordance with the repealed law without any exceptions or reservations.

60. In support of her argument, she relied on the cases of **Godfrey Miyanda vs The Attorney General**¹, and **Lusaka City Council vs Adrian Mumba**². She said the legal principles emanating from these cases are that firstly, the law preserves specific rights which accrue to a party on the happening of an event prior to the repeal of that law. Secondly, once the conditions necessary for the acquisition of that right have been met, a party is able to enforce the rights even in the event of a repeal of that law.
61. She submitted that in the present circumstances, the happening of the event required to trigger the provisions of the **Securities Act 1993** and the payment of the transaction authorization fee arose prior to the repeal of the Act, thereby giving the first respondent an

accrued or contingent right under the **Securities Act 1993** to pursue the appellants for violations of the Act as if it had not been repealed. It was her submission that in order to ascertain the appropriate forum, recourse must be had to the **Securities Act 1993** which provides for the appropriate forum for the enforcement of rights and obligations arising under that Act. She further relied on **Section 2(1) of the Securities Act 1993** which defines a court to mean the High Court.

62. She therefore argued that the appropriate forum was and is the High Court as opposed to the Capital Markets Tribunal, as the first respondent had acquired or accrued rights enforceable under the **Securities Act 1993**. She stated that the accrued rights, survived the repeal of the Act in accordance with **Section 14(3) of the Interpretation and General Provisions Act** as read with **Section 222(2) of the Securities Act**. Therefore, the lower court was on firm ground when it ruled that it had jurisdiction over this matter.

63. On ground five, Mrs. Sichone argued that the lower court did not pre-empt the issues to be determined at trial. It had merely declared in accordance with **Section 14(3) of the Interpretation and General Provisions Act**, that the cause of action to claim the authorization fee from the appellants accrued to the respondents before the repeal of

the Act and the cause of action accrued and survived the repeal of the Act. She said the court merely asserted that the respondents had the right to make the claim before the High Court. The question of whether respondent is entitled to the reliefs sought and the court should grant them remains a matter to be determined on balance of probabilities, after trial and evaluation of the evidence.

64. Mrs. Sichone makes the argument that the court below could not have properly determined the question of jurisdiction without considering when the cause of action accrued and whether it survived the repeal of the Act. She accordingly submitted that this appeal should be dismissed and this case should be remitted back to the High Court for trial and determination of the issues in dispute.
65. On behalf of the second respondent, Captain Chooka Rtd. reiterated what Mrs. Sichone stated on the issue of the appellants having raised new issues on appeal which were never raised in the court below. He submitted that this court should not entertain the new issues. Counsel relied on the case of **Premesh Bhai Megan Patel vs Rephidim Institute Limited¹⁴**, to argue that a matter not raised in the court below cannot be raised on appeal.
66. Counsel argues that it is difficult to fault the decision of the court below, as it is beyond contention that the transaction which is at the centre of this appeal occurred between 11th May, 2016 and 30th

June, 2016. He countered Mr. Chimankata's contention that the question of jurisdiction ought to have been decided at the time when the court was moved and not when the respondents believe their right to claim against the appellants accrued. This, according to him, cannot be a correct postulation of the respondents' rights to enforce an accrued right. He submits that the rights claimed by the respondents accrued to them by virtue of statute and the appellants' obligation to pay transaction and authorization fees is from the date of the occurring of the event, which is the date of the transaction, merger or acquisition.

67. Captain Chooka submitted that the pronouncements made by the Supreme Court in ***Godfrey Miyanda vs Attorney General***¹, regarding the principles governing accrued rights, offer adequate guidance as to the legal basis for the respondents' reliance on the rights conferred on them by the ***Securities Act 1993***, to claim the amounts which are subject of these proceedings. He urged this court to hold that the respondents have an acquired or accrued right to commence an action in the High Court to enforce their claims.
68. He went on to submit, that the respondents went to the High Court as the forum provided for under ***Section 63 as read with Section 78 of the Securities Act 1993***, which, when taken together, confer a right upon the first respondent to make rules for or with respect to

any matter that was required or permitted to be prescribed, or that was necessary or convenient to be prescribed for carrying out or giving effect to the Act. He argued that the respondents had pursuant to this power, an acquired or accrued right to levy transaction and authorization fees which are subject of their claims in this matter. He maintained that the forum for the enforcement of this accrued right is expressly stated to be High Court. We were urged to uphold the ruling of the lower court and to dismiss this appeal.

69. Mr. Chimankanta filed a reply in which he stated that since the **Securities Act 1993** was repealed on 19th December, 2016, the decision of the lower court would indeed be sound if the alleged take-over or merger took place between 11th May, 2016 and 30th June, 2016. This is because the right to move the court under **Sections 63 of the Securities Act 1993** would have accrued to and vested in the respondents, by virtue of **Section 14 of the Interpretation and General Provisions Act**, notwithstanding the repeal of the Act on 19th December, 2016. The said right having vested would have survived the repeal of the Act.

70. Counsel however argued that based on the statement of claim, it is not the respondents' case that the transaction took place between 11th May, 2016 and 30th June, 2016, but that it took place between 11th May 2017 and 30th June, 2017. He emphasized that it is trite law that the parties and courts are bound by pleadings and as such the court is bound by the case that is disclosed by the pleadings.
71. Mr. Chimankata pointed out that the period between 11th May 2016 to 30th June, 2016 came from the affidavit in support of the notice of motion, which relied on the statement of claim without referring to specific paragraphs in the statement of claim. He submitted that in so far as the respondents' case disclosed in the statement of claim is founded on the premise that the transaction took place between 11th May, 2017 and 30th June 2017, the court below had no jurisdiction to entertain this case under **Section 63 of the Securities Act 1993**. We were urged to uphold this appeal.

CONSIDERATION OF THE MATTER BY THIS COURT AND VERDICT

72. We have considered the grounds of appeal, the issues raised in the heads of argument filed by counsel for the parties and the evidence that is on record. Before we proceed to deal with the issues raised in the appellant's grounds of appeal, we wish to address the issue raised by the respondents' advocates that the

appellants had raised new issues which were not adjudicated upon by the lower court. These are issues pertaining to the mode of moving the court under **Section 63 of the Securities Act 1993**, the grounds for moving the court and the reliefs that can be sought under that Act.

73. Mrs. Sichone and Captain Chooka (Rtd.) anchored their argument on the principle found in the celebrated case of **Mususu Kalenga Building Limited and Another vs Richmans Money Lenders Enterprises**³, where it was held that matters not raised in the court below cannot be raised for the first time on appeal because doing so would be ambushing the other party to litigation.

74. We agree with this principle, but we think that it does not apply to questions of jurisdiction of the court or questions of law. This view is espoused in the case of **Shoprite Holdings Limited, Shoprite Checkers (Pty) Limited vs Lewis Chisanga Mosho & Lewis Nathan Advocates (sued as a firm)**¹⁵ and the case of **Admark Limited vs Zambia Revenue Authority**¹⁶, where the court held that a party may at the trial raise a point of law open to him even though it was not pleaded in his defence. The court did state, however, that it is desirable for a party who intends to raise a point of law on the facts as pleaded to do so in the pleading.

75. The Supreme Court in the case of **Road Transport and Safety Agency vs First National Bank Zambia Limited & Another¹⁷** also held that even if the question of jurisdiction has not been raised in the court below, the court is at liberty to consider it on appeal because of the consequences that flow from a court acting while wanting in jurisdiction. The issues raised by the appellants in this case are questioning the jurisdiction of the High Court to hear and determine this case. We take the view that it was not wrong for the appellants to raise the new jurisdictional issues on appeal.

76. Coming back to the grounds of this appeal, we shall deal with grounds one to four together as they were argued by counsel. The issue we have to decide is whether this matter was properly commenced before High Court or it should have been commenced before the Capital Markets Tribunal. This question is crucial, because forum, like mode of commencement, goes to jurisdiction. This essentially means that where a matter is commenced before a wrong forum or is commenced using a wrong mode of commencement, the court will have no jurisdiction to hear and determine such a matter. The line of cases which speak to this principle include: **N. B. Mbazima and Others Joint Liquidators of**

ZIMCO Limited (in Liquidation) vs Reuben Vera¹⁸ and New Plast Industries vs The Commissioner of Lands and Attorney General¹⁹.

77. The lower court in this case found that **Section 63 as read with Section 2 of the Securities Act 1993** gives the High Court jurisdiction to deal with any contraventions or violations of the Act. This finding of the court has been challenged by the appellants who have argued that this case does not fall within the ambit of **Section 63 of the Securities Act 1993**, which provides 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 license, 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 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 consequences 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 a 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.”*

78. It is clear the provisions we have cited above set out the orders which the High Court was empowered to make, without prejudice to any other order the court could make pursuant to other provisions, on an application of the first respondent. We have specifically referred to “High Court” because **Section 2(1) of the Securities Act 1993** defines the “court” to mean the “High Court of Zambia”. We are of the considered view that the application under **Section 63(1) of the Securities Act 1993**, which the first respondent is permitted to make, refers to an application which is interlocutory in nature and not an originating process.

79. There is no merit in Mr. Chimankata's argument that if this matter was falling within the ambit of **Section 63**, it should have been commenced by "application" and not by writ of summons. The starting point, as far as the commencement of proceedings in the High Court is concerned, is **Order 6 Rule 1 of the High Court Rules**², which provides that:

"(1) Except as otherwise provided by any written law or these Rules, every action in the High Court shall be commenced by writ of summons endorsed and accompanied by a full statement of claim."

80. It is a general rule of procedure that every action in the High Court should be commenced by writ of summons endorsed and accompanied by a statement of claim. The other modes of commencement envisaged under the provision we have cited should only be used where the law specifically so provides. The Supreme Court in the case of **New Plast Industries Limited vs The Commissioner of Lands and The Attorney General**³, guided that the mode of commencement of an action is generally provided by the relevant statute and not the relief sought.

81. We must stress that even though the respondents may have intended to apply for any of the orders which the High Court

could grant under **Section 63**, they were required to commence their action using the prescribed mode of commencement. We take the view that the arguments about the mode of moving the court under **Section 63**, the grounds of moving the court and the reliefs that can be sought under that Section are premature and misconceived. In our view, it is sufficient that the respondent was alleging that the appellants contravened the repealed **Securities Act 1993** by failing to pay the transaction authorization fee and the market trade commission. We find no merit in the appellants' contention that the High Court had no jurisdiction because the first respondent did not move the High Court by way of an application.

82. The fact that the respondents had alleged that the appellants contravened the **Securities Act 1993**, we cannot fault the lower court for holding that **Section 63 as read with Section 2 of the Securities Act 1993** gave the High Court jurisdiction to deal with any contraventions or violations of the Act. We cannot also fault the lower court for holding that the alleged takeover or merger took place between 11th May, 2016 and 30th June, 2016. This is what the first respondent's advocate said in the affidavit in

support of the notice of motion to raise a preliminary issue and the court was not precluded from considering this evidence.

83. We must state that interlocutory applications are heard and decided based on affidavit evidence and the decision of the lower court is supported by that evidence. In any event, the first respondent's affidavit evidence simply clarified the averments in the statement of claim and did not contradict the pleadings. The statement of claim does not indicate when the takeover or merger took place. We therefore uphold the finding of the court below that the takeover or merger took place between 11th May, 2016 and 30th June, 2016. Lord Guest in ***Central Electricity Board vs Halifax Corp***¹⁹ held that:

"the date when a cause of action accrues may be said to be the date on which the plaintiff would be able to issue a statement of claim capable of stating every existing fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to judgment."

84. In other words, a cause of action accrues where all the facts exist which entitle one person to obtain from the court a remedy against another person. On the facts of this case, the respondents had argued that although the Capital Markets Tribunal was established by law at the time this action was commenced,

Securities Act 2016 did not provide transitional provisions permitting matters that should have been commenced in the High Court under the repealed **Securities Act 1993** to be commenced before the Tribunal. Also, that the Tribunal was not yet operational as the staff had not yet been appointed.

85. We have noted that Mr. Chimankata conceded in the heads of argument in reply, that if the takeover or merger took place between 11th May, 2016 and 30th June, 2016, the right to move the court under **Sections 63 of the Securities Act 1993** would have accrued to and vested in the first respondents, by virtue of **Section 14 of the Interpretation and General Provisions Act**. The case of **Lusaka City Council vs Adrian S. Mumba**² demonstrates 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.

86. We, accordingly, uphold the finding of the court below that the right to move the court under **Sections 63 of the Securities Act 1993** accrued to and vested in the first respondents. Therefore, the High Court has jurisdiction to hear and determine this matter. We do not find merit in grounds one to four. They are hereby dismissed.

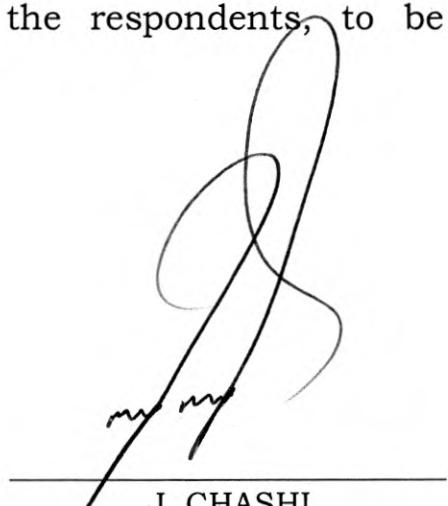
87. As regards ground five, we agree with Mr. Chimankata that a court is not supposed to make pronouncements at interlocutory stage which have the effect of pre-emptying the issues that are to be adjudicated upon after trial. We also agree with counsel, that as much as possible, the court is supposed to confine itself to issues raised at interlocutory stage without going into the merits of the main matter. The issue, therefore, is whether the learned judge in the court below overstepped his boundaries and made pre-emptive pronouncements at interlocutory stage, which effectively determined the merits of the main matter.
88. One of the pronouncements the appellants have complained about, is the finding of the lower court that the respondents' rights to receive payment of the transaction authorisation fee and the securities trade commission from the appellants arose when the takeover or merger took place between 11th May, 2016 and 30th June, 2016. The other pronouncement is the finding that the respondents met the conditions necessary for the acquisition of their respective individual rights to be paid the transaction authorisation fee and the securities trade commission, when they demanded for payment but the appellants neglected or refused to

pay. The other one is that the respondents having acquired the specific rights to be paid the transaction authorisation fee and the securities transaction commission, they were entitled to enforce their rights by bringing legal action against the appellants in the High Court pursuant to **Section 14(3)(e) of the Interpretation and General Provisions Act.**

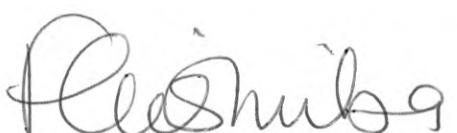
89. The view we take, after considering the context in which the lower court made these findings, is that the appellants took the pronouncements out of the context and understood them to have effectively determined the merits of the main matter. Contrary to illusory apprehension entertained by the appellants, the court simply found that the respondents had disclosed a cause of action against the appellants and had accrued the right to enforce their claims to bring an action in the High Court pursuant to **Section 14(3)(e) of the Interpretation and General Provisions Act.**
90. There is nothing amiss about the finding of the lower court that the respondents were entitled to bring an action in the High Court. The court below ably demonstrated that the correct forum which has jurisdiction to hear and determine this matter is the High Court and not the Capital Markets Tribunal. We,

accordingly, find no merit in ground five of this appeal. It is hereby dismissed.

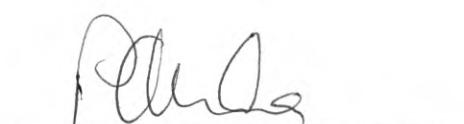
91. For the foregoing reasons, we dismiss the appeal, uphold the decision of the lower court and order that this matter be remitted back to the High Court for trial of the dispute on the merits. We award costs to the respondents, to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



F. M. CHISHIMBA
COURT OF APPEAL JUDGE



P.C.M. NGULUBE
COURT OF APPEAL JUDGE