

IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION

BLANTYRE REGISTRY

Petition No. 1 of 2023

BETWEEN

CHANDRAKANT MAKADIA.....PETITIONER

AND

FIRST CAPITAL HOLDINGS PLC.....1ST RESPONDENT

FIRST MERCHANT BANK PLC.....2ND RESPONDENT

HITESH ANADKAT.....3RD RESPONDENT

LIVINGSTONE EXPORTS LIMITED.....4TH RESPONDENT

Coram:**Manda, J**

Kazembe and Mhango for the Petitioner

Fraser for the Respondents

M. Kachimanga Court Clerk/Interpreter

RULING

This matter was set down for the 28th of June 2023 for the hearing of the Petitioner's application which was filed under the Companies Act (Companies (Shareholder Actions) Rules 2017), the Securities Act 2010 and the Malawi Stock Exchange Listing Requirements.

In summary it is the contention of the Petitioner that between March 2016 and October 2016, the Respondents traded in shares while they had sensitive information or knowledge concerning shares

with the knowledge that such information was not publicly available and that if such was publicly available, the same would have materially affected the price of shares.

It was the Petitioner's contention that this is contrary to section 49 of the Securities Act and paragraph 7.69.1 of the Malawi Stock Exchange Listing Rules. The Petitioner then went on to state that having committed offences under section 49 of the Securities Act, the Respondents are liable under sections 74 and 74 of the Financial Services Act. On this basis, the Petitioner argued that he is entitled to be compensated by the Respondents under section 343(2)(b) of the Companies Act.

Before the petition could be heard, there was a preliminary objection that was raised by the Respondents. The Respondents' objection was based on section 4 of the Limitation Act under which they argued that this petition was statute barred in that 6 years had expired from the time the alleged acts were committed to the time this petition was filed. It was the respondents' contention that the Petition was only filed on 28th of February, 2023 and that the acts complained of were between March and November 2016. According to the Respondents, 6 years elapsed in November 2022. Further, it was also the Respondents' argument that the acts complained of cannot be separated when defining them as causes of action but that they must be considered to be one continuous transaction which started in March, 2016.

In response, the Petitioner pointed out that he did initially file the Petition in September 2022 but that the documents were misplaced. The petitioner did of course exhibit a copy of the Petition which indeed showed that it had been filed on 21st September 2016. For some reason however the Petition was never issued. However, that cannot be the fault of the Petitioner as the court is obligated to issue process once it has been filed unless the process is defective. Suffice it to say that it was the contention that there were trades that were done after they had filed the Petition and that those trades were not caught by the Limitation Act and that it is in relation to those acts that the Petitioner would be seeking compensation.

From the facts before me and in as far as there are assertions that there were trades that were done after the Petition was filed, then those acts were not caught up by the section 4 Limitation Act. On this note I must disagree with Counsel for the Respondents that the trades in shares done over a period of time should be considered to be a continuous transaction. Each trade is a separate transaction regardless of the fact that the shares that are being purchased are of the same company.

Further, the Petition alleges that the Respondents breached section 49 of the Securities Act. That section provides as follows:

(1) *No person to whom this section applies shall, directly or indirectly, purchase or sell, or counsel or procure another person to purchase or sell, securities of an issuer concerning which he has knowledge that—*

(a) is not publicly available; and

(b) would, if it were publicly available, materially affect the price of the security.

(2) *Any person who contravenes subsection (1) commits an offence.*

(3) *This section applies to—*

(a) any director, officer or employee of a relevant company;

(b) any person associated in a professional capacity with a relevant company; and

(c) any person who knowingly obtains such information from any of the persons mentioned in paragraph (a) or (b).

(4) *In subsection (3), “relevant company” means—*

(a) the issuer of the securities;

(b) a company that controls the issuer of the securities; or

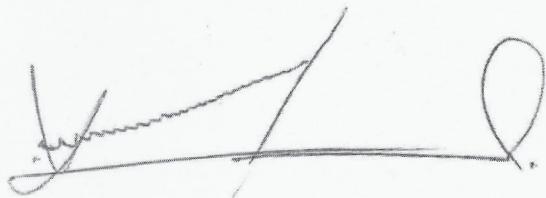
(c) a company under the common control with the issuer of the securities

A reading of the above section clearly shows that insider trading is an offence and that any person who is guilty of the same commits an offence. I do not think that the Limitation Act would apply to criminal activities. That would be against public policy and settled principles of law that one should be allowed to benefit from their illegality and also the further principle that the law should not be used as an instrument of fraud. This is especially where it is also being asserted that there has been breach of fiduciary duty.

From the foregoing, and in so far as there is an assertion that the Respondents might have committed criminal offences of insider trading, the Limitation Act would not apply. In view of this

I would overrule the preliminary objection and let the Petitioner proceed to present his Petition.
The costs will be in the cause

Made in Chambers this.....13.....day of.....July2023
.....2023



K.T. MANDA

JUDGE

