**THE REPUBLIC OF UGANDA**
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**
**CIVIL APPEAL NO. 0170 OF 2020**

**1. GUANGZHOU DONGSONG ENERGY GROUP CO. LTD**
**2. LV WEIDONG**
**3. MAO JIE**
**4. YANG JUNJIA**
**5. GUANGZHOU DONGSONG ENERGY GROUP (U) LTD::::::::::::::::::::::::::::::::::APPELLANTS**

**VERSUS**

**FANG MIN::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::RESPONDENT**

*(Appeal from the decision of the High Court of Uganda at Kampala (Commercial Division) before Wangutusi, J. dated 19th September, 2019 in Civil Suit No. 318 of 2016)*

**CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA**
**HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA**
**HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA**

## JUDGMENT OF THE COURT

This appeal is from the decision of the High Court (Wangutusi, J.) concerning a suit filed by the respondent against the five appellants and a nominal defendant Uganda Hui Neng Mining Ltd, and a counterclaim filed by the 1st appellant against the respondent. The High Court entered judgment in favour of the respondent, in the suit, and dismissed the 1st appellant's counterclaim, with costs in both actions.

### Background

A company called Uganda Hui Neng Mining Ltd (UHNML) was incorporated in Uganda on 15th February, 2013 with a nominal share capital of USD 5,000,000 divided into 100 shares worth USD 50,000 each. According to UHNML's Memorandum of Association (MOA), the 2nd appellant subscribed for 80 shares and the respondent for 20 shares. The 3rd and 4th appellants also signed the MOA but did not subscribe for any shares. UHNML was expected to engage in the business of mining at Sukulu in Tororo District

and was expected to obtain an exploration licence for that purpose. The Government of Uganda required UHNML to demonstrate possession of funds of USD 5,000,000 before giving it the exploration licence, which necessitated that the entire nominal capital of UHNML be paid up shortly after incorporation.

The 2nd appellant was, however, ordinarily resident in China, and due to restrictions on transfer of US Dollars outside China, he was unable to send money to pay for the value of his shares in UHNML to the tune of USD 4,000,000. He therefore asked the respondent to raise and pay up the entire share capital and undertook to reimburse her. The respondent raised the money which enabled UHNML to obtain the exploration licence. The operations of UHNML thereafter commenced. The 2nd appellant continued to reside in China and the respondent oversaw the initial operations of UHNML. The deposit of USD 5,000,000 was, according to the respondent, used to cater for the expenses incurred by UHNML in this period. The appellants disagreed contending that the respondent misappropriated the money for her personal use. Nonetheless, in the initial stages, the respondent was the only shareholder/director involved in the day to day running of UHNML.

Subsequently, the respondent, so she claimed, believing that she was entitled to an "appreciation fee" for the promotion of UHNML and for her efforts in ensuring that it acquired an exploration licence, and also for a refund of the money advanced to pay up for the 2nd appellant's shares, demanded money from the 2nd appellant but he did not pay. The 2nd appellant refused to pay and demanded for accountability on the expenditure of the USD 5,000,000. Thereafter, the relationship between the parties deteriorated.

Meanwhile, the appellants were apparently unaware that the 3rd and 4th appellants had not subscribed to shares as per the UHNML MOA, and the 3rd and 4th appellants were from the outset involved, as directors, in the running of UHNML. Like the 2nd appellant, the 3rd and 4th appellants also ordinarily resided in China. Upon learning of the issue with the shares, the 2nd, 3rd and 4th appellants moved to rectify UNHML's memorandum and allocate shares to the 3rd and 4th appellants, with the following effect on the shareholding;

'70 shares for the 2nd appellant, 5 shares each for the 3rd and 4th appellants and 20 shares for the respondent. The respondent however claimed that the shareholding had earlier changed as follows: 65 shares for the 2nd appellant and 35 shares for herself.

With the belief that the each of the 2nd, 3rd and 4th appellant was entitled to participate in the running of UHNML, a meeting was convened and a decision was taken to transfer UHNML's exploration licence to the 1st appellant. The respondent was aggrieved and filed a suit alleging that the transfer of the exploration licence was improper. The respondent also sued for outstanding appreciation fees for her role in promoting and running UHNML. The appellants filed a Written Statement of Defence saying that the respondent had no standing to bring a suit on behalf of UNHML which the directors had not authorized. The appellants also stated that the exploration licence was lawfully transferred to UHNML. They also filed a counter-claim seeking an order for the respondent to refund monies to the tune of USD 8,000,000 that had been transferred to her shortly after incorporation of UHNML but for which she did not provide accountability.

As stated earlier, the learned trial Judge found in favour of the respondent. He found that the respondent had the standing to sue because the acts she complained of were done by the 2nd appellant the majority shareholder in UHNML who could not bring a suit on behalf of the company against himself. Those acts, according to the learned trial Judge, amounted to a fraud against the respondent, who was the minority shareholder in UHNML, which gave her standing to sue so as to protect the company's and her interests. The learned trial Judge also found that the decision to transfer UHNML's exploration licence to the 1st was unlawful because the 3rd and 4th appellants had participated in the making of that decision yet they were neither shareholders nor directors in UHNML. The learned trial Judge also found that the respondent's shareholding in UHNML increased to 35 shares with the 2nd appellant holding 65 shares after the latter transferred 15 shares to the former. The learned trial Judge also found that the respondent's account in China to which USD 8,000,000 as compensation fees was paid by the appellants was wrongfully frozen at the request of the 2nd appellant. The

learned trial Judge further, basing on an expert report, assessed the value of the respondent's 35 shares in UHNML at USD 25,000,000 and ordered the appellants to pay this sum to the nominal defendant for the benefit of the respondent.

The appellants, being dissatisfied with the decision of the learned trial Judge, appeal to this Court on the following grounds:

"**1. The learned trial Judge erred in law and fact in holding that the respondent holds 35 shares in the nominal defendant.**

**2. That the learned trial Judge erred:**

**a) in relying on evidence of a single expert (PW2) despite the fact that the expert's report was jointly prepared by two experts.**

**b) in concluding that the appellants seem to have given in to the expert's report because they did not call an expert to rebut it; and**

**c) in holding that the expert report presented acceptable values of the respondent's shares in the nominal defendant.**

**3) The learned trial Judge erred in law and fact when he held that the respondent was entitled to a refund of her capital contribution and appreciation fee and at the same time permitted her to continue participating in the project/nominal defendant as a shareholder.**

**4) The learned trial Judge erred in law and fact when he erroneously concluded that the amount of money which was frozen and conceded to by the 2nd appellant was USD 8,000,000 and awarded interest on the same.**

**5) The learned trial Judge erred in law and fact when he inferred the existence of the nominal defendant's books of accounts from the provisions of Section 154 of the Companies Act and thereby erroneous held that:**

**a) the nominal defendant's books of accounts were in possession of the appellants who had prevented the respondent from accessing them.**

b) **the freezing of the respondent's accounts based on grounds that she has not accounted for the monies received by her was without foundation and illegal.**

c) **the counterclaim had no foundation.**

6) **The learned trial Judge erred in law and fact when he held that the respondent's personal action was tenable."**

The appellants prayed this Court to allow the appeals, set aside part of the judgment and decree of the High Court and grant them the costs of the appeal and the proceedings in the High Court.

The respondent opposed the appeal. She also cross-appealed against part of the decision of the learned trial Judge on the following grounds:

"1. **The learned trial Judge erred in law and fact having assessed the loss occasioned by the illegal transfer of the exploration licence on the basis of the 35% shares in the nominal defendant owned by the respondent in failing to order that the sum of USD 25,000,000 be paid directly to her by the appellants.**

2. **In the alternative, the learned trial Judge wrongly assessed the reflective loss due to the 2nd respondent (nominal defendant) on the basis only of the respondent's 35% shares, thereby failing to adequately compensate the respondent for the loss occasioned by the appellants' action of illegally transferring the exploration licence.**

3. **Further in the alternative, the learned trial Judge erred in fact and law when he failed to include an express order directing the appellants to pay USD 25,000,000 assessed as the value of the respondent's shares among the final orders made pursuant to the judgment."**

## Representation

At the hearing, Mr. Denis Kusasira, Mr. Patrick Turinawe and Mr. Stephen Kabuye, all learned counsel, appeared for the appellant. Mr. Francis Tumwesigye, learned counsel, appeared for the respondent.

The Court gave the parties a schedule for filing written submissions which was adhered to, and those submissions have been considered in this judgment.

**Submissions for the appellants**

Counsel for the appellants argued each ground independently in ascending order.

**Ground 1**

Counsel submitted that the learned trial Judge erred when he found that the respondent held 35 shares in the nominal defendant Uganda Hui Neng Mining Ltd ("UHNML) against the weight of the evidence. Counsel pointed out that UHNML was incorporated with the 2nd appellant holding 80 and the respondent 20 shares of a share capital of USD 5,000,000 paid by the respondent. The entire share capital was paid up by the respondent and there was an agreement that the 2nd appellant would reimburse the respondent for the value of his shares that were paid up. Counsel further mentioned that the respondent claimed that the appellant agreed and transferred 5 shares, worth USD 750,000, to the respondent to cover part of the amount he was expected to reimburse, a claim which the learned trial Judge believed. On the other hand, the 2nd appellant denied having executed a transfer of shares to the respondent and claimed that he had instead intended to transfer 65 of his 80 shares to the 1st appellant, a claim which the learned trial Judge disbelieved. Counsel submitted that the 2nd appellant's claim was more believable. Counsel contended that there was evidence revealing that by the time the respondent paid UHNML's share capital between 11th and 18th April, 2013, the 2nd appellant had already deposited money in Chinese Currency in her account in the Agricultural Bank of China in Guangzhou, the equivalent of USD 6,873,016. The money, which the respondent admitted having received, was deposited in several instalments as follows; a) between 18th and 28th January, 2013 – CNY 7,200,000; b) on 25th February, 2013 – CNY 3,100,000; c) on 15th March, 2013 – CNY 2,000,000; d) on 3rd April, 2013, CNY 31,000,000. Counsel pointed out the 2nd appellant testified that the money paid to the respondent, was his money. In view of that evidence, counsel contended that it was

inconceivable that the 2nd appellant having paid his money to the respondent, he still owed her money so as to transfer shares to offset his indebtedness.

Counsel further submitted that the 2nd appellant at various times after the respondent had paid UHNML's share capital, paid several monies to the latter which also made it unlikely that he was indebted to her at all. Counsel referred to a sum of CNY 19,000,000 paid on 27th May, 2013, and CNY 3,000,000 paid on 7th November, 2013, totaling to an equivalent of USD 3,492,063 which was intended as an appreciation fee to the respondent. Counsel also mentioned a sum of USD 3,000,000 paid to UHNML's account which the respondent withdrew and put to her private use and for which she gave no accountability. Counsel contended that the above highlighted payment made it unlikely that the 2nd appellant had any indebtedness to justify the signing of a transfer of shares (Exhibit P.17)

It was also submitted that the 2nd appellant's claim that he signed Exhibit P.17 while it was blank to facilitate the respondent to transfer shares to the 1st appellant was believable in light of evidence by the respondent admitting that except the 2nd appellant's signature, the rest of the contents of the transfer were signed by a lawyer; that 65 shares in UHNML belonged to the 1st appellant; and evidence that the respondent attempted to make the 1st appellant a shareholder in UHNML by filing an anomalous resolution. Counsel contended that the respondent gave no consideration for the alleged transfer and the same could be nullified under Section **92 (a)** of the **Evidence Act, Cap. 6** which provides that a fact which invalidates any document for disposition of property due to want of consideration may be proved in evidence.

Counsel also submitted that contrary to the learned trial Judge's findings, Exhibit P.17 was not registered, a fact the respondent admitted, and thus was inadmissible.

Counsel concluded on ground 1 by submitting that the learned trial Judge should not have considered Exhibit P.17 in isolation of the 2nd appellant's evidence, which proved that Exhibit P.17 was never intended for the benefit of the respondent.

**Ground 2**

Ground 2 has three limbs; (a), (b) and (c). On ground 2 (a), counsel submitted that the learned trial Judge should not have relied on the expert report in relation to the value of the respondent's shares. Counsel argued that this was because only one of the witnesses who made the report testified during the trial. Counsel, relying on the Nigeria Court of Appeal case of **Ogiale vs. Shell Pet. Dev. Co (Nig) Ltd (1997) 1 NWLR 148**, advanced a proposition that were an expert opinion report is jointly written by two or more experts in different but unrelated specialized fields of study, each expert must be called to testify and prove that they are qualified and competent to give expert opinion evidence in their respective fields of specialization. Counsel contended that the two experts who authored the report specialized in different fields, PW2 was a mineral valuation expert, whereas the other expert Mr. Harder was a Chartered Professional Accountant and Business Valuator. PW2 could only give an opinion on the value of the mineral deposit and not on the value of the respondent's shares in UHNML, for which the evidence of Mr. Harder was required. In counsel's view, failure to call Mr. Harder as a witness was fatal and should have led to rejection of the expert report. For this submission, counsel relied on the case of **Okeny vs. Okot, High Court Civil Suit No. 63 of 2012 (unreported)** per Mubiru, J.

Furthermore, counsel submitted that there was no evidence that PW2 being a mineral valuation expert was competent in business valuation so as to give a good estimation of the value of the respondent's shares in UHNML. Counsel advanced a proposition set out by Mubiru, J. in the **Okeny case (supra)** citing **R v. Silverlock [1894] 2 QB 766,** that **"No one may be allowed to give evidence as an expert unless his or her profession or course of study gives him or her more opportunity of judging than other people"** and also that **"an opinion of an expert witness will not be admitted as evidence unless that evidence relates to a field of**

- **expertise".** Counsel urged this Court to find that PW2 was incompetent to testify on the value of the respondent's shares in UHNML.

On ground 2 (b), counsel submitted that the learned trial Judge erred when he concluded that the appellants gave in to the expert's report because they did not call their own expert to rebut it. Counsel submitted that expert evidence may be challenged by rigorous cross-examination as was held in the English and Wales Court of Appeal decision in **Atkins and Anther vs. R [2009] EWCA Crim 1876**, and this was the approach taken in this case where cross examination revealed several flaws in PW2's evidence, as follows; 1) PW2 used an income approach yet that approach is discouraged in computing mineral projects. While PW2 attempted to justify the use of the income approach by saying that he had discretion to use it, counsel submitted that such discretion was not absolute and must be exercised having regard to the nature and characteristic of the deposit; 2) PW2's report covered a bigger area of 26 sq. km yet the mineral deposits could only be recovered from an area measuring 112.4 ha (4 sq. km). The mineral deposit in the remaining areas could not be economically exploited; 3) PW2 admitted that the cash flow figures from export of the concentrates could not be used as they included minerals were not allowed to be exploited; 4) PW2 failed to take into account other operating costs such as the cost of constructing and operating a steel plant and a phosphate fertilizer plant at the site; and 5) PW2 did not consider a balance sheet yet it was necessary to do so. In addition, the following fundamental flaws were discernable from a careful reading of the report: a) the report assumed that mining will continue until 2080 which was not the case because the mining lease was for only 21 years; b) the report did not take into account the risk of non-renewal of the mining lease; and c) the report did not consider that a mining lease could only be extended for only 15 more years under the Mining Act. Counsel submitted, relying on the case of **Commissioner for South African Revenue Service vs. Stepney Investments (PTY) Ltd [2015] ZASCA 138**, that the fundamental errors in a report should have led to its rejection.

Counsel submitted that the all the above flaws were highlighted in the appellants' submissions, and thus the learned trial Judge erred when he

- failed to consider them merely because the appellants failed to call their own expert evidence.

On ground 2 (c), counsel submitted that the expert report neither gave compelling explanations for its content, nor did it give acceptable conclusions about the value of the respondent's shares in UHNML, and thus the learned trial Judge had erred when he concluded otherwise. Counsel pointed out that while the report indicated a clear methodology and approach, it does not offer a compelling explanation of the basis upon which the expert arrived at the respondent's stake in UHNML. Counsel contended that the explanation on the respondent's stake was covered in one paragraph covering less than a quarter a page, and there was no explanation at all, on how the experts arrived at the values and how they corresponded with the value of the mineral deposit. In such circumstances, counsel submitted that the expert's evidence did not provide acceptable values and urged this Court to overrule the learned trial Judge's findings. For evaluation of expert evidence, counsel urged this Court to consider the case of UK Supreme Court case of **Kennedy vs. Cordia Services LLP [2016] UKSC 6**.

Counsel further challenged the expert report on grounds that neither PW2 nor Mr. Harder, its authors were competent to conduct a valuation under the **Surveyors Registration Act, Cap. 275** and the **Accountants Act, 2013** as interpreted in the Court of Appeal case of **Attorney General and Another vs. DMW (U) Ltd, Civil Application No. 314 of 2020 (unreported)**.

**Ground 3**

Counsel faulted the learned trial Judge for making contradictory findings – on the one hand, holding that the respondent was entitled to an appreciation fee and a refund of operating expenses incurred in the running of UHNML, and on the other hand, awarding the respondent a sum of USD 25,000,000 being an estimation of the return on investment her 35 shares in UHNML would have brought her. Counsel contended that the above findings could be made in the alternative, as they had been so pleaded at paras 5 (m) to (q) of the respondent's plaint which envisaged payment of a refund and appreciation fees only if the respondent ceased participating in the UHNML

project. Counsel contended that the learned trial Judge ought to have permitted UHNML to continue carrying out the project and for the respondent to be paid dividends as a shareholder. In counsel's view, there was no need to order for compensation for value of shares considering that the respondent was expected to continue participating in the mining project. Further, counsel contended that allowing the learned trial Judge's decision to stand would lead to unlawful reduction of UHNML's share capital since the sum of USD 5,000,000 ordered to be refunded also included a sum of USD 1,000,000 which represented the value of the 20% stake owned by the respondent in UHNML. It would also amount to a double payment by the 2nd respondent of USD 750,000 for 15 shares in UHNML, first by a transfer to the respondent and later by the refund order.

**Ground 4**

Counsel submitted that the 2nd appellant never conceded that USD 8,000,000 was frozen in the respondent's account in China, neither did the respondent claim in her pleadings that that was the case. Therefore, the learned trial Judge erred when he made an order for refund of those monies. Moreover, to counsel, the USD 8,000,000 fell in the category of special damages and therefore should have been specifically pleaded and strictly proven.

**Ground 5**

Ground 5 also had three legs (a), (b) and (c). Counsel submitted on ground 5 (a) that the learned trial Judge erred when he based on the statutory requirement under **Section 154** of the **Companies Act, 2012** for companies to keep books of account, to conclude that UHNML kept books of account at its registered offices which were under the control of the 2nd appellant. Counsel contended that there was no presumption created by the highlighted provision to the effect that each company keeps books of accounts, hence why **Section 154 (4)** creates an offence for companies that fail to keep books of accounts. Counsel contended that the appellants' case was that UHNML did not have books of accounts, and therefore the burden lay on the respondent to prove that such books existed and were in possession of the appellants, a burden she did not discharge.

Counsel also faulted the learned trial Judge for finding that there was a risk of the appellants causing the arrest of the respondent on basis of malicious allegations had she tried to access UHNML's registered office, and contended that the allegations had been found to be false after investigations by the Uganda Police, therefore it was inconceivable that the appellants would insist on arresting the respondent. Counsel contended that the respondent made the allegations because she had failed to offer satisfactory accountability for the USD 5,000,000 she spent on UHNML's expenses.

Counsel made no submissions on ground 5 (b).

With regard to ground 5 (c), counsel submitted that the learned trial Judge erred when he dismissed the 1st appellant's counterclaim on grounds that it was unfounded. Counsel submitted that the gist of the counterclaim was that the respondent had utilized money she withdrew from UHNML's account, for personal activities, yet she was supposed to expend it on UHNML's activities. Counsel submitted that the evidence indicated that UHNML's expenses were footed by companies hired by the 1st appellant. The appellants' case was also that the respondent failed to account for the money she used.

**Ground 6**

Counsel submitted that the respondent as a minority shareholder could not institute a personal action on behalf of UHNML without the permission of the majority shareholders and directors and that the learned trial Judge erred when entertained her action. Counsel contended the learned trial Judge, in reaching his decision to permit the respondent's action, had misapplied principles set out in an excerpt from the textbook **Gower's Principles of Company Law, 3rd ed**, in that he misunderstood that a shareholder who suffered as a result of expropriation of a company's assets can seek personal remedies in a derivative suit. Counsel submitted that the principle articulated in **Prudential Assurance vs. Newman Industries (No. 2) [1982] 1 CH 204** is that a shareholder cannot recover damages merely because the company in which he or she is interested has suffered loss. A shareholder's only loss is through the diminution in the value of the net assets of the company in which he or she is a shareholder. Once the asset is restored or compensated, the shareholder's loss is atoned. Furthermore, counsel relied

on the case of **Eric Terence Day vs. James Thomas Gregory Cook [2001] Lloyd's Rep PN 551** for the submission that where a shareholder's personal action is combined with a derivative action, the personal action must be dismissed.

**Respondent's submissions**

Counsel for the respondent also argued each ground independently.

**Ground 1**

Counsel submitted that at incorporation of UHNML, the respondent subscribed to 20 shares and this was not challenged by the appellants, thus the dispute relates to an additional 15 shares that the respondent acquired in the company, and the question is whether the respondent owns those shares. He contended that there was evidence supporting the respondent's ownership of the 15 shares, as follows: a) a transfer instrument by which the 2nd appellant transferred 15 shares to the respondent; b) a company resolution allotting the said shares to the respondent; c) a return of allotment for a further 15 shares; and d) a letter by the Uganda Registration Services Bureau confirming the allotment of the said shares.

Counsel pointed out that the appellants on the other hand, adduced no evidence in support of their assertion that the shares were not lawfully transferred to the respondent and instead relied on incredible oral allegations by the 2nd appellant. The 2nd appellant stated that he did not execute the share transfer yet he confirmed the signature on the document. Secondly, he claimed that the he signed a blank document, and counsel for the appellants dwelt on the fact that the respondent testified that the transfer was filled out by a firm of lawyers, as justifying the 2nd appellant's claim that he never intended to transfer shares to the respondent, but to counsel, nothing should be read into those circumstances as it is standard practice for lawyers to fill those forms on behalf of their clients. Moreover, the 2nd appellant admitted to have executed the transfer of shares but contended that he executed it to transfer 65 shares to the 1st appellant and not the respondent.

Counsel further submitted that the appellants' submission that there was no consideration for the transfer of shares had no merit as the share transfer indicated the considerations as USD 750,000. In counsel's view the learned trial Judge rightly concluded that the transfer was for 15 shares worth backed by valuable consideration.

With regard to the appellants' submission the share transfer was not registered, counsel for the respondent contended that this was simply untrue and that in a letter dated 3rd December, 2013, the Uganda Registration Services Bureau confirmed that the respondent owned 35 shares in UHNML meaning that the transfer was registered. Moreover, that assuming there was no registration, the respondent acquired an equitable interest after signing the share transfer for the 15 shares. Counsel submitted that the balance of evidence supported the learned trial Judge's finding that the respondent owned 35 shares in UHNML.

**Ground 2**

Counsel argued that contrary to the appellant's submissions on ground 2 (a), an expert report jointly prepared by two witnesses can be tendered in evidence by one of the witnesses as long as the witness can prove that he or she was privy to all information and actively participated in the making of the report. He contended that under **Section 133** of the **Evidence Act, Cap. 6,** no particular number of witnesses shall be required for proof of any fact, thus it was sufficient that only PW2 testified.

It was further submitted that as indicated at page 150 of the record, in the particular facts of this case, both experts travelled to Uganda from Canada and were ready for cross examination, but the appellants' counsel at trial declined to cross-examine them and insisted that the appellants would call their own witnesses.

Counsel also submitted that the **Ogiale case (supra)** relied on by counsel for the appellants does not, on proper reading, support the arguments for the appellants and instead permits a single expert witness to tender a joint report. Counsel submitted that the true position from that case is that the expert report is admissible but would be given less weight where the single

witness who tenders it is incapable of answering key questions because they fall outside her field of expertise. Moreover, the report in the present case was prepared jointly by the two experts all employed by the same organization, Deloitte LLP Canada. In counsel's view on the basis of the principles in the **Ogiale case (supra)**, the appellants needed to prove that each expert authored an independent chapter in the report so as to succeed in their case. In addition, counsel contended that PW2 impressively answered all the questions and therefore the learned trial Judge rightly relied on the expert report.

In response to the submissions on ground 2 (b), counsel submitted that the contention that the learned trial Judge dismissed the appellants' objection to the expert report solely on the ground that they did not call an expert to counter it was untrue. Counsel contended that the learned trial Judge also considered what was said during cross examination but rightly found that PW2's evidence was not shaken. He also pointed out that the appellants' counsel told the trial Court that they were not experts in the valuation, but later chose to make submissions as though they were such. Counsel contended that the learned trial Judge should not be blamed for preferring evidence of an expert over submissions of counsel, and urged this Court to find that he reached the correct conclusions in the circumstances.

Counsel disagreed with the submissions on ground 2 (c) and contended that as rightly found by the learned trial Judge, the expert report presented acceptable values. Counsel relied on the case of **Muzeyi vs. Uganda [1971] EA 225** for the proposition that whereas a Court has discretion to accept or deny expert evidence, such discretion should be exercised after evaluating the evidence of an expert in light of three factors, namely; a) the relevance of the evidence; b) the credibility of the expert and c) the reliability of the evidence and the weight to be placed on it. In the present case, the expert report gave provided valuation for the respondent's shares in UHNML for assisting the trial Court to ascertain the loss she incurred after the company lost its key asset, an exploration licence. Hence the expert report was relevant. As for the credibility of the experts, counsel contended that Mr. Harder and Mr. Munyaradzi, the two experts who prepared the report

stated their qualifications in their respective witnesses, and these qualifications were not contested, hence it can be concluded that they were credible experts. In addition, the evidence of PW2 was credible and during cross examination, he ably explained the reasons for using the income approach by stating that the risks linked to speculation in using the approach were mitigated by a higher discount rate. Counsel further pointed to the fact that the learned trial Judge found PW2 to be a reliable witness whose evidence remained unshaken during cross-examination. He contended that that learned trial Judge properly assessed the credibility of PW2's evidence, as he was best placed to do and there is no basis for this Court to interfere.

**Ground 3**

Counsel submitted that making a payment consisting a refund of the respondent's contribution to the share capital and appreciation fees for promoting UHNML cannot in law operate to remove the respondent from being a shareholder in the company. The respondent continued being a shareholder of 35 shares in UHNML and therefore the learned trial Judge was right when he found as much.

Counsel urged this Court, to do as did the trial Court, and reject submissions by the respondent that the respondent was not entitled to continue participating in the Sukulu Mining Project but could only do so in other projects, he submitted that the appellants did not furnish any authority which permits distinction in the projects a shareholder can benefit from. He contended that the law only recognizes distinctions to shareholder rights related to voting and payment of dividends, but not in participation in company projects.

It was further submitted that payment by the appellants of USD 5,000,000 to the respondent as a refund for preliminary expenses she incurred on account of UHNML, and USD 4,700,000 as appreciation fees did not extinguish her shareholding in UHNML. Moreover, the money was paid by the 1st appellant and not the 2nd appellant. In addition, counsel submitted that both the 2nd appellant and the respondent agreed that a refund of USD 5,000,000 would be made to the latter. With regard to the appreciation fees,

counsel submitted that the monies were paid to the respondent because of her efforts in helping UHNML to secure an exploration licence.

On the appellant's argument that the payment of the refund to the respondent would lead to unlawful reduction of UHNML's capital, counsel submitted that this was not the case. He pointed out that the payment to the respondent was deposited by a third party, the 1st appellant, and was neither paid from the capital or money of UHNML. The question of reduction of share capital could not arise.

As for whether the 2nd appellant made a double payment of USD 750,000 to the respondent for purchase of 15 shares, counsel submitted that this was not the case. He contended that the learned trial Judge rightly found that the said money was paid by the 2nd appellant whereas the refund was paid by the 1st appellant, thus no question of double payment arose.

**Ground 4**

Counsel submitted that it was not clear, from a reading of ground 4, what its import is and the submissions for the appellant had not been useful. He however stressed that the parties agreed in the trial Court that an amount of money in the range of USD 8,000,000 to 10,000,000 was paid to the respondent's account in China, although the account was frozen at the behest of the 2nd appellant. Counsel referred to the respondent's evidence that this amount of money constituted USD 4,000,000, being the value of 80 shares in UHNML, and USD 4,700,000 as appreciation fees. He also referred to the 2nd appellant's witness statement where he conceded that the respondent's account was, upon his request, frozen by Chinese authorities to cause her to give accountability. Counsel then submitted that in those circumstances, the learned trial Judge cannot be faulted yet the appellants conceded to the freezing of USD 8,000,000 on the respondent's accounts in China.

**Ground 5**

Counsel submitted that the real issue in ground 5 is whether the respondent was obligated to make an account for the monies she spent on account of UHNML. He contended that the issue arises from the 1st appellant's counter-

claim wherein it was claimed that USD 3,867,000 was paid to the respondent as appreciation fees; USD 3,000,000 was paid to UHNML. Counsel contended that the money remitted to the UHNML was company money, thus the 1st appellant, not being a director or member of UHNML had no right to institute proceedings on its behalf. For this submission, counsel relied on the case of **Foss vs. Harbottle (1863) 67 ER 189.**

Counsel further pointed out that the 1st appellant also counter-claimed about a refund for USD 5,000,000 paid to the respondent for preliminary expenses, and for USD 2,027,419 expenses spent on incorporation and for acquisition of prospecting and exploration licenses. He submitted that proper accountability for these monies could only be ascertained by reference to the company's books of account which at the time of the suit were in possession of the appellants who had ejected the respondent from UHNML's premises. Counsel contended that the learned trial Judge rightly found that a company is under the Companies Act, 2012, required to keep books of accounts at its registered office, and also when he ordered for a full audit of the UHNML's books of accounts, and the appellants have no reasonable ground for being aggrieved with these findings and orders which are in keeping with **Section 154 (1)** of the **Companies Act, 2012**.

Furthermore, counsel referred to the respondent's evidence that while she was a signatory to UHNML's accounts, she was not in charge of the accounts department. She testified that she would withdraw money and give it to the people employed in the accounts department. Counsel contended that the duty to maintain proper books of accounts lay with UHNML as a company and not on the respondent personally. Moreover, even assuming that the duty lay on the respondent personally, the relationship between the 2nd appellant and the respondent had deteriorated after the former made police complaints wrongfully accusing the latter of criminal activity. In counsel's view, given the hostile relationship, the respondent could not logically be expected to account for the money as she no longer has access to UHNML's premises.

Counsel further noted that the 2nd appellant's case was that UHNML kept no books of account, and further that the respondent had not put monies

remitted to her for UHNML's activities to proper use. He then submitted that even if that were true, it did not automatically impose a legal obligation on the respondent to make an account. He contended that the 1st appellant as counterclaimant had a legal duty to adduce evidence to prove its case on a balance of probabilities, in terms recognized under **Section 101 and 102** of the **Evidence Act, Cap. 6**. The 1st appellant bore the duty to adduce evidence to prove that the money was not used for the purposes claimed by the respondent, but did not do so. In those circumstances, the learned trial Judge was right to dismiss the 1st appellant's counterclaim.

**Ground 6**

Counsel supported the learned trial Judge's findings that the respondent's suit in the lower Court was brought as a derivative action on behalf of UHNML and also that the respondent could not recover damages personally. He pointed out that the respondent instituted the action because acts of the appellants amounted to fraud on her as a minority in UHNML affecting her interest in the suit property and the acts had also deprived the company of property. Counsel relied on the case of **Jamal vs. Uganda Oxygen, Supreme Court Civil Appeal No. 64 of 1995 (unreported)** where the Court, basing on common law, recognized that a derivative action may be brought by an individual member on behalf of the company where it was impracticable for the company to do so. Counsel submitted that the learned trial Jude found that the appellants had committed a fraud on the respondent by, among other things, "cooking" illegal resolutions, holding illegal meetings and disregarding notice requirements. These findings have not been appealed by the appellant. Further still, counsel pointed out that the learned trial Judge found that the respondent's right to institute a derivative action arose due to the reflective loss she suffered as a shareholder in terms of the principles articulated in the case of **Prudential Assurance Co. Ltd vs. Newman Industries Ltd [1982] 1 Ch 2014.** To counsel, the learned trial Judge rightly found that the respondent would not recover any personal damages as the fruits of her derivative action and any benefits would go to UHNML and trickle down to the respondent as a shareholder. The respondent received no personal remedies from the action. Counsel concluded by

submitting that the learned trial Judge's decision to allow the respondent's action was fair and justified.

**Submissions of the appellants in rejoinder**

In rejoinder to the submissions on ground 1, counsel reiterated that the share transfer form was not intended to benefit the respondent. Counsel also contended that the resolution allotting shares to the respondent was irregular in so far as it purported to give shares to the respondent yet there were no shares to allot. Further, that if the 15 shares allotted to the respondent are considered, the effect would be that she held 50 shares in UHNML which was irregular. In addition, counsel submitted that the letter from URSB also supported the fact the resolution and the return of allotment were irregular.

With regard to the respondent's submissions on ground 2, counsel contended that the reference to **Section 133** of the **Evidence Act, Cap. 6** was irrelevant and did not address the argument that PW2, a chemical engineer was incompetent to testify as a Certified Accountant or business valuator for purposes of guiding on the value of the respondent's shares in UHNML.

On the respondent's submission that the appellants took no interest in cross examining the expert witnesses when they were available, counsel contended that the trial Courts granted the appellants an adjournment as they were incapable of conducting cross examination on the initial day because they had been served with the report the previous day and needed more time to study it.

On the applicability of the **Ogiale case (supra)**, counsel reiterated that the case ought to be applied to benefit the appellants, and so should the Muzeyi case (supra).

In all other respects, counsel reiterated the earlier arguments made for the appellants.

**Submissions on the cross appeal**

As I noted earlier, the respondent filed a cross appeal against part of the decision of the learned trial Judge. The parties made the following submissions on the cross appeal.

**Cross-appellant/Respondent's submissions**

Counsel argued grounds 1 and 3 jointly and ground 2 separately.

**Grounds 1 and 3**

Counsel submitted that the learned trial Judge ought to have ordered for the sum of USD 25,000,000 representing the value of the respondent's shares in UHNML to be paid directly to the respondent and not to UHNML. He submitted that while he recognized that the reflective loss principle articulated in the **Prudential Assurance Co. Ltd case (supra)** does not permit a shareholder who brings a derivative action to be paid his/her benefits directly, several exceptions to the principle allow benefits to be paid directly. Counsel referred to two cases which discussed these exceptions. In the English and Wales Court of Appeal case of **Giles vs. Rhind [2003] Ch 618** where it was held that a shareholder could recover damages for the value of his or her shares if the wrong doing of defendants resulted in destruction of the company and it was not capable of filing a suit to recover damages against the wrongdoers. The Court emphasized that this was a question of evidence in each case. The other case was the UK Supreme Court case of **Sevilleja vs. Marex Financial Ltd [2020] UKSC 3** which also recognized the need to permit shareholders to recover for wrongs done to the company.

Counsel pointed out that the facts of this case are that UHNML is a shell company stripped of all its major assets, with no operational office or books of accounts, and the controlling directors have no interest in the finances of the country. In addition, the relationship between the shareholders has deteriorated and is not conducive to a joint business enterprise. In those circumstances, and considering that the principle on the fruits of a derivative action are derived from the common law, court ought in the interests of justice to uphold the trial Court's findings. Counsel referred to the case of **Simba Properties Investment Co. Ltd vs. Kirunda, Civil Application**

**No. 538 of 2022 (unreported)** where this Court, in the interests of justice, granted an order not expressly provided for under the law.

Furthermore, counsel submitted that the learned trial Judge should have ordered for the sum of USD 25,000,000 awarded for the value of the respondent's shares in UHNML to be paid directly to the respondent and not to the nominal defendant, considering the circumstances of the case. He therefore urged this Court to reverse the orders of the learned trial Judge on this point.

**Ground 2**

Counsel submitted that the amount of USD 25,000,000 was inadequate to compensate the respondent for the loss she suffered following the expropriation of UHNML's mining licence. He contended that adequate compensation should have been the sum of USD 71,428,571 covering the total market value of the exploration licence and mining lease as assessed in the experts' report, and urged this Court to enter judgment for the respondent for that sum.

**Submissions of the Cross-Respondents/Appellants**

Counsel for the Cross-Respondent/Appellants also argued grounds 1 and 3 jointly and ground 2 separately.

**Grounds 1 and 3**

Counsel submitted that the learned trial Judge's decision to direct for USD 25,000,000 to be paid to UHNML was discretionary, and should not be interfered with in the absence of evidence that the learned trial Judge proceeded on a wrong principle of law. He also submitted that the **Giles** and the **Simba Properties** cases relied on by the cross-appellant are inapplicable and also that it was impermissible for the cross-appellant to rely on dissenting judgments in the **Sevilleja case**.

**Ground 2**

Counsel submitted that the learned trial Judge's decision allowing UHNML to continue participating in the Sukulu Project as if it retained the exploration

- licence and for the value of the respondent's shares (albeit erroneously assessed) to trickle down to the respondent as justified. Counsel emphasized that the decision was discretionary and that this Court cannot interfere as there was no evidence that the learned trial Judge proceeded on a wrong principle.

**Resolution of the Appeal**

We have carefully studied the record, and considered the submissions of counsel for either side and the law and authorities cited. We have also reviewed other relevant authorities that were not cited. The Court is presently dealing with a first appeal and cross-appeal, both, arising from the decision of the High Court, and as such, the Court has a duty, under **Rule 30 (1) (a)** of the **Judicature (Court of Appeal Rules) Directions S.I 13-10**, to reappraise the evidence and make inferences of fact. Further, this Court, as a first appellate Court is expected to "give the evidence on record as a whole that fresh and exhaustive scrutiny which the appellant is entitled to expect, and draw its own conclusions of fact" as stated in the case of **Uganda vs. Ssimbwa, Supreme Court Criminal Appeal No. 37 of 1995 (unreported)**. We shall bear the above principles in mind as we resolve the grounds of the appeal and those of the cross appeal.

We shall resolve each ground of appeal independently in the following order: ground 6, 1, 2, 5, 3 and lastly ground 4. We shall thereafter consider the cross appeal.

**Ground 6**

We shall begin by considering ground 6 as it concerns the validity of the proceedings instituted by the respondent in the trial Court. The appellants are of the view that the proceedings were a personal action by the respondent and are barred by the common law principle that the rightful plaintiff in an action where a wrong is alleged to have been done against a company is the company itself, and that no personal action can be instituted by a shareholder on behalf of the company. The respondent is of the opposite view, that her proceedings were a derivative action brought on behalf of UHNML and also on her behalf as a minority shareholder.

A derivative action is an action brought by a minority shareholder for a wrong done to a company where the majority shareholders refuse to institute action for the wrong. The principles on derivative actions were developed at common law and were restated by the English and Wales Court of Appeal in the case of **Prudential Assurance Co Ltd vs. Newman Industries Ltd and others (No 2) [1982] 1 All ER 354**, as follows:

> **"A derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and therefore the person in whom the cause of action is vested. This is sometimes referred to as the rule in Foss v Harbottle (1843) 2 Hare 461, 67 ER 189 when applied to corporations, but it has a wider scope and is fundamental to any rational system of jurisprudence. The rule in Foss v Harbottle also embraces a related principle, that an individual shareholder cannot bring an action in the courts to complain of an irregularity (as distinct from an illegality) in the conduct of the company's internal affairs provided that the irregularity is one which can be cured by a vote of the company in general meeting.**
>
> **The classic definition of the rule in Foss v Harbottle is stated in the judgment of Jenkins LJ in Edwards v Halliwell [1950] 2 All ER 1064 at 1066–1067 as follows. (1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation. (2) Where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, cadit quaestio; or, if the majority challenges the transaction, there is no valid reason why the company should not sue. (3) There is no room for the operation of the rule if the alleged wrong is ultra vires the corporation, because the majority of members cannot confirm the transaction. (4) There is also no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by a special resolution or the like, because a simple majority cannot confirm a transaction which requires the concurrence of a greater majority. (5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in**

**favour of the aggrieved minority, who are allowed to bring minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue."**

The respondent stated in her amended plaint as follows:

**"The plaintiff brings this derivative action to recover property belonging to the 1st defendant (UHNML) that was fraudulently and unlawfully expropriated by the 3rd, 4th, 5th and 6th defendants and transferred to the 2nd and 6th defendants."**

The respondent further claimed that the fraudulent of the defendants (now appellants), which she set out in the plaint, amounted to fraud on her as a minority shareholder in UHNML. She therefore sought, among others, for:

**"General damages for the economic loss, inconvenience and lost opportunities suffered by the 1st Defendant (UHNML) and the plaintiff (herself) as a result of the action of the 2nd to 6th defendants (now appellants)."**

We noted that the respondent also pleaded at paragraph 8 of her plaint as follows:

**"The plaintiff's claim against the defendants is also in respect of her own rights as the sole minority shareholder in the 1st defendant holding 35% shares. The plaintiff's case is that the acts of the 2nd to 6th defendants amount to a fraud on the minority."**

The above averment, when considered in isolation would suggest that the respondent's suit was a personal action. However, it will be noted that a personal action as distinguished from a derivative action, is one brought for the protection of the personal rights of a shareholder and not the rights of a company. According to the textbook **Gower's Principles of Modern Company Law (11th ed.)**, personal actions include, interalia, 1) an action for enforcement of the company's constitution; 2) an action for relief from unfair prejudice in terms as enacted under **Section 248** of the **Companies Act, 2012** such as failure to declare dividends; and presumably actions based on analogous grounds.

On reading the respondent's plaint, we form the view that she sought by her averments to fit her case within the exception to the rule in the **Foss case (supra)**, namely that she could rightly institute a derivative action because the transfer of the licence from UHNML amounted to a "fraud on her as the minority". The circumstances indicated in the respondent's pleadings show that the respondent sued the 2nd appellant, who was a director and the majority shareholder in UHNML for appropriating the company's assets to third parties. Since it was unlikely that the 2nd appellant would sanction a suit against himself for the benefit of UHNML, which justified the respondent in instituting the suit in the lower Court. The respondent's suit was therefore a derivative action and not a derivative action combined with a personal action as counsel for the appellants contended.

The learned trial Judge considered that the suit in the trial Court was a derivative action instituted on behalf of UHNML following expropriation of the company's main asset, an exploration license, by the 2nd appellant the majority shareholder in UHNML. The learned trial Judge was of the view that the 2nd appellant was unlikely to sanction a suit to recover the exploration licence as that would be against his interests. The learned trial Judge considered that expropriation of UHNML's exploration licence, a key asset amounted to a fraud on the respondent, the minority in UHNML which entitled her to bring a derivative action. In our view, the learned trial Judge applied the relevant principles alluded to earlier on derivative actions and reached the correct conclusion. We find that ground 6 of the appeal must fail.

**Ground 1**

The appellants, in ground 1, contest the learned trial Judge's finding that the respondent owned 35 shares in UHNML. We note that the parties, in their respective pleadings, disagreed on the number of shares that the respondent held in UHNML. Although, the respondent accepted that, at incorporation, she subscribed for only 20 shares, she contended that the 2nd appellant subsequently agreed to transfer 15 shares to her, in the process bringing up her shareholding to 35 shares. The respondent claimed that the 2nd appellant

transferred the 15 shares in part satisfaction of a debt he owed her. In this regard, she stated in her evidence in chief, that:

> **"At incorporation, Lv Weidong (2nd appellant) subscribed for 80 shares while I subscribed for 20 shares. Mao Jie (3rd appellant) and Yang Junjia (4th appellant) also signed to the Memorandum and Articles of Association but were not allotted shares.**
>
> **...**
>
> **Mr. Lv Weidong was not able to reimburse his nominal value of 80 percent. We subsequently agreed that he would transfer an extra 15 percent of his shares to me (Exhibit P.17) increasing my shares to 35 percent as he arranged to reimburse his 65 shares."**

The respondent tendered in evidence a share transfer (Exhibit P.17) indicating the transaction in which the 2nd appellant transferred to her the relevant shares. The share transfer confirms the transaction and also indicates that an advocate called Nanyondo Sumaiyah witnessed the transfer. The respondent maintained her position in cross examination.

The appellants, in their Written Statement of Defence (WSD), refuted the respondent's claims. They denied that the 2nd appellant effected a transfer of 15 shares to the respondent, and instead averred that the 2nd appellant signed a blank transfer form to be used by the respondent to transfer 65 shares to the 1st appellant. In his evidence in chief, the 2nd appellant stated:

> **"That, I also discovered that after I questioned the resolution and the return of allotment, the plaintiff purported to use the transfer form in Exhibit P.17 at page 71 of the plaintiff's trial bundle to transfer 15 shares to herself.**
>
> **That I had earlier executed Exhibit P.17 at page 71 of the plaintiff's bundle for purpose of transferring 65 shares to the 2nd defendant (1st appellant), as it was understood by the parties that the nominal defendant was to be a subsidiary of the 2nd defendant."**

In cross examination, the 2nd appellant was asked about the share transfer. Below is an excerpt from his exchange with the respondent's counsel:

> **"Q: Do you agree that she signed for 20 shares at the beginning but she says she has 35 shares and I want to show you a document which says**

**you signed and where you buy. My Lord that document is FM2c (Am showing him Exhibit P.17 My Lord). In that document it has your name Lv Weidong and it has a signature next to Lv Weidong as the person transferring shares. Is that your signature sir?**

**A: Yes I confirm it is my signature.**

**Q: Now what that document you signed says is that you agreed for the sum of 750,000 United States Dollars to transfer 15 ordinary shares of Uganda Hui Neng Ltd to Ms. Fang Min because she had paid you 750,000 United States Dollars. So you signed it and Ms Fang Min signed it. You have just said that this is indeed your signature.**

**A: I have never received this money 750,000 US Dollars.**

**Q: According to Ms Fang Min it was because he did not make a full refund of the amount of her shares. You remember she had paid 4 million dollars on his behalf. So according to Ms Fang Min they agreed that he would have to pay all the 4 million dollars but for the 750,000 of part of that 4 million, he would give her more shares.**

**A: <u>We have to confirm that this 5 million is accountable then we can confirm about the 750,000. I admit I signed this paper as agreement but if I don't receive this 750,000 US Dollars from her that means that is not effective.</u> Because you keep asking me about 1 million, 4 million this whole thing that means that you personally accepted the 80 shares and 15 shares fact."**

Therefore, what emerges is that the 2nd appellant, during cross examination admitted to having signed the share transfer to give 15 shares to the respondent. This goes to contradict his case and evidence in chief that he signed a blank transfer form to facilitate a transfer of shares to the 1st appellant. We note that the appellants made allegations that the relevant share transfer was made fraudulently. Thus, it was essentially the respondent's word, that the 2nd appellant made the share transfer bonafide, against the 2nd appellant's award, that the share transfer was fraudulent. We note that the respondent's case was supported by the register and a transfer form. Therefore, to impeach that evidence, the appellants needed to adduce evidence proving fraud against the respondent to the requisite standard, which they failed to do. This therefore left the respondent's case and evidence more believable than that of the 2nd appellant. We are therefore

not persuaded by the submissions of counsel for the appellants suggesting otherwise. We therefore uphold the learned trial Judge's findings that the respondent owned 35 shares in UHNML.

Ground 1 of the appeal must also fail.

**Ground 2**

The respondent relied on expert evidence contained in a report (Exhibit P.36) of PW2 Munyaradzi Chirisa to provide an assessment of the value of her shares in UHNML for purposes of determining how much return on investment she lost following the appropriation of UHNML's exploration licence. It is now well-established that expert evidence is admissible in determining any issue that requires an expert's expertise to be solved. It is worth reiterating what was said of expert evidence in the case of **Kimani v Republic [2000] 2 EA 417**, as follows:

> **"In the case of Dhalay v Republic [1997] LLR 514 (CAK) this Court had this to say regarding the evidence of experts:**
>
> **"We think we should at this stage say something about the opinions of experts when they appear to assist the courts. It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so."**

The learned trial Judge found that the report tendered by PW2 (Exhibit P.36) set out an acceptable valuation of the likely return the respondent would have made on her investment in shares in UHNML had the company's exploration licence not been transferred to the 1st appellant. The appellants contend in this appeal that the learned trial Judge erred when he believed that report and give reasons which we now turn to consider.

Firstly, the appellants contend that the expert report was inadmissible because only PW2, one of the experts who prepared the report appeared in Court for purposes of having the report tendered in evidence. Counsel for the appellants cited a decision of the Nigeria Court of Appeal in **Ogiale and**

**Others vs. Shell Petroleum Development Company Nigeria Ltd 1 NWLR PART 480 PG. 148** in support of their contention. That case dealt with facts where an expert report prepared by two experts in different disciplines in a related field, was tendered in evidence by only one of them. The trial Court rejected the report finding that the evidence of the expert who testified about matters falling within the discipline of the expert who did not, amounted to hearsay rendering the report inadmissible. On appeal, the Court of Appeal disagreed, finding that the subject of the report fell in the same field which the witness who testified was competent to comment on. Akintan JCA who wrote the lead judgment commented as follows:

> **"There is definitely no doubt that where a team of two or more experts in different but related fields of study jointly undertook a research project and jointly produced a report, that report tendered by one of them in court proceedings is admissible: See Shell Petroleum Development Co. Nigeria Ltd vs. Farah & Ors, supra. But this general statement of the law will not be applicable where there is evidence of a clear division of labour among the team of experts particularly whereby a specified field of study was carried out by a particular expert or experts in not very related field of study. In such a situation, it may be necessary that at least an expert from each of the specialized field is called to give evidence in the related field of specialization.**
>
> **The facts disclosed in the instant case by Professor Odu (DW4) are that "Professor Esuroso studied the plant pathology and insect life while Dr. Obigbesan studied the plant physiology and crop production aspect." DW4 said he studied the soil aspect, the post impact aspect and the physical measurements like radiation etc. Their conclusion was that "operation of the defendant company has not affected plant growth and soil fertility in the area." It was not shown that the entire study was not in a related field. It was also not shown that DW4 was incapable of answering questions about the contents of the report relating to the area of the report containing the aspect of the studies carried out by the two members of the team who did not testify at the trial. Even where DW4 failed to answer such questions, the effect would not make the contents of that proportion of that report hearsay or inadmissible. Rather, such could only affect the weight to be attached to the portion of the report."**

The above holding does not support counsel for the appellants' submission that where an expert report was prepared by two different experts, both experts have to testify for the report to be admitted. We therefore find that submission to be misconceived. In any case, we believe that given PW2's qualifications, work experience and competence, he was suitable to testify about the contents of the report. PW2 testified that he was a Senior Manager in the Valuation and Modelling Services Group of Deloitte since 2008. He also listed his qualifications which included a Bachelor of Engineering (Hons) Chemical Engineering Degree from the National University of Zimbabwe, 2005; and other academic qualifications from Southern African Institute of Mining and Metallurgy (SAIMM), 2009; Australian Institute of Mining and Metallurgy (AusiMM), 2012; The Engineering Council of South Africa (ECSA), 2010. PW2 testified about his work experience and competencies as follows:

> **"I am a Chemical Engineer with 10 years' experience in the minerals industry in an advisory/consulting capacity. I have experience in working with both project owners and financing institutions in all stages of a mineral project's life cycle, across the full range of minerals including gold, base metals (copper, nickel, cobalt, zinc), coal, phosphates, iron ore, chromite and ferrochrome, PGMs and rare earth elements. I possess a unique combination of technical, economic, financial and valuation skills as well as a strong understanding of the regulatory environment governing the reporting of mineral resources and the valuation of mineral assets into the public domain. Due to my education, experience and professional affiliations, I am a qualified valuator/competent valuator, as defined by the internationally recognized mineral valuation codes."**

In addition, during cross examination PW2 testified that he played a key role in valuing the Sukulu Deposit. He stated:

> **"My Lord, I was the lead modeler; I had assistants but they were working under my directions. I was responsible for making sure that the technical input into the financial model are in line with what I thought was reasonable having conducted the visit and also having at (sic) the various documents that were provided. I reviewed the model after it was completed. I wrote part of the report with my colleague Mr. Harder."**

We would therefore find that the evidence showed that PW2 was a key member of the team that conducted the valuation exercise for the Sukulu Deposit. He was therefore competent to testify about the contents of the report.

We shall now move on to consider ground 2 (b). As stated earlier, expert evidence is admissible when relevant. We wish to add that expert evidence is, in law, considered at the same footing with all the other evidence adduced at trial. We also note that the trial Judge is duty bound to consider all the evidence of the case including the expert evidence and decide whether the plaintiff has established his or her case on a balance of probabilities. It has been commended that an expert's report should be relied upon if it deals with all the relevant issues; contains adequate and complete reasoning substantiating the conclusions set out in it, and is not a bare ipse dixit, that is, the report should not only set out the expert's personal assertions without relying on any authority or proof. **(See: Judgment of Asplin, LJ in Griffiths vs. TUI (UK) LTD [2021] EWCA Civ 1442)**

It is also widely established that an expert's report should not be relied on merely because it was not rebutted by other evidence, whether evidence of another expert or non-expert evidence, or rebutted in cross examination. The trial Court must consider all the evidence and circumstances of the case before deciding whether the expert evidence is cogent and worthy of belief. It is therefore clear that the learned trial Judge erred when he placed too much weight on the failure of the appellants to adduce expert evidence to challenge the relevant report. In the present case, counsel for the appellants, while cross-examining PW2, raised pertinent objections to the report, which should have been considered. We therefore allow ground 2 (b).

With respect to ground 2 (c), we shall begin by stating that an expert report that properly explains its findings and conclusions offers material that may guide the learned trial Judge's decision. The expert report in the present case is detailed and contains an explanation of the methodology adopted in arriving at the conclusions contained in it. It shows that the authors were knowledgeable about the matters on which they commented. The report

contains an overview of the Sukulu Mining Project in which UHNML was interested. It states as follows:

> **"Sukulu is located in the eastern region of the Republic of Uganda on the Sukulu Deposit Hills in Osukuru County, Tororo District. The location is approximately 10 km south of the industrial town of Tororo and approximately 210 km east of Kampala, the capital city of Uganda. Given its proximity to the town of Tororo, it is well connected by road to major Ugandan cities. The nearest major seaport is the port of Mombasa, which is located in Kenya.**
>
> **The Sukulu Hils comprise of an 18-metre-high hill group with a diameter of about 4 kilometres surrounded by northern, western and southern valleys.**
>
> **The Feasibility Study ("DFS") completed in November, 2013, indicated a mining area of approximately 26 $km^2$ which is comprised of three orebody sites: WK1 in the Western Valley, SK1 in the Southern Valley and SK2 in the northern and southern valleys.**
>
> **The DFS contemplated the development of the mineral deposit over two phases. Phase one would exploit the WK1 and SK1 orebodies for a period of approximately 40 years and Phase two would exploit the SK2 orebody in the northern valley for a further 20 years."**

The report stated that the mining area contains minerals such as phosphates, iron ore, niobium pentoxide, rare earth elements, among others. The report then goes on to provide valuation for the minerals and sets out the approached undertaken in the valuation as follows:

> **"5. Valuation methodology and approach**
>
> **Overview**
>
> **General approaches**
>
> **There are two fundamental approached to determining a fair market value. These are the liquidation approach and the going concern approach.**
>
> **A liquidation approach would be used if the business is not viable as a going concern or the return on the assets on a going concern basis is not adequate. This value is the net realizable value on an orderly**

**disposition made in a manner that would minimize the loss and or taxes thereon.**

**The going concern approach assumes a continuing business enterprise with a potential for economic future earnings. Where a business has commercial value as a going concern, three approached to valuation are commonly referred to as the following:**

**1. Cost approach**

**2. Income approach; and**

**3. Market approach."**

The report then goes on to analyse what each of the above-mentioned valuation methods entails. The experts preferred the income approach (DCF Method) for conducting the valuation of the mineral deposits at Sukuru, although they discussed the other two approaches. The report sets out the following conclusion about the value of the mineral deposit and the corresponding value of the respondent's shares:

**"We valued the Sukulu Deposit at December 31, 2013 and April 30, 2018. The December 31, 2013 valuation date represents the date closest to when Lv Weidong, acting in collusion with Mao Jie and Yang Junjia, purportedly fraudulently passed a board resolution of the company which transferred the Exploration licence to Guangzhou Dong Song Energy (Uganda) Ltd and GDS Energy. Should the court find that it is appropriate to find the fair market value of the Sukulu Deposit at the time the board resolution was passed, the December 31, 2013 valuation range should be used, with an allowance for an interest to a current date as the plaintiff has not received these monies as of the planned trial date in July 2018. The use of the April 30, 2018 valuation date recognized that the fair market value of the Sukulu Deposit has increased since December 31, 2013, for a number of reasons.**

**Based on the scope of our review, and subject to restrictions, limitations and major assumptions outlined in our report, we estimate the market value of the Mineral deposit as at December 31, 2013 to be in the range of $42.7 million to $65.0 million, with a midpoint of $53.5 million and as at April 30, 2018 to be in the range of $59.6 million to $84.4 million with a midpoint of $71.5 million.**

**The corresponding value of the fair market value of the plaintiff's equity interest as at December 31, 2013 was in a range of $14.9 million to $22.7 million with a midpoint of $18.7 million and as at April 30, 2018 was in the range of $20.9 million to $29.5 million, with a midpoint of $25.0 million. The fair market value of the plaintiff's equity was determined on a proportionate interest basis without considering the impact of minority or other discounts, based on the instruction provided to us by counsel.**

It must be observed that the appellants did not call an expert witness to provide an alternative valuation of the Sukulu mineral deposit. This was significant because successfully challenging the weaknesses of the methodology adopted by PW2 required evidence of another expert to point to a more appropriate valuation method. For all his efforts, counsel for the appellants at the trial, is not an expert in valuation and could not give an authoritative opinion on the matter.

We further note that counsel for the appellants sought to challenge the report on grounds that: 1) it probably gave an inaccurate depiction of the extent of the mineral resource as PW2 and his team conducted their valuation leading to the report without carrying out a feasibility exercise; 2) the report was conducted basing on a speculative assessment of the quantity of the mineral resource; 3) the experts could have used other approaches and not the income approach; 4) the report covered a larger area than had economically viable mineral deposits, among other objections.

We shall consider these objections shortly, but first, we must reiterate the established principle that the Court should not accept expert evidence merely because it was given by an expert. However, where the expert evidence is coherent and compelling, there must be other credible evidence rebutting it for it to be rejected wholly or in part. The rebuttal evidence may take the form of other expert evidence or other material that by inferential reasoning may dispel the expert evidence, wholly or in part.

Back to the objections to the report, counsel for the appellants, firstly, challenged the methodology applied in making the report and asserted that the experts should have relied on other valuation approaches and not the income approach. It must however be stated that valuation is not an exact

science and there are various methodologies that may be employed. The experts explained their methods in their report and counsel for the appellants, being an expert in law, and not valuation cannot successfully contest those methods, especially considering that they were not reasonable. Similarly, it can be stated that valuation is largely a speculative exercise. Therefore, the fact that a valuation is speculative does not, as of itself, undermine it. In our view, a valuation report will only be rejected if it contains unreasonable results.

The second objection was that the report attempted to determine the quantity of the mineral resource without conducting a feasibility exercise. However, in our view, PW2 explained that they relied on a previously conducted feasibility study to assess the value of the mineral resource. We accept that explanation.

The third objection was that the experts based their report on a larger area than actually contained commercially viable minerals. This objection was valid. Whereas the expert report showed that the area containing viable minerals was 26.5 square kilometers, according to the mining lease for Sukulu project, minerals could only be found in a smaller area of 112.2 hectares. Therefore, it is clear that the report was based on a faulty estimation of the area containing commercially viable minerals.

It is also our view, that the expert report gave a valuation that focused on the profits of the Sukulu project without conserving the financial challenges and problems it was likely to encounter. We observe that hardly any business goes on smoothly, and this is especially so with the mining business. I would refer to a publication by **Otto et al titled "Mining Royalties; a Global Study of their Impact on Investors, Government and Civil Society, World Bank (2006)**, which highlights the challenges faced by mining businesses, as follows:

> **"Mining is a particularly risky activity. This is partly because of the long gestation period associated with the development of most new mines and the difficulty of anticipating prior to development all the potential technical, geological, economic, and political problems. In addition, most mineral commodity markets are highly volatile over the business**

**cycle, with wide price fluctuations. When the world economy is booming, prices can be two to three times higher than during periods of slow or declining growth. As a result, profits vary greatly at any point in time for individual mining companies over time. They also vary greatly at any point in time among mining companies. Some miners turn out to be bonanzas; others never return a profit, even during the years of high prices."**

Further, the report did not discuss the duration of the mining lease for the Sukulu Project. It will be noted that under the Mining Act, 2003, the law in force at the time of granting the lease for the Sukulu project, a mining lease is granted for an initial period of 21 years, renewable for a further period of 15 years, for a combined duration of 36 years. The fact that these considerations did not figure prominently in the expert report further affected its probative value.

We have also noted the contention of counsel for the appellants that the relevant report was inadmissible because neither PW2 nor Mr. Harder, the experts who prepared it, were registered as surveyors and/or valuers in Uganda. We reject this contention. In our view, the Evidence Act, Cap. 6 does not preclude surveyors and/or valuers not registered in Uganda from giving expert evidence about valuation.

However, having earlier found that several objections to the report were valid, we conclude that whereas the expert's report was admissible, the highlighted objections, rendered the conclusions in the report unconvincing and the report to have low probative value. We therefore find that the learned trial Judge erred in failing to evaluate the report in relation to the objections we considered earlier. If he had done so, he would not have accepted the report as setting out a convincing valuation of the respondent's shares in UHNML. We therefore set aside the award of USD 25,000,000 to the respondent, which was based on the expert report. Grounds 2 (a) and 2 (b) fail, while ground 2 (c) must succeed.

However, the findings on ground 2 (c) should not, in our view, leave the respondent without any compensation. UHNML, a company in which the respondent held 35 shares, was granted the exploration licence for the Sukulu project. It is that exploration licence which was unlawfully transferred

to 1st appellant. It was also on the basis of that exploration licence that a mining lease was granted to the 5th respondent and subsequently a mining agreement concluded between the Government of Uganda and the 1st and 5th appellants. Had the licence not been transferred to the appellants, the respondent would have expected to participate in the Sukulu project and potentially earn dividends from her shares.

However, on the other hand, we note that the respondent participated only at the early stages of the project, mainly by promotion and incorporation of UHNML. It is apparent that the respondent did not possess sufficient finances to continuously invest in the mining project.

The respondent should however be given compensation which is commensurate with the role she played in the mining project. We find a sum of USD 5,000,000 representing the unpaid share capital contribution and loss of potential dividends in her shares in UHNML to be adequate. The amount awarded shall be paid directly to the respondent, and shall attract interest at a rate of 10% per annum from the date of the judgment of the trial Court.

**Ground 5**

Ground 5 arises from the learned trial Judge's findings in respect to a counter-claim filed by the 1st appellant against the respondent. The 1st appellant alleged that between 18th January, 2013 to 7th November, 2013 it remitted money to the tune of USD 10,894,419 to the respondent's accounts in China and to UHNML's account in Uganda, which the respondent represented that she used for meeting expenses for UHNML. In her defence, the respondent denied having received money from the 1st appellant and argued that she had never had dealings with that company. The respondent argued in the alternative that the receipts documenting the expenditure of the money by UHNML were kept by its accountants and that she had no duty to provide accountability.

The learned trial Judge, in his judgment, considered an issue on whether the respondent ought to have been compelled to give accountability. He concluded that accountability for the expenses incurred by UHNML were most likely reflected in the company's books of account as required under

**Section 154** of the **Companies Act, 2012**. The learned trial Judge considered that since the 2nd appellant had expelled the respondent from the running of UHNML and barred her from accessing the company's premises, the onus was on him and the other appellants to provide the books of accounts. The appellants contend in this appeal that the learned trial Judge was wrong to so find and argued that whereas there is a statutory requirement on each company to keep books of account, none were kept for UHNML. My view is that that argument cannot succeed because it would amount to this Court condoning a hypothesis based on non-compliance with the law.

We further observe that the parties disagreed on whether the respondent properly applied monies that were sent to her for the running of UHNML. The appellants contended that the respondent misappropriated that money, while the respondent contended that the she put the monies to use and that she used to withdraw it upon request from the finance department of UHNML. Unfortunately, none of the people who worked in the financial department were called as witnesses, and neither did the appellants apply to the Court to inspect UHNML's premises to ascertain whether any books of account had been kept there or not. The learned trial Judge was left with great difficulty in deciding whether there was any truth in the 1st appellant's counter-claim. In the end, after he considered the accusations and counter-accusations, he concluded that the counter-claim was not proven. We consider that the learned trial Judge was right in finding that the hostile conduct of the appellants rendered it difficult for the respondent to return to UHNML's premises and prepare accountability as requested. We also note that the learned trial Judge ordered for an audit of UHNML's books of account, an order which has not been challenged in this Court. This will help in establishing the true status of the respondent's alleged expenditure. Ground 5 of the appeal must also fail.

## Ground 3

It is not very clear which of the learned trial Judge's findings gave rise to this ground. However, the case for the respondent at the trial was that the appellant agreed to refund to her money to the tune of USD 5,000,000, being

her contribution towards paying part of UHNML's share capital at incorporation and to also give her a certain amount as appreciation fees for her role in getting UHNML's exploration licence. It appears that the appellants paid some money as refund and appreciation fees to the respondent's bank account in China but they subsequently applied and had the said accounts and money frozen. The learned trial Judge found that this money to the tune of USD 8,000,000 had been frozen at the prompting of the 1st appellant, and he ordered that it be unfrozen. If the recited facts are correct, we believe that the refund and appreciation fees were distinct from the respondent's shareholding in UHNML. Therefore, the learned trial Judge could rightly order for those monies to be paid while also separately resolving the question of the respondent's shareholding. I find that the appellants' contention in ground 3 as well as the submissions of counsel in that regard to be misconceived.

Ground 3 must also fail.

**Ground 4**

The appellants, in ground 4, challenge the learned trial Judge's finding that the appellants admitted that upon their prompting, money to the tune of USD 8,000,000, which the respondent held in her accounts in China was frozen by authorities in that country. we note that the 2nd appellant stated in his written statement, in part, as follows:

> **"That, after realizing that the plaintiff was not prepared to provide an accountability for the USD 8,000,000 (United States Dollars Eight Million) the 2nd defendant applied to the Chinese Government to freeze all the money on the plaintiff's account in China."**

The above passage from the 2nd appellant's evidence shows that the appellants admitted to prompting the freezing of the respondent's accounts. We also note that the learned trial Judge found that the appellants acted unlawfully by making false allegations to obtain the freezing of the respondent's bank account. We therefore cannot fault the learned trial Judge's findings on this point, because, as counsel for the respondent correctly highlighted, the appellants conceded to having prompted the freezing of the respondent's account containing USD 8,000,000.

Ground 4 must also fail.

**The cross appeal**

The cross appeal is affected by our earlier findings that the respondent was entitled to a sum of USD 5,000,000 as adequate compensation, and that the said amount would be paid to her personally. The cross appeal would be disposed of accordingly.

For the above reasons, the appeal partially succeeds. The findings in the appeal have an effect on the disposition of the cross-appeal. We hereby make the following declarations and orders that substitute the orders of the learned trial Judge:

a) The sum of USD 25,000,000 awarded to the respondent as compensation for loss of earnings following the unlawful transfer of UHNML's exploration licence, is set aside.

b) The respondent shall instead be paid a sum of 5,000,000/= as compensation.

c) Interest is awarded on the sum in (b) above at 8% per annum from the date of filing of the suit in the lower Court till payment in full.

d) As the appeal has partly succeeded, each party is ordered to bear their own costs of the appeal. The learned trial Judge's order on costs of the trial, is upheld.

e) The following orders made by the trial Court are upheld:

    i) The respondent is entitled to the frozen USD 8,000,000, which was conceded to by the 2nd appellant.

    ii) The sum in e (i) above shall attract interest at 8% per annum from date of filing the suit in the lower Court till payment in full.

    iii) The corporate veil of the 1st and 5th appellants shall be lifted for purposes of enabling the execution of the remedies granted against their shareholders and directors.

iv) The books of account of UHNML be subjected to an audit so as to arrive at the financial status of the company.

v) The costs in the High Court shall be borne by the appellants.

**We so order.**

Dated at Kampala this ..... day of.....2022.

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**Elizabeth Musoke**

Justice of Appeal

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**Muzamiru Mutangula Kibeedi**

Justice of Appeal

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**Christopher Gashirabake**

Justice of Appeal