

**IN THE SUPREME COURT OF ZAMBIA**

**SCZ/08/13/2021**

**HOLDEN AT LUSAKA**

**Appeal No. 14/2021**

*(Civil Jurisdiction)*

**B E T W E E N :**

**ZCCM INVESTMENTS HOLDING PLC**



**APPELLANT**

**AND**

**VEDANTA RESOURCES HOLDING LIMITED**

**1<sup>ST</sup> RESPONDENT**

**KONKOLA COPPER MINES PLC**

**2<sup>ND</sup> RESPONDENT**

**Coram: Malila CJ, Wood and Kajimanga JJS**  
**on 18<sup>th</sup> January 2022, 1<sup>st</sup> February 2022 and**  
**22<sup>nd</sup> March 2022.**

For the Appellant: Mr. S. N. Lungu SC, Mr. N. Ng'andu of Messrs Shamwana & Company; and Mr. L. Mbalashi In-House Legal Counsel (ZCCM).

For the 1<sup>st</sup> Respondent: Mr. M. Mundashi SC, Mr. D. Chakoleka and Mr. M. Chilufya of Mulenga Mundashi Legal Practitioners; Mr. S. Chisenga of Messrs Corpus Legal Practitioners, and Mr. L. Mwamba of Simeza Sangwa & Associates.

For the 2<sup>nd</sup> Respondent: Mr. B. C. Mutale SC with Ms. Mukuka of Messrs Ellis & Company; Mr. A. Musukwa of Mr. Andrew Musukwa & Company; Mr. J. Zimba of Makebi Zulu Advocates, and Mr. Chipoya In-House Legal Counsel (KCM)

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## **R U L I N G**

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**Malila CJ**, delivered the ruling of the court.

**Cases referred to:**

1. *Antonio Ventriglia and Manuel Ventriglia v. Finsbury Investment* (Appeal No. 02 of 2019)
2. *JCN Holdings Ltd v. Development Bank of Zambia* (2013) 3 ZR 299
3. *Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya Ltd* (1989) KLR 1
4. *National Holding Limited & Another v. Attorney General* (1993/1994) ZR 115
5. *Emirates Trading Agency LLC v. Societale de Fomento Industrial Private Limited* (2015) EWHC 1452 (Comm)
6. *Arnold v. National Westminster Bank Plc* (1991) 2 AC 93
7. *BP Zambia Plc v. Interland Motors Ltd* (2001) ZMSC7
8. *Kelvin Hang'andu and Co. v. Webby Mulubisha* (SCZ Judgment No. 39 of 2009)
9. *Development Bank of Zambia v. Sunvest Ltd* (SCZ Judgment No. 3 of 1997)
10. *Minister of Home Affairs, Attorney General and Lee Habasonda* (2007) ZR 207
11. *Zambia Telecommunications Company Ltd. v. Aaron Mwene Mulwanda & Another* (2012) 1 ZR 404
12. *Mukumbuta Mukumbuta & Others v. Nkwilimba Choobana Lubinda & Others* (SCZ Judgment No. 8 of 2003)
13. *Hamalambo v. Zambia National Building Society* (Appeal No. 64 of 2013)
14. *ZCCM v. Philip Pascal & Others* (Appeal No. 39 of 2018)
15. *Development Bank of Zambia and Another v. Sunvest Limited & Another* (1995-1997) ZR 187
16. *BP Zambia Plc v. Interland Motors* (2001) ZMSC7
17. *Kelvin Hang'andu & Company v. Webby Mulubisha* (SCZ Judgment No. 39 of 2008)
18. *Indeni Petroleum Refinery Company Limited v. Kafco Oil Limited & Others* (Selected Judgment No. 9 of 2017)
19. *Hayter v. Nelson Home Insurance Co.* (1990) 2 Lloyds Ref. 265
20. *Zambia National Holdings Limited & Another v. Attorney General* (1994) ZR 115
21. *Leopard Ridge Limited v. Zambia Wildlife Authority* (2008) ZR 97
22. *Konkola Copper Mines Plc v. NFC Africa Mining Plc* (Appeal No. 118 of 2006)
23. *Ody's Oil Company Limited v. The Attorney General and Constantinos James Papotis* (2012) 1 ZR 164

24. *Cash Crusaders Frankchising Pvt Ltd v. Shakers and Movers (Zambia) Ltd* (2012) 3 ZR 174
25. *Savenda Management Services Ltd v. Stanbic Bank Zambia Ltd* (Selected Judgment No. 39 of 2017)
26. *Swallow Falls Ltd. v. Monaco Yachting & Technologies SAM & Another* (2015) EWHC 2013
27. *Satish Kumar & Others v. Surinder Kumar & Others* (1970) AIR 833
28. *Bhajahari Saha Banikya v. Behary Lal Basak* (1909) ILR 33 Cal 881
29. *Bidvest Foods Zambia Ltd & 4 Others v. CAA Import & Export Ltd* (Appeal No. 57 of 2017)

**Legislation and other works referred to:**

1. *Corporate Insolvency Act No. 9 of 2017*
2. *Statutory Instrument No. 47 of 2018*
3. *Mines and Minerals Development Act, 2015*
4. *Rules of the Supreme Court 1965 (White Book (1999 Edition))*
5. *Companies (Winding Up) Rules No. 86 of 2004*
6. *Arbitration Act No. 19 of 2000*
7. *Commercial Arbitration 2<sup>nd</sup> Edition*

**1.0. INTRODUCTION, BACKGROUND FACTS AND PROCEDURAL HISTORY**

1.1. The issues in the main appeal before us bristle with very interesting questions of law implicating the interpretation of some provisions of the Corporate Insolvency Act No. 9 of 2017. The record of appeal is presented in nine volumes.

1.2. As is obvious from the year of its passage, the Corporate Insolvency Act is a nascent piece of legislation that has not presented itself to much interpretation by the courts in Zambia, let alone the Supreme Court. In point of fact,

although the Act was passed some five years ago, it only came into force on 15<sup>th</sup> June 2018 following the promulgation of the Commencement Order in Statutory Instrument No. 47 of 2018.

**1.3.** The dispute upon which the Supreme Court is being called upon to pronounce itself in the main appeal arises from a series of applications between the parties made in the High Court under the guise of vindicating their respective procedural and substantive rights. This was sequel to a winding up petition of the second respondent, Konkola Copper Mines Limited (KCM), filed by the appellant, Zambia Consolidated Copper Mines Investment Holdings Limited (ZCCM-IH). In the process the parties, not unexpectedly, enmeshed themselves in many procedural technicalities.

**1.4.** Although this decision is on the narrow issue whether or not the appeal now pending before us should be heard, it is significant that the whole dispute is considered in its full factual and evidentiary matrix so as to indicate why

and how the parties found themselves in the present predicament.

- 1.5. ZCCM-IH is a minority shareholder in KCM while the first respondent, Vedanta Resources Holdings Limited (Vedanta) holds the majority shares at 79.4% in KCM.
- 1.6. ZCCM-IH and Vedanta have a subsisting Shareholders' Agreement for the management, administration and operation of KCM by Vedanta. It would appear that the Shareholders' Agreement worked without incident until ZCCM-IH formed the view that KCM was being managed and administered in a manner that was inconsistent with the Shareholders' Agreement and, generally, detrimental to the interests of ZCCM-IH.
- 1.7. More specific grievances raised by ZCCM-IH in respect of the management and operations of KCM arose from the facts which were substantially undisputed and were as follows:
  - (a) The Shareholders' Agreement and Articles of Association stipulate, *inter alia*, that Vedanta shall

be responsible for the appointment of the Chief Executive Officer and other senior management staff of KCM.

(b) Vedanta did appoint the Chief Executive Officer and senior management staff. However, KCM is allegedly being managed in a manner that is detrimental to the interests of ZCCM-IH. In particular, according to ZCCM-IH, KCM:

- (i) had recorded losses for the previous 7 years amounting to US\$1,262.3 billion;
- (ii) had been reporting negative cash flow balances for the two years preceding the petition;
- (iii) had been declaring dividends rather erratically and has failed to pay the appellant the sum of US\$10,305,000, being its share of the appellant's dividends declared in 2013;

- (iv) has been an operating income generated on a yearly basis which is not able to meet its operating costs;
- (v) has failed to abide by its mining plan provided pursuant to section 35(1)(b) of the Mines and Minerals Development Act, 2015, and has to this end failed to develop the mining areas in Chingola and Chililabombwe; and
- (vi) owing to its failure to adhere to the operating requirements, had led the Ministry of Mines to issue a default notice to KCM on 23<sup>rd</sup> April, 2018;
- (vii) has failed to pay its debts as and when they fall due including (a) the debt of US\$24,064,722 owed to Copperbelt Energy Corporation Plc, for electricity supplied resulting in the issuance of a restriction notice on 14<sup>th</sup> May 2019; (b) the debt owed to Ndola Lime Plc in the sum of US\$468,036.25 for the supply of quick lime and

ZMW K199,941 for the supply of limestone for the period March 2019 to May 2019;

(viii) has been operating in a manner that is not environmentally friendly or sustainable and to this effect it has polluted or continues to pollute water sources in and around its mining licence areas.

(c) Arising from the foregoing ZCCM-IH has lost confidence in Vedanta's ability to manage and administer KCM's affairs in good faith that ensures ZCCM's return on its investment and dividends and, therefore, considers it just and equitable that KCM be wound up.

**1.8.** Motivated by the foregoing factors ZCCM-IH filed in court on 21<sup>st</sup> May 2019, a petition for the winding up of KCM pursuant to section 56 of the Corporate Insolvency Act for loss of confidence in the management and the conduct of KCM's affairs.

- 1.9. Contemporaneously with the filing of the winding up petition, ZCCM-IH also filed an *ex-parte* summons to appoint a provisional liquidator for KCM pursuant to section 65 of the Corporate Insolvency Act. In the supporting affidavit, it was averred that unless a provisional liquidator was appointed, there was 'a high likelihood of the assets and goodwill of the company being dissipated in the event that the public and the employees became aware of the petition to wind up the company.'
- 1.10. Bobo J of the High Court [as she then was] granted an *ex-parte* order appointing one Milingo Lungu as Provisional Liquidator and setting out his powers as such provisional liquidator. A return date for the *inter-partes* hearing was set for the 24<sup>th</sup> May 2019.
- 1.11. The Provisional Liquidator then proceeded to appoint Messrs Ellis & Co, Makebi Zulu Advocates, D.H. Kemp & Co. and Andrew Musukwa & Co. as lawyers to act for KCM in the liquidation proceedings. The new lawyers went on to file documents on behalf of KCM. This was before the

court set a date for the *inter-partes* hearing of the appointment of the Provisional Liquidator.

- 1.12. The Chairman of Vedanta's Board of Directors subsequently appointed Messrs Nchito & Nchito Advocates, to act for KCM in the proceedings, independently of the Provisional Liquidator and the lawyers appointed by the Provisional Liquidator.
- 1.13. The first application made by Messrs Nchito & Nchito following their appointment involved a preliminary issue pursuant to Order 14 of the Rules of the Supreme Court, 1965 (White Book) (1999 Edition).
- 1.14. Two questions were raised in the motion, namely, whether the lawyers appointed by the Provisional Liquidator can appear on behalf of KCM to support or oppose the appointment of the Provisional Liquidator and the winding up generally, and whether a confirmation of the Provisional Liquidator and the winding up generally can be conducted without KCM and or its directors being heard through lawyers of their choice.

1.15. On 10<sup>th</sup> June 2019 KCM, under the instructions of the Provisional Liquidator, raised its own preliminary issues pursuant to section 60(3)(f) of the Corporate Insolvency Act, asking the court to determine four questions, namely,

- (i) whether Messrs Nchito & Nchito are not conflicted and thereby precluded from acting as advocates for KCM;
- (ii) whether a sole director and chairman of the board of directors of a company in liquidation has the residual powers to instruct lawyers to represent the company where a provisional liquidator has been appointed;
- (iii) whether the preliminary issue taken out by Messrs Nchito & Nchito is competent in the absence of a notice of intention to defend; and
- (iv) whether the *ex-parte* order given on 21<sup>st</sup> May can be varied, discharged or assailed in any manner by way of the preliminary issues taken out on 6<sup>th</sup> June 2019 by a non-party.

**1.16.** The premise upon which the second preliminary objection was raised are set out in the affidavit of KCM's Provisional Liquidator. They are as follows:

1. Messrs Nchito & Nchito did on 26<sup>th</sup> February 2019 cause to be issued a writ of summons on behalf of Barclays Bank Plc against KCM under cause No. 2019/HPC/0069 and are thus conflicted.
2. By the KCM's articles of association, neither the chairman nor any director of the respondent has the power to appoint lawyers for and on behalf of the KCM without a board resolution.

**1.17.** The affidavit opposing KCM's preliminary issue was sworn by Mutembo Nchito SC. He confirmed that Messrs Nchito & Nchito no longer represented Barclays Bank Plc in cause No. 2019/HPC/0069. He also averred that the appointment of Messrs Nchito & Nchito by KCM's chairman is supported by two of the other four directors of KCM. E-mails to that effect were produced.

**1.18.** Additionally, as an officer of the court, Mutembo Nchito SC, brought to the court's attention the following facts:

- (i) Milingo Lungu's law firm was currently acting for a plaintiff called Betty Kangote against KCM over which he has been appointed Provisional Liquidator. The cause number of the action is 2016/HP/1518;
- (ii) The Provisional Liquidator, Milingo Lungu, jointly with Bonaventure Mutale SC of Ellis & Company act for the appellant in case No. 2016/HPC/0515 – a matter involving ZCCM Investment Holdings Plc as plaintiff and First Quantum Minerals Limited and 6 Others as respondent.

**1.19.** Prior to determining these preliminary issues an application was made by Vedanta to stay the winding up proceedings and refer the matter to arbitration. The judge decided to deal with that application first. There were, however, several other applications that were raised by the

parties. Two of these, details of which we give below, led to a ruling of the High Court which subsequently birthed an appeal to the Court of Appeal whose decision has now brought the parties before us.

- 1.20. The High Court made a composite ruling on first, the preliminary issue raised by Vedanta pursuant to section 60(3)(f) of the Corporate Insolvency Act and Order 33 Rule 6 of the Rules of the Supreme Court 1965 (1999 Edition) and, second, the application by Vedanta to stay proceedings and refer the parties to arbitration in terms of section 10 of the Arbitration Act.
- 1.21. The preliminary issue raised by Vedanta was whether the affidavit filed in opposition to Vedanta's application by KCM can be used in the proceeding granted that there was a preliminary issue filed into court on 6<sup>th</sup> June by Messrs Nchito & Nchito seeking to determine whether Messrs Ellis & Co, Messrs Makebi Zulu Advocates, Messrs Andrew Musukwa & Co. and Messrs D.H. Kemp & Co. can appear on behalf of KCM to support or oppose the appointment of

the Provisional Liquidator and the winding up petition generally.

- 1.22. On this preliminary issue, the High Court judge held that the affidavit filed remained on the record and could be used in determining the application to stay proceedings, and the winding up generally.
- 1.23. Turning to the application for stay of execution and reference of the matter to arbitration, the High Court held that although there is an underlying dispute between ZCCM-IH and Vedanta involving the management of KCM which was a subject of an arbitration agreement, where, as in this case, third party rights are involved in liquidation proceedings, such private agreement between shareholders and the company to submit their dispute to arbitration is displaced and rendered inoperative. Creditors of the company are in every sense alien to the arbitration agreement between the company and other entities.

- 1.24. The court thus declined to stay proceedings and refer the matter to arbitration as to do so would, in the court's view, leave KCM's creditors who are not privy to the Shareholder's Agreement and who had indicated interest in the proceedings, without a remedy.
- 1.25. Unhappy with the decision of Bobo J, ZCCM-IH launched an appeal to the Court of Appeal fronting a miscellany of grounds as follows:

**GROUND:**

1. **The learned trial 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;**
  - 1.1. **the respondents could rely on the contested affidavit of Maxwell Mainsa ("Mainsa Affidavit") that was filed pursuant to an *ex-parte* order of 4<sup>th</sup> July, 2019 ("*Ex-Parte Order*") and filed subsequently to the Stay Application, on the basis that the *ex-parte* Order had been perfected without due consideration of the principle of law that an *ex-parte* Order should be subjected to an *inter-partes* hearing; and**
  - 1.2. **the Mainsa Affidavit would 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 in fact when, after finding that there was in fact an arbitrable dispute between the appellant and the respondents which is the subject of an Arbitration Agreement, that;
  - 2.1. she did not refer the matter to arbitration which she is mandated to do in terms of section 10(1) of the Arbitration Act;
  - 2.2. she erred in finding that the 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.
  - 2.3. she erred in finding that where 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;
  - 2.4. she erred in finding that to stay the proceedings before her and give way to arbitration, would leave the 2<sup>nd</sup> respondent's creditors, who have indicated

their interest in the proceedings, cause number 2019/HP/0761, without a remedy. The court did not take into account the fact that the proceedings before her would merely be stayed and to that extent, the third-party creditors would not be prevented from pursuing other means that were available to them for purposes of recovering whatever amounts were owed to them other than through winding up proceedings;

- 2.5. 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
  - 2.6. 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 fact when she held that the appellant as contributor could not make the application to stay and refer parties to arbitration as it was not a party to the proceedings, a finding which is not consistent with the true interpretation of the Arbitration Act and the definition of "party" in the Arbitration Act and had the effect of, on her own motion and without hearing any of the parties; overturning the court's own decision of 20<sup>th</sup> June

2019, wherein the court held that the applicant as a party would had filed a Notice of Intention to be Heard was entitled to make any application in the proceedings.

4. The learned judge erred in law and in fact when she concluded that as the 2<sup>nd</sup> respondent was a separate entity from the appellant, only the 2<sup>nd</sup> respondent could defend itself in the winding up proceedings without due regard to the following;

- 4.1. the position of the law that companies make decisions through their Boards of Directors; and following the appointment of the provisional liquidator ("Provisional Liquidator") by the 1<sup>st</sup> Respondent via the *ex-parte* order dated 21<sup>st</sup> May 2019, the Board of Directors of the 2<sup>nd</sup> Respondent had been incapacitated and prevented from exercising those residual powers vested in the Board of Directors for purposes of defending the company in winding up proceedings;

- 4.2. the decisions in regard to defending the 2<sup>nd</sup> Respondent were being made by the Provisional Liquidator appointed by the 1<sup>st</sup> Respondent; and

- 4.3. the majority of the Directors of the 2<sup>nd</sup> Respondent, through its chairman had made an application for a 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.

5. The learned trial judge erred in law and fact;

- 5.1. by holding that the 2<sup>nd</sup> 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 2<sup>nd</sup> Respondent; through their appointed counsel, in regard to their application that the Directors had residual powers to represent the 2<sup>nd</sup> Respondent in the winding up proceedings;**
    - 5.2. by determining that the 2<sup>nd</sup> 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 of the 2<sup>nd</sup> Respondent an opportunity to be heard on the application that had been filed by counsel for the Directors of the 2<sup>nd</sup> Respondent.**
  - 6. The learned trial judge erred in law and fact when she held that the 2<sup>nd</sup> Respondent had mounted no objection to the winding up proceedings and had substantially admitted the allegations in the petition when the Directors of the 2<sup>nd</sup> Respondent have not had the opportunity to raise their objection to the petition.**
- 1.26.** The Court of Appeal, in a judgment given on the 20<sup>th</sup> November 2020, held that a dispute had arisen between the parties within the intendment of the Shareholders' Agreement concluded between Vedanta, Government of

the Republic of Zambia, Zambia, Copper Investment Limited (ZCI Bermuda), ZCI Holdings SA and ZCCM -IH.

1.27. The court further held that in its understanding of section 60(3) of the Corporate Insolvency Act, a person that has, under rule 10 of the Winding Up Rules, given a notice of intention to be heard at the hearing of the winding up petition as did Vedanta on 21<sup>st</sup> June 2019, is at liberty to make any application to court, including an application that the petition be withdrawn. In other words, the notice giving person becomes a party to the winding up proceedings.

1.28. In the words of Chisanga JP [as she then was]:

**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.**

1.29. On the issue of arbitrability of the dispute, the Court of Appeal, while holding the view that an arbitrator lacks the jurisdiction to make a winding up order, held that the dispute is arbitrable and that third-party interests could

be pursued independently of the winding up proceedings. It concluded that the arbitrator has jurisdiction to determine the underlying dispute between the parties.

**1.30.** In effect, the Court of Appeal held that a dispute as defined in the Shareholders' Agreement exists between the parties; that Vedanta has *locus standi* to apply for a stay of the winding up petition and reference the matter to arbitration; that the dispute between the parties is arbitrable and the arbitration agreement is thus operative. Accordingly, the Court of Appeal held that the High Court judge could rightly stay the winding up proceedings.

**1.31.** The Court thus set aside the decision of the High Court, ordered a stay of the winding up proceedings pursuant to section 10 of the Arbitration Act, and referred the matter to arbitration.

## **2.0. APPEAL TO THE SUPREME COURT**

**2.1.** Aggrieved by the decision of the Court of Appeal, and a single judge of this court having granted leave to appeal,

ZCCM-IH has now appealed, enlisting nine grounds structured as follows:

**GROUND:**

1. The Court of Appeal erred in law and in fact when it held that a person who has filed a notice of intention to appear on a winding up petition becomes a party to the winding up proceedings, who can lodge any application before court including the right to apply that the petition be stayed and the matter referred to arbitration because they can oppose a winding up petition.
2. In the alternative, the Court of Appeal erred in law and in fact by finding that a dispute was arbitrable notwithstanding that creditors were parties to the winding up proceedings.
3. The Court of Appeal erred in law and in fact when it held that a dispute as defined in the Shareholders' Agreement exists between the parties:
  - 3.1. by equating the grounds relied upon by ZCCM in its winding up petition to the existence of a dispute between the parties;
  - 3.2. by failing to appreciate that there were no disputes between Vedanta and ZCCM in the winding petition;
  - 3.3. by concluding that reference in the winding up petition to the inability of KCM to pay its debts was rooted in Clause 12.1.1 of SHA;

- 3.4. by finding that reference in the winding up petition to environmental concerns was rooted in clause 6.1 of the SHA;
  - 3.5. by establishing upon examination of the relevant clauses and grievances in the winding up petition arose from the SHA;
  - 3.6. by finding that, except for one instance, all obligations in the winding up petition were targeted at KCM the court still proceeded to refer the matter to arbitration.
4. The Court of Appeal erred in law and in fact by finding that the petition was an indictment regarding the manner in which Vedanta has managed KCM by failing to appreciate that the winding up petition concerned the management and administration of KCM, arising from a management Agreement.
  5. The Court of Appeal erred in law and in fact when it held that the dispute between the parties are arbitrable, referable to arbitration and that the arbitration agreement was operative by failing to apply and follow Supreme Court precedent that renders invalid arbitration agreements incapable of being performed on grounds of public policy affecting the rights of third parties.
  6. The Court of Appeal erred in law and in fact when it failed to consider the arbitrability of an insolvency claim.

- 7. The Court of Appeal erred in law and in fact when it failed to consider whether a petition to wind up a company for failing to pay its debts as and when they fall due and on just and equitable grounds, is arbitrable.**
- 8. The Court of Appeal erred in law and in fact when it failed to confine itself to the evidence that was available before the High Court, when the High Court determined its ruling, the subject of appeal.**
- 9. The Court of Appeal erred in law and in fact when it held that the Companies (Winding up) Rules 1929 govern the practice and procedure for winding up proceedings.**

**2.2.** This proneness towards prolixity of the grounds of appeal has the tendency to obfuscate the issues, which in the view we take, could easily have been condensed.

**2.3.** Before the appeal could be heard, each of the parties, in continuing with the spirit in which this litigation has thus far been conducted, raised preliminary issues.

### **3.0. PRELIMINARY ISSUE BY VEDANTA AND ARGUMENTS IN SUPPORT**

**3.1.** Vedanta filed an objection to ZCCM-IH's appeal on 16<sup>th</sup> December 2021. The supporting affidavit was sworn by Deepak Kumar, a Director and Company Secretary of

Vedanta. It set out the grounds of the objection to the appeal.

- 3.2. The deponent recounts the developments in sequence up to the point when the present appeal was filed. More relevantly, he avers that following the filing of the winding up petition by ZCCM-IH, a notable development occurred: Vedanta declared a dispute against ZCCM-IH in terms of the Shareholders' Agreement and proceeded to institute arbitration proceedings in Johannesburg, South Africa. This resulted in an Arbitral Tribunal being constituted.
- 3.3. The Arbitral Tribunal so constituted asked the parties to address it on various preliminary issues, including whether or not it had jurisdiction and whether or not by the grounds relied upon by ZCCM-IH in its winding up petition before the High Court it had breached, and has continued to breach, the dispute resolution provisions at clause 24 and 26 of the Shareholders' Agreement.
- 3.4. The Arbitral Tribunal heard the preliminary issues virtually over a period of four days from 31<sup>st</sup> May 2021. It

subsequently rendered its Partial Final Arbitral Award on 7<sup>th</sup> July 2021 in which it held that:

- (a) it has the requisite jurisdiction to determine Vedanta's claim that the appellant breached and is in continuing breach of the dispute resolution provisions of the Shareholders' Agreement; and**
- (b) by pursuing the petition on the grounds relied upon before the High Court, the appellant had breached and is in continuing breach of the dispute resolution provisions in clause 24 and 26 of the Shareholders' Agreement.**

**3.5.** The Tribunal's Partial Final Arbitral Award was made while the decision of the single judge of this court on the application for leave to appeal was being awaited, that application having been argued on 17<sup>th</sup> March 2021 and 4<sup>th</sup> June 2021. The single judge only managed to render his decision, granting leave on 2<sup>nd</sup> September 2021.

**3.6.** Following the Partial Final Award on 7<sup>th</sup> July 2021, Vedanta obtained from the Deputy Registrar, an *ex-parte* order on 30<sup>th</sup> July 2021 for leave to register the Partial Final Arbitral Award in Zambia which was accordingly registered. A notice of registration of the Final Partial

Award was subsequently filed in court on 3<sup>rd</sup> August 2021 and was served on the parties on 5<sup>th</sup> August 2021.

- 3.7. The Notice of Registration of the Partial Final Award has not been challenged and, to the best of the deponent's knowledge and belief, it is final and binding on ZCCM-IH and that ZCCM-IH can thus not continue with this appeal as to do so would be in continuing breach of the Shareholders' Agreement.
- 3.8. In support of the preliminary issue, the learned counsel for Vedanta also filed skeleton arguments and a list of authorities.
- 3.9. The first thing counsel did in the skeleton arguments was to demonstrate that this court has jurisdiction to entertain Vedanta's preliminary objection and that the same was properly filed before us. In this connection, reference was made to the enabling rule of court, being Rule 19(1) of the Supreme Court Rules on taking of preliminary objections. Reference was also made to statements explaining the import of that rule as given in our judgment in the case of

**Antonio Ventriglia and Manuel Ventriglia v. Finsbury Investment<sup>(1)</sup>.**

- 3.10.** Reference was also made to the principle of law as confirmed in **JCN Holdings Ltd v. Development Bank of Zambia<sup>(2)</sup>** that a jurisdictional issue ought to be promptly raised by a party seeking to rely on it. With reference to the sequence of events in this case, counsel submitted that the present objection, which is jurisdictional in substance, was raised timely.
- 3.11.** The Kenyan case of **Owners of Motor Vessel 'Lillian S' v. Caltex Oil<sup>(3)</sup>** was cited to support the submission that jurisdiction should be the overriding consideration for a court in determining whether it can proceed to entertain any question brought before it, for 'jurisdiction is everything without it, a court has no power to take one more step.'
- 3.12.** It is contended that this court has no jurisdiction to hear and determine ZCCM-IH's appeal against the Court of Appeal judgment in light of the Partial Final Award. The issues sought to be raised in the appeal, as can be distilled

from the grounds of appeal as set out in the memorandum of appeal, all emanate from the provisions of the Shareholders' Agreement, and yet the Arbitral Tribunal already held that ZCCM-IH's failure to pursue its grievances through arbitration is a breach of the Shareholders' Agreement and that such breach continues as long as ZCCM-IH pursues its grievances in the Zambian courts.

- 3.13. Counsel submitted, after quoting various passages from the Partial Final Arbitral Award, that the Arbitral Tribunal quite instructively considered what a dispute under the Shareholders' Agreement was and whether it had arisen in the case of ZCCM-IH, Vedanta and KCM and came to the conclusion that a dispute within the intendment of the Shareholders' Agreement had indeed arisen and that the same was ripe for determination by the Arbitral Tribunal.
- 3.14. We were reminded of our decision in **National Holding Limited & Another v. Attorney General**<sup>(4)</sup> where we stated that where parties agree to settle any dispute between them by

arbitration, the court's jurisdiction is ousted unless the agreement is null and void. In the present case, according to counsel, the wording of the Partial Final Award clearly states that the arbitration agreement embedded in the Shareholders' Agreement is valid and operative.

3.15. As to the question whether the appeal constitutes an abuse of court process following the registration of the Partial Final Award, counsel submitted that in order to answer that question it was imperative to establish the status of a partial final award in arbitral proceedings. He submitted that the case of **Emirates Trading Agency LLC v. Societale de Fomento Industrial Private Limited<sup>(5)</sup>** held that a partial award renders an arbitral tribunal *functus officio* with respect to the issue that such award decides. This applies as much to a partial award on jurisdiction as to any other partial award which finally determines some matter in issue in the reference.

3.16. A party is not required to participate in an arbitration by a tribunal which it contends lacks jurisdiction. If it does

so (i.e., contends lack of jurisdiction), it maintains its objection to jurisdiction when it comes to enforcement. Once final, an award becomes binding and gives rise to an issue estoppel both so far as concerns further proceedings before that tribunal and for any process of appeal or review of any subsequent award of the same tribunal. In the present case, the Arbitral Tribunal is *functus officio* in so far as it relates to all the issues that were determined.

- 3.17. Counsel quoted a passage from Michael J. Mustill & Steward C. Boyd QC, **Commercial Arbitration** 2<sup>nd</sup> Edition that:

**What is less obvious is that the award precludes the parties not only from reopening the whole of the dispute over which the arbitrator had jurisdiction, but also from reopening in a later dispute individual issues of law or fact which are necessarily decided by the award... the rule that an award extinguishes the cause of action on which it is based should in principle apply also to an award of a foreign arbitrator. A valid award of a foreign arbitrator which is final and conclusive on the merits is at common law conclusive of issues and fact and law in the same way as an award of an English arbitrator.**

- 3.18. We were referred to the explanatory note 18/19/18 of the Rules of the Supreme Court which defines abuse of the process of the court and to the case of **Arnold v. National Westminster Bank Plc**<sup>(6)</sup> before counsel submitted that there was here clearly abuse of court process by ZCCM-IH.
- 3.19. More purposefully, counsel quoted from our decision in **BP Zambia Plc v. Interland Motors Ltd**<sup>(7)</sup> where we stated that:
- As a general rule, it will be regarded as abuse of process if the same parties relitigate the same subject matter from one action to another or from judge to judge. This will be so especially when the issues would have become re-judicata.....**
- 3.20. Counsel also cited the cases of **Kelvin Hang'andu and Co. v. Webby Mulubisha**<sup>(8)</sup> and **Development Bank of Zambia v. Sunvest Ltd**<sup>(9)</sup> on the court's general attitude towards multiplicity of actions over the same subject matter.
- 3.21. At the hearing of the application, Mr. Mundashi intimated that Vedanta would rely on the documents filed in support of Vedanta's preliminary objection.

- 3.22. We were urged not to entertain the appeal as it was an attempt by ZCCM-IH to relitigate issues that have been fully heard and determined by the Arbitral Tribunal.

**4.0. KCM'S OPPOSITION TO VEDANTA'S PRELIMINARY OBJECTION**

- 4.1. On behalf of KCM, skeleton arguments in reply to Vedanta's preliminary objection to the appeal were filed. Counsel contended that in so far as Vedanta's skeleton arguments in support of the preliminary objection to the appeal seek to distinguish between the preliminary objection and its summons to dismiss the winding up petition in the High Court, Vedanta is splitting hairs.
- 4.2. After referring to the questions for determination by the High Court and the objection to the appeal in the Supreme Court as set out by Vedanta in the skeleton arguments, counsel for KCM contended that both in the High Court and in the Supreme Court, Vedanta seeks to have the proceedings terminated on account of the finding in the Partial Final Award that the matters in issue are covered

by the dispute resolution clause of the Shareholders' Agreement.

- 4.3. According to counsel, in order to reach any such determination, either court would have to examine the Partial Final Award, discuss the legal issues raised and pronounce itself on the meaning and effect of the Partial Final Award. This, according to counsel, is in keeping with the directive of the Supreme Court on the contents of a judgment as set out in the cases of **Minister of Home Affairs, Attorney General and Lee Habasonda<sup>(10)</sup>** and **Zambia Telecommunications Company Ltd. v. Aaron Mwene Mulwanda & Another<sup>(11)</sup>**.
- 4.4. Allowing Vedanta's objection would, submitted counsel for KCM, entail that the Supreme Court and the High Court would separately consider the arguments, review the law and make their respective pronouncements on the relevance, meaning and effect of the Partial Final Award. This would carry with it the likelihood of the two courts

reaching conflicting decisions and consequently being brought into ridicule.

- 4.5. Quoting a passage from our judgment in **Mukumbuta Mukumbuta & Others v. Nkwilimba Choobana Lubinda & Others<sup>(12)</sup>** where we held that the High Court was brought into ridicule by a party's forum shopping exercise, counsel submitted that such prospect was real in the current situation and should be averted.
- 4.6. In the view of KCM's learned counsel, if this court were to uphold Vedanta's objection following its interpretation of the Partial Final Award and granting orders, the effect would be that the winding up petition in the High Court would be dismissed. In the High Court on the other hand, Vedanta's prayer is that all grounds being relied upon in the winding up petition be struck out and that effectively means a dismissal of the petition.
- 4.7. The absurdity, according to counsel, is heightened by the possibility of this court and the High Court both entertaining Vedanta's application/objection, and

dismissing the appeal and the High Court proceedings. It would then be open to KCM and ZCCM-IH to lodge an appeal from the decision of the High Court, and if dissatisfied with the decision of the Court of Appeal, subject to leave to appeal being granted, would appeal further to this court.

- 4.8. Counsel then argued that what Vedanta was engaged in was forum shopping by making an improper use of court machinery. We were referred to the Guidance Note 18/19/15 in the White Book and to our statement in the case of **Hamalambo v. Zambia National Building Society**<sup>(13)</sup> where we stated *inter alia* that:

**Multiplicity of actions refers to commencement of more than one action on the same facts or transaction. Piece meal litigation is the same as multiplicity of actions; it is litigation that is split and instituted in chapters.**

- 4.9. KCM's counsel finally dealt with the competence of KCM to raise the preliminary objection in view of ZCCM-IH's unequivocal concession that the application is competently before the court. It was submitted that being a separate party and entity from ZCCM-IH, KCM is not

bound by any steps or statement made by ZCCM-IH and is entitled, in its own right, to raise any issue relating to abuse of court process.

- 4.10.** At the hearing of the two applications on the 1<sup>st</sup> February 2022, Mr. Mutale SC, on behalf of KCM, briefly augmented the affidavit and skeleton arguments already filed in challenging Vedanta's preliminary issue. We have summarized the gist of the arguments earlier in this judgment.
- 4.11.** He reiterated that the preliminary objection by Vedanta pits the Supreme Court against the High Court as both the preliminary objection before this court and the application before the High Court are anchored on the Partial Final Award.
- 4.12.** The learned State Counsel stressed that the attempt by Vedanta to distinguish the two applications is really an exercise in splitting hairs, and entertaining the application now before us would lead to absurdities in the operations of the courts, particularly that the decision of the High

Court was bound to be appealed against with prospects of it getting to be heard ultimately in this court.

- 4.13.** State Counsel Lungu submitted that not all the issues in the appeal were covered in the Partial Final Award as some issues in the appeal, as is clear from the grounds of appeal, emanate from the judgment of the Court of Appeal.
- 4.14.** Mr. Musukwa submitted that the current application on the preliminary issue is a leap frog application which has overlooked the High Court and the Court of Appeal. While an appeal cannot challenge an award, the effect of the preliminary issue brought by Vedanta is not to challenge the award but to give it effect, which effectively is entertaining the other side of the same coin.
- 4.15.** Mr. Musukwa further submitted that a jurisdictional challenge can be brought at any time. Vedanta seeks to challenge the jurisdiction of the Court to deal with the appeal. KCM's preliminary issue seeks to challenge the jurisdiction of the Court to hear the preliminary issue. It thus, in his view, takes precedence.

- 4.16. We were urged to dismiss Vedanta's preliminary application and hear the appeal.

**5. VEDANTA'S ORAL RESPONSE TO KCM'S ARGUMENTS**

5.0. Mr. Mundashi SC, shortly responded to ZCCM-IH's submission pointing out that he was puzzled by KCM's ambivalent position in which in one breath it says Vedanta's application is not properly before this court and in another, that it is properly before the court but is opposed.

5.1. State Counsel submitted that the foregoing notwithstanding, Vedanta in its arguments filed on 16<sup>th</sup> December 2021, did reproduce the grounds of appeal and demonstrated how they relate to the issue of arbitrability.

5.2. Mr. Chilufya stressed that the application before us and that before the High Court are different in that in the application before us the issue is whether ZCCM-IH can still challenge the holding of the Court of Appeal that the dispute between the parties is arbitrable; that the winding up proceedings be stayed and the matter referred to

arbitration. In the High Court the application by Vedanta is whether the winding up petition can still continue in light of the Partial Final Award.

- 5.3. According to Mr. Chilufya, the dismissal of the appeal would have no effect on the winding up petition. KCM has, in any case, failed to demonstrate that Vedanta's application constitutes an abuse of court process.
- 5.4. Mr. Chakoleka submitted that the Partial Final Award has not been challenged. It has never been the law of this country that an award can be challenged by way of an appeal. He further argued that although the learned State Counsel referred to resultant absurdities if Vedanta's objection is entertained, he has not explained what those absurdities really are. He added that the mere fact that Vedanta's application is premised on the Partial Final Award does not mean that the subject matter is the same as that being considered in the High Court, though the anchor is the same.

- 5.5. The question, according to Mr. Chakoleka, which this court is being asked to determine, is whether the court can deal with arbitrability when that issue has already been dealt with in an unchallenged arbitral award. In the High Court, the issue is whether there should be any proceedings at all in light of the issue of arbitrability having been conclusively determined in a registered Partial Final Award. By its application, KCM is, according to counsel, urging this court to fold its arms and look the other way. That position, he submitted, has no support in the Arbitration Act.
- 5.6. The final point Mr. Chakoleka responded to was the suggestion by the learned counsel for KCM that the situation now confronting the court has never happened before. While agreeing that the questions raised may never have graced this court, he submitted that it does not mean that the application made is unprocedural or an abuse of court process. The issue posed, according to Mr.

Chakoleka, is so fundamental and ought to be determined to clarify the position for posterity.

- 5.7. Mr. Chisenga responded to the argument that Vedanta's preliminary issue amounts to a multiplicity of actions. His submission was that a preliminary objection is not an action and can thus not lead to multiplicity of actions.
- 5.8. Counsel also raised the issue regarding the position of ZCCM-IH. He observed that ZCCM-IH supports KCM's preliminary issue, yet it did not challenge the Partial Final Award nor the registration of the same.
- 5.9. Mr. Chisenga added that the Court of Appeal has guided on the effect of a registered arbitral award in **ZCCM v. Philip Pascal & Others**<sup>(14)</sup>.
- 5.10. Mr. Mwamba submitted that Vedanta's preliminary issue goes to the jurisdiction of this court to hear the appeal. A jurisdictional issue can be raised at any stage. The High Court ruling being awaited is on a preliminary issue.

5.11. We were thus urged to uphold Vedanta's preliminary objection to the appeal.

**6.0. KCM'S PRELIMINARY ISSUE AND ARGUMENTS IN SUPPORT**

6.1. On the 4<sup>th</sup> January 2022, KCM filed its own notice to raise preliminary issues pursuant to Order 18 Rule 19/26. Order 33 Rule 7 of the Rules of the Supreme Court and the inherent jurisdiction of the Court.

6.2. The questions raised were:

1. whether or not Vedanta can move this court to dismiss the appeal in the manner that it has done in its application dated 16<sup>th</sup> December 2021, in light of its own application in the High Court to strike out/dismiss the winding up proceedings filed into court on 20<sup>th</sup> September 2021 *[sic!]*;
2. whether or not the preliminary objection to the appeal is an abuse of court process, multiplicity of actions and forum shopping in light of the application in the High Court to strike

out/dismiss the winding up proceedings filed into court on 20<sup>th</sup> September, 2021.

- 6.3.** An affidavit in support of the preliminary issues was filed. It was sworn by State Counsel Bonaventure Chibamba Mutale. In it he deposes that Vedanta did on 20<sup>th</sup> September 2021, file in the High Court before Hon. Mrs. Justice M. C. Mikalile, an application to dismiss/strike out the winding up proceedings and that application is currently awaiting the court's ruling.
- 6.4.** The deponent further asserted that as the basis and grounds of the application before the High Court are the same as the footing of the preliminary objection before the Supreme Court by Vedanta, Vedanta's preliminary objection to the appeal is an abuse of court process, a multiplicity of actions and amounts to forum shopping.
- 6.5.** In the skeleton arguments and list of authorities opposing Vedanta's preliminary objection, KCM's learned counsel intimated that the application was taken out pursuant to Order 18 Rule 19/26 of the Rules of the Supreme Court of

England 1995 (White Book) 1999 ed. which invests in the Court inherent jurisdiction to stay all proceedings before it which are obviously frivolous, vexatious and an abuse of process.

- 6.6. Counsel further cited Order 33 Rule 7 of the White Book which empowers the Court, where it is of the view that the decision on any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter, to dismiss the cause or matter or make such order or give such judgment as may be just.
- 6.7. Counsel essentially expanded on the averment in the affidavit of State Counsel Bonaventure Mutale regarding the preliminary objection against the appeal amounting to a multiplicity of actions and an act of forum shopping. The case of **Development Bank of Zambia and Another v. Sunvest Limited & Another**<sup>(15)</sup> was cited to buttress the submission.

6.8. The learned counsel also quoted passages from our judgments in **BP Zambia Plc v. Interland Motors<sup>(16)</sup>**, **Kelvin Hang'andu & Company v. Webby Mulubisha<sup>(17)</sup>** and **Indeni Petroleum Refinery Company Limited v. Kafco Oil Limited & Others<sup>(18)</sup>** all in support of the submission on multiplicity of actions and forum shopping. We were urged to dismiss the application.

#### **7.0. VEDANTA'S OPPOSITION TO KCM'S PRELIMINARY ISSUE**

7.1. On the 27<sup>th</sup> January 2022, Vedanta's learned counsel filed skeleton arguments in opposition to the KCM's notice to raise a preliminary issue.

7.2. After reproducing the seven grounds for Vedanta's application in the High Court, counsel for Vedanta submitted that those grounds raise, as the key broad question, whether the winding up petition now pending before the High Court can be pursued considering the pronouncement made in the Partial Final Award. The High Court was being asked to determine the status of the petition in view of the finding of the arbitral tribunal.

- 7.3.** It was submitted that Vedanta's preliminary application in the High Court was followed by counter preliminary applications by ZCCM-IH and KCM, all impeaching the propriety of Vedanta's preliminary application. The ruling of the High Court is still being awaited. That notwithstanding, the application before this court by Vedanta raises the question whether the Supreme Court has jurisdiction to hear and determine the appeal by ZCCM-IH in light of the Partial Final Arbitral Award which was registered in the High Court prior to the filing of the present appeal and whether ZCCM-IH's appeal does constitute an abuse of court process following the registration of the Partial Final Award.
- 7.4.** According to counsel for Vedanta, the two applications are different and relate to different subject matters; that ZCCM-IH has conceded that the notice filed by Vedanta is competently before the Supreme Court.
- 7.5.** Counsel also contended that the Supreme Court application is not an abuse of court process, nor does it

amount to multiplicity of actions and forum shopping. We were urged to dismiss KCM's preliminary issue.

#### **8.0. OUR ANALYSIS AND DECISION**

- 8.1.** When the appeal came up for hearing on the 18<sup>th</sup> January 2022, the learned counsel for KCM suggested that we hear KCM's preliminary application first since it was impeaching the propriety of Vedanta's objection. Vedanta's counsel, on the other hand, insisted that Vedanta's preliminary objection was filed earlier in time and impugned the jurisdiction of this court to entertain the appeal and should thus be heard first.
- 8.2.** We were satisfied that both applications in their own ways questioned the jurisdiction of this court. It was then that we gave Vedanta an opportunity to respond to KCM's preliminary issue and adjourned to the 1<sup>st</sup> February 2022 for hearing of both applications with an undertaking that we would deliver a joint ruling on the two applications.

- 8.3.** In deciding as we did, to hear both preliminary issues at the same time, we were fully alive to the cross-cutting issue of jurisdiction raised in both applications. In so far as Vedanta is concerned, this court has no jurisdiction to hear the appeal because the issues in the appeal have been determined in the Partial Final Award. For its part, KCM maintains that this court has no jurisdiction to consider the preliminary objection raised by Vedanta for the various reasons given by KCM and to which we have earlier alluded.
- 8.4.** The sole question determinative of the applications before us is, therefore, whether we have jurisdiction to entertain the appeal filed and now pending before us. In addressing this issue, we shall invariably address all preliminary issues.
- 8.5.** The real issue is whether a court does have jurisdiction to determine questions that have been determined by an arbitral tribunal, particularly when there are pending in court proceedings issues implicating or related to those

determined in arbitration. The determination of this issue in turn depends on who determines the gateway question as to who between the court and the arbitrator determines the question of jurisdiction.

8.6. Perhaps as a starting point we must agree with Vedanta's submission that where parties have chosen that they would refer any of their dispute to arbitration instead of resorting to regular courts, a *prima facie* duty is cast upon the court to act on their agreement. In **Hayter v. Nelson Home Insurance Co.**<sup>(19)</sup> Saville J noted that it should always be remembered that by their arbitration agreement the parties covenant that instead of a court, a private tribunal will resolve their disputes. This should be so even where the tribunal turns out to be slower or otherwise less efficient than the courts.

8.7. We also stated in **Zambia National Holdings Limited & Another v. Attorney General**<sup>(20)</sup> referred to by counsel for Vedanta, that where parties have agreed to settle any dispute between them through arbitration, the court's jurisdiction

is ousted unless it can be shown that the agreement is null and void or otherwise incapable of being performed. The decision in **Leopard Ridge Limited v. Zambia Wildlife Authority**<sup>(21)</sup> was to the same effect.

8.8. However, as we observed in the case of **Konkola Copper Mines Plc v. NFC Africa Mining Plc**<sup>(22)</sup> a court has no obligation to stay proceedings and refer the parties to arbitration where it is demonstrated that the arbitration agreement is null and void, inoperative or incapable of being performed.

8.9. In the case of **Ody's Oil Company Limited v. The Attorney General and Constantinos James Papotis**<sup>(2)</sup>, we guided that faced with the question whether a matter should be determined by arbitration or not:

**The court must be satisfied that there is first an agreement, that the arbitration agreement is valid, and or that it is not null and void, inoperative or incapable of being performed.**

8.10. A party that resists arbitral proceedings despite an existing arbitration agreement must establish the

invalidity of the arbitration agreement, its inoperativeness or inapplicability.

- 8.11. As the High Court correctly stated in **Cash Crusaders Frankchising Pvt Ltd v. Shakers and Movers (Zambia) Ltd**<sup>(24)</sup>:

The starting point is to recognize that once the parties have decided to have their dispute adjudicated upon by way of arbitration, they are in fact saying that they do not wish to avail themselves of the courts save in the limited circumstances provided by the law. Further, once an award is rendered, it is binding and enforceable upon the parties pursuant to section 20 of the Arbitration Act.

- 8.12. We endorsed this position in **Savenda Management Services Ltd v. Stanbic Bank Zambia Ltd**<sup>(25)</sup>.

- 8.13. In **Savenda Management Services Ltd v. Stanbic Bank Zambia Ltd**<sup>(25)</sup> we reiterated the binding nature of arbitration in the following terms:

It is very clear from section 20(1) [of the Arbitration Act] that the finality and binding effect of an arbitration award is only subject to sub-sections (2) and (3) of that section. Sub-section (2) preserves the right of person to challenge an arbitral award under avenues provided in the Act. As for sub-section (3) our understanding is that, although it provides for enforcement of an arbitration award in the same manner as an order of the court, it does not give the court jurisdiction to alter the arbitral award in any way.

- 8.14. The final and binding effect of an arbitral award is so clearly set out in the Arbitration Act. Section 20 states that:

**Subject to sub-sections (2) and (3) an award made by an arbitral tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any person claiming through or under them.**

- 8.15. We find the reasoning of the English Court of appeal rather compelling when in **Swallow Falls Ltd. v. Monaco Yachting & Technologies SAM & Another**<sup>(26)</sup> it stated that:

**... to allow the defendants in the proceedings before this court to traverse, in these proceedings, the subject matter of the arbitration, would be an abuse... The defendants were given what they asked for, which was those certain matters be submitted for decision by arbitration... To litigate the subject matter of the arbitration now through counter-claim would be to vex the claimant in these proceedings for a second time with those allegations...**

- 8.16. We also agree with the observation made by the Indian Supreme Court in **Satish Kumar & Others v. Surinder Kumar & Others**<sup>(27)</sup> where it stated that:

**All claims which are the subject matter of a reference to arbitration merge in the award which is pronounced. In the proceedings before the arbitrator and after an award has been pronounced, the rights and liabilities of the**

parties in respect of the said claims can be determined only on the basis of the said award. After an award is pronounced, no action can be stated on the original claim which had been the subject matter of the reference.

- 8.17. In the earlier case of **Bhajahari Saha Banikya v. Behary Lal Basak**<sup>(28)</sup> an Indian Court had observed that:

... as an ordinary rule, a valid award operates to merge and extinguish all claims embraced in the submission, and after it has been made, the submission and award furnish the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original demand... obviously, if ... reliance is placed upon the award, it is open to the party against whom it is sought to be used, to question its validity; but if it is established to be a valid award, it is binding upon the parties as embodying an adjudication of their rights.

- 8.18. It is obvious to us that it should not be the remit of this court to attempt to make a determination on issues that were already a subject of determination by the arbitral tribunal.

- 8.19. The United Nations Commission on Trade Law (UNCTRAL) adopted the Model Law on 21<sup>st</sup> June, 1982 which applies in this country by virtue of section 8 of the Arbitration Act No. 19 of 2000. Article 5 of the Model Law specifies very

limited instances in which a court would interfere in the decision of the parties to use arbitration as a dispute settlement method.

- 8.20.** In keeping with the spirit of Article 5 of the Model Law, our courts are enjoined to embrace the principle of limited court intervention in arbitration. As is well known, one of the chief benefits of judicial non-intervention in arbitration is that it minimizes delays in the resolution of disputes. Obviously, a principal rationale for the non-interventionist stance is respect for party choice and autonomy.
- 8.21.** As we have stated earlier in this judgment [at paragraph 3.2] sometime after the filing of the winding up petition, Vedanta declared a dispute against ZCCM-IH in accordance with the dispute resolution provision in the Shareholders' Agreement. The arbitral tribunal subsequently heard the parties on the issues of jurisdiction and arbitrability of the dispute. A decision on these matters was made.

- 8.22. To be certain, the issues determined by the arbitral tribunal in finality are set out in the Partial Final Award exhibited in the affidavit in support of Vedanta's notice to raise preliminary objection to ZCCM-IH's appeal. Those issues have to do with jurisdiction and arbitrability.
- 8.23. As counsel for Vedanta have pointed out, the arbitral tribunal's decision on those issues, that is to say the jurisdiction of the tribunal and arbitrability, is final and cannot be a subject of determination in the appeal. The authorities we have alluded to are in tandem with the statement quoted by counsel for Vedanta from the learned authors Michael J. Mustill and Steward C. Boyd QC in their **Commercial Arbitration** (2<sup>nd</sup> Ed).
- 8.24. A perusal of the grounds of appeal before us, as we have set them out earlier in this judgment, shows that by far the majority of the nine grounds of appeal all relate to matters that were determined by the arbitral tribunal and can thus not be a subject of deliberation, let alone decision, by this court in the appeal before us.

**8.25.** Tedious as this may appear to be, it is important to consider the grounds of appeal distinctly and seriatim and the decision of the arbitral tribunal so as to confirm where issue estoppel may exist:

- (i) Ground one of the appeal ascribes error on the part of the Court of Appeal when it determined the status of a person who files a notice of intention to appear at the winding up petition as a party to the winding up proceeding. This issue was, in all fairness, not an issue for determination by the arbitral tribunal and it was not in fact determined. Subject to the observations that we make later on, the appeal can thus quite legitimately deal with it.
- (ii) The second ground alleges that the Court of Appeal fell into error when it found that the dispute between the parties is arbitrable notwithstanding that creditors were not parties to the Shareholders' Agreement.

Our perusal of the Partial Final arbitral award shows that the arbitral tribunal spent a considerable amount of time assessing whether or not there was indeed a dispute within the meaning of the Shareholders' Agreement and whether the tribunal had jurisdiction to determine such dispute. Its findings on both questions was in the affirmative. The tribunal did not consider the fate of third-party creditors who were not privy to the Shareholders' Agreement. It was the Court of Appeal that considered that question and held that third parties would have alternative recourse to the company if necessary.

The arbitral tribunal, having found that the issues were arbitrable, this court has no business deliberating on that issue or attempting to find an answer to that question in the appeal.

- (iii) Under ground three, ZCCM-IH impeaches the holding by the Court of Appeal that a dispute had arisen under the Shareholders' Agreement. This ground is broken down into distinct sub-grounds.

Our reading of the Partial Final Award is that an alleged breach of the Shareholders' Agreement was the basis upon which the reference to arbitration was made. There was clearly a dispute in that one party to the Shareholders' Agreement alleged breach while the other denied it. The arbitral tribunal concluded that there was indeed a referable dispute. Again, it will go contrary to the spirit of limited court interference in arbitral decisions if the appeal is to purport to make a determination on the very question that the arbitral tribunal decided.

- (iv) Ground four questions the Court of Appeal's holding regarding the manner in which Vedanta managed KCM.

Our reading of the Partial Final Award, particularly paragraph 169 G, H, I and J, clearly shows that the arbitral tribunal dealt with that question and came up with a determination which cannot be reviewed, revisited or reversed by us in the appeal.

- (v) Ground five faults the Court of Appeal for holding that the dispute between the parties was arbitrable notwithstanding its failure to take into account public policy concerns affecting the rights of third parties.

We have already stated that this issue implicates arbitrability of the dispute and was dealt with by the arbitral tribunal. The resultant award was registered without any objection as would have been expected if non

arbitrability on grounds of public policy had been raised.

- (vi) In the sixth ground, the same issue of arbitrability is raised. The position cannot be different from that articulated at (v) above.
- (vii) Ground seven equally raises arbitrability, but confines itself to the narrow question whether a petition for winding up of an insolvent company for failure to pay debts is arbitrable.

Again, our view is that the whole Partial Final Award made a finding that winding up the company in a court of law at the instance of a party to the Shareholders' Agreement was an inappropriate course to take in light of the arbitration agreement between the parties.

- (viii) Under ground eight, ZCCM-IH takes issue with the manner in which the Court of Appeal dealt with questions of evidence.

Naturally, this was not an issue upon which the arbitral tribunal could have pronounced itself and it rightly did not venture into doing so.

- (ix) In ground nine, the grouse of ZCCM-IH is that the Court of Appeal was wrong to hold that the Companies (Winding Up) Rules 1929 applied to the situation between the parties.

Again, this was an issue outside the remit of the arbitral tribunal to pronounce itself upon, and it rightly refrained from doing so. This issue is thus in theory still one determinable on appeal.

**8.26.** Stripped of the appeal's original fatigues, and taken in context, therefore, it seems to us that the balance of the issues remaining for determination in the appeal are as follows:

- (i) Does a person who files a notice to appear at a winding up petition become a party to the petition with the right to make all manner of applications?

- (ii) Did the Court of Appeal correctly deal with issues of evidence in the manner in which it handled the appeal? And
- (iii) Was the Court of Appeal right to hold that the Companies (Winding Up) Rules of 1929 applied?

**8.27.** To this extent we agree with the submission of State Counsel Lungu that not all issues in the appeal were covered in the Partial Final Award.

**8.28.** What is, however, clear to us from all this is that disrobed of its original amour on account of the court's attitude in favour of limited court interference with arbitral awards, the substance and character of the whole appeal changes significantly.

**8.29.** It is important to recall that following the decision of the Court of Appeal, now appealed against, ZCCM-IH had, in keeping with the dictates of section 13 of the Court of Appeal Act, applied for leave to appeal to the Supreme Court. That leave was granted by a single judge of this court.

- 8.30. The basis upon which the single judge granted leave is set out in his ruling dated 2<sup>nd</sup> September 2021. He stated at paragraph 33 as follows:

**Turning to the nine proposed grounds of the appeal intended to be put up by ZCCM-IH, I notice that all of them, excluding only the proposed ground eight, revolve around the legality of the arbitrability of an insolvency claim premised on failure by KCM to pay its debts that fell due on just and equitable grounds. The big question is whether the insolvency claim is arbitrable between the parties to an agreement to resolve disputes thereunder by arbitration irrespective of the interests of third parties who registered their interest by way of notices of intention to be heard in the insolvency or winding up claim... this point brings to the fore the question raised by ZCCM-IH of the appropriate forum where the disputes should be resolved – is it in an open (court) or private forum. There is clearly public interest in seeing how the issues are resolved by the highest court in the land in such matters.**

- 8.31. At paragraph 34 of his ruling, the single judge stated that:

**I am quite satisfied that the grounds of appeal referred to in the preceding paragraph have raised a point of law of public importance in the manner explained in the Bidvest Foods<sup>(29)</sup> case that need to be pronounced upon by the Supreme Court.**

- 8.32. We have earlier in this judgment spoken to two issues namely, first, that the ruling granting leave to appeal only came after the arbitral tribunal had given its Partial Final Award, and second that the issue of arbitrability of the dispute in the wake of third party interest shown by creditors who were not privy to the arbitration agreement, loomed large in the proposed grounds of appeal.
- 8.33. We have also pointed out that of the nine grounds of appeal the substance of only the three that we identified at paragraph 8.26 were not covered in the Partial Final Award.
- 8.34. What is clear to us is that the three grounds of appeal whose content was not covered in the arbitral tribunal's Partial Final Award were also plainly not part of the sole reason for the grant by the single judge of leave to appeal, for they do not raise any point of law of public importance.
- 8.35. In the **Bidvest Foods**<sup>(29)</sup> case, we were quite categorical in our statement that when leave to appeal is granted on a specified basis, the appellant is not at liberty to sneak into

the appeal any manner of argument if unrelated to the basis for the grant of leave. We stated (at J56) as follows:

**Where leave to appeal is granted on the basis that the appeal raises a point of law of public importance and it is possible to isolate such point of law of public importance in the proposed appeal, this court will confine itself to considering only such point in dealing with the appeal. As long as the other issues in the appeal do not satisfy the threshold of raising a point of law of public importance, they do not qualify for individual separate consideration by the Supreme Court.**

8.36. Even assuming that the three residual grounds, in themselves, in fact had prospects of success, for the appeal taken as a whole, such success would only be nominal.

8.37. In the **Bidvest Foods**<sup>(29)</sup> case we stated that:

**A judgment of the lower court may well raise some doubt as to its rationalisation, application of legal principles, or some aspects of it. Those misapprehensions or misapplications or lingering doubts as to its correctness may, however, not be sufficiently weighty to justify an appeal. Indeed, there are many appeals that are arguable and have reasonably good prospects of success merely because the Court of Appeal missed a point, or made a wrong conclusion or applied a wrong principle, or where the court clearly did not direct itself to all the evidence**

**bearing on an issue, and yet the proposed appeal may not enjoy sufficient prospects of real, eventual success to justify the intervention of this court.**

**8.38.** We stress this last point merely because there is likely to be a serious urge to assume that merely because the three residual grounds may appear to have prospects of success, the whole appeal should be considered. We believe, however, that this is not a feasible way to proceed because the basis upon which leave to appeal was granted, was that it raised points of law of public importance. Prospects of success was not the basis for the grant of leave. In any case, and as we have already pointed out, such success, if it happened at all, would be nominal not real.

**8.39.** Our view is that the substratum for the grant of leave to appeal has collapsed. The balance of the issues in the appeal do not in themselves raise any point of law of public importance.

**8.40.** With the foregoing explanation, we now turn to specifically consider the preliminary issue raised by the KCM. The first question posed was whether Vedanta can move the

court to dismiss the appeal in the manner it has in the light of the application now pending in the High Court.

- 8.41.** To be clear, the application before the High Court by Vedanta is for dismissal or striking out of the winding up proceedings granted the holding of the arbitral tribunal in its Partial Final Award. Counsel for KCM contends that allowing Vedanta's preliminary objection could lead to absurdities in that the decision of the High Court in the matter could potentially come to this court on appeal.
- 8.42.** Our view is that although this argument has a superficial attraction, it is in fact fantastic. Appeals are not launched as a matter of course: they are motivated by proper grievances arising from the lower court's misdirection or error. It is thus preposterous to assume that merely because a decision is made by a lower court, it will be appealed against.
- 8.43.** Our consideration, in any case, is that the application in the High Court is separate and distinct and ought to be determined on its own merits by the dealing judge applying

the law as the judge best understands it. The question of pitting our decision against that of the High Court should not arise in our system where the doctrine of stare decisis is fully alive. We thus do not agree with the submission of State Counsel Mutale on this point.

**8.44.** Before us, the real question is whether we can determine issues around the jurisdiction of the arbitral tribunal; whether an arbitrable dispute has arisen and whether the issues in the appeal have not already been determined by the arbitral tribunal. In the High Court, on the other hand, the issue is whether the winding up proceedings should continue on the grounds as originally framed in view of a subsequent determination by an arbitral tribunal, which determination has not been impeached.

**8.45.** While we have articulated our position and our view on the effect of the Partial Final Award on the grounds of appeal, it is not in our province to pronounce the fate of Vedanta's application before the High Court. We, therefore, are of the view that an objection to the appeal can be raised in

the manner Vedanta has raised it because, as Mr. Mwamba pointed out, it is jurisdictional in substance.

- 8.46.** We think, however, that the fate of the application now pending before the High Court goes much further than merely the procedural awkwardness that would arise as counsel for KCM conceives it, should a decision not to entertain the appeal before us be made. It is a technical point deserving much deeper reflection than it might have received hitherto.
- 8.47.** The crucial question is: what happens if we agreed with Vedanta that the appeal before us is lifeless, spent academic, speculative and hypothetical when viewed in light of the registered Partial Final Award which is binding on the parties? The appeal would surely stand dismissed – meaning the Court of Appeal judgment would remain unvacated.
- 8.48.** The substance of that judgment, as has been set out at paragraphs 1.26 to 1.31, is that the winding up proceedings remain stayed and the matter referred to

arbitration. We would in those circumstances expect the High Court before which the application to dismiss the winding up petition is pending, to be guided by the decision of the Court of Appeal for the High Court is under and subordinate; indeed, submissive to, the authority of the Court of Appeal.

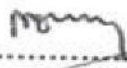
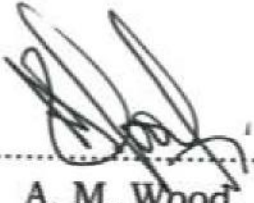

- 8.49.** KCM's second preliminary issue is whether the preliminary objection to the appeal is an abuse of court process, multiplicity of actions and constitutes forum shopping in view of the application in the High Court.
- 8.50.** We accept the arguments made by counsel for Vedanta that although the issues for consideration by us and by the High Court in the separate application before it are traceable to the Partial Final Award, they are in fact different. What we do not agree with is the argument that sustaining Vedanta's preliminary objection would have no effect on the pending application in the High Court. We think otherwise for the reasons we have given earlier on.

**8.51.** We are also sympathetic to the point made by Mr. Chisenga that arguments of abuse of court process premised on multiplicity of actions should ordinarily only sound in actions properly so called as opposed to preliminary applications, particularly when such applications question the jurisdiction of the court. It is for these reasons that we are inclined to take the position that raising the preliminary objection to the appeal in the manner Vedanta did, does not amount to abuse of court process.

**8.52.** Turning to the preliminary objection by Vedanta, namely that we have no jurisdiction to hear and determine the appeal by ZCCM-IH against the Court of Appeal judgment in view of the Partial Final Award, we have demonstrated already how the substantive grounds of appeal have been substantially consumed by the Partial Final Award and how the residue of the grounds of appeal neither raise any point of law of public importance, nor have prospects of real success.

8.53. The ultimate position we take is that the preliminary objection has merit for all the reasons we have adumbrated. We sustain it. The result is that the appeal collapses.

8.54. We award costs to Vedanta to be taxed if not agreed.

  
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M. Malila  
**CHIEF JUSTICE**  
.....  
A. M. Wood  
**SUPREME COURT JUDGE**  
.....  
C. Kajimanga  
**SUPREME COURT JUDGE**