

Selected Judgment No.30 of 2017

P.1022

APPEAL NO.17/2017

SCZ/8/238/2016

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

REYNOLDS CHANDA BOWA

AND

LUSAKA STOCK EXCHANGE LIMITED

PANGEA RENAISSANCE SECURITIES LIMITED

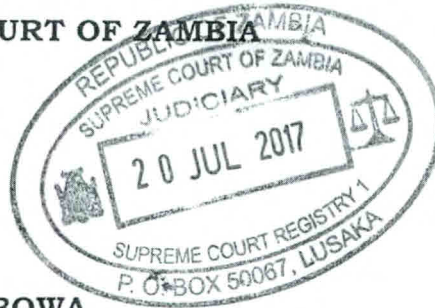
STANDARD CHARTERED BANK PLC

APPELLANT

1ST RESPONDENT

2ND RESPONDENT

THIRD PARTY



At Lusaka on 12th July 2017 and 19th July 2017

Coram : Hamaundu, Malila and Mutuna, JJS

For the Appellant : Ms M. Bwalya, of Messrs Mwenye Mwitwa Advocates

For the First Respondent : Capt. I.M. Chooka, of Messrs Lewis Nathan Advocates

For the Second Respondents: Mr. M.M. Liweleya, of Messrs MML Legal Practitioners

J U D G M E N T

MUTUNA, JS, delivered the judgment of the court.

Cases referred to:

- 1) **Clarion Limited and others v National Provident Institution (2000) 2 ALL ER page 265**
- 2) **Allen v Flood and Another (1898) A.C.1**
- 3) **Quinn v Leathem (1901) AC 495**

Other authorities referred to:

- 1) **Securities Act, Cap 354**
- 2) **Securities (Conduct of Business) Rules**
- 3) **Lusaka Stock Exchange Rules, 2003**

The subject of this appeal is trading on the stock exchange which was re-introduced onto the Zambian market in 1990s. It is, as a result, a fairly new concept to the business community in Zambia and, as such, the primary and secondary issues in contention in this matter are novel. They, however, revolve around the two competing interests of a regulator's duty to ensure fair trading, and a shareholder's right to dispose of his property in shares. The

side issue to the latter being, the extent to which, if at all, a regulator can restrict such right.

The secondary issue relates to the extent of the duties of a broker to a shareholder.

The duty and right, aforementioned, are explained in the **Securities Act** and the First Respondent's Rules, made pursuant to section 14 of the **Securities Act**. Consequently, our decision in this appeal is based on these two authorities.

We hasten to mention that we are alive to the fact that the **Securities Act**, Cap 354 has since been repealed and replaced by the **Securities Act**, No. 41 of 2016, but we have not referred to the latter Act in determining this appeal because it was not in force at the time the dispute arose.

The background to the dispute is that the Appellant is a shareholder in the Third Party holding a total number of 3,000,000 shares. Following a directive from Bank of Zambia, as regulator of banks and financial institutions, that banks should increase their capital reserves to USD100 million, the Third Party's shareholders, at an annual general meeting (agm) held on 28th March 2012, resolved that the Third Party should not pay dividends to them for the year. As such, the Third Party was to retain all profits earned in the year so that its capital reserves would increase in accordance with the directive by Bank of Zambia. It was also resolved that the Third Party would issue bonus shares to all its shareholders appearing in the register of members, as at 18th April 2012, (the record date) at the ratio of 26 to 1, that is, 26 additional shares

would be issued to each shareholder for every share owned by the record date.

The effect of the bonus shares issue was that it devalued the Third Party's shares from K80.00 to K2.96. There was, however, a delay in the issuance of the bonus shares by the Third Party as it was engaged in consultation with Stockbrokers Zambia Limited on how best to implement the resolutions of the shareholders. It also delayed publication of the bonus issue in two daily newspapers and only caused the publication to be made on 27th April 2012.

Meanwhile, the Appellant as property owner of the shares in the Third Party, between 18th and 20th April 2012, engaged the Second Respondent, a stock broker, to trade his shares on the First Respondent stock exchange at

the price of K80.00 per share. The Second Respondent executed the instructions and by 23rd April 2012, it traded 2,269,746 shares at a price of K78.00 per share, bringing the total value of the trade to K177,040,188.00. Of this amount, the Appellant was to earn a total of K174,605,885.41 after deducting commission and other charges due to the two Respondents.

In pursuance of the foregoing trade, the Second Respondent issued to the Appellant a contract note in conformity with its rules which indicated that the trade was scheduled to be settled on 26th April 2012.

Prior to the settlement date and on 25th April 2012, the First Respondent issued a notice suspending trade in the Third Party's shares on its stock exchange. The notice had retrospective effect from 24th April 2012 and it

effectively suspended all trade in shares pending as at the close of the stock exchange on that day. This included the trade in the Appellant's shares.

The suspension of trade was prompted by the Third Party's failure to issue the bonus shares by the record date due to a delay in the conclusion of the consultation it was engaged in with Stockbrokers Zambia Limited on the issue. It was also at the instigation of the Third Party after its shareholders, who included the Appellant, refused to change the record date to another date to accommodate the delay in the issue of the bonus shares.

The Appellant being aggrieved by the suspension prevailed upon the First Respondent to settle the trade but the latter refused to do so. This prompted him to seek intervention by the Securities and Exchange Commission

as regulator of the First Respondent but his efforts were fruitless. The Appellant was undeterred so he sought redress through the court below by commencing an action against the First and Second Respondents claiming the following relief:

- 1) A declaration that the Appellant's sale of his 2,269,746 shares in the Third Party on the First Respondent's stock exchange on 23rd April 2012 was a valid and legal trade and that the Second and First Respondents acted contrary to the trading rules procedure of the First Respondent and that the First Respondent abused its authority when it prevented the settlement of the Appellant's trade on 26th April 2012;
- 2) An order for payment of the sum of K174,605,885.41 by the First and Second Respondents being the net value of the trade, under contract note number 5532 due and payable to the Appellant for the sale of the said 2,269,746 shares in the Third Party belonging to the Appellant;
- 3) A penalty fee for the Respondents' failure to settle the said trade at the rate of 1% of the value of the trade per day from 26th April 2012 to the date of full and final payment of the sum claimed under claim (2);
- 4) Further and other relief, the court may deem fit; and
- 5) Costs.

By the said claim, the Appellant was essentially contending that he was entitled to conclude the trade of his shares and that the First Respondent had no right to suspend the trade. In regard to the Second Respondent, the contention by the Appellant was that as his agent, the Second Respondent was obliged to prevail upon the First Respondent and ensure that it revoked its suspension of the trade.

At a certain point in the proceedings in the court below, the First Respondent issued a Third Party notice which effectively joined the Third Party to the proceedings. It claimed indemnity from the Third Party as instigator of the suspension of the trade in the event that it was found to be liable to the Appellant.

The Respondents and the Third Party all filed defences to the respective claims against them. The First Respondent anchored its defence on the contention that it was prompted to intervene by suspending trade in the Third Party's shares and annulling the trade involving the Appellant's shares, because the Third Party's shares were being traded at an artificial price which did not take into consideration the dilution of their value as a consequence of the bonus issue. It also contended that it sought to protect members of the public who bought or were in the process of buying the Third Party's shares at the artificial price of K80.00 per share instead of K2.96 per share. The intervention, it was contended, was in compliance with the rules and practice of its stock exchange.

The Second Respondent, whilst acknowledging that it was involved in the trade of the shares, contended that it

could not conclude the trade in the Appellant's shares because of the suspension. As a consequence of this, all its efforts to have the trade settled were frustrated by the suspension.

The Third Party contended that following the resolutions at the agm, it engaged Stockbrokers Zambia Limited as a sponsoring agent to put in place measures for the implementation of the resolution relating to the bonus issue. This exercise took longer than expected such that by the record date it had neither applied to the First Respondent to list or publish a notice of the proposed bonus share issue in accordance with the applicable rule. As a result of this, the Third Party requested its shareholders, including the Appellant, to vary the record date, which request was denied by the shareholders. This prompted the Third Party, through its sponsoring agent, on

24th April 2012, to request the First Respondent to suspend trading in its shares so that the bonus shares could be issued as stipulated by the agm.

The Third Party contended further that since the Appellant was one of the shareholders who refused to change the record date, he could not be heard to challenge the decision by the First Respondent to suspend trading in the shares following a request by the Third Party.

The parties led *viva voce* evidence at the trial which by and large was a restatement of the contentions advanced in the pleadings.

In his testimony, the Appellant confirmed the contention by the Third Party that he was one of the shareholders who insisted that the record date of 18th April 2012 should be maintained by the Third Party despite

the delay in concluding the issue of the bonus shares. He also confirmed that he was bound by the resolution of 28th March 2012, but denied that the dilution of the shares occurred on 18th April 2012.

The Appellant testified further that the trade in his shares was concluded on 23rd April 2012, as a result of which, at midday on 24th April 2012, the trade was locked in accordance with the rules of the First Respondent.

In regard to his claim against the Second Respondent, the Appellant contended that, since the trade in his shares took place on 23rd April 2012, settlement of the shares was to take place on 26th April 2012, which was three days thereafter. Consequent upon this, the Second Respondent was, as his broker, due to pay him the consideration for the shares on that date. Further that, since the First

Respondent prevented the settlement aforesaid, the Second Respondent should have made representation to the First Respondent on his behalf. He concluded by contending that the three day period given between the day for close of the trade and settlement was not a window to accommodate change in circumstances such as happened in his case.

The evidence led by the First Respondent revealed that it received a request from Stockbrokers Zambia Limited on 24th April 2012, to suspend trading in the Third Party's shares. Following from this, a tripartite meeting was held between representatives of the First Respondent, Stockbrokers Zambia Limited and the Third Party at which it was resolved that the suspension must be put in place because the Third Party's shareholders had refused to change the record date. As such, the suspension of the

trade in the Third Party's shares was effected to apply retrospectively and all trade that took place on 18th April 2012 and the days that followed were unwound in accordance with rules 4.26 and 4.27 of the First Respondent's rules. It was the First Respondent's contention that it would have been a fundamental mistake to allow trading in the Third Party's shares at the price of K80.00 per share when the price ought to have been adjusted to K2.96. The suspension in trading of the shares, therefore, took effect at 15:00 hours on 25th April 2012 and that the retrospective effect was in accordance with the First Respondent's rules of 2003 and not the 1993 rules relied upon by the Appellant.

The evidence led by the Second Respondent restated: the facts leading up to the suspension of trading in the Third Party's shares; the efforts it's made following the

suspension to conclude the trade; and, confirmed that the notice of suspension was received by the Second Respondent on 24th or 25th April 2012, by which time the trade in the shares had already been locked.

In its evidence the Third Party recounted the events leading up to the suspension of trade in its shares and emphasized its failure to conclude the issue of the bonus shares by the record date due to consultations it was holding on the same. The evidence also revealed that the Third Party paid the sum of K72,817,317.30 to the First Respondent as compensation to the purchasers of its share affected by the suspension of the trade in the Appellant's shares.

At the close of the trial, the Learned High Court Judge considered the evidence and arguments by counsel and

identified three issues for determination as follows: whether the First Respondent acted ultra vires when it cancelled the Appellant's trade in his shares so as to entitle the Appellant to the relief sought; (if the answer to the first issue was in the affirmative, a second issue would arise therefrom of), whether the First Respondent is entitled to indemnity due to the Third Party's delay in complying with the prerequisites for registering a bonus issue; and whether the Second Respondent failed to protect the Appellant's interest so as to entitle the Appellant to any of the reliefs sought. He then went on to make certain findings of fact in line with the undisputed facts of the case, and concluded that the intended purchaser of the Appellant's shares would have suffered substantial loss after the bonus issue because the value of the shares would have plummeted from K78.00 to K2.96 per share. In the Learned Judge's

view, the situation would have been compounded by the fact that the purchaser would not have been entitled to benefit from the bonus issue because he or she would not have been registered as a member of the Third Party at the record date of 18th April 2012. In view of these circumstances, the Learned High Court Judge concluded that settlement of the trade would have been to the detriment of the purchaser.

The Learned High Court Judge went on to hold that his finding had taken into consideration the fact that the Third Party had not issued the bonus shares on the record date and yet the Third Party's shares continued trading normally. Consequently, he agreed with the evidence led by the First Respondent that this had the effect of misleading would be purchasers of the shares that the record date was going to be changed. He held in the converse that if the

intending purchaser knew the record date as contended by the Appellant it was only logical to assume that he or she had a legitimate expectation of benefiting from the impending bonus issue.

The Learned High Court Judge concluded his findings by holding that the First Respondent's decision to cancel the trade appeared to be logical and justified. He, however, raised a side issue of whether the First Respondent did actually have legal authority to cancel the trade. In answer to the said issue, the Learned High Court Judge observed that the Appellant's pleadings acknowledged the fact that the First Respondent had authority to prevent settlement of certain trades on its stock exchange but questioned the exercise of the said authority by the First Respondent. He went on to find that there was nothing wrong in the manner in which the First Respondent acted.

The Learned High Court Judge justified his findings by referring to the **Securities (Conduct of Business) Rules** which he held places an obligation upon the First Respondent to ensure that high standards of integrity and fair dealing are maintained on the stock exchange and has discretion to cancel a trade which contravenes these principles in accordance with rule 4.27. This rule provides as follows:

"The exchange shall not give assistance to a member to annul a bargain, except where there is an allegation of fraud willful misrepresentation, or where there is a mistake which in the judgment of the Exchange's staff would warrant its intervention".

He found further that the power under rule 4.27 is reinforced by rule 2.03(10), which he held empowers the First Respondent to suspend all or part of trading activities on the stock exchange in the event of an emergency

According to the Learned High Court Judge, the power to cancel a trade is not lost by virtue of the fact that the same is locked for settlement prior to suspension of trade in the particular shares in accordance with section 52(3) of the **Securities Act**. He drew a parallel with the London Stock Exchange which he held is vested with similar powers by its rules.

After making the foregoing findings, the Learned High Court Judge held that the outcome of his determination of the first issue rendered consideration of the second and third issues *otiose* and he accordingly dismissed the Appellant's claim with costs. This prompted the Appellant to launch this appeal on twelve grounds as follows:

- 1) The court below erred in law and in fact when it concluded and held at page J42 of the judgment that by virtue of rule 4.27 of the 1st Respondent's trading rules, the 1st Respondent had the authority to cancel the Appellant's trades when in fact Rule 4.27 provides for

- 2) specific conditions when trades may be annulled and the appellant's circumstances did not fall within those specific conditions;
- 3) The court below erred in law and in fact when it held at page J42 of the judgment that the trades could be annulled when no request for annulment assistance alleging fraud, willful misrepresentation or mistake had been made by either member party to the trade as provided for by Rule 4.27 of the 1st Respondent's trading rules and when no justification and authority is provided for in the law to override the provisions of the 1st Respondent's trading rules;
- 4) The court below erred in law and in fact when it concluded and held at page J42 of the judgment that by virtue of Rule 4.27 of the 1st Respondent's trading rules the 1st Respondent had the authority to cancel the Appellant's trades when the trades were locked and, consistent with the provisions of Rule 4.48(3), could not be amended in any way and when no justification and authority is provided for in the law to cancel or annul the trades or override the provisions of the 1st Respondent's trading rules;
- 5) The court below erred in law and in fact when it concluded and held at page J42 that the trades in question could be annulled or cancelled even when the same were guaranteed for settlement as provided for in Rule 4.48(4) and when no justification and authority is provided for in the law to cancel or annul the trades or override the provisions of the 1st Respondent's trading rules.
- 6) The court below erred in law when it held at page J42 of the judgment that section 52(3) of the Securities Act provides for a trade to be cancelled even after settlement in instances of insider trading when in fact the section provides that no dealing shall be void or voidable only by reason of having been procured by

- 7) contravention of section 52(1) i.e. by insider trading which in fact was not the case with the Appellant;
- 8) The court below erred in fact and law when it failed to make a declaration that the Appellant's trade was a legal and valid trade whilst proceeding to justify the nullification of the same;
- 9) The court below erred in fact and in law when it held at page J40 of the judgment that the 1st Respondent's decision to cancel the Appellants trade appeared logical and justifiable on the basis only that the trade would be detrimental to the buyer;
- 10) The court below erred in law and in fact when it concluded and held at page J41 that the 1st Respondent wields authority and discretion to cancel trades that contravene the principles of fair trading and integrity when no such unconditional authority and discretion to cancel or annul trades is provided for in the Securities Act, Securities (Code of Conduct) rules or the 1st Respondent trading rules;
- 11) The court erred in law and in fact when it concluded at page J43 that the 2nd Respondent was not liable to protect the Appellant's interests when the same was inherent in the 2nd Respondent obligations as the Appellant's broker pursuant to the provisions of rule 4.26 of the 1st Respondent's trading rules which required the 2nd Respondent to ensure that all trading rules were adhered to in respect of the Appellant's trades;
- 12) The court erred in law and in fact when it concluded at page J43 that the 2nd Respondent was not liable to protect the Appellant's interests when the same was inherent in the 2nd Respondent obligations as the Appellant's broker pursuant to the provisions of rule 5.04 of the 1st Respondent's trading rules which require the

- 13) 2nd Respondent to ensure that the Appellant's interest were protected at all times during the trading period;
- 14) The court erred in law and in fact when it concluded at page J43 that the 2nd Respondent was not liable to protect the Appellant's interests when the same was inherent in the 2nd Respondent obligations as the Appellant's broker pursuant to the provisions of rule 5.05 of the 1st Respondent's trading rules which required the 2nd Respondent to report any non-compliance of the trading rules in writing to the 1st Respondent which report the 2nd Respondent has manifestly failed to make;
- 15) The court below erred in law and in fact when it awarded costs to the 1st and 2nd Respondents.

Before the hearing of the appeal, the Appellant and Second Respondent filed heads of argument. The First Respondent's counsel sought leave of court to file the First Respondent's head of argument out of time which leave was granted. The Third Party, though cited in the appeal was not represented because the Appellant's displeasure with the Learned High Court Judge's findings did not extend to it.

In arguing the appeal, the parties relied upon the heads of argument which they augmented with *viva voce* arguments.

The Appellant argued grounds 1, 2, 3, 4, 5, 6 and 7 together. The thrust of the arguments by Ms M. Bwalya, counsel for the Appellant, was twofold. Firstly, that the First Respondent should have suspended trading in the Third Party's shares before the record date prior to the issuance of the bonus shares on or about 13th April 2012. This suspension should then have been lifted and trading resumed with an amended register of members and share prices. The Third Party having failed to suspend trading and issuance of the bonus shares aforestated, the trading in the Third Party's shares continued normally at the price of K80.00 per share, consequent upon which, the trade in the Appellant's shares was locked by 23rd April 2012. Once

the trade was locked, the trade could not be altered in any way in accordance with rule 4.48 of the First Respondents' rules. Consequently, the suspension announced on 26th April 2012 was of no effect because by that date the trade was settled and the First Respondent could not unwind, suspend, cancel, amend or otherwise alter the trade. Ms Bwalya argued further that a trade can only be annulled in accordance with rules 4.2 and 4.27 of the First Respondent's rules where there is an allegation of fraud, wilful misrepresentation, or where there is *prima facie* evidence of a mistake which in the judgment of the First Respondent's staff would warrant its intervention.

The second limb of Ms Bwalya's arguments was that the Appellant was in order to trade his shares because the First Respondent did not suspend trading in the Third Party's shares prior to the record date. Further that, the

failure by the First Respondent to suspend trading in good time and having known the effect of such failure, it cannot claim that its actions amounted to fundamental mistake which would have justified annulment of the Appellant's trade. Counsel drew our attention to the case of ***Clarion Limited and others v National Provident Institute***¹ and quoted the following passage:

"Save for the special cases where equity might be prepared to relieve a party from an unconscionable bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain. Thus the jurisdiction of equity did not extend to relieving a party from his contract when the nature of his mistake went not to the contract's subject matter or terms, but only to its commercial consequences and effect. In the instant case the alleged mistake did not relate to the terms of the contract but merely to its potential for commercial exploitation. Such a mistake could not be characterized as a mistake relating to the subject matter of the contract. Rather the thrust of NPI's case was that it had made a bad bargain from which it wished to be released".

She went on to argue that it is clear from the evidence of the Third Party's witness that the suspension of trading

in the Third Party's shares was triggered by a request to the First Respondent by the Third Party to that effect. As such, even assuming that the Third Party's failure to make a timely request to suspend trading were found to be a fundamental mistake, it would amount to equity relieving an entity which was not a party to the contract. She contended that the First Respondent was well aware of the mistake made by the Third Party in making the request to suspend trading in its shares late, hence its compelling the Third Party to compensate the would be purchasers of its shares.

Ms Bwalya then contended that: the First Respondent's action of annulling the trade was an abuse of its powers because it is not provided for in its rules; which caused loss to the Appellant; and, that the said loss was caused by unlawful means. She also defined what

constitutes unlawful means with reference to the cases of ***Allen v Flood and Another***² and ***Quinn v Leathem***³ which we have not reproduced because it has no bearing on the decision we have reached.

According to counsel, the Second Respondent committed the tort of unlawful means because: it wrongfully interfered with the actions of the Third Party in which the Appellant has an economic interest; and, it thereby expressed an intent to cause loss to the Appellant. The First Respondent should, therefore, be held liable for the loss caused to the Appellant.

Ms Bwalya argued further that: the liability of the First Respondent is in no way negated by the fact that it is empowered under section 14, as read with section 2, of the ***Securities Act*** to make rules for the efficient management

of its exchange and securities market; and, the actions by the First Respondent cannot be justified by reference to section 52(3) of the **Securities Act** as the court below did.

In response, counsel for the First Respondent Capt. Chooka, argued that by placing his shares on the stock exchange to be traded, the Appellant sought to take advantage of the situation that arose as a result of the bonus issue. According to Capt. Chooka, the Appellant intended to benefit from the dilution in the value of the Third Party's shares consequent upon the bonus issue and sought to trade his shares at the inflated value of K78.00 per shares. The First Respondent, as regulator of the stock exchange was, therefore, on firm ground when it suspended trade in the Third Party's shares, thereby ensuring that the unsuspecting public was protected from the consequences of the Appellant's actions. For this

reason, Capt. Chooka argued, the court below was on firm ground when it held that the First Respondent had authority to cancel the trade in line with rules 4.27 and 2.03(10) because it contravened the principles of fair trading practices.

In reply, Ms Bwalya argued that the provisions of rule 4.27 only empower the First Respondent to cancel a trade where there is an allegation of fraud, wilful misinterpretation or mistake in relation to the particular trade. That, there were no such allegations in relation to the Appellant's trade, hence the Learned High Court Judge misdirected himself by invoking the said rule. She argued further that the circumstances that presented themselves prior to the cancellation of the trade did not satisfy the provisions of rule 2.03(10) because there was no emergency.

The arguments advanced by counsel for the parties before us and indeed before the court below reveals that they are in agreement that the First Respondent is a regulator of the stock exchange where the Appellant traded his shares. The parties are also in agreement that in order to carry out its functions, the First Respondent has promulgated rules which are applicable to the players on the stock exchange. They are also in agreement that as such regulator the First Respondent enjoys certain powers of monitoring and supervising trades on its stock exchange. This power can be inferred from the wording of section 14 of the **Securities Act** which empowers the First Respondent to make rules. It states as follows:

"Subject to approval of the Commission, a securities exchange may make such rules as it considers necessary or desirable for the proper and efficient regulation, operation, management and control of the exchange and securities market operated by the exchange".

The point of departure or disagreement is to what extent the First Respondent can exercise the said powers of monitoring and supervising the trade and which rules were applicable to the trade in the Appellant's shares.

In determining grounds 1, 2, 3, 4, 5, 6 and 7 of the appeal we will resolve the two points of departure by the parties.

As regards the applicable rules, the Appellant's position is that it is the 1993 rules that were applicable to the Appellant's trade of his shares. He accordingly relied on these rules in advancing his claim in the court below and indeed before us. Submitting before us on the issue, Ms Bwalya, was adamant that it was indeed the 1993 rules that were applicable because the 2003 rules were still in draft form. However, she was unable to show us evidence

led in the court below to that effect. She also conceded that the Appellant has not appealed against the decision of the Learned High Court Judge on the applicable rules.

The First Respondent on the other hand took the view that it is the 2003 version of the rules that are applicable.

A careful reading of grounds 1 to 7 and indeed, the rest of the grounds of appeal, reveals that the Appellant has not challenged the finding by the Learned High Court Judge in respect of the applicable rules. The issue has, as a result, been determined with finality and cannot be the subject of this appeal and we accordingly uphold the finding of the Learned High Court Judge that it is the 2003 version of the rules which was applicable to the trade in the Appellant's shares.

Having dealt with the issue of the applicable rules, we now turn to consider what they provide in terms of the regulatory powers of the First Respondent.

In terms of management of the First Respondent's stock exchange, rule 2.2, stipulates that the "*[g]eneral manager shall have the general supervision of and be responsible for the day to day management of the Exchange and supervision of members as provided in [the] rules*". By the foregoing rule, all the powers of management of the stock exchange are vested in the general manager of the First Respondent.

In regard to the extent of such powers of management, rule 2.24(1) states in part as follows:

"... the General manager, shall have such powers as the Board or any committee may confer upon him including, in particular the following powers:-

- (1) To supervise the trading activities in the Exchange and trading systems, the clearing and settlement of trades executed on the Exchange, and to take all necessary steps to maintain orderly**

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(2) and efficient trading in accordance with these rules, and to suspend trading in any issue of securities or by any member as provided for in these rules or as directed or authorized by the Board, any committee or the commission".

(The underlining is ours for emphasis only).

The relevant portion of the rule is the one we have underlined which gives power to the First Respondent, acting through its general manager, to ensure orderly and efficient trading on the stock exchange and to suspend trading in any issue of securities. We are, therefore, of the firm view that the First Respondent in the exercise of its powers and pursuant to rule 2.24(1) acted within its mandate when it suspended the trade in the Third Party's shares and consequently, annulled trade in the Appellant's shares. This is the position we have taken because, and as we have demonstrated in the latter part of this judgment, there was impropriety in the manner the Appellant traded his shares. Further, the rule is couched in such a manner

that it does not restrict the powers to suspend to a certain period of a trade. As such, we do not agree with the argument advanced by Ms Bwalya that once the trade in the Appellant's shares was locked, the First Respondent could not unlock it by way of suspending trade in the shares. This restriction only applied prior to amendment of the rules pursuant to rule 4.48(3) of the 1993 rules which restricted the First Respondent's power to unlock trade in shares.

The power to suspend trading in shares, as we see it, can be invoked at any stage of a trade. As such, the Learned Trial Judge cannot, be faulted in finding that the First Respondent was on firm ground when it suspended the trade.

The decision we have made in the preceding paragraph is arrived at after considering the arguments by Capt. Chooka in relation to the powers of the First Respondent pursuant to rule 4.27 which we have reproduced in the earlier part of this judgment and rule 2.03(10) which state as follows:

"Without prejudice to rule 2.02 and any other provisions in the articles or these Rules, the following powers shall in addition be vested in the Board, to be exercised in such manner, on such terms and at such times as it shall see fit:

- (10) to suspend all or part of the trading activities on the exchange in the event of an emergency and to take such remedial actions as it thinks fit;"**

Mr. Chooka sought to impute the First Respondent's power to cancel a trade through these rules. The position we have taken is that the First Respondent's actions can be justified under rule 4.27 because there was an element of misrepresentation on the part of the Appellant as we have

explained in the later parts of this judgment. However, we feel that in view of the wide discretion vested in the First Respondent to suspend trade in shares and its other regulatory functions, we would be doing an injustice to the said discretion if we were to curtail it as emanating only from rule 4.27. This is the case with rule 2.02(10) as well. Suffice to say that, the rules only represent, two of the various instances in which the First Respondent can exercise its power to cancel a trade by way of suspending trade in shares of a certain entity.

In the earlier part of this judgment we stated the two competing interests, being, the duty of the First Respondent as regulator of the stock exchange and the Appellant's right as shareholder to dispose of his shares. The exercise of the regulatory functions requires the First Respondent to consider these competing interests and in

doing so it must ensure that there is fair trading on its stock exchange to ensure that the public is protected. The facts surrounding this appeal, as rightly argued by Capt. Chooka, reveal that at the time the Appellant placed his shares on the stock exchange for trade at the price of K78.00 per share, the Third Party was undergoing the process of issuing bonus shares, whose effect was to dilute the value of the Third Party's shares from K80.00 to K2.96 per share. This bonus issue was to take effect on 18th April 2012 which was the record date, but was delayed due to administrative hiccups the Third Party was experiencing. Despite this, the Appellant and other shareholders still insisted on maintaining the record date at 18th April 2012, notwithstanding requests by the Third Party to change it to 9th May 2012 by which date it expected it would have issued the bonus shares. By maintaining the record date at

18th April 2012, the Third Party's shares diluted in value from K80.00 per share to K2.96 per share on that date. The Appellant nonetheless went ahead to trade them at K78.00 per share on a subsequent date prompting the First Respondent to intervene because the shares in effect were not trading at their true value and the public was not aware of this fact because the bonus issue and its effect had not yet been published. Given the foregoing facts, we can understand why the First Respondent suspended trading in view of its duty to protect the unsuspecting public from a trade that was clearly improper. This is what led to the finding by the Learned High Court Judge that the settlement of the trade would have been detrimental to the purchaser's interests. We cannot fault the said finding because the actions by the Appellant clearly violated the

provisions of section 48(1) of the **Securities Act** on improper trading practices which states as follows:

"A person shall not create or cause to be created, or do anything with the intention of creating

- (a) A false or misleading appearance of the volume of trading in any securities on any securities exchange; or**
- (b) A false or misleading appearance of the market for, or the price of, any such securities".**

We are not in doubt that the act by the Appellant of trading his shares at K78.00 per share was clearly intended to mislead the market on the true value of the Third Party's shares. He, in our opinion, did this knowingly and for the sole purpose of financial gain for himself. This is evident from his, and the other shareholders of the Third Party insistence on maintaining the record date of 18th April 2012.

Consequently, grounds 1, 2, 3, 4, 5, 6 and 7 of the appeal must fail and we accordingly dismiss them.

We now turn to consider ground 8 of the appeal which questions the findings by the Learned High Court Judge that the First Respondent has authority and discretion to cancel trades that contravene the principles of fair trading and integrity on the ground that no such authority is provided for in the **Securities Act, Securities (Code of Conduct) Rules** or the First Respondent's rules. The thrust of Ms Bwalya's argument was that there was no unfair trading in the manner the Appellant traded his shares and as such the First Respondent ought not to have annulled the trade especially that it was locked.

We are of the considered view that the findings we have made under grounds 1, 2, 3, 4, 5, 6 and 7 adequately

address this ground. Having found that the First Respondent had authority to suspend trading and that the action by the Appellant contravened section 48 of the **Securities Act**, the ground is doomed to fail and we accordingly dismiss it.

As regards grounds 9, 10 and 11 which question the Learned High court Judge's finding that the Second Respondent was not liable to the Appellant. The gist of the Appellant's arguments were that in accordance with the First Respondent's rules, the Second Respondent was obliged to ensure that the First Respondent's rules were adhered to for purposes of concluding the Appellant's trade, thereby, protecting his interests.

Capt. Chooka's response was that the Second Respondent was obliged to respect the First Respondent's

decision to suspend the trade in the shares in accordance with Rule 4 of the ***Securities (Conduct of Business) Rules*** which states in part as:

"In his conduct of securities business, a licensee shall at all times act according to the principles of best practice and, in particular, shall-

(a) Observe high standard of integrity and fair dealing

(b) Act with due skill, care and diligence ..."

On the other hand Mr. Liweleya, counsel for the Second Respondent argued that the performance of the contract for the sell of the shares was frustrated by the suspension of trade in the Third Party's shares. That the said suspension led to the annulling of the trade and unwinding of the process leading to settlement of the trade.

We are of the firm view that the Second Respondent as agent for the Appellant was obliged to respect the consequences of the regulator's decision to suspend trading

in the Third Party's shares. Further, the position we have taken is that if the Second Respondent had proceeded with the trade despite the suspension, it would have contravened the provisions of Rule 4(a) of the **Securities (Conduct of Business) Rules** as argued by Capt. Chooka. By the foregoing rule, and in view of the suspension of trade in the Third Party's shares, the Second Respondent as licensee on the stock exchange was obliged to immediately discontinue the trade in the Appellant's shares. Any act to the contrary would have amounted to aiding and abating the Appellant in his improper conduct in relation to trade on the stock exchange. This would have been contrary to the Second Respondent's obligation to "... observe high standards of integrity and fair dealing ..." prescribed by the rule.

Grounds 9 and 10, therefore, fail and we dismiss them.

The last ground of appeal for consideration is ground 12 on the award of costs. In arguing this ground Ms Bwalya acknowledged the fact that the award of costs is in the discretion of the court. She then contended that the court below should not have awarded the Respondents and Third Party costs because of the transgressions they committed against the Appellant. Essentially, counsel was arguing that the court below should have found in favour of the Appellant and awarded him costs.

In response Capt. Chooka and Mr. Liweleya took the view that the Learned High Court Judge was on firm ground in condemning the Appellant to costs because his claim was dismissed.

The award of costs is indeed, in the entire discretion of the court and in the exercise of the said discretion, the court must apply the principle that costs follow the event. Put differently, the losing party must bear the costs of the other party. Having found that the Appellant's case was unmeritorious, there was no basis whatsoever for the Learned High Court Judge to award costs to the Appellant. Consequently, this ground must also fail and we accordingly dismiss it.

All twelve grounds of appeal having failed, we uphold the judgment of the court below and dismiss the appeal with costs, both in this court and the court below. The same are to be agreed, failing which, they will be taxed.



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E.M. HAMAUNDU
SUPREME COURT JUDGE



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Dr. M. MALILA, SC
SUPREME COURT JUDGE



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N.K. MUTUNA
SUPREME COURT JUDGE