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

APPEAL No. 023/2016
SCZ/8/118/2014

BETWEEN

POUWELS CONSTRUCTION ZAMBIA LIMITED — 1ST APPELLANT
POUWELS HOTELS AND RESORTS LIMITED — 2ND APPELLANT

AND

INYATSI CONSTRUCTION LIMITED — RESPONDENT

CORAM: Hamaundu, Kaoma and Kajimanga, JJJS

on 5th April, 2016 and 30th June 2016

FOR THE APPELLANTS: Mr. J. Jalasi and Mr. L. Linyama – Eric Silwamba, Jalasi and Linyama Legal Practitioners

FOR THE RESPONDENT: Mr. M. Haimbe and Mr. C. M. Sianondo – Malambo and Company

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J U D G M E N T

Kajimanga, JS delivered the judgment of the court

Cases referred to:

1. John Paul Mwila Kasengele and Others v Zambia National Commercial Bank Limited (2000) ZR 72
2. International Trades Crystals Societe Anonyme v Northern Minerals (Zambia) Limited (1985) ZR 27
3. Vangelatos v Vangelatos Appeal No. 7 of 2006
4. Leopard Ridge Safaris Limited v Zambia Wildlife Authority (2008) ZR 97 Vol. 2

5. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172
6. Paolo Marandola, Candy Marandola and Ivan Marandola v Gianpietro Milanese, Guiseppe Della Bianca, Susy Della Bianca Cragno, Vincenzo Milanese and Alberto Milanese SCZ Judgment No. 6 of 2014
7. Taurition-Collins v Cromie and Another (1964)2 ALL ER 332
8. Halifax Overseas Freighter Limited v Rasno Expert (the Pine Hill) (1958) 2 Lloyd's Rep 146
9. Development Bank of Zambia and Another v Sunvet Ltd and Another (1995-1997) ZR 187
10. BP Zambia Plc v Interland Motors Ltd (2001) ZR 37
11. Aveng (Africa) Ltd (formerly Grienaker- LTA Ltd v Midros Investments (Pty) Ltd Case No. 3187/05
12. Ody's Oil Company Ltd v Attorney General and Constantinos James Papoutsis (2012) ZR 164 vol 1
13. Simbeye Enterprises Ltd and Investment Merchant Bank Ltd v Ibrahim Yusuf (2000) ZR 159
14. International Trades Crystals Societe Anonyme v Northern Minerals (Zambia) Limited

Legislation referred to:

1. Companies Act Chapter 388 of the Laws of Zambia, ss 156, 157, 379
2. Arbitration Act No. 19 of 2000, Section 10.
3. Statutory Instrument No. 27 of 2012
4. Arbitration (Court Proceedings) Rules, 2001

Other Work referred to:

1. Halbsury's Laws of England 4th Edition Vol. 7(1), paragraph 710 [683]

This is an appeal against a ruling of the High Court at Lusaka dismissing the appellants' application to set aside originating process for irregularity.

The background to the appeal is this: On 16th July, 2009 Platinum Gold Equity Limited and the 1st appellant (1st defendant in the court below) executed a contract by which the latter was to construct a shopping centre at plot number 7732 Parklands, Kitwe, for the former. At the same time the 1st appellant executed a subcontract agreement with the respondent (plaintiff in the court below) for earthworks, layers, external works and service reticulation in respect of the said shopping centre. Alleging breach and failure or neglect by the 1st appellant to pay the respondent the outstanding amount on the subcontract, the respondent commenced an action against the 1st appellant and the 2nd appellant (2nd defendant in the court below) on 7th November, 2013 claiming the following:

(i) Payment of the sum of ZMW3,337,107.75 (equivalent to US$620,280.25);

(ii) A declaration and order that the 1st and 2nd appellants are jointly and severally liable;

(iii) Damages for breach of contract;

(iv) Interest from 31st March, 2013;

(v) Any relief the Court may deem just; and

(vi) Costs.

On 23rd December, 2013 the appellants entered a conditional memorandum of appearance. On 14th January, 2014 the appellants filed separate summons to set aside originating process pursuant to the provisions of Order LIII of the High Court Rules of the High Court Act, Chapter 27 of the Laws of Zambia, as read with Order 2, Rule II, Order 14A and Order 33, Rule 3 of the Rules of the Supreme Court 1999 Edition and section 281 of the Companies Act, Chapter 388 of the Laws of Zambia ("the Companies Act").

In respect of the 1st appellant, the basis of the application was that:

(i) The writ of summons and statement of claim were irregular as the 1st appellant company was wanting in capacity to be sued as it was in the process of liquidation and was being wound up;

(ii) The writ of summons and statement of claim were irregular as the respondent did not seek the requisite leave of court to

issue originating process on a company in liquidation pursuant to the provisions, inter alia, of section 281 of the Companies Act.

(iii) The writ of summons and statement of claim were irregular as the forum was indicated as the "Commercial Registry at Lusaka" when the provisions of Order LIII, Rule 1 and 3 of the High Court Rules of the High Court Act, refer to a "Commercial List Registry"; and

(iv) Clause 29 of the Agreement and Schedule of Conditions of Building contract between Platinum Gold Equity Limited and Pouwels Construction Zambia Limited and clause 15 of the subcontract agreement between Pouwels Construction Zambia Limited and Inyatsi Construction Limited provide for Alternative Dispute Resolution (ADR) which includes arbitration.

The affidavit in support of the application sworn by Harrie Martin Pouwels contained the following paragraphs:

"1. ...

2. ...

3. That I am a director in the 1st Defendant company herein by whom I am duly authorized to depose to this my affidavit verily believing in the truth and veracity of the same.

4. That on the 7th day of November, 2013, the Plaintiff herein caused to be issued originating process herein by way of writ of summons and statement of claim and the same was personally served upon me on the 3rd day of December, 2013.

5. That the said writ of summons and statement of claim purported to have been served upon the 1st Defendant is irregular as the 1st Defendant company is in the process of liquidation and is being voluntarily wound up. I am now shown a copy of the Special Resolution and the same is produced hereto and marked "HMP 1".

6. That I verily believe that Mr. Arthur Ndhlovu will be appointed as Liquidator subject to ratification at the meeting of creditors and I verily believe that this process should be issued and served upon the liquidator.

7. That I am verily advised by Counsel that the writ of summons and statement of claim are irregular as the Plaintiff did not seek the requisite leave of Court to issue originating process on a company in liquidation.

8. That the agreement that give[s] rise to the Plaintiff's claim expressly states in clause 15 of the sub contract agreement between the Plaintiff and the Defendant as read with clause 29 of the Agreement and Schedule of Conditions of building contracts between Platinum Gold Equity Limited and the Defendant provides that the forum for the resolutions of all disputes including the claim herein should be by way of Alternative Dispute Resolution (ADR) and includes arbitration and not court action. I am now shown copies of clause 15 of the Sub-contract and clause 29 of the Agreement and Schedule of Conditions of building contracts and the same are collectively produced hereto and marked "HMP 2".

9. That on the 8th day of January, 2014 I caused to be filed a Conditional Memorandum of Appearance in the Commercial List Registry of the High Court of Judicature for Zambia. I am

now shown a copy of the conditional memorandum of appearance and the same is produced hereto and marked "HMP 3".

10. That in the premises this is a fit and proper case for this Honourable Court to Set Aside Originating Process for Irregularity hence my application.

11. That no prejudice will be occasioned to the Plaintiff by such Order Setting Aside Originating Process and conversely the Interest of Justice shall be served.

12. That the contents of this my affidavit are true and correct to the best of my knowledge and belief."

The basis of the 2nd appellant's application was that:

"(i) The writ of summons and statement of claim were irregular as there was no cause of action against the 2nd appellant. The 2nd appellant was not privy to the contract between the 1st appellant company and the respondent and therefore had no contractual obligation towards the respondent;

(ii) The High Court was wanting in jurisdiction as the respondent had no legally tenable cause of action against the 2nd appellant; and

(iii) The writ of summons and statement of claim were irregular as the forum was indicated as the "Commercial Registry at Lusaka" when the provisions of Order LIII, Rules 1 and 3 of the High Court Rules of the High Court Act, Chapter 27 of the Laws of Zambia refer to a "Commercial List Registry."

The affidavit in support of the 2nd appellant's application also sworn by Harrie Martin Pouwels contained the following paragraphs:

"1. ...

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2. ...

3. That I am a director in the 2nd Defendant company herein by whom I am duly authorized to depose to this my affidavit verily believing in the truth and veracity of the same.

4. That on the 7th day of November, 2013, the Plaintiff herein caused to be issued originating process herein by way of Writ of Summons and Statement of Claim and the same was personally served upon me on the 3rd of December, 2013.

5. That the said writ of summons and Statement of Claim purported to have been served upon the 2nd Defendant is irregular as the 2nd Defendant company is not privy to the contract between the 1st Defendant company and the Plaintiff and therefore has no contractual obligation towards the Plaintiff.

6. That I verily believe that the 2nd Defendant company is the wrong party to this suit as it does not have the requisite *locus standi*.

7. That I verily believe that this Honourable Court is wanting in jurisdiction as the Plaintiff has no legally tenable Cause of Action against the 2nd Defendant.

8. That in the premises this is a fit and proper case for this Honourable Court to Set Aside Originating Process for Irregularity hence my application.

9. That no prejudice will be occasioned to the Plaintiff by such Order Setting Aside Originating Process and conversely the Interest of Justice shall be served.

10. That the contents of this my affidavit are true and correct to the best of my knowledge and belief."

The Respondent's affidavit in opposition to the 1st and 2nd appellants' affidavits in support sworn by Paul Ivor Lawson stated

in relevant paragraphs as follows:

"1. ...

2. ...

3. **That I am the managing director of the Plaintiff company and therefore competent to swear this my affidavit from facts within my knowledge and belief.**

4. **That I have read the two purported affidavits of Harrie Martin Pouwels and I do respond as follows.**

5. **That by a contract made in writing between the Plaintiff and the 1st Defendant, the Plaintiff agreed to carry out and complete sub-contracted works for the 1st Defendant of which include earth works, layers, external works and service reticulation at Freedom Park Shopping Centre in Kitwe, now produced and shown to me marked "PIL 1" is the said contract.**

6. **That the 1st and 2nd Defendants have, notwithstanding their purported separate and distinct legal entities, been operating and appear to be one and the same legal entity and as such the Plaintiff avers that the 1st and 2nd Defendants are a single entity and controlled by the same directors. Now produced and shown to me marked "PIL 2 (a) (b)" are the Defendants' PACRA printouts.**

7. **That the management of the Defendants as one unity made use of the same workforce in construction business of the 1st Defendant to construct the building of the 2nd Defendant.**

8. **The property being Stand No. 9909 Solwezi which is now registered in the name of the 2nd Defendant was bought and developed using the resources from the 1st Defendant. The 2nd Defendant did not have the resources to acquire land and the property was only processed into the name of the 2nd Defendant after the same had already been purchased and developed using the resources from the 1st Defendant. At the time of change of ownership from the 1st Defendant to the 2nd Defendant, the 1st Defendant was already owing the claimed amount to the Plaintiff.**

9. That in a profile of the 1st Defendant dated 23rd February, 2010, the now Stand No. 9909 Solwezi, where the Hotel stands is clearly shown as belonging to the 1st Defendant. Now produced and shown to me marked "PIL 3" is the said profile.

10. That the 2nd Defendant was only incorporated on 20th day of July 2010. The said 2nd Defendant was not even listed as a company under companies in the Pouwels Group in February 2010 because it did not exist at the date of the profile.

11. That the Hotel which is on Stand No. 9909 Solwezi existed before the 2nd Defendant was incorporated can be noted in the 1st Defendant's profile of 23rd February, 2010 and incorporated documents and land register. Now produced and shown to me marked "PIL 4 (a) (b) (c) (d)" are the certificate of incorporation, company Form 5, Companies Form No. 11 and the Lands Register.

12. That going by the contract marked as "PIL 1" of paragraph 5 of this affidavit, clause 12.2 of the contract obligated the Defendants to pay the Plaintiff amounts due by the Thirty Seven (37) day (due date) which period has elapsed and the money has already been paid to the 1st Defendant.

13. That the value of the work completed by the Plaintiff pursuant to the contract and which amount was invoice[d] is US$2,029,373.13. This amount is inclusive of tax.

14. That the Plaintiff was only paid the sum of US$1,409,092.22, leaving a balance of US$620,280.25.

15. ...
16. ...
17. ...
18. ...
19. ...
20. ...

21. That on the same day of 29th April, 2013 when the funds were transferred from the 1st Defendant's account to the 2nd Defendant, a board meeting was held where it was resolved that the minority shareholder would take full authority to

negotiate the future of the 1st Defendant. Now produced and shown to me marked "PIL 9" is the said board resolution.

22. That at the time of the said resolution, there was nothing which had remained about the viability of the 1st Defendant and Harrie Martin Pouwels who was the majority shareholder and alter ego of the Defendants never wanted to have anything to do with the 1st Defendant.

23. That as a result of the management of the Defendants as one economic unit, and after successfully transferring the assets of the 1st Defendant to 2nd Defendant, the 1st Defendant failed to repay debts and this is evident in the list of goods and chattels detrained by Zambia Revenue Authority due to the taxes owed to the authority. Now produced and shown to me marked "PIL 10" is the Arrears and Return Filling Compliance Unity Form.

24 That the other result of the decision to transfer resources from the 1st Defendant to 2nd Defendant is that the 1st Defendant failed to fulfill other contractual obligation[s]. Now produced and shown to me marked "PIL 11" is the letter from the 1st Defendant to Kabitaka Hills Development Corporation.

25. That unlike the board resolution marked as "PIL 9" in this affidavit the attempted special resolution to voluntarily wind-up of the 1st Defendant is not signed by all the members of the 1st Defendant and thereby making it defective.

26. That there is equally no declaration of solvency by the 1st Defendant and as such there is need to cause the meeting of creditors and the absence of it makes the attempted voluntary liquidation defective.

27 That in the resolution marked as "PIL 9" the responsibility to run the affairs of the 1st Defendant was left in the hands of the other director and there is no resolution to restore the mandate to Harrie Martin Pouwels to make the purported resolution.

28. That at the time of commencing the action and at the time of service the purported resolution to put the 1st Defendant

under liquidation was not even in place and does not affect these proceedings.

29. That although the reading of clause 15 of the sub-contract agreement and clause 29 of the agreement between the 1st Defendant and Platinum Gold Equity Limited suggests that the dispute between the parties need[s] to be resolved by arbitration, the amount owed to the Plaintiff is admitted and therefore there is no dispute to refer to arbitration. The admission of the amount owed is evidenced in exhibit marked as "PIL 6 (a) (b) in this affidavit.

30. That one of the claim[s] in the writ and statement of claim is the declaration that the 1st and 2nd Defendants are jointly and severally liable and I have been advised by the Plaintiff's advocates and verily believe so that where there are claims some of which are subject to arbitration and other[s] which are not, issues of convenience dictate that they should all be resolved in a single set of proceedings and by necessity that will be by way of litigation.

31. That I have further been advised by the Plaintiff's lawyers that by practice the list under which matters of commerce are filed in the High Court for Zambia called the Commercial Registry. This is evident in the date stamp of the Court which designate it as the "Commercial Registry".

32. That I do crave the indulgence of this Honourable Court that all the issues raised by the Defendants should not hinder the matter from being determined on its merit.

33. ..."

After considering the affidavit evidence, skeleton arguments and the oral submissions of counsel for the parties the learned High Court Judge dismissed the appellants' application with costs. In his ruling of 16th May, 2014, the learned trial Judge found, among

other things, that exhibit "HMP1" was not a special resolution as it was not signed by all the members of the 1st appellant company entitled to vote on the resolution in accordance with subsection (2) of section 157 of the Companies Act. The Judge went on to state as follows at page 13 of his ruling:

> **"The printout from PACRA which has been exhibited as "PIL 2 (a)" shows that the 1st Defendant has three shareholders namely Arnold Jan Pouwels, Carl August Richter and Harold Martin Pouwels. Exhibit "HMP1" was however only signed by Harold Martin Pouwels. It would therefore appear that the said Harold Martin Pouwels individually decided to place the 1st Defendant under liquidation after the commencement of these proceedings by signing the document which has been exhibited and terming it a "special resolution". The law as stated above knows no such resolution. Therefore, exhibit "HMP1" is not a special resolution. As such, the issue of leave does not arise because there can be no liquidation in the absence of any resolution or court order placing a company under liquidation."**

On the issue of arbitration, the Judge acknowledged that if a party bound by an arbitration agreement commences an action in the High Court for the determination of the substantive dispute which ought to be referred to arbitration, the other party to the agreement may make an application to stay the proceedings and refer the parties to arbitration pursuant to section 10 of the Arbitration Act No. 19 of 2000 (AA 2000). After quoting the section,

the learned trial Judge concluded as follows at page 14 of his ruling:

> **"However, no such request or application has been made in this matter. The only application before Court is for an order to set aside originating process for irregularity. Therefore, although counsel for the parties laboured to argue about whether or not the parties should be referred to arbitration, the Court cannot *ex proprio motu* make any determination or order in that respect in the absence of an application or a request as required by the foregoing provision."**

On whether or not the 2nd appellant should be joined to the proceedings, the learned trial Judge concluded at pages 14 to 15 that:

> **"The Plaintiff has, by its Statement of Claim, justified the reason why it found it necessary to make the Plaintiff [2nd Defendant] a party to these proceedings. Therefore, it would be premature at this interlocutory stage of the proceedings for the Court to make any determination as to whether or not the 1st and 2nd Defendants should be jointly and severally liable to the Plaintiff. The Plaintiff has to lead evidence at trial to justify any such finding in its favour. I thus find it inappropriate and premature to determine the issue of whether or not the 2nd Defendant's separate corporate personality can be properly ignored in the circumstances of this case so as to necessitate the lifting of its corporate veil as prayed by the Plaintiff. If, at the conclusion of trial, the Plaintiff were unsuccessful in its claim against the 2nd Defendant, the Court would, if appropriate, exercise its discretion and award costs to the 2nd Defendant. I therefore decline to make any premature determination which may have the effect of preempting the Court's decision on the merits of the matter."**

On 10th June, 2014 the 1st and 2nd appellants applied for a

stay of proceedings pending appeal to the Supreme Court. In his ruling dated 24th July, 2014 the learned trial Judge dismissed the appellants' application with costs. Dissatisfied with the ruling of 16th May, 2014 the 1st and 2nd appellants filed four grounds of appeal. They argued grounds 1 and 2 together. Grounds 3 and 4 were also argued together.

Ground 1 of the appeal was that the learned trial Judge erred in law when he held that the special resolution to wind-up the 1st appellant did not meet the requirements of the Companies Act. Ground 2 was that the learned trial Judge erred in law when he proceeded to make an enquiry with regard to the legality of the special resolution which had been duly registered at the Patents and Companies Registration Agency pursuant to the provisions of section 157 of the Companies Act and as such, any enquiry or purported illegality could only be determined by way of appeal to the Registrar of Companies pursuant to section 270 of the Companies Act which prescribes the manner in which documents registered at the Patents and Companies Registration Agency can be

challenged. Ground 3 was that the learned trial Judge erred in law when having established that an arbitration clause existed between the respondent and the 1st appellant, he refused to refer the matter to arbitration pursuant to section 10 of AA 2000 and as such abdicated his role of adjudicating on all issues in controversy when at page 15 of the ruling, he held as follows:

> **"However, no such request or application has been made in this matter. The only application before Court is for an order to set aside originating process for irregularity. Therefore, although counsel for the parties laboured to argue about whether or not the parties should be referred to arbitration, the Court cannot *ex proprio motu* make any determination or order in that prospect in the absence of an application or request as required by the foregoing provision."**

Ground 4 was that the learned trial Judge erred in law when he held that the 2nd appellant should continue to be part of the proceedings notwithstanding that no prima facie cause of action exists with respect to the claim by the respondent against the 2nd appellant on account of privity of contract.

On grounds 1 and 2, counsel for the appellants, Mr. Jalasi, submitted that while the Judge in the court below did not dispute the requirement under the law for a company that has been placed under liquidation by way of a special members resolution pursuant

to section 281 of the Companies Act, he proceeded to go beyond and make an inquiry into the legality of the resolution. It was submitted that the court below was not given any opportunity to receive an explanation as to the way the resolution was signed by one member and also inquire by way of inspection of the minute books which every company is expected to have.

Counsel for the appellants also submitted that the respondent misled the lower court by challenging the validity of the resolution by way of submission instead of commencing a separate cause of action or separate process either by way of a counterclaim as in the case of **John Paul Mwila Kasengele and Others v Zambia National Commercial Bank Limited**[1] or by way of proceeding through notice of appeal pursuant to the provisions of section 379 of the Companies Act which provides as follows:

> **"Subject to this Act, a person aggrieved by a decision of the Registrar may within fourteen days after the date on which he is notified of the decisions, appeal to the Court against the decision, and the Court may confirm, reverse or vary the decision or make such order or give such directions in the matter as it thinks fit."**

It was therefore, submitted that if the respondent was

aggrieved it was at liberty to challenge the registration of the resolution and that the record showed that no member of the company had lodged any objection as to the manner in which the meeting gave birth to the special resolution.

Counsel further submitted that the learned trial Judge fell into grave error when he held that the special resolution was made pursuant to the provisions of section 157 of the Companies Act, which according to him, does not require a meeting. According to counsel, section 156(3) of the Companies Act is clear on the requirements of a special resolution as follows:

> **"(3) A resolution shall be a special resolution if it is passed by a majority of not less than three-fourths of the votes cast by such members of the company as, being entitled so to do, vote in person or by proxy at a meeting duly convened as a meeting at which the resolution will be moved as a special resolution, and duly held."**

We were also referred to **Halsbury's Laws of England 4th Edition, Vol. 7(1) paragraph 710 [683]** where it is stated as follows:

> **"A resolution is special when it has been passed by such a majority as is required for the passing of an extra ordinary resolution at a general meeting of which not less than 21 days notice specifying the intention to propose the resolution as a special resolution has been duly given. However, if it is so agreed by the majority in the number of the members having the right to attend and vote at any**

such meeting, being the majority together holding not less than 95 per cent in nominal value of the shares giving that right, or, in the case of the total voting rights at the meeting of all the members, a resolution may be proposed and passed as a special resolution at a meeting of which less than 21 days has been given.
To be valid, the resolution passed at the meeting must be the same as that specified in the notice conveying it, both in form and in substance."

Counsel submitted that from the provisions of section 156(3) of the Companies Act and **Halbsury's Laws of England**, 4th **Edition**, **Vol. 7(1)** there is nothing to suggest that the resolution must be signed by all members. What is critical, counsel submitted, is that a meeting should be called with a 21 day notice and all members should vote.

It was also counsel's submission that section 157 of the Companies Act referred to by the learned trial Judge was with respect to resolutions passed without a meeting. Counsel argued that in this case a meeting did in fact take place where the majority shareholders having three quarters voting rights resolved to wind-up the company subject to a creditors meeting.

We were referred to the case of **International Trades Crystals Societe Anonyme v Northern Minerals (Zambia) Limited**[2] where

the plaintiff sued the defendant for certain sums of money. The defendant applied to have the writ set aside on the ground that the resolution passed by three out of five directors of the plaintiff company authorizing the institution of the proceedings was not valid because one of the directors had not been notified of the meeting at which the resolution was passed. The director to whom notice should have been given became aware of the decision taken in his absence and took no steps to require a second meeting to be held so that he could vote on the resolution. It was held that:

> **"As the director affected had not called for another meeting within a reasonable time or at all, he could be regarded as having waived the irregularity which would otherwise have attached to the meeting at which the resolution was passed."**

In the alternative, counsel argued that since there is no evidence on the record that the members of the 1st appellant company whose signatures do not appear on the resolution did not object to the special resolution, the learned Judge should have directed the 1st appellant to reconvene the meeting. We were again referred to the

International Trades Crystals case where we stated as follows:

> **"We agree also with the general proposition of the law regarding meetings of directors, that as a general rule, a decision passed by**
>
> **directors at a meeting to which some of their number are not invited will generally be considered to be invalid.**
>
> **The consequences of what we have said, however, are not necessarily that the writ must be set aside. Where there is an irregularity in the passing of a resolution by a company through its directors, then, depending on the circumstances of each particular case, the action commenced, allegedly without proper authority, may either be dismissed or it may be stayed, at the discretion of the Court, to permit any irregularity which can be cured to be cured. This is what happened for example, in the case of Bellamano v Ligure Lombarda Ltd (1) where proceedings were stayed on condition that the action be thereafter properly constituted by ratification or otherwise on the part of the plaintiff.**
>
> **On the facts of this case, however, we note that the director to whom notice was not given became aware of the decision taken in his absence. As the irregularity in this case was curable, we find that it can in fact, and it may well be cured by the calling of another meeting to which the director concerned could be summoned."**

On grounds 3 and 4 counsel submitted that having found as a fact that an arbitration agreement existed between the 1st appellant and the respondent the court should have proceeded to exercise its discretion under Order LIII (8)(1) of the High Court Rules as amended by Statutory Instrument No. 27 of 2012 which provides as

follows:

> **"8(1) A Judge may, at the scheduling conference refer the parties to mediation in accordance with Order XXX1, or where applicable, to arbitration."**

Counsel contended that having failed to exercise his discretion under Order LIII(8)(1) of the High Court Rules the learned Judge failed to adjudicate on all matters that were before him. Counsel cited the case of **Vangelatos v Vangelatos**[3] where we stated in respect of an arbitration clause as follows:

> **"In our view the literal meaning of this clause is that parties to the agreement, that is, the appellant and the respondent agreed to submit themselves to an alternative resolution mechanism of any dispute or differences that shall arise between the members."**

We were also referred to the case of **Leopard Ridge Safaris Limited v Zambia Wildlife Authority**[4] where we held as follows:

> **"Since the application for leave was before the court and in consideration of the respondents' application for the stay of the proceedings under section 10 of the Arbitration Act No. 19 of 2000, the trial Judge had no choice but to refer the dispute to arbitration."**

Counsel submitted that the wording of section 10 of AA 2000 is clear in its meaning and interpretation in that if there is an arbitration clause the matter must be referred to arbitration. He contended that having established that there was an arbitration

clause between the 1st appellant and the respondent, the learned trial Judge should have in the interest of justice referred the dispute between the two parties to arbitration and misjoined the 2nd appellant to the proceedings. Counsel submitted that it was not legally justified to join the 2nd appellant which was not privy to the proceedings merely for the purpose of enforcing a judgment that the respondent did not believe could be settled by the 1st appellant which they believed was insolvent but challenged the resolution for a voluntary members winding-up.

Counsel further submitted that since there was an arbitration clause between the 1st appellant and the respondent, the learned trial Judge should have misjoined the 2nd appellant using his powers under Order XIV of the High Court Rule which provide as follows:

> **"(2) The Court or a Judge may, at any stage of the proceedings and on such terms as appear to the Court or a Judge to be just, order that the name or names of any party or parties, whether as plaintiffs or an defendants, improperly joined, be struck out."**

On grounds 1 and 2, counsel for the respondent,

Mr. Sianondo, submitted that the purported resolution to put the 1st appellant on creditors voluntary winding-up was made on 10th December, 2013 after the originating process had already been filed into court on 7th November, 2013. Counsel argued that the purported special resolution which appears at page 40 of the record of appeal shows that it was made pursuant to section 157 of the Companies Act which provides as follows:

> "157(1) The members of a private company may, in accordance with this section, pass a resolution in writing without holding a meeting, and such a resolution shall be as valid and effective for all purposes as if it has been passed at a meeting of the appropriate kind duly convened, held and conducted.
>
> (2) The resolution shall be signed by each member who would be entitled to vote on the resolution if it were moved at a meeting of the company, or by his duly authorized representative.
>
> (3) The resolution shall be passed when signed by the last member referred to in subsection (2), whether or not he was a member when other members signed.
>
> (4) If the resolution is described in writing as a special resolution, it shall be deemed to be a special resolution for the purpose of this Act.
>
> (5) If the resolution states a date as being the date of the signature thereof by any member, the statement shall be prima facie evidence that it was signed by the member of that date.

(6) This section shall not apply to a resolution to remove an auditor or to remove a director."

It was therefore counsel's contention that the purported resolution having been made pursuant to section 157 of the Companies Act the Court below was entitled to decide whether the prescriptions under the said section were met. He submitted that in its skeleton arguments in the court below appearing at page 168 of the record of appeal, the respondent raised issues of the invalidity of the special resolution and it was within the court's competence to resolve the issue so raised. Counsel relied on the case of **Zulu v Avondale Housing Project Limited**[5] were we guided that:

> **"I would express the hope that trial courts will always bear in mind that it is their duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined with finality. A decision which because of uncertainty or want of finality leaves a door open for further litigation on the same issue between the same parties can and should be avoided."**

Counsel submitted that with the guidance above, the learned trial Judge cannot be faulted for resolving an issue which he was

invited to resolve. He contended that the issue of the illegality of the resolution was raised and upon the submissions of the parties appearing at page 168 of the record of appeal, the Court made a determination

Counsel argued that the role of the shareholders over the decision of the directors does not apply in this case where the issue was whether from the evidence available, the resolution was properly made within the provisions of section 157 of the Companies Act. He submitted that the resolution was not in conformity with section 157 of the Companies Act and consequently, there cannot be a presumption of a valid resolution when the requirements of the law have not been satisfied. He contended that the net result of the non-compliance with the law is that the resolution is null and void. According to counsel, section 281 of the Companies Act does not come into play in this matter there being no valid resolution which would effectively trigger the company into liquidation.

It was also submitted that section 379 of the Companies Act

from which the appellants would like to draw inspiration was not of any application in this matter as it provides for a procedure when a party is dissatisfied with the decision of the Registrar. Counsel argued that the issue in the court below was about the invalidity of a resolution and therefore, even though an invalid resolution was registered by the Registrar, this did not cure the invalidity. To this end, counsel submitted, there was no decision of the Registrar in issue to warrant the invoking of section 379 of the Companies Act.

He also contended that there was no evidence in the court below that the other shareholder was aware of the purported resolution so as to enable him express his view. Counsel accordingly submitted that grounds 1 and 2 are without merit.

On grounds 3 and 4, counsel submitted that there was no finding of fact in the court below to the effect that there existed an arbitration agreement as argued by the appellants. He contended that according to section 10 of AA 2000, a party to the proceedings needs to request the court to exercise its discretion to stay the

proceedings. Counsel submitted that Order LIII (8)(1) of the High Court Rules as amended by Statutory Instrument No. 27 of 2012 cannot amend a procedure which is provided for under section 10 of AA 2000. Counsel placed reliance on the case of **Paolo Marandola, Candy Marandola and Ivan Marandola v Gianpietro Milanese, Guiseppe Della Bianca, Susy Della Bianca Cragno, Vincenzo Milanese and Alberto Milanese**[6] where we stated as follows:

> **"From the above, it is clear that rule 38 (1) of the Arbitration (Court Proceedings) rule, 2001, is limited to the provisions under those rules only and does not extend to the main body of the Act. The provision allows the use of the High Court and Subordinate Court Rules in arbitration matters, where the arbitration rules are insufficient, not when the substantive Act in sufficient."**

Counsel submitted that it was clear from the above authority that for a party to derive any benefit from section 10, there is need to make a request, which is an application to stay proceedings and refer the matter to arbitration. He added that in this case no such application was made and instead there was only an application to set aside originating process. He submitted that in the cases of

Vangelatos[3] and Leopard Ridge Safaris[4] cited by the appellants, there were applications to stay proceedings.

Counsel further argued that even if an application for a stay of proceedings was made, the court below would still have not referred the matter to arbitration as one of the parties to the suit is not a party to the arbitration agreement and consequently, some of the issues are not arbitrable. He relied on the cases of **Taurition-Collins v Cromie and Another[7]** as well as **Halifax Overseas Freighter Limited v Rasno Expert (the Pine Hill)[8]** on the danger of conflicting decisions from two different tribunals. Our attention was also drawn to the cases of **Development Bank of Zambia and Another v Sunset Ltd and Another[9]** and **BP Zambia Plc v Interland Motors Ltd[10].**

Counsel also argued that it is an accepted principle of law that where some claims are subject to arbitration and others not, they all need to be resolved in a single set of proceedings and that ought to be litigation. In support of this argument, counsel referred us to

the case of **Aveng (Africa) Ltd (formerly Grienaker- LTA Ltd) v Midros Investments Pty Ltd**[11] where Wallis J. had this to say:

> **"Midros also contends that any claim based on the settlement agreement that Aveng may have is not a claim that is capable of being subjected to arbitration under the building contract. It says that such claims arise under separate agreements and are therefore outside the scope of the clause. Implicit in this contention is reliance on the principle that where there are several claims some of which are subject to arbitration and others which are not, issues of convenience will frequently dictate that they should all be resolved in a single set of proceedings and by necessity that will be by way of litigation."**

Regarding the 2nd appellant not being a party to the arbitration agreement, counsel cited the case of **Ody's Oil Company Ltd v Attorney General and Constantinos James Papoutsis**[12] where we stated as follows:

> **"Further, the fact that the 1st respondent is not a party to the arbitration agreement and therefore, not bound by its terms or outcome, also makes the arbitration inoperative in this matter.**
>
> **It is also a fact that the dispute in this matter arose from the same facts. Therefore, it would not be in the interest of justice to server the dispute in the manner envisaged by the learned State Counsel, Mr. Banda, so that one segment is arbitrated upon, while the other is thereafter, resolved by the High Court. Splitting the dispute would also result into multiplicity of actions which this Court frowns upon."**

He added that one of the claims by the respondent, in its

originating process, is an invitation to the court below to make a declaration and an order that the appellants are jointly liable. Counsel argued that the statement of claim at pages 25 to 28 of the record of appeal clearly shows the nexus between the appellants to justify maintaining them as parties to the cause.

He submitted that it is not therefore tenable, in view of the allegations made as to the operation of the appellants, to have them misjoined. He relied on the case of **Simbeye Enterprises Ltd and Investment Merchant Bank Ltd v Ibrahim Yusuf**[13] where we emphasized the need to bring all parties to disputes relating to one subject matter before the court at the same time so that they may be determined without delay, inconvenience and expense of separate actions and trials.

Counsel finally submitted that there is no doubt that the 2nd appellant would be affected by the decision in this matter particularly that there are allegations that the 2nd appellant was operated as one economic unit with the 1st appellant. He accordingly urged us to dismiss this appeal for lack of merit.

We have considered the record of appeal and the ruling appealed against. We have also considered the arguments and authorities in respect of this appeal.

Grounds 1 and 2 relate to the legality of the special resolution to wind-up the 1st appellant company. The appellants have attacked the learned trial Judge's finding that exhibit "HMP1" was not a special resolution as it was not signed by all the members of the 1st appellant company entitled to vote as required by section

157(2) of the Companies Act. In our view the learned trial Judge was on firm ground in making such a finding. We also agree with the contention of counsel that there can be no presumption of a valid resolution when the requirements of the law have not been satisfied.

We have examined exhibit "HMP1" which appears at page 40 of the record of appeal. It is quite plain to us that the resolution is patently invalid as it was signed only by one shareholder, Harrie Martin Pouwels, when exhibit "PIL2(a)" at page 128 of the record of

appeal shows that the 1st appellant company had three shareholders. Counsel for the appellants has relied on section 156(3) of the Companies Act and paragraph 710 [683] of the Halsbury's Laws of England 4th Edition, Vol. 7(1) in contending that there is nothing in these authorities to suggest that the resolution must be signed by all members. We agree, to that extent only. However, we find nothing in these authorities suggesting that the resolution can be signed only by one member. On the contrary we find that the two authorities are as clear as crystal on the requirement of a resolution being signed by a 'majority' of the members.

The learned counsel for the appellants also argued that the respondent should have challenged the validity of the resolution by commencing a separate action or by way of a counterclaim and relied on the **Kasengele**[1] case where we stated as follows:

> **"Shareholders enjoy, as a matter of right, overriding authority over their company's affairs, even over wishes of the Board of Directors and Managers."**

We find that the **Kasengele**[1] case does to apply to the

circumstances of this case. The main issue in that case was simply whether the ZIMCO board of directors had power to alter or qualify the shareholders decision to merge salaries and allowances. This Court held that they did not have such powers. We therefore, have difficulties appreciating how the principle of law enunciated in the **Kasengele**[1] case could aid the appellants in grounds 1 and 2 of this appeal. Counsel alternatively submitted that the respondent should have proceeded by way of notice of appeal pursuant to section 379 of the Companies Act. Our understanding of that section is that it applies to circumstances where the Registrar has made a decision. In the instant case we find that there was no decision made by the Registrar in the context envisaged by section 379 of the Companies Act. In our considered view, it does not amount to a decision of the Registrar when a resolution is filed by a company at the PACRA registry. If we may add, we do not find any provision in the Companies Act which imposes an obligation on the Registrar to investigate the validity or lack of it, of a resolution filed by a company.

The learned counsel for the appellants also submitted that section 157 of the Companies Act relates to resolutions passed without a meeting but in this case a meeting took place where the majority shareholders resolved to wind-up the company subject to a creditors meeting and we were referred to the case of **International Trades Crystals Societe Anonyme v Northern Minerals (Zambia) Limited**[2]. First, we find from the record that no evidence of such a meeting of shareholders was produced by the 1st appellant in the court below. Second, we find that the case relied upon by the appellants relates to a resolution passed by directors of a company and not members and it is therefore inapplicable to the circumstances of this case.

For the foregoing reasons, we find that grounds 1 and 2 have no merit.

We now turn to grounds 3 and 4. There can be no doubt from the ruling at pages 7 to 23 of the record of appeal that the trial Judge acknowledged the existence of a valid arbitration clause in the contract between the 1st appellant and the respondent.

However, his finding was that no request or application was made by the 1st appellant to refer the parties to arbitration. According to the trial Judge, the only application before him was for an order to set aside originating process for irregularity.

Section 10 of AA 2000 states as follows:

> **"A court before which legal proceedings are brought in a matter which is the subject of 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."** (underline our emphasis)

It is worth noting that the philosophy underlying AA 2000 is underpinned by its preamble as being "to redefine the supervisory role of the courts in the arbitral process." The Act is intended to restrict the court's involvement in arbitration to the extent only of providing a complementary role to the arbitral process. Unlike the repealed Arbitration Act No. 3 of 1933 (Chapter 40) which gave courts unfettered powers to interfere in and control the arbitral process, AA 2000 was intended by the legislature to foster commerce by giving parties to a commercial transaction the freedom to choose arbitration as their preferred dispute resolution forum.

The courts would only interfere with the parties' choice of forum if "... the arbitration agreement is null and void, inoperative or incapable of being performed."

Given the foregoing backdrop, our understanding of section 10 of AA 2000 is that it should not be given a restrictive interpretation that a request to refer the parties to arbitration which is not in the format of Part II of the Arbitration (Court Proceedings) Rules, 2001 is not an application. In this case, the request is contained in paragraph 8 of the 1st appellant's affidavit in support of summons to set aside writ for irregularity as follows:

> **"That the agreement that gives rise to the Plaintiff's claim expressly states in clause 15 of the subcontract agreement between the plaintiff and the defendant as read with clause 29 of the Agreement and Schedule of Conditions of Building Contracts between Platinum Gold Equity Limited and the Defendant provides that the forum for the resolution of all disputes including the claim herein should be by way of Alternative Dispute Resolution (ADR) and includes arbitration and not court action."**

And in the appellants' skeleton arguments at page 92 of the record of appeal where section 10 of the AA 2000 was cited in aid, it

was contended as follows:

> **"We submit that in this jurisdiction when a matter has an arbitration clause it must without exception be referred to arbitration."**

In addition to section 10 of AA 2000, the appellants also relied on the cases of **Vangelatos v Vangelatos**[3] and **Leopard Ridge Safaris Limited v Zambia Wildlife Authority**[4] as can be noted at pages 92 and 93 of the record of appeal.

In response to the appellants' request, the respondent stated in paragraph 29 of its affidavit in opposition as follows at page 105 of the record of appeal:

> **"That although the reading of clause 15 of the subcontract agreement and clause 29 of the agreement between the 1st Defendant and Platinum Gold Equity Limited, suggests that the disputes between the parties need to be resolved by arbitration, the amount owed to the Plaintiff is admitted and therefore there is no dispute to refer to arbitration. The admission of the amount owed is evidenced in exhibit marked as "PIL 6 (a) (b) in this affidavit."**

And the respondent's skeleton arguments from pages 170 to 182 of the record of appeal clearly demonstrate that the 1st appellant's request was spiritedly opposed by the respondent. Moreover, both Mr. Jalasi and Mr. Sianondo augmented their

skeleton arguments with brief oral submissions as can be noted at page 281 of the record of appeal. In particular, Mr. Jalasi submitted, inter alia, as follows:

> **"... there is also an arbitration clause between the plaintiff and the 1st defendant. This matter should have been referred to arbitration."**

From the foregoing, we are satisfied that the learned trial Judge fell into error when he held that no request or application had been made to refer the 1st appellant and the respondent to arbitration. Although the main application was couched as "SUMMONS TO SET ASIDE ORIGINATING PROCESS...", the view we take is that the learned trial Judge had inherent jurisdiction to treat the request as an application to stay proceedings and he should have referred the 1st appellant and the respondent to arbitration as there was a valid arbitration clause. Authorities abound where we have stated that a judge has no choice but to stay legal proceedings and refer the parties to arbitration where there is a valid arbitration agreement. See, for example, the cases of **Vangelatos Vangelatos**[3]

and **Leopard Ridge Safaris Limited v Zambia Wildlife Authority**[4] cited by the appellants.

The learned counsel for the respondent also submitted that even if an application for a stay of proceedings was made, the court below would still have not referred the matter to arbitration because one of the parties to the suit is not a party to the arbitration agreement and consequently, some of the issues are not arbitrable. It is trite that only parties to an arbitration agreement can be referred to arbitration. It is equally trite that a third party can be joined to arbitral proceedings by consent.

Paragraph 4 of the statement of claim appearing at pages 25 to 26 of the record of appeal explains why the 2nd appellant was joined to the proceedings in the court below as follows:

> **"4. The 1st and 2nd Defendant[s] have, notwithstanding being separate and distinct legal entities, at all material times operated and appear to be one and the same legal entity and as such the Plaintiff will aver that the 1st and 2nd Defendant[s] are to be considered as a single entity for the following reasons:**
>
> **1.1 Failure to operate independently of each other**
>
> **(a) By the actions of the directors, the two Defendants were managed as one.**

(b) Use of same workforce and equipment and also the transferring of monies between the companies makes the Defendants to be so mixed up that the person controlling them had authority to act for any of them."

Given the close nexus between the 1st and 2nd appellants as perceived by the respondent in paragraph 4 of its statement of claim; and since the deponent of the two affidavits in support of summons to set aside writ for irregularity was Harrie Martin Pouwels, a director in both companies, we do not see how the consent of the 2nd appellant through the said Harrie Martin Pouwels, to be joined to the arbitral proceedings would have been difficult to obtain if the 1st appellant and the respondent were referred to arbitration.

Regarding the contention by counsel for the respondent that some issues are not arbitrable, we must emphasise that this is a question to be determined by the arbitral tribunal once it is constituted and not the Court. On the facts of this case, the same can be said of counsel's argument that the parties could not be referred to arbitration because there is no dispute. In other words, we are saying that these are not the grounds envisaged by section

10 of AA 2000 upon which a court can refuse to refer parties to arbitration.

The learned counsel for the respondent further contended that it is an accepted principle of law that where some claims are subject to arbitration and others are not, they all need to be resolved in a single set of proceedings and that ought to be litigation and he placed reliance on the case of **Aveng (Africa) Ltd (formerly Grienaker LTA Ltd) v Midros Investments (Pty) Ltd**[11]. Counsel has not specified the claims which are subject to arbitration and those that are not. We discern from the statement of claim that the dispute in this matter arose from the contract executed between the 1st appellant and the respondent and the following paragraphs are pertinent:

> **"9. By a contract made in writing between the Plaintiff and the defendants [1st Defendant] the Plaintiff agreed to carry out and complete the subcontracted work for the defendants [1st defendant] of which include earthworks, layers, external works and service reticulation at Freedom Park Shopping Centre in Kitwe.**
>
> **10. The Plaintiff will refer to the contract at the trial of this action for its full terms and effect in law and in particular the following express term thereof:**

(i) By clause 12.2 the Defendants [1st Defendant] are [is] and were [was] to pay the Plaintiff the amount due by the thirty-seventh (37) day (due date) which time has long lapsed.

11. The value of the works completed by the Plaintiff pursuant to the contract is US$2,029,373.13 but the Defendants [1st Defendant] have [has] only paid the Plaintiff the sum of US$1,409,092.88

12. In the premises the balance of US$620,280.25 is still due and owing to the Plaintiff.

13. ...

14. Wrongfully and in breach of the contract, the Defendants [1st Defendant] have [has] failed or neglected to pay the Plaintiff any sum in respect of the outstanding amount.

15. By reason stated above, the plaintiff has thereby suffered loss and damages AND CLAIMS as follows:

(i) Payment of the sum of ZMW3,337,107.75 (equivalent of US$620,280.25).

(ii) A declaration and order that the 1st and 2nd Defendants are jointly and severally liable.

(iii) Damages for the breach of contract.

(iv) Interest from 31st March, 2013.

(xi) [v] Any other relief the court may deem just; and

(xii) [vi] Costs"

From the foregoing, we are of the considered view that all the claims in paragraph 15 of the statement of claim trace their origin from the contract executed between the 1st appellant and the

respondent. That contract contained an arbitration clause and all the claims in paragraph 15 fall within that clause and are therefore arbitrable.

The passage in the case of **Aveng (Africa) Ltd (formerly Grienaker- LTA Ltd) v Midros Investments (Pty) Ltd**[11] relied upon by the respondent was quoted by counsel out of context. It was not a statement made by Wallis, J as alleged but his discussion of the contention by counsel for **Midros Investments (Pty) Limited**. In any event, the Judge did not even accept the contention by **Midros Investments (Pty) Limited** when he said in the next paragraph after the passage as follows:

> **"I cannot accept this contention. Whether the certificates on which Aveng relies are certificates issued in terms of the contract is plainly an issue on which the contract and the employer disagree. So too there is disagreement on whether the work has been properly completed or whether it suffered from defects and, if so, whether the employer has suffered damages as a result. All of these disagreements arise out of the agreement and therefore fall within clause 40 and no one suggested otherwise. It would be permissible for Midros to meet the claim by Aveng in arbitration proceedings by relying on the alleged settlement agreements and the arbitrator would be obliged to determine the terms and effect of those agreements. For the arbitrator to be precluded from considering an alternative claim by Aveng based on its having fulfilled its obligations under the settlement agreements and being entitled to payment of the same amount in consequence thereof would be extremely artificial. In my view it is incorrect."**

We also adopt with approval the following passage from the judgment of Wallis, J which fortifies our belief that courts must respect the intention of parties to opt out of litigation if there is in existence a valid arbitration agreement:

> **"An arbitration clause is inserted in a contract at the time of its conclusion because the parties contemplate as a matter of commercial convenience that it is desirable to adopt this as a mechanism for resolving the disputes that may arise in the course of their business relationship. Its construction should therefore be influenced by a consideration of the underlying commercial purpose of including such a clause in the agreement."**

The record of appeal shows that the matter in the court below proceeded to trial and resulted in a judgment being rendered by the trial Judge which is the subject of Appeal No. 202/2015. The hearing of that appeal was stayed on 5th April, 2016 pending the outcome of this one.

It is trite that notwithstanding the existence of an arbitration agreement, parties may still proceed to litigation with mutual consent or acquiescence. The question therefore, is whether the 1st appellant in this case consented or acquiesced to the legal proceedings in the court below. By making a request that the 1st

appellant and the respondent should be referred to arbitration there can be no doubt that the 1st appellant did not consent or acquiesce to the said legal proceedings. The record of appeal at page 248 shows that the appellants made an application on 10th June, 2014 to stay proceedings pending appeal to the Supreme Court and at page 254 is a notice of appeal to that effect. In his ruling dated 24th July 2014 at pages 271 to 276 of the record of appeal, the learned trial Judge dismissed the application and proceeded with the legal proceedings. Under these circumstances, the 1st appellant could not be said to have consented or acquiesced to the legal proceedings.

In our view therefore, the court below inflicted the legal proceedings on the 1st appellant against its will and in violation of the arbitration agreement. Since there was a valid arbitration agreement, the learned trial Judge had no jurisdiction to adjudicate the matter. He had an obligation to stay the proceedings and refer the parties to their choice of dispute resolution forum. In the circumstances, we hold that the subsequent legal proceedings

resulting in the judgment dated 8th December, 2015 which is the subject of Appeal No. 202/2015 were a nullity. Consequently, we order that the 1st appellant and the respondent be referred to arbitration, the mechanism they mutually contemplated for resolving their disputes when they executed the contract. We are not oblivious that this decision will result in further delay in resolving the dispute and an increase in the costs on the parties. However, we are satisfied that the circumstances of the case makes this consequence inevitable.

We have indicated above that the hearing of Appeal No. 202/2015 was stayed pending the outcome of this appeal. Since we have concluded that the legal proceedings which are the subject of Appeal No. 202/2015 were a nullity, that appeal is therefore rendered nugatory.

In our opinion, grounds 3 and 4 are at the heart of this appeal. We have found merit in these grounds and the net result is that this appeal is substantially successful. We accordingly order

costs against the respondent in the court below and here, to be taxed in default of agreement.

E. M. Hamaundu
SUPREME COURT JUDGE

R. M. C. Kaoma
SUPREME COURT JUDGE

C. Kajimanga
SUPREME COURT JUDGE