IN THE COURT OF APPEAL **CAZ/08/249/2019**

HOLDEN AT NDOLA **CAZ/08/181/2019**

(Civil Jurisdiction) **APPEAL NO. 181/2019**

BETWEEN:

VEDANTA RESOURCES HOLDINGS LIMITED	**APPELLANT**
AND	
ZCCM INVESTMENT HOLDINGS PLC	**1ST RESPONDENT**
KONKOLA COPPER MINES PLC	**2ND RESPONDENT**

CORAM: CHISANGA JP, SICHINGA and NGULUBE, JJA

ON: 10th March, 2020 and

For the Appellant:	*Mr. M.M Mundashi SC, Mr. D.M Chakoleka, Messrs Mulenga Mundashi Legal Practitioners, Mr. S Chisenga, Corpus Legal Practitioners,*
For the 1st Respondent:	*Mr. A.J Shonga Jnr SC, Mr. N. Ng'andu Messrs Shamwana and Company & Mr. M. Musukwa of Musukwa & Company*
For the 2nd Respondent:	*Mr. B.C Mutale, SC, M. Sitali Messrs Ellis and Company, Mr. C. Bwalya of D.H Kemp and Company, Mr. J. Zimba, of Makebi Zulu Advocates*

JUDGMENT

CHISANGA JP, delivered the Judgment of the Court.

Cases referred to:

1. ***Etri Farms Ltd vs N.M.B UK Ltd (1987) 3 ALL ER 765***
2. ***Avalon Motors Ltd (In Receivership) vs Bernard Leigh Gadsden and Motor City Limited (1998) ZR 41***
3. ***Backloads (Zambia) Limited vs Freight and Liners (Zambia) Limited (2008/HP/0588***
4. ***In re Union Accident Insurance Co. Ltd (1972) 1 WLR 640***

5. ***Closegate Hotel Development (Durhan) Ltd and Another vs Mclean and Others (2013) EWHC 3237 Ch.***
6. ***Turnkey Properties vs Lusaka West Development Company Limited, B.S.K Cluto (Sued as Receiver) SCZ Judgment No. 3 of 1984***
7. ***Shamwana vs Mwanawasa (1993-94) ZR 149***
8. ***Beza Consulting Inc Limited and Vari Zamia Ltd and another, Appeal No 171 of 2018, CA Judgment dated 30th August 2019***
9. ***Hadkinson vs Hadkinson (1952) ALL ER 5678***
10. ***Hangandu and Co. vs Mulubisha (2005) 2 ZR 829***
11. ***Salford Estates (No. 2) Limited vs Altonert (2014) EWCA1575***
12. ***Ody's Oil Company vs The Attorney General and Papoutis (2012) 1 ZR163***
13. ***Larsen Oil and Gas Plc Limited vs Pepropod Limited (2011) SGCA 21***
14. ***Fulham Club (1987) Limited vs Richards and Another (2011) EWCA Civ 855***
15. ***In re* Pantemaenong Timber Co. Ltd (2004) 1 AC 158.**
16. ***Townap Textiles Zambia Limited and Another vs Tata Zambia Limited (SCZ) Judgment No.17nof 1988***
17. ***Konkola Copper Mines Plc vs NFC Africa Mining Plc SCZ Appeal No.118 of 2016***
18. ***Mulenga and Others vs Investment Merchant Bank limited (1999) ZR 101***
19. ***Zambia Revenue Authority vs Post Newspaper Ltd SCZ Judgment No. 16 of 2016***
20. ***Royal & Son Alliance Insurance Plc vs T & N limited (In administration (2002) EWCA GV 1964***
21. ***Hammond Suddard Solutions vs Agriculture International Holdings Ltd (2001) EWCA Civ 2065***
22. ***Bowa (suing as Administrator of the estate of the late Ruth Bowa vs Mubiana and Zesco Ltd SCZ Appeal No. 121 of 2011***
23. ***Chibwe vs Chibwe SCZ Judgment No. 38 of 2000***
24. ***Audrey Nyambe & Total Zambia Limited SCZ Judgment No. 1 of 2015***
25. ***Tomolugen Holdings Ltd and Another vs Silica Investors Ltd and Other Appeals (2015) SGCA 57***
26. ***Four Pillers Enterprises Co Ltd vs Beiersdorf Aktiengesellschaft (1999) SLR (R) 382.***
27. ***Re Bradford Navigation Company (1870) LR 5 Ch App 60***
28. ***Re SBA Properties Ltd (1967) 1 WLR799 at 802***
29. ***Fred M'membe & Post Newespapers vs Moozi & Others***
30. ***Petropod Limited (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) [2011] SGCA 21***
31. ***O'neals and another vs Philips and Others (1999) 1 WLR 1092 at 1098-1099***
32. ***Re-Bleriot Manufacturing aircraft Company (1916) 32 Times of L R 253, 255***
33. ***Re Brinsmead (Thomas Edward) and son (1897) I Ch. 406***

34. ***Lock vs John Blackwood Limited (1924) A 783***
35. ***Yenidje Tobacco Co. Limited (1916) 2 Ch. 426***
36. ***Ebrahim vs Estbourne Gallerve Ltd (1973) AC 360***
37. ***Baird vs Lees 1924 S.C. 83, 92***
38. ***Davis & Company Ltd vs Bruiswicke (Australia) Ltd Bruiswicke-Balke-Collender Co. And Bruinswick Radio Corporation 1936 1 All ER P299***
39. ***Sonny Paul Mulenga and Another vs Chainama Hotels Limited and Others (SCZ Judgment No. 15 of 1999).***

Other Works referred to:

1. **Section 10(1) of The Zambian Arbitration Act.**
2. **Halsbury's Law of England 4th Edition Vol. 37**
3. **Corporate Insolvency Act No. 9 of 2017**
4. **Arbitration Act 1975 Chapter 3 United Kingdom**

INTRODUCTION

There are four appeals before the Court.

1. The first is by Vedanta Resources Holdings Plc (Vedanta). It questions the refusal of Bobo J, to stay winding up proceedings and refer the parties to arbitration, pursuant to a Shareholder Agreement executed by the parties. The second, a cross appeal by ZCCM Investment Holdings Plc (ZCCM IH), is against Bobo J's finding that there was a dispute contemplated by the SHA between the parties. The Third appeal is against the Order that stayed the winding up proceedings pending the hearing and determination of the appeal. It was brought by ZCCM IH. The fourth is a cross appeal, on the leaned judge's view that the proposed appeal had no prospects of success. This Judgment deals with all four appeals.

BACKGROUND

2. Vedanta Resources Holdings Limited (Vedanta) owns the majority of the shares in Konkola Copper Mines (KCM). ZCCM Investments Holdings Limited (ZCCM IH), is the minority Shareholder. A Shareholder's Agreement was executed at the acquisition of the majority stake in Konkola Copper Mines (KCM) by Vedanta. The parties to this agreement included the Government of the Republic of Zambia through the Minister of Finance, Zambia Copper Investments Limited (ZCI Bermuda) ZCI Holdings SA, (ZCI Holdings) ZCCM Investments Plc, (ZCCM IH), Vedanta Resources Holdings Limited ("VRHL"). The agreement outlined the obligations of the Company (KCM), the Board of Directors and Vedanta. It also conferred power on Vedanta to appoint the majority of the Directors.

PETITION

3. ZCCM IH became disillutioned with the manner in which KCM was being managed and administered which it felt was detrimental to its interests. This impelled it to petition that KCM be wound up on the just and equitable ground.
4. More particularly, the petition asserts that KCM has operated at USD 1.2623 billion, loss for the past 7 years. It has reported negative cash flow balances in the last 2 years, and only declared dividends for 4 years, viz 2007, 2008, 2012 and 2013 in the total sum of USD 67.105 million. KCM has failed to pay ZCCM IH a portion of the dividend declared in 2013, in the sum of USD 10,305,000. Moreover,

the income generated on a yearly basis is unable to meet KCM's operating costs.

5. KCM has failed to develop the mining areas in Chingola and Chililabombwe, contrary to the mining plan formulated pursuant to Section 35(1)(6) of the Mines and Minerals Development Act 2011.In addition, it has failed to carry out mining operations with due diligence. As a result, it continues to operate below capacity. The failure to adhere to the operational requirements in the Mines and Minerals Development Act has prompted the issuance of a default notice against KCM.
6. KCM has failed to pay its debts when they fall due. It has failed to pay Copperbelt Energy Corporation PLC (CEC) for the electricity the latter supplies to the mine. As a result, CEC issued a restriction notice on 14th May 2019, on account of outstanding arrears in the sum of USD 24,064,722.
7. As well, KCM has failed to pay Ndola Lime Plc, a sum of USD 468, 036.25 for the quicklime it supplied, as well as the sum of ZMW 199,941 for limestone supplied for the period March 2019 to May 2019. Moreover, KCM has failed to pay some of its suppliers and contractors.
8. KCM has been operating in a manner that is not environmentally friendly or sustainable. It has polluted or continues to pollute water sources in and around its mining licence areas.
9. These grievances have led to a loss of confidence in Vedanta's ability to manage and administer KCM's affairs in good faith and in a

manner that ensures ZCCM IH's return on its investment and dividends.

10. Thus, according to ZCCM IH, *"it is justifiable that KCM be wound up for failing to pay its debts as and when they fall due, and that for the foregoing reasons, it is just and equitable that KCM be wound up."*

A number of creditors filed in notices of intention to be heard at the hearing of the petition pursuant to Rule 10 of the Companies (Winding-up) Rules 2004. These rules were promulgated pursuant to the Companies Act, when the Corporate Insolvency Regime was in that Act. The Corporate Insolvency Act No. 9 of 2017 now provides for winding up of companies.

ANSWER TO THE PETITION

11. KCM applied, exparte, for leave to file its Answer and Affidavit in reply out of time. The Court allowed it to do so, and accordingly, one Maxwell Mainsa, the legal Counsel and secretary of KCM, swore an Affidavit in Opposition to the petition. It was filed into Court on 4th July, 2019. He deposed as follows:

12. KCM had not paid the Shareholders the dividends declared in the 2013 financial year, on account of cash flow and liquidity constraints, as well as the conditions that had to be met.

13. The Company had operated at a loss of USD 1, 2623 million in the last seven years. For 2018, this was because of the drop in the planned production of 100,610 CU MT mainly due to lower primary development against (sic) planned as per KCM Business Plans for the financial year by 701 meters. Secondly, there was loss in secondary

development of 2,231 meters due to no capital injection in development. This accounted for the drop in revenue for 2017, 2016, 2015, 2014 and 2013, with varying drops in production, and loss in secondary development. For 2012, an additional factor was lower sales realization than planned.

14. The negative cash flow balances for 2017 were brought about by payments of interest and loan principle to Standard Bank. Reduced production also accounted for reduced cash flow. The increase in inventory and receivables also led to reduced cash flows.

15. The apparent failure to meet operating costs for the years 2013 to part of 2019 was due to failure to achieve targeted primary and secondary developments as per KCM business plan resulting in lower actual revenue than planned.

16. The Company had unpaid debts, and this was due to the technically unsound business operations model adopted by Vedanta Resources Limited, the management employed by Vedanta Resources Holdings Limited to provide management services at Konkola Copper Mines PLC pursuant to the management Agreement which are not generating sufficient funds to meet all payment obligations as they fall due.

17. The failure to comply with the Mining Plans was due to lack of capital injection in primary and secondary development, lack of equipment required for mining, failure to allocate finances to necessary aspects of the plans and purchase of spares for machinery, non payment of contractual liabilities to suppliers and contractors thereby

compromising implementation of mine plans, and abandonment of mine plans due to constrained resources.

18. There had been cases of pollution of the aquatic environment and KCM had been held liable.

VEDANTA'S OPPOSITION TO THE PETITION

19. Vedanta also filed an affidavit, which was sworn by one Srinivasen Venkatakrishnan, a Director of Vedanta Resources Limited, the parent Company and Vedanta the contributor. The opposition was that the allegations in the petition were a smoke screen for the attempted expropriation of KCM by the Government of the Republic of Zambia, going by the sentiments expressed by Government officials and Ministers on the matter. He charged that the petition has nothing to do with the interests of KCM or its creditors, shareholders or employees. Rather it is an abuse of the winding up legislation.

20. The matters relied on in support of the petition concern the conduct of Vedanta in the management of KCM. They are in the nature of a shareholder dispute which must be determined by the dispute resolution mechanism agreed upon in the SHA. The agreement provides for amicable dispute resolution negotiations for 30 business days followed by arbitration in accordance with the UNCITRAL Arbitration Rules. ZCCM IH is required to follow the contractually agreed dispute resolution process in the SHA.

21. The response to the allegation that KCM was being managed and administered in a manner that was detrimental to the interests of ZCCM IH was that there was no requirement that KCM be managed

solely in the interest of ZCCM IH. The Directors of KCM are obligated to act in the best interests of KCM, and not one shareholder.

22. In addition to this, the executive management team in charge of KCM was highly competent and experienced. Even if there was an infringement of ZCCM IH's rights, which was denied, that was not a basis on which ZCCM IH could petition for winding up.

23. During the period from 2004 to 2018, KCM has declared dividends totaling USD 122.94 million, out of which USD 72.94 million have been paid to the Shareholders, including ZCCM IH. In years where profits are unavailable, it would be unlawful to declare dividends which, in any event, the Directors are not obligated to declare, doing so only in their discretion.

24. Initially, an interim dividend had been declared for the first half of the year 2013. Despite the loss made in the second half, the Directors decided to convert the interim dividend into a final dividend, with a condition that it would be paid upon free cash flow being available. ZCCM IH in fact served a Notice of Arbitration with regard to the unpaid dividends.

25. In answer to the allegation that KCM has been operating at a loss, it was explained that once depreciation and other non-cash adjustments are taken into account, KCM's aggregate earnings before interest, taxes, depreciation and amortization (EBITDA) for the past seven years has been a positive USD 386.6 once exchange losses on value added tax (VAT) receivables and the one time

reversal of power tariffs are removed, KCM's aggregate EBIT DA for the past seven years was US $488.1 million.

26. For the financial year ended March 31st 2018, net cash generated from operating activities was US $ 120.7 million. For 2019, a negative cash flow was recorded. However, the deficit for that year was supported by Vedanta Resources (VRL) and its subsidiaries and therefore the negative cash flow did not reflect an inability on KCM's part to pay its debts.

27. In response to the assertion that KCM has failed to develop the mines or carry out the mining operations appropriately, it was stated that KCM has spent over US$ 3 billion on capital expenditure since 2004, with the assistance of funding from Companies within VRL's group.

28. This included US$ 925 million on the Konkola Deep Mining Project and US$ 467 million on the smelter. KCM was also, at the time the petition was presented, in the process of discussing a turnaround plan involving further capital expenditure from 2020 to 2024.

29. The strategic priorities under the plan included creation of a highly productive underground mine at Konkola with an additional horizontal development, involving aggregate capital expenditure of US$ 750-760 million using new mining methods.

30. The stabilization and completion of the elevated temperature leach project, creation of a modernized refinery at Nchanga using permanent cathode technology at the tank house, to increase its capacity by approximately 30 tonnes was one of the priorities.

31. KCM has engaged the Ministry of Mines and Mineral Development concerning mining operations generally. A detailed technical report was submitted to the Ministry in June 2018. KCM has taken responsible steps to address the concerns of the Ministry.

32. Responding to the claim that KCM was insolvent, it was explained that Vedanta Resources Holdings and its subsidiaries were providing financial support to KCM and no creditor of KCM had petitioned for winding up of the Company for failure to settle debts owed to it. Prior to presentation of the petition, KCM met its day to day working capital requirements through operating revenues, overdraft facilities, other bank borrowings and related party loans. Vedanta Resources Holdings (VRL) had always provided KCM with the financial support it needed to carry out its operations and there was no reason for the Board of KCM to believe that VRL was not going to continue to do so for the foreseeable future. As at 31st March, 2019, KCM was owed approximately US$ 164 million by the Zambia Revenue Authority (ZRA) in respect of VAT rebates. This has affected payments to its creditors.

33. Regarding the CEC debt, KCM, became current with all payments in January, 2019. As for Ndola Lime, KCM would have liquidated its indebtedness had it not been for the liquidation proceedings. Moreover, the letter of financial support issued by Vedanta Resources Holdings Limited will enable KCM to pay existing current liabilities if the petition is dismissed.

APPLICATION TO STAY PROCEEDINGS AND REFER THE MATTER TO ARBITRATION

34. Vedanta Resources Holdings Limited had on 21st June 2019, filed a Notice of Intention to appear at the hearing of the petition pursuant to Rule 10 of the Companies (Winding – up) Rules Statutory Instrument No.86 of 2004 and Section 60(3) of the Corporate Insolvency Act No. 9 of 2017 of the Laws of Zambia. And on 28th June, 2019, it filed Summons for an Order to stay proceedings and refer parties to arbitration. The premise of the proposed referral was that the issues raised by ZCCM IH amounted to a dispute between the shareholders in terms of the SHA. That ZCCM IH had, by filing the Winding up petition contravened the dispute resolution mechanism agreed to in the SHA. The contributor had in reaction issued a Notice of Dispute relating to ZCCM IH's breach and continuing breach of the SHA in commencing and presenting the winding up petition.

35. At the hearing of the application, two preliminary issues were raised by Vedanta's advocates.

36. These were whether the petitioner could rely on the affidavit of Maxwell Mainsa on the application to stay proceedings and refer the matter to arbitration, when an application challenging the exparte Order that had allowed the filing of the affidavit in opposition to the petition was being challenged.

37. And secondly, whether the affidavit in question could be relied upon when an application to determine whether the 2nd Respondents could

represent KCM generally was pending determination of the issue filed into Court by Messrs Nchito and Nchito.

38. Bobo J, in dealing with the two issues stated that as the exparte Order pursuant to which the Mainsa affidavit was filed still subsisted on the record at the hearing, she had difficulty appreciating the argument that it should not be relied upon on the application to stay proceedings and refer the parties to arbitration. It was her considered view that nothing stopped a party to the proceedings, or one who had duly filed a Notice of Intention to be heard on the petition, from relying on a document filed pursuant to the exparte Order.

39. On the question whether the matter should be stayed and referred to arbitration, Bobo J, on examining Clause 26. 1 of the SHA, and the definition of a 'dispute' in that agreement, concluded that the definition of dispute was very broad, capturing any issue in contention between the parties relating to the interpretation or performance of the SHA. She also formed the view that there was an underlying dispute between the petitioner, the Respondent and the contributor, as parties to the SHA, and that Section 10 of the arbitration Act was applicable. She however opined that, that Section enjoined her to refuse to stay proceedings on finding that the Arbitration Agreement is null and void, inoperative or incapable of being performed.

40. The learned Judge stated that she was alive to the fact that liquidation proceedings are governed by statute, and that the Court has exclusive jurisdiction to oversee this process, the ultimate of which is founded in public policy considerations such as the protection of interests of third

parties, who include creditors of a Company which sought to be wound up.

41. She noted the Notices of Intention that had been filed by creditors wishing to be heard on the winding up petition, and expressed the view that she was duty bound to consider the third party interests in deciding the application before her. Referring to Fulham Football Club (1987), the learned judge resolved that where third party rights are involved in liquidation proceedings, the private agreement between the shareholders and a company to submit their dispute to arbitration is displaced and rendered inoperative. The competing interests of third parties can only be taken care of through the court process.

42. Drawing guidance from the *Ody's* case, Bobo J, opined that an arbitration clause is wholly inoperative against creditors and other third parties whose claims are subject of winding up proceedings. She thus found clause 26.1 of the SHA inoperative and incapable of performance.

43. In addition to this, the learned Judge opined that the contributor was procedurally ill placed to request for a stay and reference to arbitration, when the parties to the proceedings were not averse to the winding up. To accede to that request would be contrary to the express wishes of the parties themselves. In arriving at this decision, she took into account the separate legal personality of KCM from its shareholders. She also referred *to* ***Etri Farms Limited vs NMS (UK) Limited***[1] which interrogated Section 1(1) of the Arbitration Act 1975.

44. The application having fallen on hard ground, Vedanta launched this appeal on the following grounds:

1. **The learned Judge erred in law and fact by holding that for the purpose of the hearing of the application to stay proceedings to refer the matter to arbitration (the "Stay Application") under Section 10 of the Arbitration Act No. 19 of 2000 (the "Arbitration Act") that:**

   (a) **The Respondent could rely on the contested affidavit of Maxwell Mainsa ("Mainsa Affidavit") that was filed pursuant to an ex parte order of 4th July, 2019 ("Exparte Order")should be subjected to an inter partes hearing and**

   (b) **The Mainsa Affidavit could be relied on during the Stay Application pending the determination of the Appellant's application challenging the Affidavit and without allowing the Appellant to be heard on the challenge of the Ex parte Order that allowed the filing of the affidavit.**

2. **The learned Judge erred in law and fact when, after finding that there was in fact an arbitrable dispute between the Appellant and the Respondent which is the subject of an Arbitration Agreement:**

   (a) **She did not refer the matter to arbitration which she is mandated to do in terms of Section 10(1) of the Arbitration Act.**

   (b) **She erred in finding that there were an Arbitration Agreement was inoperable on account of the fact that there were alleged creditors who had filed notices of intention to be heard subsequent to the filing of the Stay Application**

and who were not parties to the Arbitration Agreement; and she wrongly interpreted Section 6(2) of the Arbitration Act when she concluded that though there was an arbitrable dispute, the dispute was not capable of being referred to Arbitration.

(c) She erred in finding that were third parties are involved in liquidation proceedings, and therefore, the private agreement between shareholders and a company to submit their dispute to arbitration is displaced and rendered inoperative.

(d) The Court erred in law in finding that if the winding up proceedings were stayed; the third-party creditors would be left without any remedy at all; and

(e) The learned Judge erred when she did not interrogate and undertake a determination of whether the third party's claims as allegedly set out in the notices of intention to be heard were so relevant or connected to the determination of the dispute between the Appellant and the Respondents so as to make the Arbitration Agreement inoperable as per the proviso to Section 10 (1) of the Arbitration Act.

3. The learned Judge erred in law and in fact when she concluded that as the 2nd Respondent was a separate entity from the Appellant, only the 2nd Respondent could defend itself in the winding up proceedings without due regard to the following:

(a) the position of the law that Companies make decisions through their Board of Directors and that on account of the fact that the ex parte order procured by the 1st Respondent appointing a provisional liquidator (the "Provisional Liquidator") for the 2ndRespondent, the Board of Directors of the 2nd Respondent had been prevented by the Provisional Liquidator from exercising those residual powers vested in the Board of Directors for purposes of defending the Company in the winding proceedings.

(b) the decision in regard to defending the 2nd Respondent were being made by the Provisional Liquidator appointed by the 1stRespondent; and

(c) the majority of the Directors of the 2ndRespondent, through its Chairman had made an application for determination that the Board of Directors of the Respondent had the residual powers to defend the company in winding up proceedings and at the time of hearing of the Stay Application.

4. The learned trial Judge erred in law and fact:

(a) By holding that the 2nd Respondent was a party to the proceedings and thereby able to defend itself, which holding as a consequence had the effect of predetermining the application brought by the Directors of the 2nd Respondent; through their appointed counsel, in regard to their application that the Directors had residual powers to represent the 2nd Respondent in the winding up proceedings.

(b) By determining that the 2nd Respondent, which was being controlled by the Provisional Liquidator, was a party to the winding up proceedings and by this determination, the learned trial Judge denied the Directors not affording the Directors of the 2nd Respondent an opportunity to be heard on the application that had been filed by counsel for the Directors of the 2nd Respondent.

5. **The learned trial Judge erred in law and fact when she held that the 2nd Respondent had mounted no objection to the winding up proceedings and had substantially admitted the allegations in the petition when the Directors of the 2nd Respondent have not had the opportunity to raise their objection to the petition.**
6. **The learned Judge erred in law and fact when she held that the Appellants as contributor could not make the application to stay and refer the parties to arbitration as it was not a party to the proceedings.**

1. APPELLANT'S (VEDANTA) ARGUMENTS

45. At the hearing of the appeal by Vedanta against Bobo J's refusal to stay the petition ad refer the matter to arbitration, Mr. Mundashi SC informed the court that reliance would be placed on the heads of argument filed on 16th July 2020. He drew particular attention to page 797 in relation to fraud.

46. On the first ground, it was grumbled that the 'Mainsa' affidavit remained on the record only because the Appellant's application to set aside the Exparte Order had not yet been heard by the learned Judge who should have subjected the Exparte Order to an inter partes hearing before it could be relied upon. The Judge's conclusion, based on the contents of the affidavit, was that the parties to the petition were not averse to the proposed winding up.

47. In finding the arbitration agreement inoperative, the learned Judge ignored the fact that the petition was filed by a member on the basis of shareholder disputes, and not by a creditor, and that the parties had contractually agreed to resolve their disputes by arbitration.

48. Whilst the creditors are entitled to file notices to be heard in the winding up proceedings, they have to take the proceedings as they find them. The right to be heard cannot alter the proceedings, cure a defect or overreach the legitimate rights and interests of the parties to the proceedings. Allowing this would render arbitration agreements meaningless, as they would then be easily sidestepped.

49. The creditors elected to avail credit to an entity whose shareholders were bound by a shareholder's agreement. Moreover, the Court has jurisdiction to protect creditors in various ways. Therefore protecting the creditors by rendering the arbitration agreement inoperable was misdirection.

50. This case is distinguishable from the *Ody's case* because in that case, reference to arbitration was refused because the agreement was tainted with illegality. The fact that the third party was not a party to the

arbitration agreement was a secondary consideration. In addition to this, the standing of the third party was given cursory treatment, no authorities were cited, nor were reasons given. The decision is inapplicable to the instant case as there is no illegality or any other basis on which the arbitration agreement can be rendered inoperative or incapable of performance.

51. Furthermore, the rights and claims of the creditors would not come within the arbitration or fall to be decided by the arbitrator if the winding up proceedings were to be stayed in favour of arbitration. The creditors of KCM would not be drawn into an arbitration they had not agreed to.

52. The Exparte Order appointing the Provisional Liquidator though widely drawn does not prevent the Board of Directors from exercising its residual power to conduct the defence of the company in winding up proceedings. Even were that the case, the Board of Directors and shareholders have a responsibility to defend the action before the Court: ***Avalon Motors Ltd (In Receivership) vs Bernard Leigh Gadsden and Motor City Limited***[2], and paragraph 1489 of **Halsbury's Laws of England 4th Edition volume 7(2)**, where authors make this statement:

> ***"The winding up order also has the effect of discharging all the company's employees, and terminating agencies, and discharging its Directors. It puts an end to the Director's powers of management, thus, they cannot make calls. They may however, appeal in the company's name from the winding up Order, and they do not cease to be officers of the company for purposes of being ordered to answer, interrogations".***

53. Reference was also made to the High Court decision in ***Backloads (Zambia) Limited vs Freight and Loners (Zambia) Limited***[3], as well as in ***Re Union Accident Insurance Co.***[4], and ***Closegate Hotel Development (Durhan) Ltd and Another vs. Mclean and Others***[5].

54. In the premises, the learned trial Judge erred in holding that only KCM could defend the winding up proceedings, ignoring the fact that KCM's defence was advanced by the Provisional Liquidator appointed by the Petitioner/1st Respondent and not the Directors of the Company. This, when an application for determination of the residual powers of the Board of Directors to defend KCM in the winding up proceedings, was pending.

55. The holding that KCM was able to defend itself predetermined the application brought by the Directors of KCM through their appointed Counsel. Moreover, the holding that the Appellant was not a party to the proceedings rendered the said application, which was pending before the Court, nugatory. The Directors of KCM, were denied a hearing: ***Turnkey Properties vs Lusaka West Development Company Limited, and Others)*** and **ZSIC and Shamwana vs Mwanawasa**[7].

56. The alleged admission of insolvency was made in an affidavit sworn by an employee of KCM, Mr. Mainsa, who it would appear, was under the control and direction of the Provisional Liquidator appointed by the Petitioner/1stRespondent. To discount the existence of a dispute capable of reference to arbitration was erroneous as a result.

57. Section 60(3) of the Corporate Insolvency Act allowed the Appellant to make the stay application. It was the only party that could put up an independent objection to the winding up proceedings and seek to enforce the Arbitration Agreement. The learned Judge should not have entertained the notion that KCM is not averse to the winding up proceedings: ***Re Union Accident Insurance Co. Ltd[4], Close gate Hotel vs Mclean and Others[5]***

58. Moreover, the finding is inconsistent with the true interpretation of the Arbitration Act and the definition of 'party' in that Act. The definition includes a party to an arbitration agreement, which in this case was the SHA. It was therefore a misdirection for the court below, after acknowledging the existence of a dispute between the Appellant and Respondent, to hold that the Appellant was not entitled to make a stay application.

59. Mr. Chakoleka also addressed the court. Drawing our attention to Beza Consulting Inc Limited and Vari Zamia Ltd and another, Appeal No 171 of 2018, CA Judgment dated 30th August 2019, as well as The Post Newspapers Ltd in Liquidation and Abel Mbozi & Five Others, Appeal No. 175 of 2019 in which Judgment was dated 10th July 2020, Mr. Chakoleka on *locus standi.* He contended that the two decisions are distinguishable in a material particular from the facts of the case. He argued that none of those decisions dealt with section 60(3) of the Corporate Insolvency Act which empowers a party who has filed a notice of intention to appear to make an application at any

time in the proceedings. Mr. Chisenga sought to distinguish the Ody's case from the present one. He also argued that the creditors had alternative remedies, as they could sue for debts I a civil action or alternatively, they could file a creditor's winding up.

1st RESPONDENT'S (ZCCM IH) ARGUMENTS

60. Mr. Shonga SC, on behalf of ZCCM informed the court that reliance would be placed on the head of argument filed on 24th July 2020. With reference to the Mainsa affidavit, learned state counsel argued that if that affidavit were removed, the petition would be undefended, and the judge would have come to the very conclusion she arrived at. Mr. Shonga SC argued that the cases referred to by Mr. Chakoleka were applicable, and against the appeal. He urged the court to dismiss the appeal.

61. The court allowed the Mainsa affidavit to be relied upon because it formed part of the record, and had not been set aside. There was no appeal against that portion of the Ruling in issue. The Appellant raised preliminary issues on the affidavit, when those same arguments were to be raised on the pending application relating to the affidavit. That is why the Court did not delve into the Appellant's arguments on the alleged impropriety of the 'Mainsa' affidavit. The Court of Appeal, it was argued, should desist from delving into matters that await determination by the court below.

62. An application for leave to file an affidavit verifying petition out of time does not contemplate an interim Order. The matter is concluded, subject only to appeal or review. In any event, the Practice Direction, No. 1 of 1993, gives an opportunity when the leave is granted to the opposing

party to issue inter parte summons for the application. Failure to hear the application inter partes does not lead to nullification or invalidation of the exparte Order.

63. Furthermore, as the Practice Direction refers to the 'other side' this envisages a party to the application. The Appellant would have no *locus standi* to make the application as it is not the other side with respect to the dispute between the 1st and 2nd Respondents in this appeal. ***Hadkinson vs Hadkinson[11].***

64. The Court was right in finding that the presence of third parties rendered the arbitration agreement inoperable.

65. The Court's conclusion that KCM was a separate legal entity from Vedanta and could defend itself was properly made. The context was that the Appellant, which was not a party to the winding up proceedings, had not applied to stay proceedings and refer the 1st Respondent and 2nd Respondent to arbitration. The learned Judge was averse to the Vedanta interposing itself in the dispute between the ZCCM IH. Even though Vedanta was majority shareholder of KCM, this was of no consequence as the two were separate and distinct legal entities. Vedanta could not speak nor act on behalf of KCM. It could not apply for a stay of proceedings and reference of a matter to which it was not a party, to arbitration.

66. Vedanta has no legal interest in the application by the Chairman of the KCM's Board. It could not launch grounds of appeal that in essence seek to champion applications made by a totally different party that awaited determination.

67. The Appellant was the architect of its own misfortune. Had it not applied for stay proceedings and reference to arbitration, and had its counsel objected to the hearing of that application before all pending applications, then, perhaps the application by the Chairman of the 2nd Respondent's Board of Directors would have been heard earlier in time.

68. The trial Judge did not pre-determine the application by the Chairman of the 2nd Respondent's Board of Directors. She did not make a finding that only the Provisional Liquidator could represent the 2nd Respondent in the proceedings or that the Chairman of the 2ndRespondent's Board of Directors had power to appoint lawyers to represent the 2nd Respondent. She cannot in the premises be said to have predetermined the application. The application was heard, and a Ruling is pending on the same.

69. A challenge as to whether the Chairman could lawfully be heard outside the Board, remains underdetermined by the learned Judge. She aptly captured the gravamen of the petition before her. No defence had been mounted to the petition by ZCCM IH. The learned Judge merely observed what the papers before her revealed.

70. The Appellant was not in a position to apply for stay of the proceedings so that the matter could be referred to arbitration. Reliance was placed on ***Etri Farms Ltd vs N.M.B UK Ltd***[1]

71. Although the wording of Section 1(1) of the English Arbitration Act 1975 differs from Section 10(1) of the Zambian Arbitration Act, the reasoning of Woolf LJ applied to this case. The learned Judge could not therefore be faulted in construing Section 10(1) of the Arbitration

Act as he did. The only parties to the Proceedings were the 1st and 2nd Respondents.

72. The learned Judge refused to join the Appellant to the proceedings, as the winding up rules of 2004 did not provide for joinder. No appeal was made against that Ruling. As a result, the Appellant lacked the *locus standi* to apply to stay proceedings and refer the 1st and 2ndRespondents to arbitration. It was also argued that Section 60(3) of the Corporate Insolvency Act confers no right to make blanche applications in winding up proceedings, dictating to the parties how the dispute should be resolved.

73. The notion that the Court is clothed with inherent jurisdiction to stay proceedings in favour of arbitration on the Vedanta's application is unfounded. This is because, that jurisdiction is displaced by the statutory regime of **Section 10(1) of The Zambian Arbitration Act.**

74. Vedanta had in its arguments raised an issue that had not been canvassed in ground six. It had impliedly amended ground six without the leave of the Court. Thus, the Court should disregard the arguments on the issue. Moreover, the motion of the Chairman of the 2nd Respondent's Board of Directors was heard on 13th August, 2019. The decision of the Court was awaited.

75. Mr. Shonga SC augmented the arguments as follows:

With reference to the Mainsa affidavit, learned state counsel augmented that if that affidavit were removed, the petition would be undefended, and the judge would have come to the very conclusion she arrived at. Mr. Shonga Sc argued that the cases referred to by Mr.

Chakoleka were at applicable and against the appeal. He urged the court to dismiss the appeal.

2nd RESPONDENT'S (KCM) ARGUMENTS

76. Mr. Mutale SC, informed the Court that reliance would be placed on the amended heads of argument that were held on 31st July 2020.

77. The 2nd Respondent's opposition on ground one of the appeal is as follows: The learned Judge allowed the Respondent to file an Answer and opposing affidavit out of time. This was duly done. The Order given by the Court had to be obeyed, unless and until it was set aside or discharged by further Order of the Court, or on appeal. It was as a result open to the parties to refer to it. Thus, the Court of appeal had no jurisdiction to delve into the 'Mainsa' affidavit as that issue was before the High Court, and had yet to be heard and determined. Reference was made to ***Hangandu & Co. vs Mulubisha[12]***, **Turnkey *Properties vs Lusaka West Development Company Limited Bsk Chiti[6]*** authority for this argument.

78. Only the High Court has competence to determine Liquidation proceedings. This holding has not been appealed against. Therefore, the appeal relating to the dismissal of the Section 10 application to refer the parties to arbitration is *otiose*.

79. Reliance was placed on ***Salford Estates (No. 2) Limited vs Altonert[13]***, where the Court held that the mandatory stay provisions under Section 9(1) of the Arbitration Act did not apply to winding up petitions brought on the ground that a Company is unable to pay its debts, where what

was in dispute was whether the Company was, in fact, unable to pay its debts.

80. Winding up proceedings are non-contractual but statutory. Jurisdiction is vested in the Courts, and not co extensive with arbitration. This jurisdiction extends to consideration of third party' interests, as provided for under the Corporate Insolvency Act 2017 and the Companies (Winding up) Rules 2004.

81. Forty-two entities had filed notices of intention to be heard at the hearing of the petition, the High Court being enjoined by statute and subsidiary legislation to give audience to parties who had accordingly filed notices of intention to be heard when the petition is heard. The majority of these entities are creditors. The Court cannot refer a dispute to arbitration if it involves 3rd parties who are strangers to the arbitration agreement.

82. It is not in the interest of justice to sever a dispute so that one segment is referred to arbitration, while the other is determined by the Court. Once a situation would lead to this outcome, the Court has a duty to find a valid arbitration agreement inoperative or incapable of being performed. ***Ody's oil company vs the attorney general and papoutis***[14] refers.

83. The applicable statute and subsidiary legislation enjoin the High Court to hear a person that has filed an appropriate notice in support of or in opposition to the petition. It would be a travesty of justice, and contrary to justice for the High Court not to hear the grounds in support of or in opposition to the petition. This right is conferred by statute, and has nothing to do with an agreement of the parties.

84. Only a party to proceedings can apply for a stay of proceedings and reference to arbitration. Section 10 of the Arbitration Act 2000, does not apply to a non-party to legal proceedings. The Appellant is not a party to legal proceedings for purposes of Section 10 of the Arbitration Act. Thus it has no standing.

85. Furthermore, an entitlement to be heard on an application does not necessarily lead to it being granted nor does it constitute a waiver by the Court from considering whether or not the applicant has the standing to bring the application. Even assuming Vedanta was joined to the proceedings as second Respondent, it was highly doubtful that it could invoke Section 10 of the Arbitration Act as the petition was not brought against it.

86. Grounds 3 and 5 cannot be entertained by this Court, as the application by the Chairman of the Respondent is pending determination before the High Court. It is doubtful that the Appellant has competence to address the matters raised. This is because the decision of the High Court is pending on the same.

87. The Court of Appeal's jurisdiction being appellate, it can only adjudicate an appeal and not proceedings that are yet to be determined by the lower court.

88. Learned state counsel Mr. Mutale in augmenting his arguments urged the court to interrogate the rights derived by a party by filing a notice of intention to appear at the hearing of the petition to oppose it. It was learned state counsel's argument that the notice only entitled the party

filing the notice to participate in the petition proceedings in the High Court.

VEDANTA'S RESPONSE

89. In response Mr. Mundashi, SC, argued that the Mmembe case was decided under the repealed Companies Act, which did not contain section 60(3) of the Corporate Insolvency Act.

CROSS APPEAL AND ARGUMENTS

90. ZCCM IH had filed a cross appeal to the appeal under case number CAZ/08/249/2019. The grounds of appeal are that:

i. **The learned Judge in the court below erred in law and fact in finding that there existed a dispute between the parties which was subject of an arbitration agreement in terms of Section 10 of the Arbitration Act No.19 of 2000.**

ii. **The learned Judge in the court below erred in law and fact by failing to consider and find that the public policy implications underlying insolvency proceedings brought the dispute outside the realm of arbitral proceedings.**

91. The parties to the petition were ZCCM IH and KCM. No claims were directed at Vedanta Resources Holdings Limited. It was therefore wrong for the Court to base its reasoning on perceived disputes between ZCCM IH, KCM and Vedanta. The Court should have confined its enquiry to the question whether there was a dispute between ZCCM IH and KCM as parties before the Court.

92. The finding that there was a dispute between the parties was baseless. The definition of a dispute, and Clause 26.1 defined the matters which

would be subject to arbitration. They would stem from the Shareholder's Agreement. Any disagreement of whatever nature, arising out of the interpretation or performance or breach of the shareholder's agreement would be referred to arbitration. The dispute had to be traceable to a benefit or obligation conferred by the agreement. It had to be clearly grounded within one or more clauses in the agreement. If it did not, the arbitration agreement had no reach or relevance to the quarrel between the parties.

93. The petition cites loss of confidence in the Appellant's ability to manage and administer the affairs of the 2nd Respondent, as well as the failure of the 2nd Respondent to pay its debt as and when they fall due. The 2nd Respondent acknowledged that it had been operating at a loss for the past 7 years, and had not abided by its mining plan. It did not deny its failure to pay a number of debts. There was no dispute as to these matters between the parties.

94. In addition to this, initially a dispute had existed, and the 1st Respondent served a Notice of Dispute upon the 2nd Respondent. A Notice of Arbitration was issued, in relation to alleged breach of the shareholder's Agreement. The remedies sought from the arbitral process were specific performance and damages for breach of contract. The winding up proceedings seek no affirmation as to which party was in the wrong, nor compensation for the failings of KCM. Further, issues of management and administration of KCM fell within the shareholder's Agreement, but even if this were to be the case, neither ZCCM IH nor KCM were parties to the Management Agreement, which would be the basis of the dispute.

95. The learned Judge failed to show how the claims before the Court could be equated to the definition of the dispute as stated in the Shareholder's Agreement. It was necessary for the learned Judge to state the basis of her conclusion that the matters constituted a dispute within the meaning of the arbitration clause before her. According to learned Counsel, the learned Judge failed to consider whether matters of KCM were governed by the SHA.

96. The SHA merely provides a skeleton of the composition and rights of the Board and Management of the 2nd Respondent. The agreement refers to a Management Agreement, defined as follows:

> ***"Management Agreement means that agreement of even date herewith entered into between the Company and Vedanta, regarding the provision by Vedanta or one of its Affiliates of management marketing or technical services to the company or any of its subsidiaries".***

97. The Management Agreement at pages 1233 -1249 of Vol. 3 of the Amended Record of Appeal is between KCM and Vedanta Resources Plc.

98. In view of the agreement, the ZCCM IH could not be taken to have a dispute with the Vedanta as it was KCM which had retained their management services. Also, KCM did not deny the failures in management but simply sought to explain the reasons for these failures. The dispute, if existent at all, could not be said to be wholly within the ambit of the SHA.

99. Moreover, the term 'dispute' as defined in the SHA, could not extend to insolvency proceedings and usurp the Court's jurisdiction under Section 57 of the Corporate Insolvency Act. The mere fact that some of the grounds of the petition partly fell under what could be termed as a

dispute in the SHA could not, warrant a finding that the matter was subject of the Arbitration Agreement. There was thus no dispute in terms of the SHA.

100. The court below did not fully take public policy consideration into account in her decision. Arbitration is essentially a private dispute settlement mechanism. Public policy considerations however limit party autonomy, and impede resort to arbitration. As a result, Courts would in some instances refuse to refer the matter to arbitration. Reference was made to ***Larsen Oil and Gas Plc Ltd vs Pepropod Ltd***[15], as well as ***Fulham Club (1987) Ltd vs Richards and Another***[16].

101. Whenever the question of insolvency arises, in winding up proceedings, the dispute cannot simply be considered as concerned with private interests and rights: ***Re Pantmaenog Timber Co. Ltd***[17] ***(2004) I AC 158*** *and* ***Salford Estates No. 2 Ltd vs Altomart***[13].

102. The protection of public expectation that debts will be incurred and honoured in good faith undergirds Commercial Life, and this translates into a public interest that these norms will be observed and enforced. For this reason, when a Company fails to pay its debts as and when they fall due, the correct and proper fora for addressing the issue of insolvency is not in arbitration, as the public is not privy to the same. It is public policy that issues of insolvency are heard and determined by the Court.

103. In the present case, proceeds, the issue of insolvency arises in paragraph 12 of the amended petition as well as paragraphs 15 and 16 of the amended affidavit verifying petition. This takes the matter out of the realm of the dispute between the parties to the SHA. Those who filed

notices of intention to appear and be heard, as well as the public at large are affected. Any arbitral award made on the issue of insolvency would be contrary to public policy. The question of insolvency prevents the Court from staying the proceedings and referring the parties to arbitration. The Court was urged to allow the cross appeal.

104. Mr. Mutale SC informed the court that KCM had not filed any heads of argument, but placed on record KCM's support for the appeal.

105. Mr. Mundashi SC also informed the court that Vedanta was its amended heads of argument filed on 21st August 2020.

VEDANTA'S OPPOSITION TO THE CROSS APPEAL

106. Learned counsel placed reliance on written arguments which were as follows:

107. Clauses 24 to 26.4 of the SHA reveal that the issues raised in the winding up Petition are shareholder disputes. The grounds on which ZCCM-IH seeks the Winding up of KCM on the just and equable basis are disputes within the meaning ascribed to that term in the SHA. ZCCM-IH therefore, attempted to circumvent the dispute resolution mechanism in Clause 26 of the SHA.

108. ZCCM-IH, emphasized Vedanta's responsibility for the Management and Administration of KCM under the SHA, and listed grounds for alleging that KCM has been managed and administered in a manner that is detrimental to ZCCM IH's interests. The grounds relate to non-payment of dividends, alleged failures by KCM in developing mining areas, the carrying on of mining operations and the alleged non –payments of suppliers and contractors. These disputes ought to have been resolved

under the dispute resolution process set out in the SHA. The existence of a dispute between the parties under the SHA was properly found by the court below. Section 60(3) of the Corporate Insolvency Act was referred to.

109. In holding that the contributor, a non-party to the petition, could not apply to refer the matter to arbitration, the learned Judge overturned her ruling of 20th June, 2019. This was incompetent and inconsistent with Section 60(3) of the Corporate Insolvency Act.

110. The petition contains allegations against Vedanta, which are founded on the SHA. Furthermore, even assuming this Court finds that some issues relate to the management of the KCM, which stem from the management agreement which the ZCCM IH is not party to, nothing stops the Court from staying the proceedings and referring the parties to arbitration, to arbitrate the issues centered around the SHA which are clearly in contention in the petition.

111. It would be just and fair to refer the parties to arbitration so as to afford Vedanta an opportunity to respond to the allegations leveled against it. This is because in ***Townap Textiles Zambia Limited and Another vs Tata Zambia Limited***[18], the Court was suggesting that nothing stops the Court from referring parties to arbitration in a winding up petition on the just end equitable ground. This will be considered on a case by case basis. In the cited case, a referral to arbitration was not done because that would have been an academic exercise, and the reference would have served no useful purpose. Here, the petition is yet to be determined.

112. It is mandatory to refer a matter which is subject of an arbitration agreement to arbitration, because of the word 'shall' in Section 10 (1) of the Arbitration Act. That Section, creates no exceptions as to the nature of proceedings before the Court. Reference was made to Fulham (1987) Football Club *supra.*

113. Learned Counsel expressed the understanding that in the *Salford Estates* case *supra,* the Court described the jurisdiction to wind up a Company as discretionary and that discretion was to be exercised consistently with the legislative purpose of arbitration. A Court could thus dismiss or stay the petition, so as to compel the parties to resolve their disputes as contractually agreed.

114. ***Konkola Copper Mines Plc vs NFC Africa Mining Plc***[19] unreported, as compels a Court to refer a matter to arbitration whenever Section 10 of the arbitration Act was invoked. Winding up proceedings on a just and equitable ground were contemplated in Clause 26.1 of the SHA. *Larsen Oil and Gas PLC* was no assistance to the Appellant, because Section 6, which lists exceptions to arbitration would have included winding up proceedings.

115. Despite ***Pantemaenog Timber Co. Ltd***[17], the third party creditors are not precluded from employing other legal means available to them for purposes of enforcing their rights or claims. Therefore, consideration of the third party's rights should not override the arbitration agreement. The petition was not commenced by creditors. The dispute in issue is a shareholder dispute which the creditors are not party to.

STAY OF PETITION PROCEEDINGS PENDING APPEAL

116. After Bobo J, had rendered her Ruling in the application to stay the matter and refer it to arbitration, Vedanta applied that the proceedings be stayed pending appeal. The basis for the proposed stay was that the appeal against the Ruling was meritorious with reasonable prospects of appeal. That if the proceedings were not stayed, the outcome of the appeal would be rendered academic. KCM would be wound up and Vedanta seriously prejudiced.

117. It was explained that the Vedanta group had since 2004, provided over US$100 billion in form of shareholder loans to KCM. It had also provided guarantees for certain loans and credit facilities from third party banks, and had also guaranteed a US$ million advance payment by one of KCM's customers.

118. The Vedanta group, of which Vedanta is a member by far the largest creditor of KCM, and therefore, likely to suffer the greatest financial harm if the stay application is not granted. ZCCM IH would not suffer any harm as it had not invested any amounts in the Respondent.

119. That if the appeal succeeds, the proceedings before the Court would be stayed and the matter referred to arbitration.

120. The application was opposed, the basis of opposition being that the appeal against the Ruling in the stay application had no prospects of success. In addition to this, Vedanta would not be prejudiced if proceedings were not stayed. Moreover, Vedanta was a separate and distinct entity from other Companies within the purported Vedanta Group and was in any event not a party to the winding up proceedings.

That the winding up proceedings are of public interest, and other creditors had filed notices of intention to appear at the hearing of the petition. In the event Vedanta's appeal is unsuccessful, the proceedings would be unduly delayed.

121. Upon hearing the parties, the learned Judge rendered an extempore Ruling. She disclosed that she had previewed the grounds on which her Ruling would be questioned, and remained unconvinced that the proposed appeal had prospects of success. She would however, in the interest of justice exercise her discretion to stay the proceedings so that the so called novel issues are interrogated by the Court of Appeal. They would prevent the appeal from being rendered nugatory in the unlikely event the appeal succeeds.

122. ZCCM-IH was aggrieved with this Ruling and appealed against it on two grounds. These are that:

i. **The Court erred in fact and in law when it granted a stay of the winding up proceedings pending the determination of the appeal despite making a finding that the contributor's appeal lacked any chance of success.**

ii. **The Court erred in fact and in law in the manner in which it exercised its discretion to grant the stay of proceedings pending appeal on the ground of novelty.**

123. Mr. Shonga SC placed reliance on the heads of arguments filed on 25th September, 2019.

124. Mr. Mutale SC informed the court that KCM had not filed any heads of argument but wished to place itself on record as supporting the appeal.

125. The two grounds were argued together. Our attention was drawn to **Order X Rule 5 CAR, as well as Order 59 Rule 13 RSC.** Learned Counsel recoursed paragraph 422 of **Halsbury's Law of England 4th Edition Vol. 37,** where the power to stay proceedings is discussed. It was argued that as disclosed by the rules, and the cited work, the power to stay proceedings should be ... exercised. This position, it was argued was echoed by the Supreme Court in ***Mulenga and Others vs Investment Merchant Bank Limited***[20] although the Court was there dealing with an application for stay of execution.

126. Learned Counsel argued that the learned Judge, granting a stay of the proceedings had a duty to act judiciously. She did not do so. She had considered the prospects of success of the 2nd Respondent's appeal, and found that non-existed. That being so, she erred in staying the proceedings. This militated against the interest of justice. Upon finding prospects of the success of the proposed appeal dim, the learned Judge's hands were tied. The judicious exercise of her discretion demanded that she refuse the stay, in accordance with the guidance of the Supreme Court in ***Zambia Revenue Authority vs Post Newspaper Limited***[21].

VEDANTA'S CROSS APPEAL

127. Vedanta's cross appealed against this appeal on one ground:

The learned High Court Judge erred in law and in fact when she found that the 2nd Respondent's grounds of appeal did not have prospects of success without giving any reasons for the said findings:

128. Mr. Chakoleka indicated that the appeal was opposed by combined heads of argument filed on behalf of Vedanta on 23rd October, 2019, which he relied on.

129. Mr. Shonga SC informed the court that ZCCM-IH placed reliance on heads of argument filed into court on 11th June, 2020.

130. Mr. Mutale SC informed the Court that KCM had not filed arguments in the appeal and would leave the decision to the Court.

131. In response to ZCCM IH's appeal, it was argued, on behalf of Vedanta, after referring to **Order 59 Rule 13 Sub rule 2 RSC**, that the High Court has a discretion to order a stay pending appeal, which the learned Judge exercised. According to learned counsel, her decision was a case management one, which per Chadwick LJ in ***Royal & Son Alliance Insurance Plc vs T & N Ltd (In administration)***[22], should not be interfered with. It is contended that the decision to stay proceedings is not so plainly wrong and outside the ambit of the Judge's discretion. ***Hammond Suddard Solutions vs Agriculture International Holdings Ltd***[23] was referred to as laying down the question a Court considering a stay and execution is to ask itself.

132. Reliance was also placed in ***Bowa (suing as Administrator of the estate of the late Ruth Bowa) vs Mubiana and Zesco Ltd***[24] as stating the test for the grant of a stay.

133. It was contended that if the stay pending appeal is not maintained (pending appeal), a real act of injustice to the Respondent and other parties with an interest in the 1st Respondent exists. The injustice is that if KCM is wound up, any successful appeal will be rendered nugatory.

Secondly, the Provisional Liquidator will proceed to depose of KCM's assets. This will cause irreparable harm. The case of ***Zambia Revenue Authority vs Post Newspaper Ltd***[21] was said to be distinguishable from the present one, as the there were no special circumstances which warranted a stay.

134. *'Novel'* issues had arisen, and these warranted interrogations by the Court of Appeal. These were said to have arisen in that a Provisional Liquidator was appointed when the petition was filed. This in turn raised questions as to who could defend the interests of the company, whether it was the Provisional Liquidator, or the company's director exercising residual powers.

135. The arguments in support of the 2nd Respondent's cross appeal are the learned Judge should have given reasons for the view that the grounds of appeal had no prospects of success. Referring to ***Chibwe & Chibwe***[25], it was contended that the learned Judge misdirected herself in finding that the appeal lacked prospects of success without any reasons for the said Ruling. We were urged to overturn the Ruling.

136. In response, learned counsel for ZCCM IH referred to the definition of *"decision"* in Black's Law Dictionary 9th Edition at page 467. Premised on the definition, they argued that the finding complained about is not a decision. The *Chibwe case* decision is therefore inapplicable. They argued that it would have been improper for the learned Judge to assign reasons as to why the 2nd Respondents appeal had no prospects of success. She would have delved into the merits of the appeal, when she had no jurisdiction to do so. They urged the court to dismiss the appeal

ISSUES FOR DETERMINATION

137. The issues that arise for the Court's determination in the appeals before it are:

i. Whether a dispute as defined in the SHA has arisen.

ii. If so, whether Vedanta has *locus standi* to apply for stay of the Petition and reference of the matter to arbitration.

iii. If so, whether the disputes are arbitrable, and whether the disputes can be so referred in light of the notices of the intention to appear at the hearing of the Petition filed by third party creditors.

iv. Whether the Mainsa affidavit should have been considered by the court, and whether the application concerning the right of the KCM's board to represent KCM has been pre-determined.

v. Whether Bobo J should have assigned reasons for the view that the appeal lacked merit,

CONSIDERATION

138. The cross appeal by ZCCM-IH raises issues that have a bearing on the matter now in controversy between the parties to the appeal by Vedanta. We propose to deal with them together. We will begin with the question whether or not a dispute has arisen between the parties. The term 'dispute' is defined in the SHA, as follows:

> ***"Dispute" means any dispute, disagreement, controversy, claim or difference of whatsoever nature arising under, out of, in connection with or relating (in any manner whatsoever) to this Agreement or the interpretation or performance of this Agreement or the breach, termination or validity thereof."***

139. Clause 26.1 of the SHA is in the following terms:

> **Subject to the provisions of clauses 24 and 25 above, the parties hereby consent to submit any dispute to be resolved by arbitration in accordance with the UNCITRAL Arbitration Rules (the "Rules") as in force and effect on the date of service of Notice of Dispute under clause 23 above, save as modified by the provisions of this clause 26. The tribunal shall consist of a sole arbitrator (The "Tribunal") and the appointing authority shall be the Secretary General of the Permanent Court of Arbitration at The Hague. The place of Arbitration shall be Johannesburg and the language of the arbitration shall be English.**

140. This clause reveals that the parties to the SHA agreed to submit any dispute that would arise as defined, to arbitration. The first thing to determine, as stated as above, is whether a dispute as defined, exists. This entails scrutiny of the words employed in the SHA to decipher whether ZCCM IH's grievances fall within the ambit of the matters addressed in the SHA. Kaoma JS, delivering the judgment of the Supreme Court in ***Audrey Nyambe & Total Zambia Limited***[26] gave expression to this approach when she said at J9:

> ***"However, in determining whether a matter is amenable to arbitration or not, it is imperative that the wording used in the arbitration clause itself are closely studied."***

141. Section 10 of the Zambian Arbitration Act enacts the following:

> ***(1) "A court before which legal proceedings are brought in a matter which is subject to an arbitration agreement shall, if a party so requests at any stage of the proceedings and notwithstanding any***

written law, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where proceedings, referred to in subsection (1) have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before court."

142. Our considered view is that the words *"in a matter which is subject to an arbitration agreement"* clearly indicate that the parties would have agreed to arbitrate a dispute arising on that matter.

143. In determining whether a matter is caught by an arbitration clause, we find the approach of the Court of Appeal of Singapore in ***Tomolugen Holdings Ltd and Another vs Silica Investors Ltd and Other Appeals***[27] persuasive. Sundaresh Menon CJ, delivering the Judgment of the court, said the following at J62:

> ***"In our judgment, when the court considers whether any 'matter' is covered by an arbitration clause, it should undertake a practical and common sense enquiry in relation to any reasonably substantial issue that is not merely peripherally or tangentially connected to the dispute in the court proceedings. The court should not characterize the matter(s) in either an overly broad or unduly narrow and pedantic manner."***

144. Our understanding of this decision is that the proposed enquiry requires the court to address its mind to the question whether realistically speaking, the matter belongs to arbitration as agreed. Too narrow a review might deprive the parties an opportunity to employ their agreed mode of dispute resolution while an unduly broad assessment might well

consign matters to arbitration which do not belong there, as would be discovered by the arbitrator. This would lead to avoidable time wasting.

145. We turn then to the grievances in the petition as compared to the relevant clauses in the SHA.

146. The first is that KCM has operated at a loss for 7 years, and declared dividends only for 4 years. It has failed to pay US$10,305,000. A dispute was declared for the failure to pay this dividend. The petition does not seek winding up on account of this debt, concerning which a dispute was declared by ZCCM IH.

147. The second complaint is that KCM has failed to develop the mining areas in Chingola and Chililabombwe, contrary to the mining plan. It has failed to carry out mining operations with due diligence, and continues to operate below capacity. This has led to the issuance of a default notice against it.

148. Clause 3 of the SHA states that the primary object of the company shall be to carry out the Business. The Business shall, where relevant, be carried out in accordance with scheduled programs.

149. It is plain beyond controversy that a dispute as defined, has arisen. ZCCM IH has taken issue with the manner in which the mining, which is the business of the company (KCM) has been performed. This matter is clearly within the ambit of arbitration as agreed.

150. Another grievance ZCCM IH has with Vedanta is that it has failed to pay its debts when they have fallen due. CEC and Ndola Lime are listed as creditors who have not been paid.

Clause 12.1.1 reads:

Subject to clause 12.1.2, the Board shall be responsible for the raising of all finance necessary to implement:

(a) The scheduled programmes (and any refinancing thereof) and

(b) To the extent such operations do not form part of the scheduled programmes, the carrying out of the Business (and any refinancing thereof)

12.1.2 Vedanta shall provide or procure the provision of all and any finance required in order to discharge the shortfall funding commitment and for any Konkola Ore Body Extension Project in accordance with Clauses 12.3 and 12.4 respectively.

151. It seems to us that ZCCM IH's complaint on this ground implicates the obligation of KCM's board to raise finances required to implement the scheduled programmes, as well as Vedanta's obligation to meet the cash flow shortfall as per its commitment to do so under clause 12.3 of the SHA. In our opinion, these finances would facilitate procurement of goods and services.

152. The fourth complaint is that KCM has been operating in a manner that is not environmentally friendly or sustainable. It has polluted or continues to pollute water sources in and around its mining area. It seems that KCM is obligated to ensure that environmental matters are handled as planned. This appears to be within the contemplation of Clause 6.2 which states as follows:

6.2 Without prejudice to clause 6.1, the company, at its own cost, shall prepare and send (in the case of clauses 6.2.1 to 6.2.3) or give notice (in the case of clauses 6.2.4 and 6.2.5) to the Directors and, in the case of Clause 6.2.3, to such persons who may be entitled by law or regulation to the same:

6.2.2 Not later than three (3) months following the end of each financial year, a report on environmental, social and labour matters with comparisons to the Final Environmental and Social Management Plan and the Employment and Training Plans.

153. There appears to be Final Environmental Management Plan to which the report on environmental matters will be compared. This suggests an obligation to manage environmental matters as planned.

154. It is indisputable that the grievances deployed by ZCCM-IH are matters that substantially touch on some clauses in the SHA. We agree that a dispute as defined by the SHA had to originate from the agreement. It would arise out of the interpretation, performance or breach of the SHA, thus grounded in that agreement. Our examination of the relevant clauses and the grievances in the Petition confirms that the complaints arise from the SHA. The obligations imposed on KCM as well as on Vedanta in one instance by the SHA are at the crux of the Petition. Bobo J, was in our view not off the mark in holding that a dispute had arisen between the parties.

155. The next question that arises is whether Vedanta has locus to apply for a stay of the petition and reference of the matter to arbitration. It will be noticed that the Mainsa affidavit attempts to offer an explanation for the woes of KCM while admitting ZCCM IH's accusation. Vedanta on the other hand has taken a stance that indicates that KCM's financial position is not as bleak as has been painted by ZCCM IH. It claims that once adjustments are taken into account, KCM's aggregate EBITDA has been a positive USD 386.6 for the past seven years. It asserts that although a negative cash flow was recorded in 2019, the deficit for that

year was supported by Vedanta Resources and its subsidiaries and therefore the negative cash flow did not reflect an inability on KCM's part to pay its debts.

156. On the alleged failure to develop the mines, it is explained that KCM has spent over US$3 billion on capital expenditure with assistance from the companies in the VRL group. It has also spent US$925 million on the Konkola Deep Mining project and US$467 million on the Smelter. In a nutshell, Vedanta has attempted to portray a picture of substantial expenditure on development of the Mine. The posture taken by Vedanta is that it disputes the accusations leveled at KCM by ZCCM-IH.

157. In terms of Section 56 of the said Corporate Insolvency Act, a company may be wound-up by the court on the petition of a member. According to section 57(1) of the Act, the court may order the winding up of a company on the petition of a person other than the official receiver *"if in the opinion of the court it is just and equitable that the company should be wound-up."*

158. Section 60(3) of the Act is in these terms:

> ***(3) The court may, on hearing of a petition or at any time on the application of the petitioner, a company or person who has given notice of the intention to appear on the hearing of the petition -***
>
> ***(a) direct that any notice be given or steps taken before or after the hearing of the petition;***
>
> ***(b) dispense with any notice being given or steps being taken which are required by any prior order of the Court;***
>
> ***(c) direct that oral evidence be taken on the petition or any matter relating to it:***

(d) ***direct a speedy hearing or trial of the petition or any issue or matter;***

(e) ***allow the petition to be amended or withdrawn; and***

(f) ***give such directions as to the proceedings as the Court considers appropriate in the case.***

159. As argued on behalf of Vedanta, this section reveals that even a person that has given notice that they will appear on the hearing of the petition can make an application to the Court. This would be a person that did not file the petition, but merely signified the intention to be heard on the petition. They are nonetheless allowed to apply that the petition be withdrawn, and the court may so order. They may in addition apply that directions as to the proceedings be given, which in the court's view are appropriate in the circumstances. These provisions, in our consideration demolish the argument that a party that has given the notice of intention to be heard cannot lodge an application for the consideration of the court in its own right.

160. We are fortified in this view by the persuasive decision in ***Four Pillars Enterprises Co. Ltd vs Beiersdorf Aktiengesellschaft***[28]. In that case, the Court of Appeal in Singapore discussed the rule on the giving of the intention to be heard on the petition in the Applicable Act. It held at (13) that the purpose of the rule is to give the person, *"normally a creditor or contributor,"* a right to be heard before the Court decides whether to make a winding up Order.

161. It was further explained that by serving the notice, the person becomes a party to the proceedings and acquires the rights to; appear before the court and be heard, file an affidavit in opposition to the winding-up application, receive affidavits in reply to his affidavit, apply to the court

for orders and directions enumerated in section 257(2) of the CA, and appeal against the winding-up order.

162. Learned state counsel for the respondent referred to ***Etri Farms Ltd vs NMS Ltd***[1], where it was held that for the purposes of section 1 of the 1975 Act *'any party to the proceedings'* referred not merely to a person who had been joined as a party but to a party against whom legal proceedings had been brought by the other party to the arbitration agreement in respect of any matter agreed to be referred to arbitration, since the purpose and interest of Section 1 was that only parties to an arbitration agreement and those claiming through or under them who were sued in relation to a matter which it had been agreed should be referred to arbitration should be entitled to seek a stay. Since the appellants had not been sued by E Ltd they would not be entitled to a stay under Section 1(1) even if they were joined in the action.

163. The facts in the case were that Miriebea Company Ltd and Kondo Company Ltd appealed against the judgment of Sir Nichols Browne-Wilkson V C given on 22nd October 1985 whereby he refused the appellant's application (1) to be joined as defendants in an action brought by the plaintiffs ***Etri Farms Ltd***[1] against the defendant, ***NMB (UK) Ltd*** for infringement of copyright and for a stay of proceedings.

The section in issue, read as follows:

> ***"1. If any party to an arbitration agreement... or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement or any person claiming though or under him, in respect of any matter agreed to be referred, any party to the***

proceedings may...apply to the court to stay the proceedings and the court... shall make an order staying the proceedings...."

164. Woolf L J observed that the purpose and intent of that section was that parties to an arbitration agreement and those claiming through or under those who are sued in relation to a matter which it has been agreed to refer to arbitration, should be entitled to seek a stay. It is not the intention of the sub section that those who have not been sued should be able to take advantage of the provisions of section 1(1) by applying to become parties to the proceedings against the wishes of a plaintiff purely for the purposes of obtaining a stay of an action which has been commenced, not against them, but another party who either did not have or did not wish to avail himself of the right to seek a stay.

165. It will be noticed that the *Etri case* was about breach of copyright. It was not concerned with the winding up of a company. Thus, the decision did not address the standing of a contributor. The English Court of Appeal had almost a century before the *Etri case* confirmed in ***Re Bradford Navigation Company***[29], that no person has a right to be heard on a petition for winding up of a company except for creditors and contributors. This was reiterated in ***Re SBA Properties Ltd***[30].

166. Similarly, in this jurisdiction, the Corporate Insolvency regime, enables creditors and contributors to give notice that they intend to appear on the hearing of a petition. They would either oppose or support the petition to wind up the company. Statute has conferred a

right on them to address the court and to make applications for certain orders. We are persuaded by the decision in ***Four Pillars***[26] that they become a "party" to the winding up petition. The court will take their support of, or opposition to the petition into account in deciding whether to wind a company up or not. In our opinion, this scheme of things fits into the characterization of a contributor who gives notice of the intention to appear as a *'party'* to a winding up petition as elucidated in the *Four Pillars case.* We use the word "party" loosely.

167. Moreover, a contributor or member does not contrive to become a party to a petition so that they are heard as in the *Etri case.* Statute allows them to be heard by enabling them to file the requisite notice. If they can oppose a winding up petition, we cannot think why they should not apply that the petition be stayed and that the parties be referred to arbitration as agreed, on a minority shareholder's petition to wind up the company on the just and equitable ground. This is more so that dissolution of the company on this ground directly affects them, the petition being an indictment regarding the manner in which they have managed the company.

168. We have considered the arguments relating to the case of ***Fred M'membe & Post Newespapers vs Moozi & Others***[29]***.***

169. We agree that the court is bound by the principle of *stare decisis*, to abide by its decisions. As pointed out by Mr. Mundashi SC, Post Newspaper Liquidation was commenced under the Companies Act

CAP 388 of the Laws of Zambia. The applicable rules were **The Companies (Winding-up) Rules of 2004.** Neither the Companies Act nor the Rules conferred power on a member to make an application for an order that a petition be withdrawn, or for such directions as the court would consider appropriate. The M'membe case is thus distinguishable as grounded on the law as it then stood.

170. Turning to ***Beza Consulting Inc Limited and Bari Zambia Limited & Another***[8]. That case reiterated the position that an arbitration agreement between two parties is rendered inoperable where a third party is involved in a dispute. The reasoning in that case does not apply to the instant case because even though third party creditors have signified their intention to be heard on the hearing of the petition, the dispute is between a minority shareholder and the majority shareholder concerning how the company is being managed.

171. Our considered opinion is that Vedanta, which has exercised its right to be heard on the petition which seeks dissolution of the company on the just and equitable ground, can competently apply that the Petition be stayed and the matter be referred to arbitration. This standing is derived from the avenue availed to a person who has not petitioned the court for a winding up Order, to move the court for Orders including one for termination of a winding up proceeding by its withdrawal, and for directions as to how the proceedings would proceed. In the present case, Vedanta seeks a stay of the proceedings, and not termination. This it can do, as the court is empowered to give

'such directions as to the proceedings as the court considers appropriate in the case.' Vedanta assumes the standing of a party by the notice to appear, and may make the application for a stay of the petition and reference of the matter to arbitration. The argument to the contrary is unsustainable.

172. We next approach the question whether the matter is capable of reference to arbitration. It is argued that an arbitrator has no power to wind up a Company. We agree with this proposition. ***Larsen Oil and Gas Plc Limited***[15]***, Petropod Limited (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)***[30] was referred to by learned counsel VK Rajah JA (delivering the grounds of decision of the Court), articulated the widely accepted ambit of arbitration in these words, at paragraph 44.

> ***"The concept of non-arbitrability is a cornerstone of the process of arbitration. It allows the Courts to refuse to enforce an otherwise valid arbitration agreement on policy grounds. That said, we accept that there is ordinarily a presumption of arbitrability where the words of an arbitration Clause are wide enough to embrace a dispute, unless it is shown that parliament intended to preclude the use of arbitration for the particular type of dispute in question (as evidenced by the statute test or legislative history) or that there is an inherent conflict between arbitration and the public policy considerations involved in that particular type of dispute."***

173. In that case, Petropod was placed in official liquidation in the Cayman Islands by an Order of the Grand Court of the Cayman Islands. It was subsequently placed in compulsory Liquidation in Singapore by an Order of the High Court on 3rdAugust, 2009. A month later, Petropod's

Liquidators launched proceedings against Larsen to avoid a number of payments made by Petropod to Larsen on the ground that the payments amounted to unfair preferences or transactions at an undervalue within the meaning of certain provisions of the Bankruptcy Act (Cap 61, 1994 Rev Ed") read with Section 329 (1) of the Companies Act") and to avoid a number of payments made by the four subsidiaries to Larsen pursuant to 73 B of the Conveyancing and Law of Property Act(Cap 61, 1994 Rev Ed.) ("CLPA") on the ground that they were made with the intent to defraud it as a creditor of the subsidiaries.

174. Larsen applied for a stay of all further proceedings brought by Petropod pursuant to Section 6 (2) of the Arbitration Act. The basis of the application was the arbitration Clause in an agreement between the parties. The Judge dismissed the application on the basis that the issues were none arbitrable. Upholding the Judges' decision, VK Rajah JA said the following:

> ***"In our opinion, Petropod's claims against Larsen were founded entirely on the avoidance provisions of the BA and Companies Act. The focus of these avoidance provisions is to address situations where value has been subtracted from the Insolvent Company to the detriment of the general creditors, independent of the nature of the provisions allowing for the adjustment of concluded transactions upon the onset of insolvency...."***
>
> ***Accordingly, we rejected Larsen's claim that Petropod's claims were pure contractual claims merely because of the MA. Rather, we found that Petropod's claims against Larsen were avoidance claims that sprung from the special regime created by the BA and companies Act."***

175. It is apparent that public policy considerations informed the Court's refusal to refer an avoidance claim under the insolvency regime to arbitration.

176. In the *Fulham* case, the English Court of Appeal was confronted with a similar question whether to stay a petition presented by Fulham on the basis that it had been unfairly prejudiced by the conduct of Sir David Richards, who it was alleged had acted as an unauthorized agent in breach of the FA football Agents Regulations when he was asked by the Chief Executive of Portsmouth City Football Club Limited to approach the chairman of Totteham Hotsport Football and Athletic Company Limited in order to facilitate the transfer to Tottenham of one of Portsmouth's players, Peter Crouch. Fulham had as well been interested in the transfer of the same player to itself. The Judge at first instance stayed the petition on an application by Sir Richards, that the matter be referred to arbitration pursuant to the agreement between the parties.

177. The decision of the Judge was upheld. Patten LJ (with whom Longmore and Rox LJJ agreed) said this at paragraph 77.

> ***"77. The determination of whether there has been unfair prejudice consisting of the breach of an agreement or some other unconscionable behavior is plainly capable of being decided by an arbitrator and it is common ground that an arbitral tribunal constituted under the FAPL and FA rules would have the power to grant the specific relief sought by Fulham in its section 994 petition. We are not therefore concerned with a case in which the arbitrator is being asked to grant relief of a kind which lies outside his powers or forms part of the exclusive jurisdiction of the Court. Nor does the determination of***

issues of this kind call for some kind of state intervention in the affairs of the company which only a Court can sanction. A dispute between members of a company or between shareholders and the board about alleged breaches of the articles of association or a shareholders' agreement is an essentially contractual dispute which does not necessarily engage the rights of creditors or impinge on any statutory safeguards imposed for the benefit of third parties. The present case is a particularly good example of this where the only issue between the parties is whether Sir David has acted in breach of the FA and FAPL rules in relating to the transfer of a premier league player". **(underlined for emphasis)**

178. Nowadays, it is common for members of a company to embody their obligations in a shareholder agreement and elect arbitration as their preferred mode of settling disputes, should they arise. When the interpretation or performance of the parties' contractual obligations, if such a dispute were to arise, it would have arisen from a contractual agreement. It is in those circumstances difficult to conceive how third party interests would have a bearing on such a dispute.

179. Moreover, decisions from other jurisdictions indicate that in arbitration a distinction lies between want of jurisdiction by the arbitrator to make certain orders, and the arbitrability of the subject matter. Patten LJ explained the distinction in Fulham at paragraph 84.

> **"84.** ***But as explained earlier in this Judgment, these jurisdictional limitations on what an arbitration can achieve are not decisive of the question (of) whether the subject matter of the dispute is arbitrable.***
>
> ***They are no more than the practical consequences of choosing that method of dispute resolution."***

180. Patten LJ had earlier observed at paragraph 83 that the underlying dispute on granting a winding up application on the *'just and equitable'* ground in the UK Insolvency Act 1986 would be arbitrable even if it might be beyond the power of the arbitral tribunal to grant some of the remedies sought. He stated to that effect as follows:

> ***"...the agreement could not arrogate to the arbitrator the question of whether a winding up order should be made. That would remain a matter for the Court in any subsequent proceedings. But the arbitrator could, I think legitimately, decide whether the complaint of unfair prejudice was made out and whether it would be appropriate for winding up proceedings to take place or whether the complainant should be limited to some lesser remedy."***

189. This view was endorsed in *Tomulugen supra*, at para 100 when Mennon CJ said this:

> ***"100...Conceptually, there is nothing to preclude the underlying dispute from being resolved by an arbitral tribunal with the parties remaining free to apply to the court for the grant of any specific relief which might be beyond the power of the arbitral tribunal to award. In so far as any findings have been made in the arbitration in such a case, the parties would be bound by such findings and would, at least as a general rule, be prevented from re-litigating those matters before the court."***

190. Earlier in the Judgment, Mennon CJ had drawn at para 84, a distinction between a petition for relief under section 216 and the Companies Act for unfairly prejudicial conduct towards it as a minority shareholder, and one for the liquidation of an insolvent company or avoidance claims that arise upon insolvency. The court was of the view that the former claims do not generally engage the public policy considerations involved in the latter two situations. According to the court, nothing in the text of section 216 suggested an

express or implied preclusion from arbitration. Nor did the legislative history and statutory purpose of the provision suggest that a dispute over minority oppression or unfair prejudice was of a nature which made it contrary to public policy for the dispute to be adjudicated by an arbitral tribunal.

191. In arriving at this decision, the court reviewed the legislative history and statutory purpose of the provision. It noted that section 216 of the Companies Act was modeled on section 210 of the Act 1948 of the UK, which was enacted pursuant to a recommendation of a UK Committee on company Law Amendment ("the Cohen committee") L1945. The Cohen committee's recommendation was its response to a perceived need to *"strengthen the minority shareholders of a private company in resisting oppression by the majority"* Report of the committee on Company Law Amendment (CMD 6659, 1945) (Chairman Mr. Justice Cohen) ("Report of the Cohen Committee) at paragraph 60.

170. The Court went on to observe that the Cohen Committee proposed that the Court be given "unfettered" discretion to impose on the disputing parties whatever settlement it considered just and reasonable in such circumstances.

171. The Court referred to a passage in Lord Hoffmann's Judgment in ***O'Neills and Another vs Philips and Others***[31] where he said:

"In the case of Section 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreement between the shareholders. Thus the

manner in which the affairs of the Company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman Societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have with appropriate modification, been carried over into company law.

The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith."

172. Mennon CJ recalled that his Court had endorsed this exposition in an earlier case, and applied it. He went on to observe that Lord Hoffmann's Judgment made it plain that the essence of a claim for relief on the ground of oppressive or unfairly prejudicial conduct lay in upholding the commercial agreement between the shareholders of a company. This is irrespective of whether the agreement is found in the formal constitutional documents of the company, in less formal shareholder's agreements, or in the case of quasi – partnership, in the legitimate expectations of the shareholders Section 216 of the Companies Act was not introduced to protect or further any public interest.

173. Mennon CJ expressed the view that Section 216 was concerned with protecting the Commercial expectations of the parties to such an association. If those persons had chosen to have their differences

resolved by an arbitral tribunal, they should be entitled to do so. There is in general no public element in disputes of this nature which mandate the conclusion that it would be contrary to public policy for the dispute to be determined by an arbitral tribunal rather than a Court.

174. We reproduce Section 210 of the UK 1948 companies Act to contextualize the Court's discussion.

> ***"210 (1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) or, in a case falling within subsection (3) of Section 169 of this Act, the Board of Trade, may make an application to the Court by application to the Court by petition for an Order under this Section.***
>
> ***(2) If on any such petition the Court is of opinion-***
>
> ***(a) that the company's affaires are being conducted as aforesaid; and***
>
> ***(b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up;***
>
> ***the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the companies affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and in the case of a purchase by the company, for the reduction accordingly of the company's capital or otherwise."***

175. In Zambia, Section 134 of the companies Act No. 10 of 2017 addresses oppressive conduct, and outlines the orders that may be made by the Court on a member's application. The word *'oppressive'* is defined in subsection 9 as:

(a) Unfairly prejudicial to or unfairly discriminatory against a member or members of a company; or

(b) Contrary to the interest of the members as a whole

176. Given the similarities in Section 134 of the Zambian Companies Act and Section 210 of the 1948 UK Companies Act although repealed, Lord Hoffmann's exposition still rings sound, and we in passing, endorse it as applicable to applications premised on Section 134. Our further considered view is that it aptly encapsulates the considerations that are applicable to petitions for dissolution of a Company on the just and equitable ground.

177. Section 57 of the Zambia Corporate Insolvency Act states the circumstances in which a winding up Order can be made by the Court. It provides *inter alia* as follows:

> ***"57 (1) The Court may Order the winding up of a company on the petition other than the official receiver if-***
>
> ***(a)*** .....
> ***(b)*** .....
> ***(c)*** .....
> ***(d)*** .....
> ***(e)*** .....
> ***(f)*** .....
> ***(g) In the opinion of the Court, it is just and equitable that the Company should be wound up."***
>
> **And in Section 60(4) as follows:**
>
> ***"(4) Where a petition is presented by members on the ground that it is just and equitable that a company should be wound up and the Court determines that the petitioners are entitled to relief by winding up the company or by some other means, it***

shall make a winding up order unless some other remedy is available to the petitioners who are acting irresponsibly in seeking to have the company wound up instead of pursuing the other remedy."

178. Case law in England indicates that successful petitions for a winding up order on the just and equitable ground have been made where:

1. A loss of substratum of the company has occurred
2. The company was formed for a fraudulent purpose
3. Justifiable loss of confidence in company management has occurred
4. There is a deadlock in the company's management
5. In a quasi- partnership type of company, a shareholder has been excluded from management.

179. In ***re Bleriot Manufacturing Aircraft Company***[32], the Company's main objects were to acquire a German patent to manufacture substitute coffee made from dates. The company failed to obtain the patent and this prompted the minority shareholders to petition for a winding up order on the just and equitable ground as the company was now unable to pursue its principle object. The court granted a winding up order, although the company had established a factory to manufacture the coffee, was prosperously trading, and had in fact acquired a similar Swedish patent. The court held that the company's objects clause only permitted the company to manufacture the coffee substituted by working a particular German patent which could not be obtained.

180. In ***re Brinsmead (Thomas Edward) and son***[33], three former employees of John Brinsmead and Sons who were well known piano manufacturers formed a company. The object was to manufacture pianos and then fraudulently pass them off as having been made by John Brinsmead and Sons. The court held that the circumstances entitled a shareholder to petition for a winding up order on the just and equitable ground.

181. ***Lock vs John Blackwood Limited***[34] affords another instance in which the company was wound up. The managing director of the company refused to hold general meetings. He neither submitted accounts nor recommend dividends. He ran the company in a profitable but oppressive manner towards the shareholders with the exception of his wife. It was held that running the company in this way led to justifiable lack of confidence in the management of the company's affairs. A winding up order was granted on the just and equitable ground.

182. Yet another example of a case in which a company was wound up is ***Yenidje Tobacco Co. Limited***[35]. In that case, two Tobacco Manufacturers, Rothman and Weinberg combined their businesses to form the company. They were the only shareholders and directors but could not work together. Rothman sued Weinberg for fraud and they could only communicate with each other through the company secretary. Weinberg petitioned for a winding up order. The Court found it just and equitable to wind up the company, stating that the

company was in effect a partnership and the circumstances would justify the dissolution of a partnership. An order for winding-up was granted as a result.

183. ***Ebrahimi vs Westbourne Galleries Ltd***[36] affords a detailed exposition as to when a company could be wound up on the just and equitable ground. In that case the two parties had been running a partnership for 10 years which dealt in oriental rugs. They incorporated the company to take over the Oriental rug business. One of the shareholder's sons joined the company as director and shareholder.

184. As a result, the other shareholder became a minority on the board, and at general meetings. He could be out-voted by the combined shareholding of the other shareholder and his son. Relations between the two camps deteriorated. The minority shareholder was voted off the board pursuant to a provision in the Companies Act.

185. On a petition for a winding up order, it was held that even though he had been removed from the board in accordance with the Companies Act and the articles of association, the just and equitable ground conferred on the court the jurisdiction to subject the exercise of legal rights to equitable considerations. Since the minority shareholder had agreed to the formation of the company on the basis that the essence of their business relationship would remain the same as in their prior partnership, his exclusion from the company's management was clearly in breach of that understanding. It was therefore just and

equitable to wind-up the company. Lord Wilberforce listed the typical elements in petitions brought under this ground:

- A business association based on a personal relationship and mutual confidence. This will be found where a pre-existing partnership has converted into a limited company.
- An understanding that all or certain shareholders (excluding 'sleeping' partners) will participate in management.
- Restriction on the transfer of members' interests preventing the petitioner leaving.

186. Lord Wilberforce stressed that the court was entitled to superimpose equitable constraints upon the exercise of right set out in the articles of association or the Act. He stated that the words "just and equitable",

> ***"are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own; that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure."***

187. It should be borne in mind however that the cited instances do not exhaustively indicate the circumstances when a company will be wound up on the just and equitable ground.

188. In ***re Bleriot Manufacturing aircraft Company***[32] the words *'just and equitable'* are words of the widest significance ad do not limit the

jurisdiction of the court to any case. It is a question of fact and each case must depend on its own circumstances.

189. In ***Baird vs Lees***[37], Lord Clyde. He said:

> ***".... I have no intention of attempting a definition of the circumstances which amount to a 'just and equitable' cause. But I think I may say this. S Shareholder puts his money into a company on certain conditions. The first of them is that the business in which he invests shall be limited to certain definite objects. The second is that it shall be carried on by certain persons elected in a specified way. And the third is that the business shall be conducted in accordance with certain principles of commercial administration defined in the statute which provide some guarantee of commercial probity and efficiency. If shareholders find that these conditions or some of them are deliberately and consistently violated and set aside by the action of a member and official of the company who wields an overwhelming voting power, and if the result of that is that, for the extrications of their rights as shareholders, they are deprived of the ordinary facilities which compliance with the companies Acts would provide them with, then there does arise, in my opinion, a situation in which it may be just and equitable for the court to wind up the company."***

190. ***Davis & Company Ltd vs Bruiswicke (Australia) Ltd Bruiswicke-Balke-Collender Co. And Bruinswick Radio Corporation***[38] Lord Muagham delivering the judgment of the court said, at P 308

> ***"...The position of the court in determining whether it is just and equitable to wind up the company require a fair consideration of all the circumstances connected with the formation and the carrying on of the company during the short period which had elapsed since May 12, 1930."***

191. It may be safely concluded that the cited cases indicate that a petition for winding up of a company on the just and equitable ground seeks dissolution of a company where the good faith footing on which it was formed has been eroded by certain occurrences or the conduct of

other shareholders. Whether or not the petition as drawn up by the Petitioner in the case before us meets the articulated criteria is a question for another day. Suffice to state that the Petitioner is appealing to the court's conscience to free it from its associates by a winding up Order.

192. As was stated in ***Loch & Another and John Blackwood Limited***[34]. At the foundation of applications for winding up on the *'just and equitable'* rule, there must lie as justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore, the lack of confidence must spring not from dissatisfaction at being out-voted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity I the conduct of the company's affairs, the former is justified by the latter, and it is under the statute just and equitable that the company be wound up.

193. It will be recalled that the decisions we have referred to above reveal that a petition to wind up a company on the just and equitable ground is referable to arbitration pursuant to applicable arbitration agreements. We accept that an arbitrator does not possess jurisdiction to make a winding-up Order. It is undeniable however from the persuasive decisions cited above that they have jurisdiction to determine the underlying dispute between the parties. In the event

they make an award in favour of the petitioning minority contributor, nothing stops the contributor from petitioning the court for a winding-up Order. In the case under consideration, it will be remembered that the disputes between the parties stem from the performance of the obligations imposed on KCM and Vedanta by the SHA, which is in the nature of a contractual agreement among the shareholders.

194. Our considered view is that the decision in the ***Ody's Oil Company***[12] case is distinguishable. In that case the court refused to refer the matter to arbitration because the contractual agreement was tainted with illegality. In addition to this, another party which as a stranger to the arbitration agreement was involved. The court was of the view that referring part of the case to arbitration would lead to multiplicity of actions, which could result in conflicting decisions. That is not the scenario in the present case. As stated above, the grievances of the 1st respondent have arisen from the SHA. None of them lie outside the SHA. Secondly, the dispute is among the shareholders. ZCCM-IH seeks a remedy available to a minority shareholder.

195. We thus fail to conceive how the interests of third party creditors can be brought to bear on the dispute between the parties to the SHA. It is our view that the proposed public interest considerations on the stay application are far-fetched. The third party creditors are in fact not stopped from approaching the court in their own right. We in this regard adopt the persuasive reasoning by the Singapore Court of Appeal in *Tomolugen supra.* It resonates our view that the dispute between the parties is contractual. The third party interests the

petition is said to implicate are not visible to us. Contrary to Bobo J's views, we find the arbitration agreement operative and capable of performance between the parties to the SHA.

This discussion disposes of ZCCM IH's appeal and addresses part of vedanta's appeal.

196. We turn to consider the grounds in the Vedanta appeal which remain unresolved after discussing the issues raised by ZCCM-IH in its cross appeal. we have addressed some of issues raised by Vedanta in its appeal and will now address the outstanding issues.

197. The Mainsa affidavit is said to have influenced Bobo J's decision. The Corporate Insolvency Act, which is applicable to this appeal, does not prescribe the procedure to be followed when presenting a winding up petition. This brings in Order XLIV of the HCR Cap 27 of the Laws of Zambia which enacts the following:

> ***1. The rules of the Supreme Court of England in force immediately prior to the coming into effect of the Companies Act 1948, of the United Kingdom, and the general practice therein as regards, the procedure on applications under the Companies Act 1929 of the United Kingdom, shall apply as far as circumstances may permit to all applications made under the Companies Act or any Act in amendment or substitution thereof, except if and so for as any Act otherwise provides.***

198. The Corporate Insolvency Act of 2017 has replaced those portions of the Companies Act that addressed the Insolvency of a company. Winding up rules have not yet been promulgated. That being the case, the applicable rules are those referred to in Order forty four of the High Court Act.

199. According to rule 35 of the Companies (Winding up) Rules, 1929 of England affidavits in opposition to a petition must be filed within seven days of the date on which the affidavit verifying the petition is filed:

35.1 Affidavits in opposition to a petition that a Company may be wound up by or subject to the supervision of the Court shall be filed within seven days of the date on which the affidavit verifying the petition is filed and notice of the filing of the affidavit in opposition to such a petition shall be given to the petitioner or the solicitor or London agent of the petitioner, on the day on which the affidavit is filed.

(2) An affidavit in reply to an affidavit filed in opposition to a petition shall be filed within three days of the date on which notice of such affidavit is received by the petitioner or the solicitor or London agent of the petitioner.

200. This rule does not convey the notion that the contemplated affidavit will be an interim one, subject to an interpartes hearing, as proposed by learned counsel for Vedanta. The practice direction referred to by learned counsel is clearly inapplicable.

201. Learned counsel for ZCCM IH are right in arguing that had learned counsel objected to hearing the stay application before the other applications which they considered necessary, then the learned Judge would have considered the pending applications and determined them. The pending applications do not appear to have been decided, as the learned Judge did not address those outstanding issues. There was also an application whether the Chairman of the Board could be heard outside the Board.

202. As regards Bobo J's comments on the ability of KCM to defend the petition, her comments must be contextualized. They reiterate the legal position that a company is a legal entity. The question of residual powers that reside in the directors on a winding up is another issue that fell to be addressed at another time.

203. In any case, it is our view that the determination of those applications would have had no bearing on the stay application, whose mover was a contributor, with a right to be heard, as discussed above. We would further point to the statement in Halsbury's Laws of England Fourth Edition Vol. 7 at Para 1026 as supporting our view, to this effect.

204. We are informed the application by the Chairman for the KCM Board of Directors awaits delivery of ruling. It would be pre-emptive to comment on the same.

205. We move to the appeal against the stay of the winding up proceedings. We agree that the law on stay of proceedings is as quoted by learned counsel for ZCCM IH. However, it turns out that the proceedings were properly stayed in that although the learned Judge thought that the appeal was doomed to fail, it has not failed. The stay has curtailed the winding up process, preventing the appeal from being rendered an academic exercise. Although caution exercised by the learned Judge was well founded in our view.

206. The complaint in the cross appeal by Vedanta is that the learned Judge did not give reasons for the view that the appeal had no prospects of success. Our short response to this grievance is that an

evaluation of prospects of success of an appeal is not a decision contemplated in the *Chibwe* vs *Chibwe* case. However, as articulated in the case of ***Sonny Paul Mulenga vs Chainama Hotels Limited and Others***[39], the judge should have previewed the prospects of success as was demonstrated by the Supreme Court in that case.

207. On the foregoing discussion, we conclude as follows:

1. A dispute as defined in the SHA exists between the parties

2. Vedanta has *locus standi* to apply for stay of the winding up petition and reference of the matter to arbitration.

3. The disputes between the parties are arbitrable and referable to arbitration. Thus, the arbitration agreement is operative.

4. The learned Judge rightly stayed the winding up proceedings.

5. It was necessary to preview the prospects of success of the proposed appeal.

208. The upshot of our decision is that Vedanta has substantially succeeded in the appeal against the refusal to stay proceedings and refer the matter to Arbitration while ZCCM-IH has failed in its cross appeal to Vedanta's appeal. In addition to this, ZCCM-IH has failed in its appeal on the stay of the winding up proceedings pending appeal, while Vedanta has nominally succeeded in the cross appeal to ZCCM-IH's appeal.

209. In the premises, we set aside the decision of the learned Judge, order a stay of the winding up proceedings pursuant to Section 10 of

the Arbitration Act No. 19 of 2000 and refer the matter to arbitration as requested by Vedanta. The arbitration will be between the parties to the SHA, to the exclusion of the third parties, the dispute between the parties being a shareholder dispute. We award costs to Vedanta both here and in the court below, to be agreed and in default taxed.

F. M. CHISANGA
JUDGE PRESIDENT

D. L. Y SICHINGA
COURT OF APPEAL JUDGE

P. C. M. NGULUBE
COUR OF APPEAL JUDGE