IN THE MALAWI SUPREME COURT OF APPEAL

SITTING AT BLANTYRE

CIVIL APPEAL NO. 42 OF 2015

(Being High Court (Commercial Division) Case No. 120 of 2012)

(Originally High Court Civil Cause No. 3072 Of 2003)

BETWEEN

ROLF PATEL.....1ST APPELLANT

REUBEN PATEL.....2ND APPELLANT

STANLEY PATEL.....3RD APPELLANT

ROLF PATEL JUNIOR .....4TH APPELLANT

AND

PRESS CORPORATION LIMITED.....1ST RESPONDENT

PRESSCANE LIMITED.....2ND RESPONDENT

CORAM: HON A. K. C. NYIRENDA SC, CHIEF JUSTICE

HON JUSTICE E. B. TWEA SC, JA

HON JUSTICE R.R. MZIKAMANDA SC, JA

HON JUSTICE A.C. CHIPETA SC, JA

HON JUSTICE L.P. CHIKOPA SC, JA

HON JUSTICE F.E. KAPANDA SC, JA

HON JUSTICE A. D. KAMANGA SC, JA

B. Mhango SC, J. Dzonzi & A. Nampota	**Counsel for the Appellant**
Savjan SC, D. Njovu & N. Misanjo	**Counsel for the Respondent**
Msowoya & W. Shaibu	**Judicial Researcher Officers**
Chimtande & Minikwa	**Court Clerks**
Pindani	**Reporters**

JUDGMENT

The judgment in this case is unanimous. This is an appeal against the judgment of Honourable Justice Dr. Mtambo delivered on 24th February 2014 in the High Court Commercial Division sitting at Blantyre. In that judgment, the Court below referred to the liquidator of CPL for PWC and/or Society of Accountants to conduct an equity verification exercise which final report was subject to the Court's review to be a Judgment of the Court. The notice of appeal indicated that the appellants appealed against all the parts of the judgment the Court below had found adverse to the prayers of the appellants. There are seven grounds of appeal.

The respondents too were dissatisfied with the decisions of the Court below and filed their own notice of appeal which was taken as a cross-appeal.

The respondents appealed against the decision to allow amendment of statement of claim after trial and parts of the decision in the Judgment delivered on 24th February 2014. There are numerous grounds of cross-appeal in the respondents cross-appeal.

The following are the appellant's grounds of appeal:

1. The learned Judge, having found as a fact that the 1st respondent was guilty of breach of clauses 7.2.2 and 7.4 of the Joint Venture Agreement, erred in law by finding that these breaches were cured by the alleged Resolution of 20th August 2003, contrary to the evidence available before the Court.
2. The learned Judge erred by upholding the Resolution of 20th August 2003 as amending the Joint Venture Agreement, contrary to the provision of clause 29 of the Joint Venture Agreement and evidence showing that the 1st and 2nd respondents did not in fact act in accordance with the said Resolution.
3. The learned Judge erred in law by refusing to make an order for striking out the 1st respondent from the Register of Companies contrary to the provisions of clauses 7.2.1.1 and 7.2.1.2 of the Joint Venture Agreement which clearly provided for the consequences of the 1st respondent's failure to furnish consideration for its shares in the 2nd respondent.
4. The learned Judge erred in law by refusing to grant the appellant's legal remedies commensurate with the law of contract, having found as a fact that the 1st respondent was guilty of breaching clauses 7.2.2 and 7.4 of the Joint Venture Agreement contract, contrary to established principles of contract law.
5. The learned Judge misdirected himself in delegating the Court's powers to determine the rights in the parties to PWC or the President of Society of Accountants of Malawi and by conferring himself with the power to review his own decision contrary to the provisions of the Republican Constitution as read with the Courts Act.
6. The learned Judge erred in law by making orders relating to the liquidation proceedings between National Bank of Malawi Ltd and Cane Products Ltd (in liquidation) both of whom were not parties to the proceedings before him contrary to rules of civil procedure.
7. The learned Judge erred in law by failing to make findings of fact and consequential orders on the 1st respondent's misappropriation of the sum of K820,624,162.59 wrongfully collected by it from the 2nd respondent's debtors, US$2 million loan the 2nd respondent obtained from Stanbic Bank and K39,000,000 it charged the 2nd respondent as management fees contrary to civil procedure practice rules.

The notice of appeal specifies the reliefs sought from this Court and these will be referred to later in this judgment.

The respondent's grounds of the cross-appeal are listed below. On the interlocutory orders made during and after trial, the grounds are that:

1. The learned Judge erred in law in granting leave on 24th June 2013 to the plaintiffs to amend the statement of claim.
2. The learned Judge erred in law in refusing on 28th June 2013 leave to the respondents to recall the Plaintiffs witnesses for further cross-examination.
3. The learned Judge erred in law and fact in holding that the Court has dismissed just one or two of the Plaintiffs ancillary claims.
4. The learned Judge erred in law and fact in holding that the main thrust of the plaintiffs' claim was outstanding since the learned Judge did not grant any of the principal and ancillary reliefs claimed by the plaintiffs.
5. The learned Judge misdirected himself as to the scope and effect of the amended statement of claim and/or the defendant election not to call evidence and/or the duty of the plaintiffs to define and prove their case.
6. The learned Judge misdirected himself in ordering that "this matter goes to the liquidator for finalization.
7. The learned Judge erred in law and in fact in holding directly and/or by implication that PWC has not completed the Equity Verification Exercise.
8. The learned Judge erred in law and fact in holding in effect that there should be a further Equity Verification Exercise by PWC and a further report by PWC.
9. Further or in the alternative, the learned Judge erred in law and in fact in asking PWC in effect to reopen and extend the completed PWC Equity Verification Exercise.
10. Further or in the alternative, the learned Judge erred in law and in fact in directing PWC to in effect reopen and extend the completed Equity Verification Exercise and to submit a further PWC report.
11. The learned Judge erred in law and fact in ordering that the PWC Equity Verification Exercise should take into account plaintiff's input.
12. Further or in the alternative, the learned Judge erred in law in requiring liquidator to take into account the input of PWC.
13. The learned Judge erred in law in purporting to make orders, directives or guidance statements in favour of and/or to the liquidator of Cane Products Limited when the plaintiffs did not seek any of the directives or order or guidance statements given by the Judge.
14. The learned Judge erred in law in finding or holding that the liquidator of Cane Products Limited can call upon the Defendants to explain various matters specified by the learned Judge.

15. The learned Judge erred in law in ordering that the liquidator of Cane Products Limited should call upon the Defendants to reverse all charges by 1st Defendant to the 2nd Defendant.
16. The learned Judge erred in law in finding that the liquidator of Cane Products Limited can call upon any person who took or misapplied the funds of Cane Products Limited.
17. The learned Judge erred in law in holding by implication or suggestion that the Defendants counter-claim is unreasonable and should not be pursued.
18. The learned Judge erred in law in ordering that "... dividends be declared and paid after the Equity Verification Exercise is completed."
19. The learned Judge erred in law by implication and/or directly in invoking or purporting to invoke powers including powers to order the purchase of shares by other members or by the Company itself granted under section 203 of the Companies Act dealing with rights of members of a Company, particularly minority rights.
20. The learned Judge erred in law in making orders and recommendations without specifying the time of compliance.
21. The learned Judge erred in law and in fact suggesting that Messrs Savjan & Co. should cease to act on behalf of the Defendants in any matter involving the interpretation of the Joint Venture Agreement.

These grounds have left out argumentative aspects that were included in the drafting of each one of them. More will be said later in this judgment regarding the drafting of the grounds of appeal. Also, to be highlighted later are the reliefs sought on the cross-appeal.

We recognize that this matter has a long and troubled history in this Court and in the Court below. The judgment of the Court below has captured some of the twists and turns in the case. It was commenced by way of originating summons in the High Court of Malawi, General Division, as Civil Cause No 3072 of 2003. It then was characterized by numerous applications for trial, preliminary issues, informations, recusals, appeals and other proceedings on the same facts. Various Judges handled the matter and in 2012 Chipeta J (as he then was) ordered that the matter be transferred to the High Court, Commercial Division and be proceeded with de novo. The matter was proceeded with as if it was commenced by way of writ of summons. According to the Judge in the Court below, nearly half the complement of the High Court Judges at the time had handled the case before he took over and finalized it. The matter which first commenced with Cane Products Limited (CPL) as the plaintiff had the present appellants added as parties in 2003 being subscribers to CPL's memorandum of association. The appellants were added following an

application that was premised on a common question of law or facts with respect to the rights of the appellants under a Joint Venture Agreement between CPL and the 1st respondent. The appellants were described as CPL Associates even in the Joint Venture Agreement, the basis of this action.

Subsequently, lawyers for National Bank of Malawi who were creditors of CPL applied for CPL's liquidation and its removal from the proceedings. The application was granted. That left the appellants as the claimants. The matter had been re-registered as Commercial Case No. 95 of 2012 in Lilongwe Registry of the Commercial Division before being transferred back to Blantyre Registry.

The background to the present matter is well set out in the judgment of the Court below. The first appellant used to carry on transportation business styled Katundu Haulage. He had an assignment to transport sugar cane molasses to the 1st respondent's Ethanol factory in Nkhotakota. He then conceived an idea of forming a company to manufacture ethanol from sugar cane molasses and that the factory would be based in Chikwawa District. He promoted and had incorporated a company styled Cane Products Limited (CPL) for the purpose. The appellants were the shareholders in Cane Products Limited. CPL was to carry on the business venture in conjunction with the first respondent who became a majority shareholder of the second respondent, a joint venture company. CPL subscribed 499 shares while the first respondent subscribed 501 shares. On 5th June 2001 a Joint Venture Agreement was entered into between the appellants CPL, the 1st and 2nd respondents. The appellants were described in the Joint Venture Agreement as CPL Associates who were members and trustees of CPL. The appellants were not directly shareholders of the 2nd respondent.

By 2003 disputes arose between CPL and the 1st respondent pertaining to the proportions of equity which each party had contributed. The first appellant became the face of CPL in the dispute that arose from violation of the Joint Venture Agreement. PWC was engaged to carry out an Equity Verification Exercise and a preliminary report was issued.

Both CPL and 1st respondent had issues with the report. CPL then commenced an action by way of originating summons claiming:

i. that the 1st respondent pays the assessed buy-in amount of US$843,443.24;
ii. that the 2nd respondent allots to the plaintiff shares commensurate with the certified value of all civil works rendered to the 2nd respondent by the plaintiff in accordance with clause 7.34 of the Joint Venture Agreement.

b) Payment of US$843,443.24 "buy-in"
c) an order for accounting more specifically the shareholder's contributions towards the equity of the 2nd respondent in accordance with the Joint Venture Agreement.
d) an order for damages by way of lost dividends from the date the 2nd respondent started posting profits to the date of payment.
e) an order that management of absolute control of the Board of the 2nd respondent instead of the 1st respondent as provided for in clause 5 of the Joint Venture Agreement or the appointment of independent management.
f) an order that the Board of the 2nd respondent be reconstituted to reflect the plaintiffs and 1st respondents' amendment of clause 5.1 of the Joint Venture Agreement on 31st July 2001.

Witness statements on both sides were filed and served. The respondents over time filed 5 Notices Refusing to Admit the Authenticity of Documents attached as exhibits in the plaintiff's witness statement. On 7th May 2013, the respondents filed a Composite Notice Refusing to Admit the Authenticity of Documents. After the 4th witness for the plaintiffs had given evidence, on 23rd May 2013, the plaintiffs indicated to the Court that they were closing their case. Then the respondents communicated to the Court that they would not call witnesses in the matter although they would submit on the evidence addressed by the plaintiffs and address all issues relating to the matter on submission. On 28th June 2013, after the conclusion of the trial, on application by the plaintiffs, the Court granted leave to amend the statement of claims. Time for the respondents to serve a defence was also fixed. The final version of the claim after all amendments filed on 11th July 2013, to which final amend defence was filed on 17th July 2013, was for:

a) a declaration that the 1st respondent failed to comply with provision of clause 7.2.2 and 7.4 of the Joint Venture Agreement consequent upon which it has not furnished consideration for its acquisition of a 50.1% equality stake in the 2nd respondent.
b) consequent upon (a) above, an order that the 1st respondent must be struck out from the Register of Companies as a shareholder of the 2nd respondent forthwith.
c) An order for accounting as pleaded in paragraph 16 above.
d) An order for damages by way of lost dividends from the date the 2nd respondent started posting profits to the date of payment thereof.
e) ALTERNATIVELY, an order of specific performance compelling.

i. 1st respondent to comply with clause 2.2 of the Joint Venture Agreement by reversing all the acts complained of in paragraph 12 herein above;
ii. 1st respondent to comply with clauses 7.2.2 and 7.4 of the Joint Venture Agreement;
iii. 2nd respondent to comply with clauses 7.2.1.1, 7.2.1.2, 7.2.2, 7.3.4 and 7.4 of the Joint Venture Agreement.

f) Cost of the action.

The judgment of the Court below itemized issues for the determination of the Court as agreed at a scheduling conference and appearing from the trial and submission of the parties. The issues were:

1. Whether or not the plaintiffs had a standing to prosecute the matter.
2. Whether or not the plaintiffs' claims were caught by the Limitation Act.
3. Whether or not the plaintiffs had any rights under the JVA.
4. Whether or not the plaintiff's statement of claim was frivolous and vexatious and whether or not it disclosed a reasonable cause of action.
5. Whether or not there is substance in PWI Mr Kayira's evidence that the 1st respondent does not have equity in the 2nd respondent.
6. Whether or not PW1's evidence can prevail over Equity Verification Exercise by PWC.
7. Whether or not there had been any misappropriation of the 2nd respondents' funds by the 1st respondent as alleged by the plaintiffs.

The Court below then proceeded to analyse the evidence and the issues as it made a number of findings. At page 22 of the judgment, the Court below had this to say:

"In the final analysis, CPL is in liquidation. I cannot resurrect it through these proceedings. I cannot also make orders which result in the death of the 2nd Defendant which is doing well and making profits. This is in line with the decision of Mtegha J (as he then was) in Re: Mapanga Estates when he, in an application under section 203 of the Companies Act refused to wind up a company in which there was a deadlock between two shareholders one holding 51% and the other 49% of the shares on the ground that it was not just and equitable to do so as the company was profitable. Instead, he ordered that the minority shareholder sells his shares to the majority one.

Consequently, I order that this matter goes to the liquidator properly appointed under the Winding Up Rules for finalization. By law, the job of the liquidator is to release the assets of CPL including the shareholding in the 2nd Defendant, pay of the debts of CPL and share any surplus amongst the shareholders, the plaintiffs. In this quest, the liquidator can call upon any person who took or misapplied the funds of CPL such as the Defendants to account

and make good thereof to him. The case of Underwood Limited V Martins Bank Limited is instructive in this regard. Apart from appointing his own accountants and for auditors, the liquidator will also appoint his own lawyers not being the current Counsel. Considering the findings in this case, the liquidator can call upon the 1st and 2nd Defendants to explain the grey areas which I have outlined. These include, the discrepant financial statements which define what the 1st Defendant calls equity contributions as loans and advances were fully paid as a result of which they cannot be converted into equity in terms of the shareholder agreement of September 2003, the missing list of the 2nd Defendant creditors to whom the K820 million was paid; how the US$2 million Standard Bank loans was disbursed; the missing loan contracts between the 1st Defendant and the 2nd Defendant; the rate and period over which the 1st Defendant charged interest to the 2nd Defendant; and a reversal of all charges by the 1st Defendant to the 2nd Defendant with respect to management fees not provided for in the JVA."

Further down the judgment, the Court below stated at page 25 that:

"For the sake of clarity, this judgment has made findings of law and fact which should guide the final resolution of the matter by all parties tasked hereunder. The Court has dismissed just one or two of the plaintiffs' ancillary claims. However, the main thrust of the claim has not been dismissed in view of the withdrawal of CPL from these proceedings and the election by the Defendants not to call evidence which made verification of the Defendants story on grey areas raised by the plaintiffs not possible. Hence, the matter has been referred to the liquidator of CPL for the PWC and or Society of Accountants Equity Verification Exercise which final report shall, subject to the Courts review, be a judgment of this Court."

In this appeal, the appellant seek various orders as follows:

1. A declaration that the 1st respondent breached the provision of clause 7.2.2 and 7.4 of the Joint Venture Agreement consequent upon which it has not furnished consideration for its acquisition of a 50.1% equity stake in the 2nd respondent.
2. An order that consequent upon the failure by the 1st respondent to furnish consideration for its shares, the appellants and Cane Products Ltd are the legal owners of the 2nd respondent in accordance with clauses 7.2.1.1 and 7.2.1.2 of the Joint Venture Agreement.
3. An order that consequent upon the failure, the 1st respondent must be struck out from the Register of Companies as a shareholder of the 2nd respondent forthwith.
4. An order that the 1st respondent refund to the 2nd respondent all sums of money which it wrongfully misappropriated as set out in the statement of claim (being K820,624,162.59, collected from the debtor of 2nd respondent obtained from

Stanbic Bank and K39,000,000 management fees charged to the 2nd respondent contrary to civil procedure practice rules).

5. ALTERNATIVELY, an order of specific performance compelling
   i. The 1st respondent to comply with clauses 7.2.2 and 7.4 of the Joint Venture Agreement by paying in cash for its shares in the 2nd respondent in accordance with the provisions of the Joint Venture Agreement; and
   ii. The 2nd respondent to comply with clauses 7.2.1.1, 7.2.1.2, 7.2.2, 7.3 and 7.4 of the Joint Venture Agreement by issuing appropriate shares to its shareholders.

6. Costs of the appeal and in the Court below.

The reliefs sought by the cross-appeal are:

1. An order that such parts of the Judgment as held that the Court has dismissed just one or two of the plaintiffs' ancillary claims or similar holdings be varied to provide that all the plaintiffs' claims have been dismissed.
2. Further or in the alternative, an order that such part of the Judgment that holds that. "However, the main thrust of the claim has not been dismissed..." be rescinded together with all consequential or related orders in regard to reference of this matter to the liquidator, directions or guidance to PriceWaterHouse Coopers, the President of the Society of Accountants in Malawi, declaration of dividends.
3. Further, or in the alternative, orders relating to management fees be rescinded.
4. Further, or in the alternative, the suggestion of the learned Judge in the Judgment that Messrs Savjan & Co. cease to act on behalf of the respondents be rescinded.
5. Further or in the alternative, an order that the order in the Judgment that each party should pay its own costs be reversed and be replaced with an order that the plaintiffs pay the costs of the respondents.

The reliefs sought in the appeal and the cross-appeal were articulated by each party at the time they argued the appeal and the cross-appeal respectively. The parties filed with this Court argument in support of the appeal and the cross-appeal respectively. On 13th May 2019 and on application by the respondents Honourable Justice of Appeal Twea, SC made an order expunging some skeleton arguments that:

1. The appellant's skeleton arguments filed herein on the 10th day of May 2018 and served on the respondent on 11th May 2018 are hereby expunged from the Court record.

2. During the appeal, the appellants shall use their skeleton arguments filed herein on the 16th of August 2018 and served on the respondents on the same day.
3. The respondents shall be at liberty to review their skeleton arguments, if need be, within 10days from the date of service of this order on the respondents.

The record has respondents' skeleton arguments against appeal and for the cross-appeal pursuant to the order made by Twea, SC, JA on 13th May 2019, which arguments were filed on 27th May 2019 although another Court stamp on it shows the date of 24th May 2019. Be that as it may, these are the arguments that will be considered in this appeal.

The appellants' skeleton arguments as filed on 16th August 2013 are quite detailed, as are the respondents' arguments filed on 27th May 2019. In stating the chronology of events, the appellants' skeleton arguments show that the 1st appellant was at all material times a businessman, carrying on various businesses including a transport business under the name of Katundu Haulage Ltd. Between late 1980's and early 1990's, the 1st respondent used to hire Katundu Haulage Ltd to transport sugar molasses from Nchalo in Chikwawa to Dwangwa in Nkhotakota where the 1st respondent had an ethanol company by the name Ethanol Company Ltd (ETHCO). Then, the 1st appellant decided to form his own ethanol company to be based at Nchalo to produce ethanol cheaply by cutting the transport costs which the 1st respondent was incurring. After some feasibility study, the appellant formed Cane Products Limited jointly owned by him and his three sons, 2nd, 3rd and 4th appellants with an eventual shareholding of 40%, 20%, 20% and 20% respectively. The company was incorporated on 21st February, 2000. An exclusive molasses supply agreement was acquired from Illovo in Nchalo Estate, land and financing for the ethanol plant were also acquired. The plant was to be located at Mwithu Village near Dyeratu Trading Centre in Chikwawa. Between January and March 2001, the 1st respondent approached the 1st appellant with a proposal for 1st respondent to join in the ethanol project under a medium of a Joint Venture Company. On 21st March 2001 a Memorandum of Understanding was signed between the 1st respondent and Cane Products Limited led by 1st appellant. Under the Memorandum of Understanding, the 1st respondent agreed with Cane Products Limited to form a Joint Venture Company as a business vehicle for the joint venture exploitation of the ethanol business to be called Presscane Limited which was incorporated as the JVC and owned 50.1% and 49.9% ratio by 1st respondent and Cane Products Limited respectively. On 5th June 2001, the appellants, Cane Products Limited, the 1st respondent, and the 2nd respondent entered into a Joint Venture Agreement (JVA) which provided for the relationships between the parties thereto, including the

appellants as CPL Associates, in connection with the running and management of the 2nd respondent. The parties agreed, inter alia, that:

a) Under clause 2.2 the business of the 2nd respondent "shall be conducted in the best interest of the (2nd respondent) on sound commercial profit-making principles".
b) Under clause 5.1; "Press shall have control over the management and operations of the company."
c) Under clause 6.2, the project costs would be financed in accordance with the following financial plan:

"K84,001,168 by equity contribution of Press
K83,665,833 by equity contribution of CPL
K250,077,000 by Third Party Loan."

d) Under clause 7 an elaborate and comprehensive scheme by which the 2nd respondent would acquire the project from the appellants was agreed including on how CPL and 1st respondent would subscribe for their shares in the 2nd respondent.

It was argued that while CPL proceeded to honour their part of the bargain, 1st respondent reneged on its obligations as manager and controller of the 2nd respondent, thus preventing 2nd respondent from honouring its obligations. In or about November 2003, Cane Products Ltd commenced this action, which matter dragged on and on or about 12th May 2012, Cane Products Ltd went into compulsory liquidation on the grounds that while constructing the 2nd respondent's factory, it received an overdraft facility from the 2nd respondents' sister company, National Bank of Malawi Ltd at the instance of the 2nd respondent. The understanding was that the 2nd respondent would settle the same when due, but later the 2nd respondents then Board Chairman, one Dr. Chikaonda, stopped the 2nd respondent from paying, thereby creating a liability on the part of Cane Products Ltd that led to its liquidation.

In February 2013, the appellants were granted leave by Court to be added as joint parties to the action. On 12th April 2013, National Bank of Malawi, as a creditor in the winding up proceedings of CPL applied for and obtained an injunctive order stopping the Official Receiver and liquidator of Cane Products Ltd from prosecuting the present action on the pretext that doing so prejudiced the winding up proceedings. At the hearing of 15th April 2013, the Court below decided to strike off Cane Products Ltd as a party to these proceedings, leaving the four appellants to proceed with the action based on the Joint Venture Agreement. After trial, an

application to amend the statement of claim was allowed by the Court below and an amendment was duly effected. It was clear that both the appellants and the respondents were dissatisfied with different aspects of the judgment that the Court below delivered on 24th February 2014 and both made an appeal to this Court, one of which was designated a cross-appeal. The appellant's skeleton arguments cover legal principles applicable to the respondent's appeal, amendment of pleadings, before embarking on arguments in support of their appeal. The manner in which the arguments of the appellants were presented is unusual and presents some challenges and confusion. For example, page 24 of the arguments has 11.2 headed as GROUNDS OF APPEAL 2.1.1 and 2.1.2 but the body of the discussion opens by saying in the second sentence of the first paragraph that:

"Grounds 3.1 and 3.2 of Appeal shall be argued together."

The next sentence then states that

> *"In the first ground of the appeal, the Appellants contend that the learned Judge in the Court below, having found as a fact that the 1st respondent was guilty of breach of clauses 7.2.2 and 7.4 of the Joint Venture Agreement erred in law by finding that these breaches were cured by the alleged Resolution of 20th August 2003 contrary to the evidence available before the lower Court."*

We will nonetheless summarize the appellant's argument as best we can in order to make as much sense out of them as would enable us determine this matter.

It is clear that the appellants agree with the findings of the Court below that the 1st respondent acted in breach of causes 7.2.2 and 7.4 of the Joint Venture Agreement but do not agree with the part of finding that said that the breach was cured by a Resolution of 20th August 2003 on the ground that there was no evidence to support that part of the finding. They argue further on this point that the 1st respondents subsequent conduct did not support the resolution. The subsequent conduct showed that 1st respondent continued to treat all its contributions in 2nd respondent as long-term loans, and not equity, so the appellants argue. They further argued that the Resolution did not meet the requirements of clauses 26 and 29 of the JVA. Only the Chairman of the 2nd respondent signed and none of the shareholders or indeed the rest of the parties to the JVA signed it, they argued. They argued further that the Resolution did not and could not have amended the Joint Venture Agreement, an issue the Court below did not address its mind to. According to the appellant, neither they nor CPL waived their rights. Regarding the 2014 PWC Equity Verification

Report of Factual Findings, the appellants argued that it clearly showed that the 1st respondent had lent money to the 2nd respondent as opposing to the purchasing of shares in cash. It was further argued that the evidence showed that between 2004 and 2009, the 1st respondent received repayments of its loans from the 2nd respondent and that by 31st December 2009, it had been repaid every single penny it lent to the 2nd respondent, a fact the 1st respondent admitted. Consequently, it was argued the 1st respondent made no equity contributions to the 2nd respondent.

According to the appellants, the Court below ignored a 2nd Resolution of the same meeting which resolution complemented the first one in the sense that upon verification of each shareholder's contributions, the shareholding would be admitted accordingly. The appellants lament that the Court below disbelieved the evidence of PW2 and ordered a fresh equity verification exercise. According to the appellants, the 1st respondent stopped being a shareholder of the 2nd respondent in December 2009 when it withdrew all its equity contributions from the 2nd respondent leaving Cane Products Ltd as holder of 49.9% shares and the appellants (CPL Associates) holding the remaining 50.1% abandoned by the 1st respondent in accordance with (clauses 7.2.1.1 and 7.2.1.2 of the JVA).

In arguing Grounds of appeal described as 2.1.3 and 2.1.4, the appellants contended that the learned Judge in the Court below erred in law by refusing to make an order for striking out the 1st respondent from the Register of Companies contrary to the provision of clause 7.2.1.1 and 7.2.1.2 of the JVA providing for the consequences of the 1st respondents' failing to furnish consideration for its shares in the 2nd respondent. According to the appellants, the above clauses created two levels of interdependent flow of events, namely, the transfer of legal and equitable ownership of Presscane and acquisition of 50.1% ownership by Press Corporation. It was argued that a consequence of the breach by the 1st respondent is that the lands. tanks, preparatory works and the project still vest in CPL and its Associates.

Regarding grounds of appeal styled 2.1.5 and 2.1.6, the appellant argued that they were superseded by the production of the report on the 2nd Equity Evaluation Exercise and that arguing them would serve no useful purpose except as an academic exercise. It was further argued that a full panel of this Court comprising Kapanda, Mwaungulu and Kamanga JJA unanimously ruled in its judgments of 29th July 2017 and 20th October 2017 that the PWC Report which emanated from the directions of the learned Judge in the Court below is part of his judgment and must therefore be dealt with as such, rendering the issue res judicatum.

Regarding ground of appeal styled 2.1.7, it was argued that the Court below failed to make findings of fact and consequential orders on the 1st respondents misappropriation of the sums of K820,624,162.59 it wrongfully collected from the 2nd respondents debtors, US$2 million loan the 2nd respondent obtained from Stanbic Bank and K39,000,000 it charged the 2nd respondent as management fees contrary to Court procedure practice rules in that the Court failed to make a proper ruling or order so as to fully dispose of the claim. The appellants argue that the collection of the sums stated above deprived the 2nd respondent of its rightful income from which it could have realized profits, thereby undermining the profitability of the 2nd respondent. According to the appellants, the 1st respondent committed glaring acts of breach of the provisions of clauses 2.2.5 and 2.6 of the JVA. It is further argued that by its various acts stated above, the 1st respondent has amply demonstrated its unwillingness or lack of capacity to run and manage the affairs of the 2nd respondent within the core foundations of the JVA and mutual aspirations that founded the 2nd respondent. According to the appellants, the 1st respondents' various breaches of the JVA has wholly discharged the Agreement by repudiation and the appellants are no longer interested to be bound by the JVA. The appellants pray for an order that the JVA has been discharged by repudiation and can no longer govern the relationship between the appellants, the respondents and Cane Products Ltd.

The respondents' arguments for appeal and cross-appeal filed pursuant to the order made by Twea, SC, JA on 13th May 2019 are extensive and quite detailed. We will highlight those aspects that are necessary for the just determination of the appeal. The background of the matter as provided by the respondents is similar to that given by the appellants. The respondents argued that the appellants have never held equity in the 2nd respondent and they are/were only shareholders of CPL which in turn held shares in the 2nd respondents. According to the respondents, both them and the appellants appealed against the judgment of the Court below and the Supreme Court of Appeal ordered that the appellants appeal be treated as the appeal and the respondent appeal as the cross-appeal.

The respondents argued that there were fundamental flaws in the proceedings in that the Court below allowed appellants who were not mentioned in the pleadings and were not claiming any relief to conduct trial based on statement of claim by CPL. According to the respondents, the appellants who are shareholders of CPL but not shareholders of the 2nd respondent did not appear in the pleadings until June 2013 after conclusion of the trial. The respondents argue that the action by CPL went through chops and slashing and was amended on about 6 occasions, mostly in reaction to defences raised and were aimed at introducing new or additional claims, which ended up being just as spurious as the initial claims, fabrications aimed at

removing the 1st respondent from control and management. Then CPL was unilaterally removed by the Judge as a party on the basis of an injunction by National Bank of Malawi and no fresh pleadings were introduced by the appellants. When the appellants were eventually introduced as parties on an application, they simply recast the claims and reliefs sought by CPL in the action, according to the respondents.

The respondents argue that it was wrong for the Court below to hold a trial without any claims and prayers for relief in the pleadings. They argued that despite the amendments made by the appellants to the pleading of CPL, the issues raised by the appellants still center on issues of shareholding and control of Presscane Limited, the 2nd respondent when the appellants themselves are not shareholders in Presscane Limited. They argued that the JVA is in essence a shareholders' agreement between CPL and the 1st respondent while the appellants as CPL Associates were members of CPL and acted as trustees prior to its incorporation.

Regarding grounds styled 3.1, 3.2 and 3.3 of the appellant's appeal, the respondents argued that clauses 7.2.1.1, 7.2.1.2 and 7.2.2 of the JVA were all complied with by the respondents as confirmed by the admission made by the 1st appellant that the amount of shares supposed to be allocated to CPL for land, tanks and preparatory works was K33,000,000 for 30,000,000 shares which 2nd respondent issued to CPL and 33,132,265 shares were issued to 2nd respondent representing 50.1%. It was also argued that witnesses called by the appellants conceded that the 1st respondent made cash contribution to the 2nd respondent. It was also argued that there was undisputed evidence that CPL received cash in excess of K300 million from monies contributed by the 1st respondent in the 2nd respondent. It was further argued that there was no provision in the JVA which authorized CPL and/or the CPL Associates to receive cash from the 2nd respondent in respect of their contribution in kind. The respondents argued that instead it was CPL which acted in noncompliance with the JVA by not tendering for the works which were carried out. It was further argued that the alleged contracts produced by the appellant before the Court below were part of the documents whose authenticity was denied by the respondents. The respondents argued that the alleged breach of (clause 7.4 on their part is not a breach at all because under the JVA, the 1st respondent made more equity contribution than it required to make). According to the respondents, CPL was unable to raise any cash or simply guarantee a loan and relied solely on the 1st respondent to provide funds or secure loans. It was argued that there are no findings that the respondents breached clauses 7.2.1.1, 7.2.1.2 and 7.2.2 in the judgment of the Court below, contrary to the assertions in the Notice of Appeal. The respondents argued that the allegations that the 1st respondent took out its equity contributions by way of loan repayments are

embarrassing, frivolous, vexatious and are aimed at misleading the Court. They argue that there were no particulars of alleged breaches of provisions of the JVA in the re-re-re Amended Statement of Claim and that the respondents were kept guessing of the appellant's case. It was also argued that the shareholders meeting of 20th August 2003 Resolution regularized the technical flaws in the manner of subscription and raising capital and a director of CPL, Mr Dye Mawindo, attended that shareholders meeting, there by curing all violations of the JVA by the parties.

Regarding PWC Equity Verification Exercise of 2005, they argued that the parties had agreed to an independent equity verification exercise. They argue that PWC carried out the exercise systematically, professionally and methodically before coming up with the report which confirmed 1st respondents' contributions in 2nd respondent. According to the respondents, the 2005 PWC Equity Verification Report established that CPL received cash in excess of the values of their works, which works were incomplete, substandard and overstated. It was also argued that there was long delay in the implementation of the report because CPL procrastinated in producing relevant documents. The respondents argued that allegations that the 1st respondent took out all its equity contributions from the 2nd respondent were spurious and vexatious as the evidence, showed otherwise.

Regarding the 2014 Equity Verification Report, the respondents argue that it is bogus, unreliable, based on inadmissible evidence and was actually withdrawn by the liquidator a day after being filed with the Court.

In response to the appellants ground of appeal styled ground 3.3, the respondents argued that the Judge in the Court below acted correctly in refusing to grant the order to strike out the 1st respondent from the Register of Companies as prayed by the appellants. It was further argued that there was no claim for rectification of the register of members under s35 of the Companies Act. It was also argued in respect of ground of appeal styled ground 3.4 that there were no issues coming out of it. As to grounds of appeal 3.5 and 3.6, the respondents argued that the delegation of some matters to PWC, the President of the Society of Accountants in Malawi and the liquidator meant that the Judge would be functus officio and could not re-open and review his own judgment. According to the respondents, the appellants seek to reverse their reliance on post-judgment processes and seek to withdraw grounds 3.5 and 3.6 from the notice of appeal.

As to the appellants ground of appeal 3.7, the respondents argue that the issues raised in that ground were not pleaded in the re-re-re amended statement of claim and no evidence or no reliable evidence was tendered before the Court in respect of the

same. The respondents argue that the reliefs sought in the appeal portray that the appellants' action is exhibiting futile attempts to prove through the backdoor while not being a party to the proceedings.

In arguing the cross-appeal, the respondents indicated that the core of the respondents' cross-appeal is that there was no case pleaded or presented by the appellants before the Court below that warranted anything other than an outright dismissal of the action without any leftovers. According to the respondents, the Court should not have allowed the appellants to amend CPL's pleadings at the end of the trial, should have appreciated the respondents' decision not to call witnesses in the circumstances of the trial and should not have made orders directing for extra judicial processes beyond the judgment delivered on 24th February 2014. Grounds 3.1 and 3.2 of the cross-appeal were argued together. It was argued that having allowed the amendment after trial, the Court below should not have refused the respondents application for leave to recall the appellants' witnesses for further cross-examination. According to the respondents, the refusal to grant such leave was contrary to the rules of civil procedure and natural justice.

Regarding Grounds 3.3 and 3.4 of the cross-appeal, relating to ancillary claims dismissed and the main thrust of the claim, the respondents argue that the Court made an unprecedented direction to refer other matters to the liquidator of CPL, PWC and others. The respondents also argued under ground 3.5 of the cross-appeal that the Judge in the Court below was seemingly displeased by the election of the respondents not to call witnesses in the matter. According to the respondents, it took a lot of convincing by the respondents for the Court to accept that the case could end without the respondents calling any witnesses.

The respondents argued under grounds 3.11 and 3.12 of the cross-appeal that the scope of PWC's new Equity Verification Exercise created problems with relation to evidence. Its effect would be after the Court itself became functus officio and it was also not pleaded in the re-re-re amended statement of claim. Under Grounds 3.14 and 3.15 of the cross-appeal, it was argued that the alleged misappropriation of funds was never proved. It was further argued underground 3.16 that the appellants never established a fiduciary relationship for account and that the Court erred when it held that the liquidator could call any person who took or misapplied the funds of CPL to account and make good thereof to him.

It was argued by the respondents under Ground 3.17 of the cross-appeal that there was no basis for the Judge in the Court below to make any orders or directions

regarding the respondents' counter-claim against CPL as a party to the proceedings as the counter-claim never came before him for determination. According to the respondents, the Judge overreached and wrongly assumed jurisdiction over matters which the Court was not called upon to arbitrate.

As to Ground 3.18 of the cross-appeal, the respondent argued that the appellants are not shareholders of the 2nd respondent and that no dividends were recommended by the Board of the 2nd Respondent and none were declared by the shareholders of 2nd respondent. It was further argued that the Court cannot award undeclared dividends in an action.

It was argued Under Ground 3.19 of the cross-appeal that the citing of section 203 of the Companies Act by the Court below and the relevant principles was an error of law because the action before the Court was not for winding up.

The respondents also argued under Ground 3.21 of the cross-appeal that the Court erred its orders in relation to representation by Messrs Savjan & Co, then having prepared the JVA on behalf of the parties. It was argued that there was no issue raised by the appellants in the Court below and there is nothing that arose during trial so as to raise any concerns of ethical misconduct or conflict of interest on the part of Messrs Savjan & Co.

Lastly, it was argued under Ground 3.22 of the cross-appeal that the respondents were unfairly deprived of costs.

At this juncture, and before we engage in an in-depth analysis on the appeal, we would like to address the question of drafting grounds of appeal. This Court has previously and on a number of occasions addressed the question of proper drafting of ground of appeal in what we would describe in as clearest terms as possible. It therefore surprises us that the same errors keep being repeated. Order III r 2 (3) of the Supreme Court of Appeal Rules provides that:

> *"The notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to rely on at the hearing of the appeal without any argument or narrative and shall be numbered consecutively."*

Order III r 2 (4) of the Supreme Court of Appeal Rules provides that:

> *"No Ground which is vague or general in terms or which discloses no reasonable ground of appeal shall be permitted, save the general ground that*

the judgment is against the weight of the evidence, and any ground of appeal or any part thereof which is not permitted under this rule may be struck out by the Court of its own motion or on application by the respondent."

The importance of proper grounds of appeal is further emphasized in Order III r 2 (5) of the Supreme Court of Appeal Rules which provide that:

"The appellant shall not without leave of the Court argue or be heard in support of any ground of appeal not mentioned in the notice of appeal but the Court may in its discretion allow the appellant to amend the grounds of appeal upon such terms as the Court may deem just."

While the appellant is confined to arguing grounds of appeal in the notice of appeal including amend grounds, the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant, provided that the respondent has had sufficient opportunity of contesting the case on any ground that the Court may rest its decision, not being the ground or grounds set forth by the appellant. (See Order III r 2 (6) of the Supreme Court of Appeal Rules).

This Court has on number of occasions made pronouncements that emphasize on the proper drafting of grounds of appeal in accordance with the rules of practice. It has been emphasized that grounds of appeal must be concise, distinct, not argumentative or narrative, neither vague nor general and must disclose reasonable grounds of appeal. Imprecise and convoluted grounds of appeal do not help the appeal and can be fertile ground for unguided arguments that deny the respondent a clear understanding of the thrust of the appeal. Further still, this Court has pronounced on the undesirability of a multiplicity of grounds of appeal that tend to be sliced up and which give an impression that the party making those grounds of appeal is unsure about his/her case. The grounds of appeal must clearly indicate the nature of misdirection or error of law being raised in the appeal. In the case of Mutharika & the Electoral Commission V Chilima and Chakwera MSCA Constitutional Appeal Case No 1 of 2020 this Court had this to say about the drafting of grounds of appeal:

*" In **Dzinyemba t/a Tirza Enterprise v Total (Mw) Ltd** MSCA Civil Appeal No. 6 of 2013 (unreported), this Court emphasized that grounds of appeal must conform to the requirements of Order III rule 2 of Supreme Court of Appeal Rules. The Rules require that the grounds must be precise and concise; they must not be argumentative; and that the grounds of appeal must state clearly whether they are based on law or fact, so that this Court and the other party (or parties) to the proceedings are able to appreciate precisely what the*

appellant is appealing against. This Court also emphasized that grounds of appeal that do not comply with Order III rule 2 of Supreme Court of Appeal Rules may be struck out by the Court on its own motion or on application by a respondent in the proceedings".

In the present case, and more particularly with respect to the cross-appeal, there is not only a multiplicity of the grounds of appeal, running to 21 of them, but also most of the grounds of appeal are convoluted, argumentative and narrative. In some instances, it is not clear as to what exactly a particular ground is raising. On the authority of Order III r 2 (4) of the Supreme Court of Appeal Rules, we have struck out those parts of the grounds of appeal that are imprecise, vague, argumentative, convoluted and narrative and those parts that generally offend the rules of proper drafting of grounds of appeal. The parts that we have struck out add no value to the appeal, and in some cases obscure the issues that need to be decided upon in this appeal. We are clear as to what needs to be decided upon as we determine this appeal.

Turning to matters that we must decide upon, we would like to observe that the judgment of the Court below was subject of various applications before this Court before the hearing of the appeal. Under MSCA Civil Appeal No 26 of 2014 where the parties were given as Press Corporation Limited and Presscane Limited V Rolf Patel, Reuben Patel, Stanley Patel and Rolf Patel Junior and in an application for stay of execution of the judgment now appealed against, Chipeta SC JA ordered a stay of execution of the judgment. That order of stay is dated 18th July 2014. His Lordship also made certain observations which will bear relevance in the determination of this appeal. It is pertinent at this point to also point out that in MSCA Civil Appeal No 42 of 2015 where the parties were given as Press Corporation Ltd and Presscane V Rolf Patel and Others a panel of three Justices of Appeal allowed an application to have a full record of appeal as opposed to one that had been previously prepared. That ruling also made some pertinent observations that have a direct bearing to the determination of this appeal. On 13th July 2018 Twea SC JA sitting as a single member of this Court disallowed two applications, one to amend grounds of appeal and another to vary an order made by the Registrar of this Court. His Lordship also made some pertinent observations about the judgment that is now appealed against which observations have a direct bearing to the determination of this appeal (See ruling of 13th July 2018 MSCA Civil Appeal No 42 of 2015 Rolf Patel and Others V Press Corporation Limited and Presscane Limited).

We would wish to address the issue of parties to this appeal at this point. The parties to this appeal are no strangers to each other and to these Courts, having been in the corridors of these Courts together on the same facts since 2003 in a case the Court below described as ancient and characterized by an eventful history of numerous applications, twists and turns. One of the issues that fell for determination by the Court below was whether or not the appellants had standing to prosecute the matter, CPL having been withdrawn from the proceedings. The appellants were shareholders in CPL which was a separate legal entity in terms of Solomon V A. Solomon and Co. Ltd [1897] AC 22, [1895-9] All ER 33. Moreover, the JVA recognized the appellants as CPL Associates in the relationship that was created.

Also relied upon was the case of Foss V Harbottle (1843) 2 Hare 461 that the alleged wrongs are not the concerns of the shareholders. The Court below found for the appellants that they were entitled to prosecute the matter even after CPL was withdrawn from the proceedings. This was arrived pursuant to the exception to the principle in Solomon V Solomon & Co Ltd. We agree that the peculiar circumstances of this case are such that the veil of incorporation of CPL must be lifted to protect the minority shareholding rights of the appellants in the 2nd respondent. The shareholding in the 2nd respondent were made up of majority shareholding by the 1st respondent in the ratio of 50.1% and minority shareholding by CPL and its Associates in the ratio of 49.9%. There was nothing to suggest that the minority shareholding rights in 2nd respondent automatically moved to 1st respondent upon the withdrawal of the CPL from the action by operation of law or otherwise. In the worst-case scenario, there is nothing to suggest that the 1st respondent unilaterally grabbed minority shareholding rights of CPL in 2nd respondent. Yet the 2nd respondent continued to thrive regardless of what was going on with CPL. We uphold the conclusion of the Court below that the appellants, having been allowed to join the action as parties were entitled to prosecute the matter to the end. What this also means is that they were entitled to be and remain part of the pleadings made before they joined the action. A Court has discretion to join a party or parties to proceedings whose presence is necessary for the effective, just and fair adjudication of a matter (See Nseula V Attorney General and another [1996] MLR 401). The appellants were rightfully parties to the proceedings by virtue of the JVA.

In addressing the matter of pleadings, we would like to observe that the Court below allowed amendments to both the statement of claim and the defence many times, up to six times. Thus, the parties ended up with a Re-Re-Re-Re-Re-Re Amended Statement of Claim and a Re-Re-Re-Re-Re-Re Amended Defence. Allowing an amendment to pleadings is a matter of discretion on the part of the Court. In the

present matter the Court below allowed an amendment to the statement of claims after the appellants had closed their case. The law is settled that an amendment can be allowed at any stage provided there will be no injustice caused to the other party (See Manica Mann George (Mal) Ltd V Karim & Sons [1978-80] MCR 258) Khembo V Mandal Motors Ltd [1984-86] MLR 134; Globe Wholesalers V Lustania Ltd [1984-86] MLR 248). An amendment must be such as would facilitate a real question in dispute between the parties being determined. An amendment may not be permitted if it creates fresh cause of action after action commenced (See Chatata Paint & Lacquer Industries Ltd V Autocrat Panel Beaters [1981-83] MLR 109.) In the present case, we do not see any improper exercise of discretion by the Court below in allowing the amendment to the statement of claim even after the appellant had completed giving evidence.

We observe that some issues raised in the appeal were authoritatively commented upon by Kapanda SC JA in the ruling on what the appeal record should have contained and Chipeta SC JA in his ruling granting order of stay of execution of the judgment now under appeal as well as Twea SC JA in his ruling disallowing an application to amend grounds of appeal and an application to vary an order by the Registrar. The comments made by their Lordships will inform the determination of this appeal. Of particular significance at this point is the observation made by Twea SC JA who, having quoted the judgment of the Court below lamenting the eventful and acrimonious history of the hearing of the case charged with technical condition, stated that:

> *"The damning indictment by the judge in the Court below, in my view is not unjustified. Beneath the surface of the man oeuvres and shenanigans by the parties, there is a very serious question about good corporate governance: protection of minority shareholders and equitable exercise of the executive powers by corporate governors."*

We agree with the observation made by Twea SC JA regarding this appeal. This judgment must address the serious question about good corporate governance regarding the protection of minority shareholders and equitable exercise of the executive power by corporate governors. We will address the grounds of appeal mindful of this poignant observation by Twea SC JA.

As to the first ground of appeal that, having found as a fact, that the 1st respondent was guilty of breach of clauses 7.2.2 and 7.4 of the Joint Venture Agreement, the Court below erred in law by finding that the breaches were cured by the alleged

Resolution of 20th August 2003 contrary to the evidence available before the lower Court, we find no evidence that contradicts the holding by the Court below on that point. We are cognizant of the appellants' argument that according to the JVA, the 1st respondent could only make equity contributions in the manner prescribed by clauses 7.2.2 and 7.4. The Court below noted that the 1st respondent admitted that it made more equity contributions than it was required to make in that clause 7.4 of the JVA stated that any subscription by the 1st respondent shall not exceed the value of the works done or procedure to be done by CPL in respect of Buildings and site structures from time to time to maintain the 50.1% rate and 49.9% ratio. The Court below analyzed the evidence on this point and found that the 1st respondent had contributed equally in the 2nd respondent with CPL as the other contributor. A Board meeting at which the appellants had a representative agreed to regularize the technical flaws in the manner of subscription and raising Capital, according to the uncontroverted evidence before the Court below. We are not persuaded by the lengthy and longwinded arguments by the appellants tending to undermine the Resolution that was made on 20th August 2003. At page 21 of its judgment, the Court below stated that:

> *"In view of my findings above in particular to the binding effect of the 2nd Defendant's shareholder's/board resolution to treat all contributions as of 23rd September 2003 as equity, all violations of the JVA by the parties with respect to the manner of equity contributions were cured, the plaintiffs have therefore no claim with respect to this issue."*

The Court below was justified to make the above conclusion, in all the circumstances of the case. We find no merit in this ground of appeal and we dismiss it.

We take the same position with respect to the second ground of appeal. What we have said about the first ground of appeal equally applies to the second ground of appeal. Assertions about the 1st respondents subsequent conduct not supporting the resolution and about the resolution not meeting the requirements are without support in the evidence that was before the Court below. The second ground of appeal is without merit and is dismissed.

Grounds 3 and 4 of appeal were argued together. The appellants wanted to have an order striking out the 1st respondent from the Register of Companies. They argued that clauses 7.2.1.1 and 7.2.1.2 of the JVA provided for such consequence for failure to furnish consideration for its shares in the 2nd respondent. According to the appellants, the refusal by the Court below to grant the order striking out the 1st respondent from Register of Companies and refusal to award the appellants legal

remedies commensurate with the law of contract was an error of law. The two grounds of appeal have no leg to stand on, the Court below having found earlier that the 1st respondent made equity contribution and violations of the JVA, including those by the appellants, were cured by Resolutions and Board meetings. We found nothing in the arguments by the appellants to support at law any order striking out the 1st respondents from the Register of Companies.

Grounds of appeal 3 and 4 are without merit and are dismissed.

The appellants opted not to pursue grounds of appeal 5 and 6 appearing in their notice of appeal for two reasons. They gave the first reason as being that the issue was superseded by the fact that the part of the judgment complained of, had been actualized. The purpose of the grounds of appeal had been to prevent the Court below from delegating its powers to other authorities, and to take away the appellants right to pursue this case as the right parties to it without the involvement of non-parties. However, before the appellants summons for stay of execution of the judgment pending appeal was set down for hearing, the Liquidators of CPL on or before 5th April 2014, had completed the exercise and filed with the Court a report. The appellants considered that the grounds of appeal had been superseded by the report and a further pursuit thereof would be an academic exercise.

The second reason the appellants gave for not pursuing the two grounds of appeal any further was that the issue had become res judicatum as it had been determined by a full bench of this Court comprising of Kapanda SC JA, Mwaungulu SC JA and Kamanga SC JA in a unanimous ruling of 29th July 2017 and 20th October 2017. According to the appellants, the full bench ruled that the PWC report which emanated from the directions of the Court below was part of the judgment and must be dealt with as such. To be sure the full bench of this Court in an application on what should constitute the record of appeal went to great length to address the issue in the following terms:

> *"The question that arises in whether the Court below was right in proceeding as it did here where it determined some issues and still left it open for it to revisit its decision depending on the outcome of the report from either PWC or Society of Accountants in Malawi .... The trial Court was not empowered to re-open and revisit its own judgment. And, for that reason, the trial Court was not right to consider the new evidence provided or to be so produced by the respondent for any purposes.... The trial Court as well as this Court would be wrong in taking the report into account because to do so would amount to re-opening and revising the judgment that has been appealed against. This Court*

and the Court a quo has no power to do so... If allowed, however, he evidence (the so called PWC report) would operate in the respondents favour as against the appellants. The judge or the respondent did not make the report available at the trial."

Further down the ruling, the Court observed that:

"In the matter at hand, the Judge's decision of 24th February 2014 was a final order once for all intents and purposes it finally determined as between the appellant and respondent. as such, the Judge's decision ought not to be revisited as part of the judgment or additional evidence."

The Court was emphatic that:

"It is found and concluded that on the day the Judge handed down his judgment, he determined the rights of the parties. He then became functus officio."

And further that:

"... Justice Dr. Mtambo was wrong in taking the course he did i.e. referring the matter to the liquidator of CPL of the PWC and or Society of Accountants for an equity verification exercise for a final report which would subject to the Courts review, be a judgment of the Court. The action that was before him only concerned the past and his decision was to be premised on that and not as to the future as well as what was yet to be determined by PWC and or Society of Accountants. It is and had remained much the same since the time of the proceedings between the parties herein commenced in 2003. It would be unreal to treat the action as lacking particulars respecting equity verification in 2003 through to 24 February 2014, but be able to have same after 24 February 2014 on receipt of the PWC report."

The sentiments of this Court as extensively quoted above, adequately address the concerns that were raised through grounds of appeal 5 and 6. The appellants were right to abandon their pursuit of those grounds of appeal.

We now turn to ground of appeal 7. The appellants' argued that the learned Judge in the Court below erred in law by failing to make findings of fact and consequential orders on the 1st respondent's misappropriation of sums of K820,624,162.59

wrongfully collected by it from the 2nd respondent's debtors, US$2 million loan the 2nd respondent obtained from Stanbic Bank and K39,000,000 it charged the 2nd respondent as management fees contrary to civil procedure practice rules. According to the appellants, the Court below made a cursory attempt to address this issue, but no proper ruling or order was made so as to fully dispose of the claim. The appellants argue that the 1st respondents unequivocally admitted that between 6th January 2006 and August 2007, it collected the total sum of K820,624,162.59 from the 2nd respondent debtors which amount was not recorded in the Financial Statement and there was no explanation for this. They contended that this conduct deprived the 2nd respondent of the rightful income from which it would make profits. As to the sum of US$2 million, the appellants argued that the 2nd respondent admitted that on or about 30th September 2003 it obtained an off-shore loan from Stanbic Bank, which amount was subsequently transferred from its Foreign Currency Denominated Account (FCDA) with Stanbic Bank to its Foreign Currency Denominated Account with National Bank of Malawi from where the money simply disappeared. They argue that this conduct was a breach of clause 6.2 of the Joint Venture Agreement by depriving the 2nd respondent of financial resources to the detriment of its businesses profitability.

The appellants further argued that the 1st respondent admitted to have been charging the 2nd respondent management fees from 2008 to February 2009 amounting to K39,000,000 under Clause 5 of the Joint Venture Agreement which give 1st respondent the right to control and manage the 2nd respondent. It was contented that the 1st respondent committed glaring acts of breach of the provision of the Joint Venture Agreement. The following paragraph in the appellant's written argument is significant in considering the disposal of this ground of appeal.

> *"The appellants contend therefore, that by it, various acts enumerated here in above the 1st respondent has amply demonstrated its unwillingness or lack of capacity to run and manage the affairs of the 2nd respondent within the core foundations of the Joint Venture Agreement and mutual aspirations that founded the 2nd respondent. In view of this, it is the appellants' submission that the 1st respondent's various breaches of the Joint Venture Agreement has wholly discharged the Agreement by repudiation. The appellants no longer want to be bound by the said Joint Venture Agreement as the same is no longer capable of being performed by the respondents. The appellants pray to hold that the JVA has been discharged by repudiation and can no longer govern the relationship between the Appellants, the Respondents and Cane Products Ltd."*

We hold the view that it is this ground of appeal that raises the serious question about good corporate governance and about the protection of minority shareholders as well as the equitable exercise of the executive powers by corporate governors. This is the main thrust of the claim referred to in the judgment of the Court below now under appeal. We are clear that the action in this matter was not and did not amount to winding up proceedings under any law. Neither the Court below nor this Court would have legal basis for making winding up orders or any orders akin to or consequential to a winding up order. In any event, the 2nd respondent to which the Joint Venture Agreement related was found to be doing well and making profits by the Court below and there is nothing to suggest the contrary with regard to that finding.

We are also clear that the action in this matter was firmly grounded on breach of contract resulting from various acts of non-compliance with the JVA between CPL, CPL Associates and the 1st respondent, which JVA had resulted in the incorporation of the 2nd respondent. There is no doubt that the relationship between and among the parties to the JVA was troubled, to say the least. Some quotations made by the Court below relevant to this matter are informative. The reference by the Court below to what this Court said in a related matter National Bank of Malawi V Cane Products Limited MSCA Civil Appeal Number 21 of 2008 is on point. This Court through Nyirenda SC JA (as he then was) said:

> *"Supposing we are to accept that it was Dr. Chikaonda who instructed Press Cane not to remit any money to the Respondent's account with the Appellant and even if we were to assume that Dr. Chikaonda's motive was to settle scores with the Respondent, are we entitled to conclude that the Appellant joined the fight in support of Dr. Chikaonda... We are clear in our mind that such a conclusion would be too feeble if not hypothetical because it would be based on sheer speculation..... We agree Dr. Chikaonda was Chairman of the Board for both the Appellant and Press Cane. We would not deny that by virtue of the position, he wielded substantial authority over the affairs of both the Appellant and Press Cane..."*

That Dr. Chikaonda was Chairman for both National Bank of Malawi which gave a loan to CPL Limited and the 2nd respondent, which was stopped from making remittances to CPL from its profits in order for the said CPL to be able to clear its loan with National Bank of Malawi was clearly the source of

all the trouble that has manifested itself in the present case. It is clear to us that the wielding of so much power by Dr. Chikaonda in both National Bank of Malawi and the 2nd respondent had negative repercussions on the minority shareholders of the 2nd respondents. The majority shareholders in 2nd respondents were the 1st respondents, represented on the Board of the 2nd respondent by Dr. Chikaonda among others. Small wonder that the appellants submitted in the Court below that:

> *"Today we are in this Court because the plaintiffs dared stand up to the 1st Defendant, a renowned corporate bully...This case is about corporate greed and mindless plunder and squander. It is about envy that small men in business suits have against those who dare to imagine beyond the comforts of employment..."*

These lamentations by the minority shareholders in the 2nd respondent against the majority shareholders, being the 1st respondent may have persuaded the minority shareholders to allow them to enter into a Joint Venture Agreement with a view to push the minority shareholders out of the business of Ethanol. Although the accusations by the appellants of fraud, financial mismanagement of 2nd respondent, money laundering, corporate arrogance and cover up as against the 1st respondent were not established by the evidence, it is clear to us that the 1st respondent controlled and managed the 2nd respondent in disregard of the interests of the minority shareholders in the 2nd respondent. We are mindful of the following statement, by the Court below in its judgment at page 21 that:

> *"In view of my findings above in particular to the binding effect of the 2nd Defendant's shareholder's/board's resolution to treat all contribution as of 23rd September 2003 as equity, all violations of the JVA by the parties with respect to the manner of equity contributions were cured, the Plaintiffs have therefore no claim with respect to this issue"*

We hold the view that the manner of exercising control and management of 2nd respondent by the 1st respondent in many respects undermined the minority shareholders in the 2nd respondent. The Court below down the judgment observed thus:

"Having made the above findings, I must observe that the 1st Defendant charged the 1st Defendant's management fees which are not provided for in the JVA. The 1st and 2nd Defendants financial statements do not tally and there is no list of creditors to who the K829 million belonging to the 2nd Defendant was paid by the 1st Defendant."

These observations are borne out by the evidence that was before the Court below. The minority shareholders in the 2nd respondent needed protection, both the 1st respondent and the appellants having contributed equity to the 2nd respondent. When Clause 5 of the JVA provided that the 1st respondent should have the control and management of the 2nd respondent, it did not mean that the 1st respondent should act in self-interest, but it meant that all the shareholders, including minority shareholders should have their interests advanced and protected. The rights of the minority shareholders need to be affirmed and protected by the Court. The Court found for the appellants in this matter. At page 25 of its judgment, the Court stated that:

"The Court has dismissed just one or two of the Plaintiffs ancillary claims. However, the main thrust of the claim has not been dismissed in view of the withdrawal of CPL from these proceedings and the election by the Defendants not to call evidence which made verification of the Defendants story on grey areas raised by the Plaintiffs not possible. Hence, the matter has been referred to the liquidator of CPL for the PWC and or Society of Accountants equity verification exercise which final report shall, subject to the Courts review, be a judgment of this Court."

We have already pronounced ourselves on the error of law the Court below made in the last sentence on the above quote in referring for further equity verification exercise. The Court had before it sufficient material on the basis of which it would have disposed of the matter. The ratios of the shareholding whether in CPL or in the 2nd respondent were clear from the start. That shareholding ratio remained throughout. There was no resolution produced to show any changes in the shareholding ratio. The 2nd respondent remains a thriving company with a shareholding whose ratio has remained unchanged through a resolution.

The appellants suggested that since Presscane has thrived by funds from the appellants only, it would give full meaning to the judgment of the Court below if dividends supposed to have been paid to the appellants from the date the same were withheld to the date the sums will be paid back. Again, this suggestion is premised

on the supposition that the 1st respondent had at some point ceased to be shareholders in 2nd respondent. That supposition is not supported by any resolution. We are satisfied that the minority shareholders would be protected by our order to restore the position of the 2nd respondent to the original shareholding ratio and that all dividends payable must be so paid in the original shareholding ratio to the date of judgment. Should the appellants remain disinterested in the running of 2nd respondents, then they are at liberty to follow lawful and appropriate procedures to dispose of their shares in the 2nd respondents.

We will now turn to the cross-appeal. We hasten to observe that a majority of the matters raised in the grounds of the cross-appeal have been addressed as we dealt with the grounds of appeal as well in earlier part of this judgment. We do not consider it necessary to repeat the matters we have already pronounced upon. For purposes of emphasis, the claims by the appellants were clear in the Court below and the materials on which those claims were to be adjudicated upon were available before the Court. We are unable to agree with the respondents that the trial in the Court below was without any claims and prayers for relief in the pleadings. The JVA had the appellants in it who were described as CPL Associates. Arguments that sought to exclude the appellants from being parties to the JVA were as ingenious as they were without support. The violations of JVA identified in the judgment of the Court below had direct implications on the appellants. So too were the resolutions that cured some of the violations. The Court below also found that some delays in the declaration of dividends in the 2nd respondent had partly been attributed to by the 1st appellant's procrastination in providing some relevant information. That finding was never negated by any evidence. We find nothing in the judgment of the Court below to suggest that the Court was angered by the election of the respondents not to call witnesses in the matter.

The 1st respondent cannot be heard to argue in this Court that the CPL and the CPL Associates had no equity in the 2nd respondent. The totality of the evidence that was before the Court below does not support this argument.

Having subjected the record before us to careful scrutiny, we do not agree with the 1st respondent that there were fundamental flows in the proceedings in the Court below in that the appellants were allowed to be party to the proceedings. We are clear that CPL and CPL Associates in the names of the appellants were pursuing a common question of law in their relationships under the JVA.

We observe that the respondents conceded that the issues in this case centered on the shareholding as well as the control and management of the 2nd respondent. They

also conceded that the JVA was the shareholders agreement in relation to the business of the 2nd respondent. What the respondents attempt to do here is to exclude the appellants from the shareholders agreement which was the basis of the Joint Venture Company, 2nd respondent. Yet the JVA expressly recognized the appellants in the shareholding relationship in 2nd respondent.

We are mindful that the Court below made some observations regarding the appearance of Messrs Savjan and Co. in the matter on the ground that they had at some point acted for the two parties now in dispute. At page 24 of the judgment, the Court below stated that:

> *"It is hoped that except for applications to enforce this judgment and/or a possible appeal against it, Savjan & Co. should excuse themselves from representing the Defendants in a manner involving the interpretation of a JVA which they presented on behalf of the parties in dispute thereby causing them to discharge their legal professional duties unobjectively and raising ethical concerns."*

The appearance of Savjan & Company had also been objected to in the case of Cane Products Limited V Press Corporation Limited cited in the judgment of the Court below. About that objection, the Court below observed as follows:

> *"But after having gone through this trial, it has not become clear to this Court that the objection against the appearance of Savjan & Company was justified not on the ground that they had acted for both parties, but on the ground that they prepared the JVA whose provisions are the subject of dispute and had authored some correspondences which would be subject to cross-examination thereby making them potential witnesses in the proceedings and as such, they not being capable objective discharge of their legal professional duties."*

Further down in the judgment, the Court below also made an observation about Messrs Bazuka Mhango SC and Dzonzi regarding the conduct of the trial. The Court stated as follows:

> *"Similarity, it is hoped that except for applications to enforce this judgment and for a possible appeal against it, Messrs Bazuka Mhango SC and Dzonzi excuse themselves acting for the plaintiffs as the tone of their submissions shows that they have been consumed by the fires of animosity between the parties as earlier on indicated in this judgment."*

It is obvious to us that the trial of the matter in the Court below was characterized by acrimony exacerbated by Counsel on both sides who made some violent exchanges even though they were simply representing their clients. The conduct of Counsel on both sides was unfortunate. However, it was such conduct as would only have attracted caution from the Court without the further steps as appear in the above quotations. After all, the Court below observed in the same judgment that if there were any outstanding issues between the parties, these should be resolved amicably. The Court further stated that:

> *"There should be an end to animosity and litigation. It is not too late for the parties to salvage a win-win situation. The parties must be reminded of the adage that where members of the family fight over a will, the estate ends up being consumed in legal fees."*

These sentiments must have given hope to the parties to get to finalizing the matter. We hold that this matter needs to be resolved with the recognition of the shareholding ratios of the parties in 2nd respondents on the basis of which any declared dividend to the date of the judgment must be distributed with the aim of protecting the minority shareholders. Beyond that the minority shareholders have various options available to them on how they want to deal with their shareholding interests in the 2nd respondent. We order accordingly. The appeal succeeds to the extent we have described above and the cross-appeal is dismissed in its entirely.

In the Court below, each party was ordered to bear its own costs. We order that each party bears its own costs.

Pronounced at Blantyre this 14th day of December, 2022.

THE HON. A K C NYIRENDA SC
CHIEF JUSTICE

THE HON. JUSTICE E B TWEA SC
JUSTICE OF APPEAL

THE HON. JUSTICE R R MZIKAMANDA SC,
JUSTICE OF APPEAL

THE HON. JUSTICE A C CHIPETA SC
JUSTICE OF APPEAL

THE HON. JUSTICE L P CHIKOPA SC,
JUSTICE OF APPEAL

THE HON. JUSTICE F E KAPANDA SC
JUSTICE OF APPEAL

THE HON. JUSTICE A D KAMANGA SC,
JUSTICE OF APPEAL