IN THE HIGH COURT FOR ZAMBIA **2018/HPC/0034**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF : **THE ARBITRATION ACT, NO. 19 OF 2000**

IN THE MATTER OF : **AN APPLICATION TO SET ASIDE AN AWARD DATED 8TH NOVEMBER, 2017 AND 16TH JANUARY 2018 PURSUANT TO SECTION 17 (2) OF THE ARBITRATION ACT, NO. 19 OF 2000.**

B E T W E E N:

SA AIRLINK (PTY) LIMITED	**APPLICANT**
AND	
ZAMBIA SKYWAYS LIMITED	**1ST RESPONDENT**
YOUSUF VALLI ZUMLA	**2ND RESPONDENT**
LEWIS KUNDA	**3RD RESPONDENT**
SULEMAN AHMED PATEL	**4TH RESPONDENT**
GILLIAN LEE CASILLI	**5TH RESPONDENT**
DIEGO GAN- MARIA CASILLI	**6TH RESPONDENT**

Delivered in Chambers before the Honourable Mr. Justice Sunday B. Nkonde, SC at Lusaka this 12th day of September, 2019.

For the Applicant : *Mr. D. M. Chakoleka of Messrs Mulenga Mundashi Kasonde Legal Practitioners.*

For the Respondents: Mr. J. Madaika of Messrs J & M Associates

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J U D G M E N T

CASES REFERRED TO:

1) *China Henan International Cooperation Group Company Limited v G and G Nationwide (Z) Limited SCZ No. 8 of 2017*
2) *Zambia Revenue Authority v Tiger Limited and Zambia Development Agency, SCZ Judgment No. 11 of 2016*
3) *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA (2007) 1 SLR (R) 597)*
4) *PT Prima International Development v Kempinski Hotels SA and other Appeals (2012) 4 SLR 98*
5) *Ng Chin Siau and Others v How Kim Chuan (2007) 2 SLR 789*
6) *The Vimeira (1984) 2 Lloyd's Rep 66*
7) *Zermalt Holdings SA v Nu Life Upholstery Repairs Ltd (1985) 2 EGLR 14*
8) *Kerajaan Malaysia v Pewrira Bintang Holdings Sdn Bhd (2015) 1 CL J 617*
9) *Mpulungu Harbour Management Limited v Attorney-General and Mpulungu Harbour Corporation Limited – 2010/HPC/589*
10) *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172*
11) *Galaunia Farms Limited v National Milling Company Limited and National Milling Corporation Limited (2004) Z.R. 1 (S.C.)*
12) *Victor Koni v Attorney-General (1990-1992) Z.R. 20*
13) *Bonham-Carter v Hyde Park Hotel Ltd (1948) 64 TLR 177*
14) *Official Assignee v Chartered Industries of Singapore (1978)2 ML J 99*
15) *Mohammed Itowala v Variety Bureau De Change (SCZ Judgment No. 15 of 2001)*

LEGISLATION AND OTHER WORKS REFERRED TO:

1) *The Arbitration Act, No. 19 of 2000*
2) *The Arbitration (Court Proceedings) Act, Statutory Instrument No. 75 of 2001*
3) *Michael Mustill and Stewart Boyd. 1988.* ***Commercial Arbitration, 2nd Edition.***
4) *Sundra Rajoo. 2017.* ***Law, Practice and Procedure of Arbitration, 2nd Edition.***
5) *Gary B. Born. 2014.* ***International Arbitration, 2nd Edition.***

6) *Redfern, Hunter, Blackaby and Partasides. 2004.* ***Law and Practice of International Commercial Arbitration (4th Edition).***

BACKGROUND AND CLAIM

The delay in delivering this Judgment is regretted.

By way of Originating Summons and Affidavit in Support filed into Court on 30th January, 2018, the Applicant applied to the Court seeking Orders that:-

1. *The Award rendered by the Arbitral Tribunal on 8th November, 2017 be set aside in its entirety on the grounds that the award deals with a dispute not contemplated by, or not falling within the terms of the submission to arbitration, and thus contains decisions on matters beyond the scope of the submission to arbitration thereof;*

2. *The Award rendered by the Arbitral Tribunal on 8th November, 2017 and 16th January, 2018 be set aside for being contrary to public policy to the extent that the Tribunal awarded expectation damages outside the scope of the submission to arbitration.*

3. *The Award rendered by the Arbitral Tribunal on 8th November, 2017 be set aside for being contrary to public policy to the extent that the Arbitral Tribunal awarded expectation damages to the 4th Respondent notwithstanding the fact that the said Respondent did not prosecute his*

claim, if at all.

4. *The Award rendered by the Arbitral Tribunal on 8th November, 2017 be set aside for being contrary to public policy to the extent that the Tribunal awarded reliance damages outside the scope of the submission to arbitration.*

5. *The Award rendered by the Arbitral Tribunal on 8th November, 2017 be set aside for being contrary to public policy to the extent that the Tribunal proceeded to award reliance damages to the Respondent in the absence of any evidence to support a claim for reliance damages.*

6. *The Award rendered by the Arbitral Tribunal on 8th November, 2017 be set aside for being contrary to public policy to the extent that the Tribunal awarded reliance damages in respect of a non-party to the arbitration proceedings.*

7. *The Award rendered by the Arbitral Tribunal on 8th November, 2017 is set aside for being contrary to public policy to the extent that the Tribunal awarded reliance damages not withstanding express provision in the Shareholders Agreement to the effect the parties were to bear their own costs for negotiation and implementation of the proposed joint venture.*

8. *The Arbitration process including the analysis of evidence and the Award was not in accordance with the arbitration procedure as agreed by the parties and as set out in the Orders for Directions.*

9. *To the extent that the Arbitration process was not in accordance with the arbitration procedure as agreed by the parties, the Arbitration Award is contrary to public policy.*

10. *The Shareholders Agreement as read with the Voting Agreement was contrary to public policy and the dispute thereof was therefore not capable of determination by arbitration.*

11. *In the event that the Court is of the view that the dispute is capable of determination by arbitration, the matter be referred back to arbitration for determination of the case submitted to the Arbitral Tribunal by the Applicant and the Respondents;*

12. *The Court grants the applicant any other relief the Court may deem fit or necessary; and*

13. *The Applicant be granted costs of and incidental to this action.*

EVIDENCE

(A) Affidavit in Support

In the Affidavit in Support sworn by DE VILLIERS ENGELBRECHT, the Financial Director in the Applicant (SA Airlink (pty) Limited), it was deponed as follows:

On 16th June 2014, the Applicant entered into and executed a Memorandum of Understanding ("MOU") with the 1st Respondent, the 5th Respondent and the 6th Respondent. The purpose of the MOU was for the Applicant and the 1st

Respondent to enter into discussions and possible co-operation towards the establishment of a possible joint venture which would provide passenger and cargo travel services on domestic routes in Zambia, as well as international routes originating from Zambia.

The MOU had an express provision to the effect that it would expire after 180 days from the date of its execution, and the MOU did indeed terminate by effluxion of time after the expiration of the 180 days.

Following the expiry of the MOU, the Applicant and the Respondents (other than the 1st Respondent), sometime in 2014 executed a Shareholders Agreement for purposes of governing their relationship regarding the proposed joint venture in the 1st Respondent Company. The 1st Respondent was not a party to the Shareholders Agreement. The 1st Respondent was only added as a party to the arbitration proceedings on the basis that it was claiming through or under a party to the arbitration proceedings, despite the name of the party through whom the 1st Respondent was claiming not being indicated.

Further, that at the time of executing the Shareholders Agreement, the Applicant was not a Shareholder in the 1st Respondent but was merely proposed to become a Shareholder in the 1st Respondent upon the 1st Respondent increasing its share capital and in fact it was agreed that at all material times, the Applicant would have the majority shareholding in the 1st Respondent.

The Shareholders Agreement had the following material conditions precedent for it becoming effective:-

(a) Written Approval had to be obtained regarding the shareholding structure and the operations of the 1st Respondent;

(b) The Applicant was supposed to pay the sum of USD300,000 capitalization in the Bank Account of the 1st Respondent within 7 days of the receipt of the Regulatory Approval referred to in (a) above.

The proposed shareholding structure was for the Applicant to hold 70 per cent of the shares in the 1st Respondent, upon the latter increasing its share capital. The structure which was proposed and agreed upon by all the parties to the Shareholders Agreement was that the Applicant would directly hold 49 per cent of the shares in the 1st Respondent while 21 per cent of the shares would be held by the 5th Respondent on behalf of the Applicant, making a total shareholding of 70 per cent in favour of the Applicant.

In furtherance of the proposed shareholding structure, the Applicant, the 1st Respondent and the 5th Respondent executed a Voting Agreement wherein it was expressly indicated that the 5th Respondent would hold 21 per cent shares in the 1st Respondent on behalf of the Applicant and the 5th Respondent would exercise voting rights in line with the instructions of the Applicant.

However, and due to differences during the negotiations touching on the proposed joint venture, the Applicant officially communicated its withdrawal from the proposed joint venture.

Meanwhile, the Applicant was not aware and was never informed that Regulatory Approval had been obtained by the 1st Respondent and only came to know of the same after the proposed joint venture had been terminated. The Applicant was, therefore, never made aware of the fact that the first condition precedent was met and, therefore, never put in a position to perform in order for the second condition precedent to be met.

Thus, the Respondents were aggrieved with the termination and declared a dispute in line with the arbitration clause contained in the Shareholders Agreement.

Pursuant to the arbitration agreement, on 27th January 2016, the President of the Law Association of Zambia appointed his Lordship Mr. Justice Mathew M.S.W. Ngulube (Rtd) as the sole arbitrator.

Then on 30th March 2016, a preliminary interlocutory meeting was accordingly held between the parties and the Arbitral Tribunal, after which Order for Direction No. 2 was issued. The said Order for Directions set out the procedure which was agreed upon by the parties in the conduct of the arbitration proceedings including the strict application of the rules of evidence.

During one of the preliminary issues that had been raised by the Applicant, the Arbitral Tribunal ruled that the 1st Respondent despite not having been a party to the arbitration agreement contained in the Shareholders Agreement could be made a party to the arbitration proceedings by virtue of claiming through or under a party to the arbitration agreement. On the basis of this Interim Award

that the 1st Respondent was then joined to the arbitration proceedings as claiming through or under a party to the arbitration proceedings and in no other capacity.

The Respondents on 22nd November 2016, then filed a detailed Statement of Case and Accompanying Bundle of Documents settling out their claims against the Applicant herein and seeking the following reliefs before the Arbitral Tribunal:

(a) Specific Performance of the Shareholders Agreement to compel Airlink to pay the US$300,000 capitalization amount;

(b) Special damages resulting from Airlink's breach as follows:

(i) Damages in the sum of US$1,618,573.98 being Zambia Skyways' loss of business resulting from Airlink's breach;

(ii) Damages of the total sum of US$350,000 being the aggregate of the actual legal, consultancy and technical advisory costs incurred as a result of the proposed joint venture;

(iii) Loss of profits for the period of May 2015 until a date to be determined by the Arbitrator

(c) Interest on any damages

(d) Further and other relief as the Tribunal may deem fit; and

(e) Costs

On 16th December 2016, the Applicant filed before the Arbitral Tribunal its Defence traversing the Respondents' claims as contained in the Respondents'

Statement of Case. The Statement of Defence was accompanied by a Bundle of Documents.

On 12th January 2017, the Respondents then filed a Statement of Reply to the Applicant's Statement of Defence.

Upon the pleadings being closed, the parties to the arbitration proceedings then proceeded to file their respective Witness Statements before the Arbitral Tribunal. Oral arbitration hearings were then held and submissions made thereafter.

On 8th November 2017, the Arbitral Tribunal then rendered the Final Award wherein the Respondents were awarded reliance damages and expectation damages but denied specific performance on the basis that ordering specific performance would be contrary to public policy on account of the shareholding structure in the 1st Respondent.

In the Award rendered by the Arbitral Tribunal, it was essentially ruled as follows:

(a) *That Ordering specific performance would be contrary to public policy because the shareholding structure reflected in the Shareholders Agreement as modified by the Voting Agreement violated the provisions of the Aviation Act and the applicable international conventions on aviation. The Tribunal held that the Shareholding Agreement as modified by the Voting Agreement worked to vitiate the Written Regulatory Approval on the ground of misrepresentation. In sum, the Tribunal refused to Order specific performance on the ground that doing so would*

be contrary to public policy.

(b) *That the Respondents who were not a part to the Voting Agreement were not aware of the increased shareholding by the Applicant and therefore entitled to reliance damages for breach of the Shareholders Agreement, breach of the Wet Lease Agreement, for the offending shareholding structure and for terminating the joint venture. In coming up with the figure for expectation damages, the Tribunal used the computations that had been submitted in relation to the expected profits for 1st Respondent but used a monthly income of half what the Respondents projected over a 12 month period awarded the 2nd, 3rd and 4th Respondents a total of US$432,000 as representing 18 per cent of their shareholding in the 1st Respondent.*

(c) *That the 1st Respondent should be paid the sum of US$40,000 to be paid over to 3rd Respondent and Captain Mulundika (a non party to the arbitration proceedings); and*

(d) *That the 1st Respondent is entitled to recover US$175,000 reliance damages from the Applicant. This verdict by the Arbitral Tribunal was made notwithstanding that the 1st Respondent was supposed to have only been claiming through or under a party to the arbitration proceedings.*

It was averred that upon receipt of the Final Award, the Applicant then made a Request for the Tribunal to correct computational errors in line with Article 33 of

the **UNCITRAL Model Law** of the **Arbitration Act**. The request was opposed by the Respondents.

On 16th January 2017, the Arbitral Tribunal rendered a Supplementary Award to the effect that there were no computational errors in its initial Award and it was upon perusal of the Final Award that he, the deponent, firstly noticed that the Arbitral Tribunal made a finding to the effect that the Applicant was in breach of the Wet Lease Agreement, which agreement was not part of the dispute that had been submitted for determination. Secondly, that the Arbitral Tribunal awarded damages to Captain Mulundika, who was not a party to the arbitration proceedings, and was not a party to the Shareholders Agreement. Further that the 4th Respondent did not prosecute his case before the Tribunal and no evidence was given on his behalf but the Tribunal still granted the 4th Respondent expectation damages notwithstanding the agreement of the parties to the effect that the rules of evidence were to be strictly followed in the arbitration proceedings. Similarly, from the pleadings filed by the parties, none of the 2nd, 3rd and 4th Respondent claimed expectation damages against the Applicant but the Tribunal proceeded to award expectation damages to the said Respondents.

To understand the fact that there was no claim for expectation damages on the part of the 2nd, 3rd and 4th Respondents, Mr. Engelbrecht sought to set out the manner in which, in his view, the Respondents claims evolved before the Honourable Tribunal, *inter alia*, as follows:-

(a) That in the month of May 2016, the 1st Respondent commenced arbitration proceedings against the Applicant by filing A statement of

Case seeking for specific performance of the Shareholders Agreement, special damages in the sum of US$1,618,573.98 for loss of business and special damages in the sum of US$350,000 for costs incurred in seeking to implement the proposed joint venture.

(b) *That on 1st June 2016, the Applicant filed a Notice to Raise Preliminary Issues before the Arbitral Tribunal on the basis, inter alia, that the 1st Respondent did not have the locus standi to commence the arbitration proceedings against the Applicant because it was not a party to the Shareholders Agreement.*

(c) *That on 28th June 2016, the 1st Respondent filed an Affidavit in Opposition to the Notice to Raise Preliminary arguing that the 1st Respondent was commencing the action on behalf of the Shareholders in a representative capacity.*

(d) *That on 12th July 2016, the Applicant herein then filed Skeleton Arguments in support of the Preliminary Issues it had raised before the Tribunal, effectively arguing that it was not possible for the 1st Respondent to commence arbitration proceedings in a representative capacity on behalf of its shareholders because the 1st Respondent and the Shareholders were not in the same class.*

(e) *That following a hearing on 21st July 2016 of the Preliminary Issues raised by the Applicant, the Arbitral Tribunal ordered vide Order for Directions No. 4 that the Statement of Case referred to in (a) above*

should be amended so as to reflect the signatories of the Shareholders Agreement as parties to the arbitration proceedings.

(f) That consequent to (e) above, the Statement of Case on 28th July 2016 was amended to reflect the 2nd, 3rd, 4th and 5th Respondents as the only Claimants. In the Amended Statement of Case, the reliefs that were being sought by the Claimants were set out in paragraph 40 of the Statement of Case and did not include a claim for expectation damages in their own stead.

(g) That on 18th August 2016, the Applicant for the first time filed its Statement of Defence before the Arbitral Tribunal, traversing the claims that were being made in the Statement of Case. In particular, the Applicant in paragraph 40 of its Statement of Defence pointed out that the Respondents had not furnished any consideration towards the Applicant. The Applicant in its Statement of Defence also pointed out that the 1st Respondent herein was not a party to the arbitration proceedings and the Claimants could not therefore seek to recover damages for loss allegedly suffered by the 1st Respondent.

(h) That from the Statement of Defence that was filed before the Arbitral Tribunal by the Applicant, the Respondents on 19th September 2016 then filed a Notice to Raise Preliminary Issues seeking for a determination of the Arbitral Tribunal on whether the Respondents were entitled to claim damages suffered by the 1st Respondent who was not a party to the arbitration proceedings. The Notice to Raise Preliminary

Issues was then supported by Skeleton Arguments that were filed on 27th September 2016.

(i) *That consequent to the Notice to Raise Preliminary Issues that had been filed by the Respondents, the same then culminated in an application for joinder of the 1st Respondent and the 6th Respondent to the arbitration proceedings. The application for joinder was heard by the Arbitral Tribunal on 25th October 2016 and the Interim Award was rendered by the Arbitral Tribunal on 31st October 2016.*

(j) *That the Arbitral Tribunal joined the 1st Respondent as a party to the proceedings on the basis that the 1st Respondent was a party claiming through or under a party to the Arbitration Agreement. ... Suffice to add that the Arbitral Tribunal did not indicate which Respondent the 1st Respondent was claiming through or under.*

(k) *That following from the Interim Award on Joinder, the Respondents then filed an Amended Statement of Case and Bundle of Documents on 22nd November 2016. ... The said Amended Statement of Case did not contain any claim for expectation damages on the part of the 2nd, 3rd and 4th respondents.*

(l) *That following the Interim Award on Joinder, the Arbitral Tribunal then issued Order for Directions No. 5 to guide the parties.*

According to Mr. Engelbrecht, the Arbitral Tribunal in both the Final Award and the Supplementary Award did expressly acknowledge the fact that there was no evidence that had been adduced with respect to the expectation damages that were granted to the 2nd, 3rd and 4th Respondents. Further that, in their respective Witness Statements, both the 2nd and 3rd Respondent did not indicate that they were claiming any expectation damages on account of money they would have received arising from their shareholding in the 1st Respondent.

Mr. Engelbrecht amplified by stating that, in their respective Witness Statements, the 2nd and 3rd Defendants made specific claims against the Applicant, which claims did not include expectation damages against the Applicant. In the case of the 2nd Respondent's Witness Statement, he personally only claimed for the sum of US$60,000 as consultancy services, as well as damages for loss of business in respect of the failed hangar lease negotiations. In the case of the 3rd Respondent, his only personal claim as per his own Witness Statement was for consultancy fees. In the case of the case of the 4th Respondent, he did not make any claim against the Applicant. There was equally no evidence that was given on behalf of the 4th Respondent. Apart from the 1st Respondent, the 2nd, 3rd and 4th Respondents did not make any claim for damages in their capacity as Shareholders in the 1st Respondent.

Mr. Engelbrecht also deponed that in the proceedings, the issue of money that was expected to be received by the 2nd, 3rd and 4th Respondent from the proposed joint venture did not arise at any one point because the same did not form part of the dispute that was submitted to the Arbitral Tribunal.

In relation to reliance damages, Mr. Engelbrecht deponed that despite the Arbitral Tribunal in the Final Award finding that the Respondents did not adduce any evidence to prove reliance damages, the Arbitral Tribunal still awarded reliance damages in the absence of evidence notwithstanding the agreement of the parties as per Order for Direction No. 2 to the effect that the rules of evidence were to be strictly followed. Further, that the Arbitral Tribunal awarded reliance damages to the 1st Respondent in its own right, notwithstanding the fact that the 1st Respondent could only claim through or under a party to the arbitration agreement.

With respect to costs, it was stated that despite the mutual agreement in the Shareholders Agreement that the parties were to bear their own costs with respect to the implementation of the proposed joint venture, the Arbitral Tribunal still proceeded to award reliance damages to the 1st Respondent.

(B) Affidavit in Opposition

The Respondents opposed the application. The Affidavit in Opposition was sworn by the 2nd Respondent, Yousuf Valli Zumla who stated as follows: Foremostly, that most of the Applicant's averments went to questioning the merits of the Arbitral Tribunal's Award, and therefore, not relevant to this Court which cannot review the Arbitral process and merits of the Award. The main issue before the Arbitral Tribunal was with regard the Shareholders Agreement the purpose of which was to govern the proposed joint venture between the parties. The failure to perform Shareholders Agreement necessitated the arbitral proceedings and to state that expectation damages and reliance damages arising out of the said

Shareholders Agreement was beyond the scope of the arbitral tribunal was, therefore, incorrect.

According to Mr. Zumla, the Applicant erroneously believed that the Statement of Case having not indicated "expectation damage" and "reliance damage" put the said reliefs beyond the scope of the powers of the Arbitral Tribunal and yet a perusal of the Statement of Claim indicates that the Respondents did in fact seek "**Further and other relief as the tribunal may seem fit**", and an Arbitrator has the power to award any relief allowed under law.

To emphasize the point, Mr. Zumla stated that detailed documentation with regard the dispute between the parties was brought before the Arbitral Tribunal and in the Respondents' presentation of its case before the Tribunal, it was indeed evident that expectation damages were and are a fitting relief with regard the issue relating to the performance of the Shareholders Agreement brought to the Arbitral Tribunal for consideration.

Further, Mr. Zumla stated that detailed documentation was presented before the Arbitral Tribunal and from this evidence, the Arbitrator correctly found that there was breach of the Wet Lease Agreement and the Arbitral Tribunal being under a mandate by virtue of the Statement of Claim to grant "**Further and other relief as the Tribunal may deem fit**", was on firm ground to making a finding to the effect that the Applicant was in breach of the Wet Lease Agreement.

In relation to Joinder, Mr. Zumla stated that the issue as to the Joinder of the 1st Respondent to the Arbitral proceedings was dealt with at interim award stage and

cannot be reopened at this stage. Further, that the Joinder of the 1st Respondent by the Arbitrator was not in any way qualified or limited under the said Interim Award as was sought to be implied by the Applicant. Clause 13 of the Interim Award clearly joined the 1st Respondent as a party with all full rights and liabilities of a party to arbitration and without any restriction on the rights, liabilities or entitlements due to the 1st Respondent under the arbitration.

On the assertion by the Applicant that certain Claimants, that is the 4th Respondent herein and one Captain Mulundika, did not give evidence and thereby did not prosecute their claim, Mr. Zumla stated that the Respondents, who were the Claimants in the arbitration proceedings opted to streamline their evidence by calling only four (4) Witnesses, including himself, to give evidence on behalf of all the Claimants and avoid repetition, since the claims were joint and stemmed from the same documents and the same transaction.

The Zumla concluded by stating that the Originating Summons and its Supporting Affidavit did not disclose a reasonable cause of action in that the said pleadings did not disclose any legitimate grounds upon which an Award can be set aside and that the Applicant's entire process amounted to an abuse of the Court process and an attempt to appeal the Arbitral Award contrary to the provisions of the law.

This was the totality of the evidence presented by the parties.

SKELETON ARGUMENTS

(A) APPLICANT'S ARGUMENTS

In the Skeleton Arguments, Mr. Chakoleka, Learned Counsel for the Applicant started by referring to **Section 17 (2)** of the **Arbitration Act** which provides as follows:-

" (2) ***An Arbitral Award may be set aside by the Court only if***

(a) the party making the application furnishes proof that

(i) a party to the Arbitration Agreement was under some incapacity; or the said Agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the laws of Zambia;

(ii) the party making the application was not given proper notice of the appointment of an arbitral or of the arbitral proceedings or was otherwise unable to present his case;

(iii) the award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains decisions on matters beyond the scope of the submission to

arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;

(B.) the composition of the arbitration tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with this Act or the law of the Country where the arbitration took place; or

(C.) the award has not yet become binding on the parties or has been set aside or suspended by a Court of the Country in which, or under the law of which, that award was made; or

(b) if the Court finds that –

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zambia; or

(ii) the award is in conflict with public policy; or

(iii) the making of the award was induced or effected by fraud, corruption or misrepresentation"

The Applicant's Learned Counsel then argued in turn on each of the applicant's grounds for setting aside the Award as follows:-

GROUND 1.

The Award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.

Mr. Chakoleka submitted that the Award rendered by the Arbitral Tribunal on 8th November, 2017 delved into issues that had not been pleaded thereby deciding on issues in respect of which the Applicant was not given a chance to be heard and contrary to the law.

Mr. Chakoleka further submitted that the Supreme Court of Zambia has given adequate guidance as to how the Model Law must be treated from the Zambian context. In the case of **China Henan International Cooperation Group Company Limited v G and G Nationwide (Z) Limited**,[1] the Supreme Court of Zambia guided as follows at pages J26-29:-

> " ***Before we determine this ground we feel that it is necessary for us to explain once again the relationship between the Arbitration Act and the Model Law which is the First Schedule to the Act. We are compelled to do so because of the position taken by Counsel for the Appellant that Articles 13 and 16 of the Model Law are subordinate to Section 17 of the Arbitration Act because the Model Law is a Schedule to the Arbitration Act.***

The Model Law was adopted by the United Nation's Commission on International Trade Law (UNCITRAL) in June 1985 and was introduced onto the international plane for purposes of harmonizing arbitration laws and thus providing a law consistent with the United Nations J27 P.258 on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"). The need for harmonizing international arbitration laws stems from the fact that on the international plane arbitration is the preferred choice of dispute resolution in international trade and other relationships, resulting in a need to have a uniform set of rules relating to international arbitration to avoid the uncertainty and inconsistency that arises from conflicting legal regimes, particularly at the point of enforcing an award. After the Model Law was introduced, nations were given an opportunity to adopt it into their domestic legislation either in its entirety or with modifications. When the old Arbitration Act, Chapter 40 of our laws was repealed and replaced by the Arbitration Act, Zambia chose to adopt the Model Law with modifications which are contained in the sections in the Arbitration Act. By this we mean that, the Sections in the Arbitration Act vary the application of the Model Law by substituting certain Articles in the Model Law with the sections in the Arbitration Act. The First Schedule to the Arbitration Act confirms this because the articles of the Model Law that are not applicable to Zambia are clearly indicated as "modified by" specified sections of the Act. The effect of the foregoing, as we stated in the case of Zambia Revenue Authority v Tiger Limited and Zambia Development Agency, is

that our Arbitration Law is in effect the Model Law. This situation is not unique to Zambia alone as evidenced by the Zimbabwean Arbitration Act which also has the Model Law appended as Schedule 1 to the Act. In explaining the relationship between the Zimbabwean Act and the Model Law three renowned legal experts and practitioners in Zimbabwe, namely I. A. Donovan, AR. McMillan SC and M.A. Masunda, writing in the text Sourcebook of Arbitration Materials, had this to say on the issue:

> *"The Act itself contains only enabling and incidental provisions while the substance of the new Arbitration Law of Zimbabwe is to be found in Schedule 1."*

Indeed, this is the position we have also taken in Zambia and from a Practical point of view, in applying the Arbitration Act one must at all times look at the First Schedule, first, and only where a particular Article is not applicable, does one resort to the Section in the Act that has modified the Article."

Since the Model Law is actually the **Arbitration Act**, the Applicant felt justified to cite cases from other Model Law Countries that have interpreted the meaning of **Article 34(2) (a) (iii)** of the **Model Law** contending that **Article 34(2)(a)(iii)** of the **Model Law** is the same as **Section 17 (2)(a)(iii)** of the **Arbitration Act**. The authority for citing the cases passed in other Model Law Countries is based on the guidance of the Supreme Court of Zambia in the case

of **Zambia Revenue Authority v Tiger Limited and Zambia Development Agency**[2] wherein it was held as follows at page J31-32:-

> ***"The provision relating to the setting aside of awards in the Model Law is article 34 which has been modified or varied by Section 17. The extent of the modification or variation is merely the inclusion of subsection 2(a) (v) and 2(b)(iii) which appear in our reproduction of Section 17 in the earlier part of this Judgment. Subsection 2(b)(ii) relating to the ground of an award being in conflict with public policy was not interfered with in adopting the Model Law.***
>
> ***We have found it necessary to state the foregoing because we have no case law or jurisprudence in Zambia which explains when an award would be considered to be in conflict with public policy. We have therefore sought guidance from the decisions of other Model Law Countries which have interpreted the provisions of the Model Law. In doing so, we are on firm ground in view of the clarification we have given that the Arbitration Act is in effect the Model Law and having regard to Section 2(3) which states in part as follows:***
>
> > **.... in interpreting the provisions of the First Schedule, regard shall be had to its international origin and to the desirability of achieving international uniformity in its interpretation and application.**

When interpreting the Model Law, one must therefore, not lose sight of the fact that it is an international instrument to be used on the international plane. Further that there is need to have uniformity worldwide, on how the articles of the Model Law are interpreted."

It was submitted, therefore, that **Article 34 (2)(a)(iii)** of the **Model Law** has not been varied by the **Arbitration Act**. The Supreme Court in the case cited above did emphasize the need for uniformity worldwide in interpreting the Articles of the Model Law and in this regard the Applicant urged this Honourable Court to adopt the interpretations in other Model Law Countries on this ground.

It was stressed that the Award in issue is captured by **Section 17 (2) (a) (iii)** of the **Arbitration Act** when the Tribunal delved into and decided on the following issues:-

(a) *When the Tribunal proceeded to award Expectation Damages in the sum of US$432,000 to the 2nd, 3rd and 4th Respondents when the said damages were not claimed or pleaded by the said Respondents in their pleadings;*

(b) *When the Tribunal ruled that the applicant was in breach of the Wet Lease Agreement, which agreement was neither the subject of determination in the arbitral proceedings nor the subject of an arbitration agreement between the Applicant and the*

Respondent; and

(c) When the Tribunal ordered that the Applicant should pay the sum of US$20,000 as reliance damages to Captain Mulundika, who was neither a party to the arbitration proceedings nor the subject of an arbitration agreement between him and the Applicant.

The Applicant then proceeded to submit on the above issues.

(a) The grant of Expectation Damages in the sum of US$432,000 to the 2nd, 3rd and 4th Respondents when the said damages were not claimed by the said Respondents in their pleadings.

On this limb of Ground 1, Mr. Chakoleka submitted that the Tribunal exceeded the scope of the submission when it granted the sum of US$432,000 to the 2nd, 3rd and 4th Respondent despite the fact that there was no such relief which was sought by the said Respondents. To support the argument, Mr. Chakoleka stressed that the record will show that the Tribunal proceeded to award the 2nd, 3rd and 4th Respondents damages in respect of what they allegedly would have earned from the joint venture as Shareholders in the 1st Respondent as evident from paragraph 6.16 of the Award of 8th November, 2017 where the Tribunal stated:- ***"The major damages of a compensatory nature in these proceedings would be the loss of the money the Shareholders expected to get out of the joint venture."*** Therefore, the Tribunal considered the money the Shareholders

expected to get out of the joint venture as the major compensatory damages that were to be granted, and that the statement cited above from the Award of the Tribunal was the first time the Applicant was becoming aware of a claim in respect of the money the Shareholders expected to get from the joint venture.

It was, however, contended that the damages which the Tribunal considered as being the major compensatory damages were not pleaded by any of the Shareholders of the 1st Respondent, from the first Statement of Case in May 2016 to the final Statement of Case of 22nd November, 2016. There was no plea in respect of damages for money that the Shareholders expected to earn from the joint venture in their capacity as Shareholders in the 1st Respondent.

In reaction to the Respondents' contention that the damages in issue were pleaded under "**further and other relief as the Tribunal may deem fit**," Mr. Chakoleka submitted that the contention flies in the face of the Award itself and the law that requires special damages to be specifically pleaded and then strictly proved. Firstly, this contention by the Respondents was a clear admission that the damages in issue were never specifically pleaded by the 2nd, 3rd and 4th Respondents and, therefore, did not form part of the dispute that was actually submitted for determination. Secondly, the Tribunal in paragraph 6.16 of the Award described the damages as being **'major damages of a compensatory nature'** which entails that the same were actually the main damages as opposed to being further and other relief. Thirdly, the Tribunal expressly indicated that it had not granted further and other relief as pleaded in the Statement of Case and in this regard, Mr. Chakoleka referred the Court to where the Tribunal stated as

follows in paragraph 10.4 of the Award: "**I declare that no further awards are due or warranted such as requested in the prayers for further and other relief.**" Lastly, it was submitted that the further and other relief can never be relief in respect of which the other party has not been given an opportunity to be heard. In this regard, Learned Counsel maintained that the sum US$432,000 granted to the 2nd, 3rd and 4th Respondent were not pleaded and clearly fell outside the scope of the submission to arbitration.

Mr. Chakoleka further contended that the position of the law is that scope of submission relates to the dispute that is actually submitted for determination by the parties as per their pleadings. On the jurisdiction of a Tribunal, Mr. Chakoleka cited **G. Born, the Learned Author of International Arbitration, 2nd Edition** where he states at page 3125-3126 as follows:-

> ***The most common basis for annulling awards under Article 34 (2) (a) (iii) is where the arbitrators ruled on issues not presented to them by the parties.***

Similarly, **Redfern, Hunter, Blackaby and Partasides, Law and Practice of International Commercial Arbitration (4th Ed.)** where it is stated as follows: "***This third ground of challenge under the Model Law contemplates a situation in which an award has been made by a tribunal that did have jurisdiction to deal with the dispute, but which exceeded its powers by dealing with matters that had not been submitted to it ...*** "Further, in the case of **PT Asuransi Jasa**

Indonesia (Persero) v Dexia Bank SA[3], the Singapore Court of Appeal held as follows:-

> ***" The law on the jurisdiction of an arbitral tribunal is well established. Article 34(2)(a)(iii) of the Model Law merely reflects the basic principle that an arbitral tribunal has no jurisdiction to decide any issue not referred to it for determination by the parties."***

The Applicant's Learned Counsel maintained that the above demonstrated that an Arbitral Tribunal's jurisdiction is limited to the Issues that have actually been presented to it by the parties for determination. In this regard, in relation to **'submission to arbitration'** the Court was invited to visit the decision of the Singapore Court of Appeal in the case of **PT Prima International Development v Kempinski Hotels SA and other Appeals**[4] where it was held as follows in relation to **Article 34 (2) (a) (iii)** of the **Model Law:-**

> ***An Arbitration Agreement is merely an agreement between parties to submit their disputes for arbitration. The disputes submitted for arbitration determine the scope of the arbitration. It is plain that the scope of an arbitration agreement in the broad sense is not the same as the scope of the submission to arbitration. The former must encompass the latter, but the converse does not necessarily apply, in that the particular matters submitted for arbitration may not be all the matters covered by the arbitration agreement. The parties to an arbitration agreement are not obliged to submit whatever disputes they may have***

for arbitration. Those disputes which they choose to submit for arbitration will demarcate the jurisdiction of the arbitral tribunal in the arbitral proceedings between them. An arbitral tribunal has no jurisdiction to resolve disputes which have not been referred to it in the submission to arbitration.

It was further submitted that in the same case, the Singapore Court of Appeal held and guided as follows in relation to the role of pleadings in arbitration proceedings:-

> " *The role of pleadings in arbitral proceedings is to provide a convenient way for the parties to define the jurisdiction of the arbitrator by setting out the precise nature and scope of the disputes in respect of which they seek the arbitrator's adjudication. It is for this purpose that Art 23 of the Model Law provides for the compulsory filing of pleadings as follows:*

STATEMENTS OF CLAIM AND DEFENCE

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the Responded shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements

of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his Claim or Defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it."

The Court of Appeal further went to state as follows in relation to pleadings and the jurisdiction of an arbitral tribunal:-

" Although there is an important difference between arbitration and litigation in the sense that arbitration is consensual in nature whereas litigation is not, the basic principles applicable to determine the jurisdiction of the arbitrator or the Court to decide a dispute raised by the parties are generally the same. In arbitration, the parties can determine the scope of the arbitration; so can the parties in litigation vis-à-vis the issues to be tried ...

The established principles in this area of the law are clear. As Lord Normand succinctly stated in Esso Petroleum Co Ltd v Southport Corporation (1956) AC 218 at 238-239:

The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. ...

... To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

In the present case, the scope of the parties' submission to arbitration is delineated by the Notice of Arbitration filed by Kempinski on 20th May, 2002 in accordance with Art 20 of the Management Contract."

Mr. Chakoleka, therefore, submitted that it was clear that an Arbitral Tribunal in a Model Law Jurisdiction like Zambia derives its jurisdiction from the pleadings of the parties, as opposed to the arbitration agreement and an Arbitral Tribunal will be considered to have acted outside the scope of the submission when it grants a relief that was not pleaded by the parties.

Mr. Chakoleka then submitted on the evidence in form of Witness Statements to further show that the damages awarded to the 2nd, 3rd and 4th Respondents were not pleaded as follows:-

Personally, I have lost out on the income that was pre-agreed

with the Respondent for my consultancy services as I expended a considerable amount of time and energy on advising and assisting the Company on the merger with the Respondent. My total cost is in the sum of USD60,000 excluding taxes

Since there was no pleading on the damages in issue, the 2nd Respondent did not lead any evidence as to the money he expected to get from the joint venture as a Shareholder in the 1st Respondent.

In relation to the 3rd Respondent, in his Witness Statement, the 3rd Respondent equally did not make a claim for any damages in the form of money he would have received from the joint venture in his capacity as a Shareholder in the 1st Respondent. In paragraph 29 of the 3rd Respondent's Witness Statement circumscribes his claim as follows:-

"***The Respondent must pay for the damages that have been suffered by the parties. Personally, I should have earned the sum of USD2, 500 as consultancy fees for the work that I did towards the joint venture for the first three months and USD7, 500 thereafter. These monies have never been paid to me and the Respondent as a result of the breach ought to pay these sums.***"

In relation to the 4th Respondent, there was no evidence that was adduced by him and neither was there any evidence that was adduced on his behalf in the arbitral

proceedings for purposes of showing how much money he expected to earn from their joint venture in his capacity as a Shareholder in the 1st Respondent.

Mr. Chakoleka referred to the case of **Ng Chin Siau and Others v How Kim Chuan**[5] wherein the Singapore High Court emphasized the importance of abiding by the pleadings in the following terms:-

> " ***I took the view that in an arbitration governed by rules of procedure that provided for each party to set out its case in a statement of case in the same way as parties to litigation set out their cases in their pleadings, the arbitrator would be bound to decide the case in accordance with the parties' pleadings. He would not be entitled to go beyond the pleadings and decide on points on which the parties had not given evidence and had not made submissions. If an arbitrator considers that the parties have not framed their cases correctly and that certain points need to be addressed then he must indicate his concerns to the parties and allow them to make such amendments to their pleadings and to adduce such additional evidence as may be necessary to deal with those concerns. He is not entitled to make a decision on points that have not been addressed by the parties. The necessity of abiding by this rule is important in litigation but it is essential in arbitration proceedings where the right of appeal is severely restricted."***

Similarly, in the case of **PT Prima International Development v Kempinski Hotels**

SA already cited above, the Court guided as follows:-

> *" ... The purpose of the arbitration agreement here, as in other cases, was to bind [the] parties to submit the disputes arising under the [Management] Contract to determination by arbitration. It did not imply that [the] parties would be free at any time during the proceedings to raise material and unpleaded points without having first made an application to amend their pleadings.*
>
> *... Under Art 34(2)(a)(iii) of the Model Law ..., one of the grounds on which an arbitration award may be set aside is where the matters decided by the Tribunal were beyond the scope of the submission to arbitration. To determine whether matters in an award were within or outside the scope of the submission to arbitration, a reference to the pleadings would usually have to be made. It is therefore incorrect for [Prima] to argue that jurisdiction in a particular reference was not limited to the pleadings or that there was no rule of pleading that requires all material facts to be stated and specifically pleaded as would be required in Court litigation. An Arbitrator must be guided by the pleadings when considering what it is that has been placed before him for decision by the parties. Pleadings are an essential component of a procedurally fair hearing both before a Court and before a Tribunal."*

In further buttressing the arguments on this issue, Mr. Chakoleka also referred to two more cases; the case of **Interbulk Limited v Aiden Shipping Co. Limited (The Vimeira)**[6], where **Ackner LJ** stated as follows:-

> *" **The essential function of an arbitrator ... is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be** and, at the conclusion of the evidence, it should be apparent what issues still remain live issues. **If an arbitrator considers that the parties or their experts have missed the real point ... then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it ...***

Lord Golf in the same **Vimeira** case held as follows:- *"**In truth, we are simply talking about fairness. It is not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the Tribunal."***

In addition, the Court in the case of **Zermalt Holdings SA v Nu Life Upholstery Repairs Limited**[7] equally guided as follows per **Bingham LJ** at page 15 in relation to the issue of an Arbitral Tribunal dealing with issues not pleaded by the parties:-

> ***" If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment.*** **If he feels that the proper approach is one that has not been explored or advanced in evidence or submission, then again it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way, then that again is something that he should mention so that it can be explored.** ***It is not right that his decision should be based on specific matters which the parties never had the chance to deal with, nor is it right that a party should first learn of adverse points in a decision against him. That is contrary both to the substance of justice and to its appearance."***

In reiterating the submission in this regard, Mr. Chakoleka further referred to the case of **Kerajaan Malaysia v Perwira Bintang Holdings sdn Bhd**[8] wherein the Malaysian Court of Appeal held as follows:-

> **" We have considered the Appeal Record, in particular the reasoning and findings of the arbitration.** ***In as much as our Courts must embrace the principles of finality of awards, party autonomy and minimal Court intervention in the context of the Model Law legal regime, and the more general considerations that out Courts should be arbitration-friendly and pro-enforcement, we cannot allow an award to stand in the face of a clear excess of jurisdiction and a breach of the equality important principle that arbitration proceeding is consensual and the mandate of***

the chosen arbitrator has to be limited to the terms of the submissions and the agreed issued. If four issues have been agreed, the arbitrator cannot, on his own volition, add another issue (particularly without prior consensus and after the close of the case of the parties), for to allow this will result in gross unfairness"

(b) When the Tribunal ruled that the Applicant was in breach of the Wet Lease Agreement, which agreement was neither the subject of determination in the arbitral proceedings nor the subject of an arbitration agreement between the Applicant and the Respondent

It was submitted on this issue that the arbitral proceedings were commenced pursuant to the arbitration clause that was in the Shareholders Agreement that executed between the Applicant and the Respondents (except the 1st Respondent). Clause 23.1 of the said Shareholders Agreement provided that "***Any dispute arising out of or in connection with this Agreement of the Corporate Documents, including any question regarding their existence, validity or termination, shall be referred to and finally resolved by arbitration administered under the Arbitration Act, No. 19 of 2000."*** Thus, the disputes that could be referred to arbitration where those arising from the Shareholders Agreement.

It was, submitted, therefore, that a dispute arising from the Wet Lease Agreement could not be referred to arbitration and the Arbitral Tribunal, consequently, acted in excess of Jurisdiction when it held that the Applicant was in breach of the Wet Lease Agreement. The Applicant referred to the Final

Award of 8th November, 2017 where the Tribunal stated under paragraph 6.12 of the Arbitral Award as follows:-

> ***"The problem in this arbitration is that the Respondent seeks to avoid liability for any alleged breaches largely on the footing of their own actions and/or omissions. They did not provide the start-up funds; they did not complete the needful under the Wet Lease Agreement; ...".***

It was submitted that the said Wet Lease Agreement did not have an Arbitration Clause and there was, therefore, no basis for the Arbitral Tribunal to have on its own motion decided that the Applicant was in breach of the Wet Lease Agreement. This is more so that there was no dispute that had been declared under the said Wet Lease Agreement.

It was further submitted that the award of damages for breach of the Wet Lease Agreement was in excess of the jurisdiction of the Arbitral Tribunal as the Arbitral Tribunal took the alleged breach of the Wet Lease Agreement into account in paragraph 6.4 of the Award when awarding damages. The Arbitral Tribunal stated as follows:-

> **" Accordingly, it is my considered finding and determination that they are clearly entitled to the universal remedy of damages for the overarching breach of Agreement involved in the series of breaches pointed out at 6.12 above."**

It was canvassed that the series of breaches that was being referred to included the alleged breach of the Wet Lease Agreement.

(c) The award of US$20,000 reliance damages to Captain Mulundika who was neither a party to the arbitration proceedings nor the subject of an arbitration agreement between him and the applicant

Mr. Chakoleka referred to paragraph 7.2 of the Final Award where the Arbitral Tribunal stated as follows:-

> **" It is my further FINDING AND DECISION that the 1st Claimant is entitled to recover from the Respondent reliance damages of USD$40,000 to be paid over to Mr. Kunda and Capt. Mulundika."**

It was submitted that the award of the sum of US$20,000 to Captain Mulundika was in excess of the jurisdiction of the Tribunal since the said Captain Mulundika was not a party to the arbitral proceedings before the Tribunal. Furthermore, there was no arbitration agreement between the said Captain Mulundika and the Applicant and consequently the Arbitral Tribunal acted in excess of the scope of the submission. Reference was made to the Learned Authors of **Law, Practice and Procedure of Arbitration, 2nd Edition** state as follows on page 762 in relation to examples of a Tribunal acting in excess of jurisdiction:-

> ***"Yet another example would be the arbitral tribunal rendering an award against a non-signatory to the arbitration agreement."***

In the same vein, the Supreme Court of Zambia in the case of **Zambia Revenue Authority v Tiger Limited and Zambia Development Agency** (supra) set aside the Award that had been made against the Zambia Revenue Authority, which was a non-party to the arbitration proceedings.

It was spiritedly submitted that the nature of arbitration proceedings is such that one cannot make a claim on behalf of a non-party to the arbitral proceedings and the arbitration agreement. According to the Applicant's Learned Counsel, while the course of action taken by the Arbitral Tribunal may be permissible in litigation before a Court of Law, the same is not the case in relation to arbitration proceedings which are consensual in nature. In any case, the instances where a party can sue for and on behalf of another party are only applicable when there is an arbitration agreement as between the party on whose behalf a claim is made and the party against whom the claim is sought to be made. The **Learned Authors of Law Practice and Procedure of Arbitration, 2nd Edition** state as follows at page 130:

> *" the words 'any person claiming through or under him appear to cover circumstances where the interest of a party to arbitration has passed to some other derivative person through death, bankruptcy, voluntary assignment, agency law or for example name borrowing."*

In this matter, it was stressed that there was no interest whatsoever that passed from Captain Mulundika to the 1st Respondent for the latter to be indicated as

having been claiming on behalf of the former. There was no arbitration agreement between Captain Mulundika and the Applicant, and it was therefore not competent for the 1st Respondent to make a claim on behalf of Captain Mulundika.

GROUND 2.

The Award rendered by the Arbitral Tribunal on 8th November, 2017 and 16th January, 2018 be set aside for being contrary to public policy to the extent that the Tribunal awarded expectation damages outside the scope of the submission to arbitration.

On this Ground, it was submitted by Mr. Chakoleka that the Arbitral Tribunal exceeded the scope of the submission when it awarded damages to the 2nd, 3rd and 4th Respondent in respect of reliefs that were not pleaded.

It was further submitted that the Supreme Court of Zambia has guided as to the criteria to be used by a Court when deciding as to whether an arbitral award is contrary to public policy. In the same case of **Zambia Revenue Authority v Tiger Limited and Zambia Development Agency,** the Supreme Court of Zambia defined public policy in relation to an Award quoting a decision of the Supreme Court of Zimbabwe as follows:-

" Gubbay CJ, in considering the test of an award that offends public Policy held as follows:

where, however, the reasons or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes an inequity that is so far reaching and outrageous in its defiance of logic or accepted standards that a sensible and fair-minded person would consider that the concept of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it.

We see no reason why we should not adopt the reasoning of Gubbay CJ, in determining the test under Section 17(2) (b) (ii) and have in arriving at our decision applied the said test."

In this regard, it was submitted that the award of damages to the 2nd, 3rd and 4th Respondents was in excess of the submission to arbitration and beyond mere faultiness or incorrectness and constituted an inequity that is so far reaching that it defiles the concept of justice in Zambia. Reference was made to the case of **Mpulungu Harbour Management Limited v Attorney-General and Mpulungu Harbour Corporation Limited**[9], where this Court in a Judgment dated 10th October, 2014 at J54 held as follows:

" I am satisfied that the Arbitral Tribunal dealt with a dispute not falling within the terms which were submitted to it and that the Arbitral Award contains decisions on matters beyond the scope of the issues submitted to the Tribunal.

Therefore, the Tribunal reasoning and conclusion in the Award goes beyond mere faultiness and incorrectness and constitutes a palpable inequity as is contrary to public policy as enunciated in the case f Zimbabwe Electricity Authority v Genius Joel Maposa."

Mr. Chakoleka, thus, maintained that the position of the law in Zambia is that an Award that is in excess of the scope of the submission and which contains decision on issues beyond the scope of the submission to arbitration is contrary to public policy and must accordingly be set aside.

GROUND 3.

The Award rendered by the Arbitral Tribunal on 8th November 2017 be set aside for being contrary to public policy to the extent that the Arbitral Tribunal awarded expectation damages to the 4th Respondent notwithstanding the fact that the said Respondent did not prosecute his claim, if at all.

It was submitted that the Tribunal's award of damages to the 4th Respondent was contrary to public policy as the said Respondent did not lead any evidence whatsoever, in addition to the fact that he did not plead for any expectation damages.

It was further submitted that the award of expectation damages to the 4th Respondent clearly conflicted with the principle of law to the effect that he who alleges must prove and the agreement of the parties in the Orders for Directions

to the effect that the strict rules of evidence were to be applicable in the arbitration proceedings.

Mr. Chakoleka made reference to the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[10], where the Supreme Court per **Justice Ngulube D.C.J (as he then was) stated the position of the law in the following terms as regards the burden of proof;** ***I think that it is accepted that where a Plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case where he makes any allegations it is generally for him, to prove those allegations. A Plaintiff who has failed to prove his case cannot be entitled to judgment***...and the case of **Galauni Farms Limited v National Milling Company Limited and National Milling Corporation Limited**[11] "where it was held that "***An unqualified proposition that a Plaintiff should succeed automatically whenever a Defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so the mere failure of the opponent's Defence does not entitle him to Judgment***".

Mr. Chakoleka, therefore, maintained that by agreeing in the Order for Directions that the strict rules of evidence were to be applied in the proceedings, it meant that the parties needed to strictly prove their claim in line with the requirements of the rules of evidence. It was prayed, therefore, that the Court set aside the Award for being in conflict with public policy.

GROUND 4.

The Award rendered by the Arbitral Tribunal on 8th November, 2017 be set aside for being contrary to public policy to the extent that the Tribunal awarded reliance damages outside the scope of the submission to arbitration.

The Applicant did not advance arguments distinctly under this Ground or as a separate ground, but the submissions of the Applicant's Learned Counsel with respect to Ground 1 (c), 5 and 7 quite sufficiently covered this Ground.

GROUND 5.

The Award rendered by the Arbitral Tribunal on 8th November, 2017 be set aside for being contrary to public policy to the extent that the Tribunal proceeded to award reliance damages to the Respondent in the absence of any evidence to support a claim for reliance damages.

It was submitted on this ground that the Arbitral Tribunal awarded the 1st Respondent reliance damages in the absence of any evidence whatsoever; and the fact that no evidence had been presented to support the claim for special damages in the form of reliance damages was equally acknowledged by the Arbitral Tribunal in paragraph 6.18 of the Award in the following passage:-

> **"One other head of reliance damages needs to be considered. A sum of USD$ 350,000-00 was claimed in legal, consultancy and technical advisory expenses or costs which were wasted or thrown away on account of the aborted Joint Venture ... That such costs are**

recoverable hardly needs any debate: The only problem is the quantum since such special damages need to be supported by evidence which makes it possible to ascertain their value with some certainty. Unfortunately, this was not the case here, prompting Counsel for the Claimants in the final submission to invite Tribunal to make an intelligent guess. The best I feel able to do in the circumstances is to award the 1st Claimant half of the claimed amount, that is to say, I award US$ 175,000-00."

On special damages, Learned Counsel for the Applicant cited the case of **Victor Koni v Attorney-General**[12], where the Supreme Court of Zambia states that "***We agree with the Learned Deputy Registrar, and indeed, this Court has on several occasions indicated that claims for special damages should be supported by documentary or independent evidence***." It was, thus, submitted that in the matter *in casu,* since there was no documentary or independent evidence that was adduced to prove special damages, the Arbitral Tribunal committed a great inequity that transcends mere faultiness or correctness so as to offend the concept of justice in Zambia. It was stressed that contrary to the law on proving special damages, all that the Respondents did was to present a figure of US$ 350,000-00 as reliance damages and gave a breakdown of the same. Reference was made to the case of **Bonham-Carter v Hyde Park Hotel Limitd.**[13]**.,** where **Lord Goddard C J** held thus:-e

" Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down

the particulars, and, so to speak, throw them at the head of the Court, saying 'this is what I have lost, I ask you to give me these Damages.' They have to prove it."

The Applicant's Learned Counsel, therefore, prayed that this Court sets aside the Award for being contrary to public policy as it was beyond mere faultiness and incorrectness.

GROUND 6.

The Award rendered by the Arbitral Tribunal on 8th November, 2017 be set aside for being contrary to public policy to the extent that the Tribunal awarded reliance damages in respect of a non-party to the arbitration proceedings

Mr. Chakoleka submitted that firstly, the award of damages to Captain Mulundika who was a non-party to the arbitral proceedings was contrary to public policy as an Arbitral Tribunal cannot make a pronouncement in respect of or grant a relief to a non-party to the Arbitration proceedings. In the case of **Zambia Revenue Authority v Tiger Limited and Zambia Development Agency** (supra), the Supreme Court of Zambia held as follows at page J43-44 with respect to liability that had been imposed on a non-party to the arbitral proceedings:-

" In view of the findings we have made in the preceding paragraphs, we find no basis for the Arbitrator finding the Applicant liable. The Applicant, as we have found was not a party to the dispute before the Arbitrator and neither was it designated as such in the final award

rendered. The view we take is that, the conclusion in the award of making the Applicant liable, is beyond mere faultiness or incorrectness and constitutes an inequity that is far reaching and outrageous in its defiance of logic or acceptable standards that a fair minded person would consider that the concept of justice would be intolerably hurt by the Award if it is allowed to stand."

It was submitted that in the same way that it was contrary to public policy to impose liability on a non-party to the arbitration proceedings, it was equally contrary to public policy to award relief to a non-party to the arbitration proceedings. This was more so that Captain Mulundika was not a party to the Shareholders Agreement and neither was there any arbitration agreement between him and the Applicant.

Lastly under this ground, it was submitted that the award of the sum of US$175,000 to the 1st Respondent was contrary to public policy as the sum of US$350,000 which was being claimed by the Respondents included amounts claimed by third parties who were not party to the arbitration proceedings. Thus, the claim by the 1st Respondent of the sum of US$350,000 as reliance damages included the sum of US$120,000 which was being claimed by Eastern Safaris Limited as income that would have been generated from the lease of the hangar to the 1st Respondent. Yet Eastern Safaris Limited was not a party to the arbitral proceedings and neither was there any arbitration agreement between the said Company and the Applicant.

In order to demonstrate that the sum of US$350,000 included the sum of US$120,000 that was being claimed by Eastern Safaris Limited, the Applicant referred to the pleadings that were before the Tribunal and in particular paragraph 57.22 of the Statement of Case where it was averred that "***the damages of the total sum of USD350,000 being the aggregate of the actual legal, consultancy and technical advisory costs incurred as a result of the proposed joint venture and referred to in paragraphs 53, 54 and 55 above.*** It was canvassed that the details of the composition of the US$350,000 were contained in paragraphs 53,54 and 55 of the Respondents' Statement of Case. Paragraph 55 of the Respondents' Statement of Case detailing the particulars of special damage were pleaded as follows:

> " **In addition, after the disagreement between Airlink and Mr. Zumla on the hangar lease, the hangar suffered a loss of business as it would have accrued a monthly rental in the sum of USD5,000 from August 2014 to date making a total loss of USD120,000 excluding taxes."**

Further, the sum of US$350,000 that was being claimed by the 1st Respondent included a claim in the sum of US$100,000 in favour of a company called Amagrain. The Applicant in this regard referred to the Applicant's Affidavit in support of this application wherein the Respondents provided a breakdown of the sum of US$350,000 that was being claimed as reliance damages and invited the Court to note that the breakdown of the US$350,000 reliance damages included the sum of US$120,000 which was being claimed by Eastern Safaris Limited and a

claim of US$100,000 by Amagrain, both of which were not parties to the arbitration agreement, and both of which were considered as incompetent by the Arbitral Tribunal in its earlier assessment. It was contended that the fact that the US$350,000 also constituted the sum of US$100,000 in respect of the claim by Amagrain could be seen from the evidence of the 2nd Respondent during the arbitral proceedings who confirmed that the US$350,000 comprised the sum of US$100,000 that was allegedly being claimed by Amagrain.

It was submitted that, therefore, it followed that in considering the claim for damages in the sum of US$350,000, the Tribunal was supposed to subtract the sum of US$120,000 in respect of the Eastern Safaris Limited claim, as well as subtract the sum of US$100,000 in respect of the Amagrain claim which the Arbitral Tribunal did not leading to gross injustice against the Applicant.

It was consequently submitted that the reasoning of the Arbitral Tribunal in the award when dealing with the claim for US$350,000 reliance damages goes beyond mere faultiness or incorrectness and constitutes an inequity that is far reaching and outrageous in its defiance of logic or acceptable standards that a fair-minded person would consider that the concept of justice would be intolerably hurt by the Award if it is allowed to stand.

GROUND 7.

The Award rendered by the Arbitral Tribunal on 8th November, 2017 is set aside for being contrary to public policy to the extent that the Tribunal awarded Reliance Damages notwithstanding express provision in the Shareholders

Agreement to the effect the parties were to bear their own costs for negotiation and implementation of the proposed joint venture.

Mr. Chakoleka submitted that the Award of 8th November, 2017 is contrary to public policy by virtue of the fact that the 1st Respondent was awarded the sum of US$ 175,000-00 as damages for what the Tribunal considered as wasted costs on account of the aborted joint venture. Equally that the Award of the sum of US$ 20,000-00 each to Captain Mulundika and the 3rd Responded was also contrary to public policy in light of the express provisions of the Shareholders Agreement to the effect that parties were to bear their own costs for implementation of the joint venture. Clause 28 of the said Shareholders Agreement expressly provided as follows:-

> ***"Each party will bear and pay its own legal costs and expenses of and incidental to the negotiation, drafting, preparation and implementation of this Agreement. "***

However, the Arbitral Tribunal in paragraph 6.18 of the Award stated as follows:-

> ***" One other head of reliance damages needs to be considered. A sum of USD$ 350,000-00 was claimed in legal, consultancy and technical advisory expenses or costs which were wasted or thrown away on account of the aborted Joint Venture. Various processes had been embarked upon, including an increase in the share capital; new returns at PACRA; and so on. All had to be reversed or re-adjusted***

when the Respondents walked out of the transaction. That such costs are recoverable hardly needs any debate.... "

Thus, Mr. Chakoleka submitted that the reliance damages that were awarded by the Tribunal to the 1st Respondent related to the legal and consultancy costs for the implementation of the Shareholders Agreement which costs each party was to bear.

Similarly, that the sum of US$ 20,000-00 each that was awarded by the Arbitral Tribunal to Captain Mulundika and the 3rd Respondent related to costs allegedly incurred by the 1st Respondent for purposes of implementation of the Joint Venture and as such, costs were supposed to be borne by the respective parties in line with Clause 28 of the Shareholders Agreement.

Learned Counsel for the Applicant, thus, emphasized that the Award of US$ 20,000-00 each to Captain Mulundika and the 3rd Respondent conflicts with public policy as it was against the express terms of the Shareholders Agreement executed by the parties. The Award of reliance damages by the Arbitral Tribunal was beyond mere faultiness or incorrectness but actually constituted an inequity that is so far reaching to the concept of justice in Zambia.

GROUND 8.

The Arbitration process including the analysis of evidence and the award was not in accordance with the arbitration procedure as agreed by the parties and

as set out in the orders for directions and is therefore contrary to public policy.

This ground is a consolidation of the Applicant's Grounds 8 and 9.

It was vehemently submitted, by Mr. Chakoleka that the analysis of the evidence and the Award itself was not in accordance with the procedure agreed by the parties as set out in the Orders for Directions; that strict rules of evidence would apply to the arbitration proceedings. This meant that the parties needed to strictly prove their claims by adducing the requisite evidence before the Tribunal. However, the Tribunal proceeded to grant reliance damages and expectation damages in the absence of any evidence.

Further, it was submitted that the parties in the same Order for Directions under point No. 12 agreed that the Tribunal was to render a reasoned award based on findings of fact and based on laws applicable in Zambia. **The Learned Authors of Law, Practice and Procedure of Arbitration** state as follows at page 600: "***a valid award must contain the arbitral tribunal's decisions on all the issues of fact and law arising out of the dispute which the parties have referred to arbitration".***

Mr. Chakoleka insisted that the Award in issue, however, did not contain the decision on all the issues of fact and law arising out of the dispute which had been submitted for determination by the parties. Examples given were: the alleged breach of Clause 18 of the Shareholders Agreement. Notwithstanding the detailed submissions of the parties on the issue, the Award did not in any way

deal with the issue as to whether or not there was a breach of clause 18 of the Shareholders Agreement.

The issue raised by the Respondents as to whether the joint ventures had been properly terminated in light of Clause 21 of the Shareholders Agreement;

The issue that arose in the arbitration proceedings as to whether clause 4.2.2. of the Shareholders Agreement was condition subsequent and, therefore, a suspensive condition in light of the wording of clause 22.1 of the Shareholders Agreement. The Applicant contended that the issue as to whether clause 22.1 of the Shareholders Agreement was a suspensive condition was one of the issues crucial to determining as to whether the applicant was in breach of the requirement to provide the capitalization amount and more importantly, whether the Shareholders Agreement had become enforceable;

The issue on whether the Applicant made part payments of the capitalization amount. The Respondents argued that the Applicant had made part payments of the capitalization amount that was required in clause 4.2 of the Shareholders Agreement whereas the Applicant vigorously argued that no part payments had been made in respect of the capitalization amount because it was not aware that the regulatory approval had been obtained by the 1st Respondent. However, again from a perusal of the Award, the Tribunal did not determine the issue thereby not rendering a reasonable ruling on the same as required by the procedure that had been agreed upon by the parties;

Whether the Applicant needed to be informed of the fact that the 1st Respondent had obtained regulatory approval of the capitalization amount. This issue was fiercely contested by the parties as the record of proceedings will show. This issue was critical to the proceedings in so far as determining whether or not there was failure by the Applicant to provide the capitalization amount. This issue was equally crucial in that it would have helped to show from what date time started running for purposes of the Applicant providing the capitalization amount under clause 4.2 of the Shareholders Agreement. However, the Tribunal again did not deal with the issue and there was no reasoned award in this regard, contrary to the procedure agreed by the parties.

The Applicant's Learned Counsel contended, therefore, that the failure by the Award to deal with all the issues of fact and law raised by the parties was a clear breach of the requirement to the effect that an Arbitral Award must contain reasoned decisions on all issues of fact and law raised by the parties. In this regard, **Section 17 (2) (a) (iv)** of the **Arbitration Act** provides that an Arbitral award can be set aside if the procedure was not in accordance with the procedure that was agreed by the parties. The Learned Authors of **Commercial Arbitration, 2nd Edition** state as follows at page 378: "***where a party has argued for a finding of fact with which the arbitration does not agree, the award should state explicitly that the allegation has not been proved".***

In support of the argument, Mr. Chakoleka cited the case of **Official Assignee v Chartered Industries of Singapore[14],** where the Court held as follows at page 100:-

"It is obvious looking at the award that the arbitrator failed to decide on all matter or issues referred to him... the arbitrator should have stated in his award whether the notice and the termination of the agreement were good or bad. The ward is clearly defective and therefore void. I do not see any means of avoiding the consequence, which is, that the award must be set aside."

It was stressed by the Applicant that the failure by the Tribunal to deal with all the issues highlighted above entails that the award must be set aside in line with **Section 17(2)(a)(iv)** of the **Arbitration Act.**

GROUND 9.

The Shareholders Agreement as read with the Voting Agreement was contrary to public policy and the dispute thereof was therefore not capable of determination by arbitration thereby rendering the award of damages contrary to public policy.

Mr. Chakoleka submitted that having found that the Shareholders Agreement was contrary to public policy on account of the Voting Agreement that had been executed between the Applicant, the 1st Respondent, the 5th and 6th Respondents, the Arbitral Tribunal should not have made an award of damages as the dispute became one that is not capable of determination by arbitration. To show that the Arbitral Tribunal found the Shareholders Agreement to be contrary to public

policy, the Applicant referred to paragraph 6.11 of the Arbitral Award where the Arbitral Tribunal held as follows:-

> **" I have to agree with the submission that to enforce the Joint Venture envisaged in the shareholders Agreement as modified by the object of the Voting Agreement in these circumstances would run counter to public policy and the scheme adumbrated in the aviation statues and conventions articulated in the submissions. The Civil Aviation Act, 2016 (No. 5 of 2016) restates the earlier statutes and captures the applicable international conventions quite well. The submissions were on the right track and on this ground alone, quite apart from anything else, the remedy of specific performance requested by the Claimants and stipulated for as the only appropriate one in one of the clauses in the Shareholders Agreement cannot possibly be entertained."**

By this passage, it was submitted, the Arbitral Tribunal effectively found that the Shareholders Agreement as read with the Voting Agreement violated not only public policy, but the Aviation legislation as well, hence the refusal to order specific performance. Therefore having found as such, the Tribunal did not have jurisdiction to then award damages on the Agreement. The Applicant in this regard referred to **Section 17(2)(b)(i) of the Arbitration Act** that provides that an arbitral award should be set aside if the Court finds that the subject matter of the dispute was not capable of determination by arbitration. Further, S**ection 6(2)** of the **Arbitration Act** also provides as follows:-

"(2) **Disputes in respect of the following matters shall not be capable of determination by arbitration:**

(a) ***an agreement that is contrary to public policy;"***

It was further submitted that the Tribunal decided to award damages on the basis that the Founder Members were innocent parties who were allegedly not aware of the shareholding arrangement, notwithstanding the fact that the 1st Respondent was a party to the Voting Agreement. The **said Section 6(2)** does not give an Arbitral Tribunal any jurisdiction to deal with a dispute on an agreement that is contrary to public policy and the **Arbitration Act** does not make any distinction between innocent parties and those who are not when it comes to an Agreement that is contrary to public policy.

It was, therefore, accordingly prayed that the Award be set aside in its entirety in line with **Section 17(2)(b)(i)** of the **Arbitration Act.**

CONCLUSION

In conclusion, Mr. Chakoleka vigorously prayed by way of summary that the Arbitral Award of 8th November 2017 and the Supplementary Award of 16th January 2016 be set aside on the grounds canvassed; that the Award exceeded the submission to arbitration and contains decisions on matters beyond the scope of the submission to arbitration; that the awards in issue are also contrary to public policy and that the procedure agreed to by the parties was not adhered to by the Arbitral Tribunal and, lastly, that the Tribunal dealt with a dispute that

was not capable of determination by arbitration on account of the Shareholders Agreement having been found to be contrary to public policy and in violation of the various Aviation legislations in Zambia.

Thus, on behalf of the Applicant, Learned Counsel Mr. Madaika prayed that the Arbitral Awards should be set aside in total as the Applicant has met the required threshold under **Section 17(2)** of the **Arbitration Act.**

(B) RESPONDENTS' ARGUMENTS

On the part of the Respondents, the submissions by Learned Counsel, Mr. Madaika started with a preamble as follows:- That both in the pleadings and the submissions of the Applicant, there has been heavy repetition of the same issues meaning that although there were 11 grounds in the Originating Summons, the same facts are repeated in what are purported to be different grounds.

The 11 grounds can also be condensed into four issues which keep being repeated. The issues according to the Respondents are:-

(a) *That the award of expectation and reliance damages was allegedly beyond the scope of the submission to the arbitration;*

(b) *That certain reliefs were purportedly awarded to parties who did not plead them or present evidence (the 2nd, 3rd and 4th Respondents) and a relief was awarded to a non-party (Captain Mulundika) and that as*

such, the arbitrator allegedly exceeded his powers;

(c) That the agreed procedure in the Order for Directions was allegedly not Strictly adhered to by the arbitrator; and

(d) That because of all the above, the Award is against public policy.

It was submitted, thus, that the Applicant failed to condense these issues and opted to repeat the same issues and craft different grounds relating to the exact same facts. The pleading was therefore bad on account of the unnecessary repetition of the same issues and is therefore PROLIX. A party must plead only material facts and must not be allowed to try and lend weight to their arguments by repetition.

Further, Mr. Madaika contended that the Applicant in their arguments heavily relied on decided cases from foreign jurisdictions. However, what the Court must warn itself in evaluating these cases is that the Applicant engaged in what is known as "key word" research; meaning that with the advent of the internet, anyone can enter certain Key words such as "public policy","submission to arbitration", "setting aside an award" and so on, and thereby obtained a large number of quotations from many cases BUT without a single instance in their arguments where the Applicant has referred to the FACTS of any of the cases they have cited and compared them or drawn an analogy to the facts in the current case.

A party must demonstrate to the Court how the holdings in the cited cases apply to the facts in the case being adjudicated upon.

It was contended that many of the citations in the Applicant's arguments were quoted out of context because they were quoted broadly without any reference to the peculiar facts of this case.

Mr. Madaika maintained that the question of setting aside an Award is based on proving that there exist FACTS which warrant the invocation of the provisions of **Section 17** of the **Arbitration Act No. 19 of 2000.** The law must be cited to supplement facts. The law must not form the facts. In contrast, it was submitted that the Applicant has approached this matter in reverse. The Applicant is finding quotations/holdings on setting aside an Award and then working backwards to try and fit the facts of this case into what those quotations/holdings state. An example is whereby the Applicant, in trying and fit this case into a pigeon hole of "cases not capable of determination by arbitration" went at length to try and convince the Court to read the Shareholders Agreement as one with the Voting Agreement, so that both can then be said to be illegal Agreements.

Mr. Madaika, thus, urged the Court to shy away from entertaining the Applicant's attempts at fitting the facts into 'pigeon hole' narratives. Instead, the facts of the case as contained in the pleadings, evidence by witnesses and the Award must be taken 'as is' without adding any additional 'flavour' aimed at achieving any pre-conceived result.

Lastly, it was submitted in the preamble that in many instances, in order to establish its claim, the Applicant has delved into the merits of the decision by the Arbitrator. An example is the argument as to the manner in which the Arbitrator evaluated the evidence before him and the argument relating the award of USD 175,000 as damages to the 1st Respondent. In many instances, the Applicant's Arguments went the merits of the decision of the tribunal and amount to an appeal. This again should not be entertained.

The Respondent's Learned Counsel then proceeded to submit on the Grounds raised by the Applicant.

GROUND 1.

The award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.

Mr. Madaika submitted that the Arbitral Tribunal, in awarding expectation damages to the 2nd, 3rd and 4th Respondent explicitly explained the basis upon which such award had been made. A perusal of the Award at Clause 6.16, shows that the Arbitral Tribunal spoke to the claim by the Company (the 1st Respondent) and its Shareholders for money that they had expected to make pursuant to the Shareholders Agreement had the venture not been prematurely terminated. It was explained that it was pleaded in the Statement of case that the Claimants, due to the heavy expenses of operating an airline did not expect to make a profit

(per month) of more than USD202,321.75.

The Arbitration Tribunal, accepted this figure that had been pleaded as being realistic and that from the evidence tendered, the Arbitrator found that the figure was not exaggerated.

Based on this figure, the Arbitral Tribunal, due to reasons explained in paragraph 6.13, decided NOT to award the entire amount claimed but restricted the Award to only three (3) Claimants, the 2nd, 3rd and 4th Respondents herein whom it had been shown in the arbitration proceedings as having not been party to the illegal Voting Agreement that the Applicant together with the 5th and 6th Respondents had entered into.

The total shareholding stake of the 2nd, 3rd and 4th Respondents in the 1st Respondent amounted to 18% and the Arbitral Tribunal apportioned Eighteen percent (18%) of the total claimed amount of USD2,400,000.00 which came to the sum of USD432,000.00 contained in the Award (referring to paragraph 6.16 of the Award).

It was submitted that the Applicant in their arguments wished to create the impression that by using the term 'expectation damages' the Arbitral Tribunal came up with a new species of damages that was not claimed, which was not true. The term expectation damages merely arises from the fact that what the Claimants (Respondents) were asking for was an Award

of the loss of business and profits that they had expected to earn under the venture. The expectation of the profits is what the Arbitral Tribunal termed as 'expectation damages'. There was and is nothing mythical or strange about the use of such terms by the Arbitral Tribunal.

The fact that the 'expectation damages' relate to what was claimed by the Respondents is demonstrated, as earlier stated, by the fact that the funds Awarded are calculated as a portion of what was pleaded by the Claimants (Respondents) in paragraph s 51, 52 and 57.2.1 of the Claimants' Statement of Case.

Further, a perusal of the Statement of Case filed in the arbitration proceedings reveals that at paragraph 57.2.3 there appears a claim for "**loss of profits for the period of May 2015 until a date determined by the arbitrator.**"

The Arbitral Tribunal would have been perfectly entitled to award the 1st Respondent, and by extension , its Shareholders the entire amount claimed by the Respondents as loss of business and loss of profits. However, due to EX TURPI CAUSA rule, the Arbitral Tribunal pointed out that only the innocent Shareholders were entitled to receive their portion of the expected profits.

Further, that Paragraph 2 of the Statement of Case introduced the 2nd, 3rd and 4th Respondents as Shareholders in the 1st Respondent and by paragraph 27 of the 2nd Respondent's Witness Statement in the arbitration, it was shown that the total shareholding of the 2nd, 3rd and 4th Respondents amounted to eighteen

percent (18%) of the 1st Respondent's total issued shares.

Secondly, the Applicant has alleged that the 2nd, 3rd and 4th Respondents did not plead for such damages as were awarded to them and that they did not even seek them in their Witness Statements or in their *viva voce* evidence at the hearing.

It was also submitted that similarly, the term "reliance damages" was merely a term that the Arbitral Tribunal used to explain and amplify the claim for expected profits. The Respondents did claim for such profits in their Statement of Case and they also re-iterated the claims in their Witness Statements.

The Court was invited to peruse paragraphs 48 to 52 of the 2nd Respondent's Witness Statement, paragraphs 27 to 29 of the 3rd Respondent's Witness Statement and the Witness Statement of Mundwe Godfrey Mulundika at paragraph 22 all which were exhibited in the Applicant's Affidavit in support.

It was submitted by Mr. Madaika that the Applicant in its arguments also wrongly sought to claim that the Respondents, in their Affidavit have conceded to the fact that expectation damages were not claimed. The Respondents maintained that the Arbitrator had the right to award expectation damages and the question of "further and other relief" did not matter because it had been demonstrated that the expectation damages were pleaded and were correctly awarded by the Arbitrator.

Mr. Madaika maintained that the vocabulary used by the Arbitrator who is a

pre-eminent jurist is not an issue on which the Award may be set aside.

Thirdly, there is no rule of law which compels all the Respondents to have tendered evidence at the Tribunal. The fact that the evidence of the witnesses that were called to testify on behalf of the Respondents during the arbitration covered the 4th Respondent is sufficient for the Court to make an Award in favour of the 4th Respondent as a party to the proceedings. There was absolutely no need for all the Claimants (Respondents) to testify and repeat the same testimony which had been tendered by other witnesses.

Fourthly, although the Applicant argued that they never had the opportunity to submit or answer to the issue of expectation damages, the damages referred to relate to the loss of expected profits and the Applicant answered to this issue in the amended Statement of Defence and also through the evidence of their witnesses and furthermore, in their submissions before the Arbitral Tribunal and in the application under **Article 33** of the **UNCITRAL MODEL LAW** which led to the Supplementary Award of 16th January, 2018.

It was, therefore, submitted that the Applicant's argument on this Ground has no merit.

On the issue of the Wet Lease Agreement, firstly, it was canvassed by Mr. Madaika that the issue relating to the Wet Lease Agreement was not pleaded by the Applicant in their Originating Summons and was being included in the

arguments without foundation and by this narrow point alone, this ground must fail.

Further, it was contended that the Award mentioned the Wet Lease Agreement *only in* passing when the Arbitral Tribunal took note that the Applicant was seeking to rely on its own defaults in order to escape liability against the Respondents. The Arbitral Tribunal at paragraph 6.12 of the Final Award was not making any substantive pronouncement nor was it awarding any relief in relation to the breaches but was merely tabulating the various breaches on the part of the Applicant, which the Applicant was seeking to rely on to escape liability from the Respondents.

It was stressed that the Arbitral Tribunal's language and train of thought in paragraph 6.12 of the Final Award is clear and concise and any attempt by the Applicant to connect what was said in paragraph 6.12 of the Award to any other portion of the Award and thereby claim that the Arbitral Tribunal awarded reliefs in relation to the Wet Lease Agreement was mere 'grasping at straws'.

By way of emphasis, Mr. Madaika submitted that the mentioning of the various breaches observed by the Tribunal including the Wet Lease Agreement was merely part of the Tribunal's general overview of the Applicant's conduct and was mentioned only in passing as can be noted from the fact that the issue of the breach of the Wet Lease Agreement was only mentioned once in the entire Award. It did not form part of the basis for any of the reliefs awarded by the Arbitrator. It was mentioned as Obiter Dicta.

On the last issue in Ground one, of the Award of US$ 20,000-00 to Capt. Mulundika, It was submitted that the USD20,000 was awarded to the 1st Respondent for purposes of clearing the debt incurred by the 1st Respondent to Captain Mulundika for the consultancy services he provided in setting up the Airline venture prior to the termination of the venture by the Applicant.

Mr. Madaika repeated their arguments in relation to 'expectation damages' that the term 'reliance damage' is simply an amplification or clarification of the damages that were claimed by the Claimants under paragraphs 53, 54 and 55 of the Claimants' Statement of Case and also at paragraph 57.2.2 of the same Claimants' Statement of Case.

Notably, that at paragraph 54 of the Claimant's Statement of Case, it was pleaded that the 1st Respondent, as a result of relying on the overtures of the Applicant and in pursuance of the joint venture project, had incurred liability to third parties that included specialized consultancy services, to *inter alia,* Captain Godfrey Mulundika.

The funds due to Captain Mulundika, had already been incurred and were due and payable by the 1st Respondent to the said Captain Mulundika. The 1st Respondent produced invoices for these services in its Bundle of Documents and Captain Mulundika gave a Witness Statement and *viva voce* evidence before the Arbitral Tribunal in which he claimed the sum of USD40,000 for his consultancy services rendered to the 1st Respondent.

It was emphasized that the 1st Respondent was, therefore, liable to Captain Mulundika on account of its having relied on the promises made to it by the Applicant. The 1st Respondent, therefore, claimed these amounts as special damages in the Statement of Case.

The Arbitral Tribunal accepted the evidence of the Claimants' witnesses at arbitration and found that the 1st Respondent had indeed incurred debts to third parties on account of its reliance on the undertakings and promises of the Applicant and having evaluated the evidence held that out of the USD 40,000-00 claimed as due to 1st Respondent on account of the debts to Captain Mulundika, only USD20,000-00 was recoverable. Therefore, the award of the of the USD20,000 was not to Captain Mulundika but to the 1st Respondent. Captain Mulundika was mentioned merely because the claim was for special damages and his name was mentioned as part of the claims for the special damages.

In fact, according to the Respondents' Learned Counsel, the Arbitral Tribunal addressed its mind to third party claims at paragraph 6.15 of the Final Award, where it was, *inter alia*, stated thus:-

> ***"The only kind of third party claim which can be entertained is that Where a proper party, such as the 1st Claimant and the Founder Members incurred expenditure, loss or obligations in reasonable Reliance upon the Respondent performing their side of the transaction. The claims by captain Mulundika and Mr. Kunda who***

were assigned duties and special tasks for the benefit of the Joint Venture and who were actually paid some of their earlier dues by the Respondent fall within this latter category. The other reliance losses would obviously include the expenditure wasted in processing the PACRA and other documentation and in reversing the whole thing following the cancellation of the transaction."

It was, thus, submitted that as explained by the Arbitral Tribunal, the USD20,000 paid to the 1st Respondent on account of Captain Mulundika falls in a category of those which can properly be claimed because the liability is borne by a party to the arbitration.

The Respondent's Learned Counsel urged the Court to reject the Applicant's contention with respect to Ground 1.

GROUND 2.

The award rendered by the arbitral tribunal on 8th November 2017 and 16th January, 2018 be set aside for being contrary to public policy to the extent that the Tribunal awarded expectation damages outside the scope of the submission to arbitration.

It was submitted that this ground was a repetition of what was argued earlier under the award of expectation damages to the 2nd, 3rd and 4th Respondents, except that now the Applicant was stating that the same facts amount to a breach of public policy.

Mr. Madaika consequently relied on his submission on the issue of the propriety of the award of expectation damages and emphasized that 'expectation damages' is merely the nomenclature or term applied to classify the damages that were claimed by the Claimants for loss of profits.

Learned Counsel emphasized that the Applicant could not claim to have been blind-sided by this award, as a proper reading of the award shows that the Arbitral Tribunal, although using fancy terms, was speaking of the same issues that had been the subject of the arbitration and to which the Applicant had responded in its Statement of Defence, its witnesses and by its submissions to the Arbitral Tribunal. All the issues in the Award were canvassed by the Applicant in its pleadings and later in its application under **Article 33** of the **Model Law.**

It was also stressed that the Applicant, in it's referral under **Article 33** of the **Model Law**, after the Final Award had been published, applied for the Arbitral Tribunal to re-calculate the figures awarded in the Award. This shows that the Applicant knew where the figures stemmed from and could not now say the issue of reliance damages was never pleaded. The Applicant read the Award and knows that the expectation damages relate to the projected profits which were claimed by the Respondents.

Thus, it was submitted on behalf of the Respondents that the award in this respect was, therefore, sound at law and did not offend public policy.

GROUND 3.

The Award rendered by the Arbitral Tribunal on 8th November, 2017 be set aside for being contrary to public policy to the extent that the Arbitral Tribunal awarded expectation damages to the 4th Respondent notwithstanding the fact that the said Respondent did not prosecute his claim, if at all.

It was reiterated by the Respondents' Learned Counsel that the use of the term 'expectation damages' did not introduce a new claim nor did it result in the Arbitral Tribunal awarding a claim that was not pleaded.

Further, that the 4th Respondent is one of the Claimants that pleaded for loss of business and loss of profits under the Statement of Case and as such, the argument that the 4th Respondent did not plead for expectation damages was totally misguided and arises from a misapprehension of the import of the language used in the award.

On the non-giving of evidence by the 4th Respondent, it was submitted that Plaintiffs and/or Claimants in a joint-claim are not bound to all give testimony personally. It would mean each and every Plaintiff or Claimant in a joint-action would need to each personally give evidence in order to establish their claims.

GROUND 4.

The Award rendered by the Arbitral Tribunal on 8th November, 2017 be set

aside for being contrary to public policy to the extent that the Tribunal awarded reliance damages outside the scope of the submission to arbitration.

The Respondents did not distinctly present arguments under this Ground but reading the overall submissions, the Respondents do not agree that the reliance damages awarded were outside the submission to arbitration.

GROUND 5.

The Award rendered by the Arbitral Tribunal on 8th November, 2017 be set aside for being contrary to public policy to the extent that the Tribunal proceeded to award reliance damages to the Respondent in the absence of any evidence to support a claim for reliance damages.

On this, Mr. Madaika placed reliance on the earlier arguments herein where it was demonstrated that the damages that were awarded were all pleaded for in the Statement of Case and proven by evidence in the Claimants' Witness Statements and the viva voce evidence of the Claimants' witnesses at the Arbitral hearings.

Furthermore, it was contended that the Applicant had raised this issue in the application under **Article 33** of the **UNCITRAL MODEL LAW** and the Arbitral Tribunal answered this issue in the Supplementary Award of 16th January, 2018 and, therefore, the issue of breach of public policy under this ground was and is misconceived.

GROUND 6.

The Award rendered by the Arbitral Tribunal on 8th November, 2017 be set aside for being contrary to public policy to the extent that the Tribunal awarded reliance damages in respect of a non-party to the arbitration proceedings.

It was submitted on behalf of the Respondents that, again, the issues being raised under this head were a repetition of the issues canvassed and except to highlight the fact that the actual award of the USD 20,000-00 was not directly to Captain Mulundika but to the 1st Respondent which was the entity liable to Captain Mulundika for the said accumulated consultancy fees.

The Arbitral Tribunal awarded the USD 20,000-00 to the 1st Respondent to the account of Captain Mulundika because the 1st Respondent was found to be legitimately indebted to Captain Mulundika in the stated amount and if the Court had not awarded this amount to the 1st Respondent to be paid over to Captain Mulundika, the 1st Respondent would have suffered loss because it would have Remained liable to Captain Mulundika, having been the party that hired Captain Mulundika in reliance of the venture going forward.

On the other hand, Mr. Madaika reiterated that the damages awarded did not Include amounts for third parties, Eastern Safaris Limited and Amagrain.

Hence, it was submitted that the Arbitrator did not make any award in form of reliance damages to a non-party and the Applicant's Arguments that the award is

on this score contrary to public policy, is misconceived.

GROUND 7.

The award rendered by the Arbitral Tribunal on 8th November, 2017 be set aside for being contrary to public policy to the extent that the Tribunal awarded reliance damages notwithstanding express provision in the Shareholders Agreement to the effect that the parties would bear their own costs for negotiation and implementation of the joint venture.

Under this ground, Mr. Madaika submitted that the Applicant is seeking to derive a benefit from the same agreement which it breached in wanting to still enforce its terms to prevent the other party from obtaining relief against the Applicant in terms of damages.

The Learned Counsel contended that, this Ground must fail, firstly, on the ***EX TURPI CAUSA*** rule. A party cannot derive a benefit from its own default and even if the Applicant had been correct about the import of **Clause 28** of the Shareholders Agreement, which they are not, the Applicant could not claim the relief it was seeking to claim under this head. The Applicant could simply not prevent an Arbitral Tribunal from awarding damages against it by hiding behind the same Agreement that it breached.

Further, that the principle of sanctity of contract and could not be used by a party in breach of contract to prevent the innocent party from obtaining legal relief in the form of damages.

On costs, it was submitted that **Clause 28** of the Shareholders Agreement speaks of legal costs and expenses incidental to the **negotiation, drafting, preparation and implementation of the agreement** and of damages awarded as a result of breach of the contract. The Applicant in its pleadings and evidence has not disputed the fact that the venture envisioned by the Shareholder's Agreement never took off on account of the Applicant's breach of contract. Therefore, the legal costs and expenses mentioned in **Clause 28** of the Shareholder's Agreement did not apply.

Further, the Respondent's Learned Counsel invited the Court to note that even if the issue in question was legal costs as envisages by **Clause 28** of the Shareholder's Agreement or to costs of the arbitration, the arguments under this head would still not hold because the Arbitral Tribunal did not award the legal costs or costs of the arbitration to the Respondents. Each party was ordered to bear their own costs.

It was, therefore, submitted that the question of the Award offending public policy in regard to costs does not arise and the arguments under this ground must fail.

GROUNDS 8 AND 9.

The Arbitration process including the analysis of evidence and the Award was not in accordance with the arbitration procedure as agreed by the parties and

as set out in the Orders for Directions and is therefore contrary to public policy.

Mr. Madaika submitted that, in a civil matter, the standard of proof is 'on the preponderance of the facts' or 'on a balance of probabilities'. Matters do not need to be 'strictly proven' and strict proof only applies in criminal matters where the standard of proof is beyond reasonable doubt.

Thus, the fact that the Order for Directions stated that rules of evidence were to be strictly observed did not mean that the parties had raised the standard of proof. This could be seen from High Court procedure in civil matters where the rules of evidence are always strictly observed but the standard of proof always remains 'upon the preponderance of the facts'.

Mr. Madaika also submitted, on the Applicant's contention that the Arbitral Tribunal left several issues unresolved, that the duty to deal with all issues, applies only to the issues in controversy between the parties. The issues in controversy between the parties are revealed in the pleadings. A perusal of the pleadings shows that in paragraph 57 of the Statement of Case, the Claimant outlined what issues it wished the Tribunal to determine. The Applicant in the amended Statement of Defence answered to these issues and the Arbitral Tribunal proceeded to make a determination on the same issues pleaded by the Respondents which were traversed by the Applicant.

Consequently, it was submitted that adjudicating on all the issues in controversy did not mean that the Arbitral Tribunal had to go paragraph by paragraph and line

by line of every document in the arbitration and make a pronouncement on every paragraph in the Statement of Case and the Statement of Defence.

Thus, it was stated that the attempt by the Applicant to try and start dissecting how the Arbitral Tribunal received, reviewed and evaluated the evidence and arguments presented to him amounts to a veiled attempt to question the merits of the Final Award and amounts to an attempt to appeal the decision of the Arbitral Tribunal and should not be entertained by this Court.

GROUND 10.

The Shareholders Agreement as read with the Voting Agreement was contrary to public policy and the dispute thereof was therefore not capable of determination by arbitration thereby rendering the award of damages contrary to public policy.

In arguing against the above, it was submitted on behalf of the Respondents that the Shareholders Agreement was separate and distinct from the Voting Agreement and that there was, therefore, no basis upon which the Shareholders Agreement could be read together with the Voting Agreement which was a private agreement between the Applicant and the 5th Respondent which was solely meant to assist the Applicant to circumvent the law.

Further, that the Applicant as the proponent and beneficiary of the Voting Agreement is again caught by the ***EX TURPI CAUSA*** rule and cannot derive a

benefit from its own misdeeds. However, the 1st, 2nd, 3rd, and 4th Respondents who were innocent parties and did not actively participate in the illegality of the Voting Agreement cannot then be divested of their rights under the Shareholders Agreement because of the misdeeds perpetrated by the Applicant under the Voting Agreement, which in essence was the holding of the Arbitral Tribunal.

In support of this submissions, Mr. Madaika cited the case of **MOHAMED S. ITOWALA V VARIETY BUREAU DE CHANGE**[15] where it was extensively stated as follows:-

> *"The invocation of the maxim ex turpi causa appears to have been misdirected. We wish to take the opportunity of Learned Authors of Chitty On Contracts, General Principles, 26th Edition, in paragraph 1257, that when a* **contract***ual right is said to be unenforceable on the ground that ex turpi causa non aritur actio this is an illustration of the general principles of the law regarding the effect of illegality on the formation performance and enforcement of a contract. In this regard sight should not be lost of the fact that the plaintiff at no time sued for the payment of 10,000 dollars which he had set out to buy. He simply sued to recover his money. We wish to draw attention to paragraph 1138 of the same chitty on contract in which the position at common law is discussed. The authors observe under the sub heading. Both parties aware of legally objectionable features. Neither party can sue upon a contract if:*

(a) Both knew that it necessarily involved the commission of an act which, to their knowledge, is legally objectionable, that is illegal or otherwise against public policy, or

(b) Both knew that the contract is intended to be performed in a manner which, to their knowledge is legally objectionable in that sense, or

(c) The purpose of the contract is legally objectionable and that purpose is shared by both parties, or

(d) Both participate in performing the contract in a manner which they know to be legally objectionable.

All the foregoing is an assumption that in fact there was an illegal transaction. The directive for the purpose of countering money laundering and robberies was addressed to persons in the position of the Defendant. It was not addressed to the public at large so that quite clearly there can be no suggestion that the plaintiff was aware of the circular. Indeed he said so in his evidence, that he was not aware. The parties were therefore not both aware nor did they both intend to perform something illegal. In this particular case even assuming that the plaintiff was aware of the illegality and was trying to perform an illegal contract, the illegality would only have been in respect of the excess 5,000 dollars and not the entire amount of money. But in fact there was no occasion to assume that the appellant intended an illegal way of doing anything. It was clearly a misdirection to find that there was any question of anyone trying to defraud anyone else when the plaintiff applied to buy dollars. We also wish to draw attention to paragraphs 1275 to 1277 of the same Chitty On Contracts

where they discuss among other things the question of Locus Poenitentiae if the plaintiff because the transaction is frustrated repents of it altogether he is free to recover his money. The Plaintiff's title to his money is unaffected and did not result from an illegal transaction. Quite clearly he did not obtain K24 million from an illegal transaction. In the circumstances of this case, therefore, it could not be said the money became irrecoverable. The plaintiff did not need to allege illegal transaction in order to found his cause of action based on his clear title to the K24 million which must be paid back to him. It would have been exceedingly strange if in fact it could be properly accepted that the other party to the transaction could pocket the money and benefit from the alleged illegality.

It was for the foregoing reasons that we allowed the appeal and dismissed all the arguments which sought to rely on the maxim ex turpi causa and which sought to persuade that the defendant could simply pocket the other person's money. We must point out that we have no quarrel with the cases and authorities which were cited on the subject of illegal contracts; but in the view that we take, it is here unnecessary to recite those authorities and cases because as pointed out in the quotations from Chitty those principles ought not have been upheld in this case."

Thus, to the Respondents, the ***EX TURPI CAUSA*** rule applied against the Applicant and prevents the applicant from using its own illegalities to keep the innocent Respondents from being awarded what is due to them as damages under the contract. The ***EX TURPI CAUSA*** rule cannot be applied against the 1st, 2nd, 3rd and 4th Respondents for the reasons stated in the **ITOWALA** case cited above and for

the reasons cited by the Arbitral Tribunal where he said in the Final Award that he found that the founding shareholders had not participated in any illegalities nor where they aware of any such illegalities.

For the foregoing reasons, it was prayed that this ground ought to also fail.

CONCLUSION

In robust submissions to convince the Court on the fatality of its case, Mr. Madaika submitted that although the Applicant was clearly dissatisfied with the outcome of the Ruling, the Applicant's application was on very lean on facts as the bulk of the arguments tendered by the Applicant seek to draw the Court into reviewing the merits of how the evidence was taken and evaluated by the Arbitral Tribunal. This amounts to an appeal.

In passionate conclusive words, Mr. Madaika stated that there was no rule of law that requires an arbitration Award to be perfect. In any event, the practice of the law and rendering of awards is not a scientific process as there are no absolute answers. The test for arbitration, like litigation, is that the Arbitrator (like a Judge), must address his mind to all the issues in contention between the parties and render an Award adjudicating on the said issues in contention.

In this case, the Arbitral Tribunal did exactly that and based on the evidence, awarded reliefs to the parties who, in the evaluation of the evidence, were entitled to said reliefs.

In embedding the Respondents' arguments, Mr. Madaika sought to remind the Court that in an adversarial system, there is always a winning party and a losing party. It is understandable that all losing parties are almost always dissatisfied. In litigation, such losing party has the right of appeal on the merits. In arbitration, there is no such right, regardless of the merits.

It was submitted that the Applicant in this matter has very loosely thrown around the term 'public policy' and used it to imply that in every instance where the Applicant feels that the Arbitral Tribunal did not analyze the evidence according to the Applicant's liking, then there was a travesty committed and a breach of public policy. Mr. Madaika stated that such an approach is very dangerous and may very well undermine the entire arbitration avenue in this jurisdiction if every dissatisfied party to arbitration could come before the High Court and start analyzing the evidence with a view to overturning the opinion or finding of the Arbitral Tribunal and replace it with their own.

The Respondents, thus, urged the Court to shy away from any inclination to sit in an appellate capacity and start reviewing the evidence and the Arbitral Tribunal's findings as there is a very thin line between setting aside and appealing.

The Respondents, therefore, urged the Court to dismiss the entire action with costs to be borne by the Applicant.

DECISION

I have anxiously considered the evidence and arguments, both oral and written, by the contesting parties which, as can be seen, were very detailed. I appreciate the tremendous effort that was put in this matter by both Learned Counsel.

Now, I must necessarily caution myself that I am not sitting as an Appellant Court against the Arbitral Tribunal's Award. Rather, my role is limited to determining whether there are indeed shown facts that warrant the invocation of **Section 17** of the **Arbitration Act No. 19 of 2000** to have the Final Award of the Arbitral Tribunal set aside. **Section 17(2) (i) to (v)** of the **Arbitration Act** already reproduced herein provides grounds when Court may set aside an Arbitral Award.

The onus is also placed on the Applicant to prove any of the Grounds provided in **Section 17.**

Further, I agree with the contention of the Respondents that the 11 grounds could have been condensed into a fewer grounds. For instance, Grounds 2 and 4 on reliance and expectation damages being contrary to public policy could have been condensed into one ground. Similarly, Grounds 3 and 5 and Grounds 8 and 9. Nonetheless, I see no harm in dealing with the grounds relied on by the Applicant and in the manner I have set out in this Award.

1. **The Award rendered by the arbitral Tribunal on 8th November, 2017 be set aside in its entirety on the grounds that the Award deals with a**

dispute not contemplated by, or not falling within the terms of the submission to arbitration, and thus contains decisions on matters beyond the scope of the submission to arbitration thereof;

The matters alleged to be beyond the scope of the submission are the following:-

(a) When the Tribunal proceeded to award Expectation Damages in the sum of US$ 432,000 to the 2nd, 3rd and 4th Respondents when the said damages were not claimed or pleaded by the said Respondents in their pleadings;

(b) When the Tribunal ruled that the Applicant was in breach of the Wet Lease Agreement, which agreement was neither the subject of determination in the Arbitral proceedings nor the subject of an Arbitration Agreement between the Applicant and the Respondent; and

(c) When the Tribunal ordered that the Applicant should pay the sum of US$ 20,000 as reliance damages to Captain Mulundika, who was neither a party to the arbitration proceedings nor the subject of an Arbitration Agreement between him and the Applicant.

In addressing Ground 1, in my view, it is necessary to note that in paragraphs 37 to 57.1 of the Amended Statement of Case which is exhibited to the Applicants' Affidavit in support of the Originating Summons as "DVE 4", the following was pleaded:-

"37. *On 2nd September 2015, the Company through its Advocates of record, Musa Dudhia Company, issued a letter if demand to Airlink in which they demanded payment of the sum of USD 274 432. 75 being the balance owed for the Shares that had been subscribed to Airlink. A copy of the letter of demand dated 2nd September 2015 is now produced in the Claimants' Bundle of Documents and marked "**CD15.**"*

38. *Airlink has claimed that it is not obliged to make payment of the outstanding balance on the capitalization sum on the basis that the Shareholders Agreement is not effective.*

39. *Airlink's allegation is unfounded as it clearly signed the Shareholders Agreement and also took steps towards the joint venture and partly performed the agreement as a sign of its commitment. Airlink cannot be allowed to rely on its own failure to perform its obligations under the Shareholders Agreement.*

40. *The repudiation of the Shareholders Agreement by Airlink has caused the Claimants to suffer loss and damage.*

41. *The nature of the transaction between the parties is or a unique and special nature and as such the remedy of specific performance is the appropriate to be ordered. In addition, damages for the delayed performance should also*

be ordered.

42. *Airlink ought to be required to specially perform its obligations under the Shareholders' Agreement. A subsequent Contract with another entity will Not be equivalent in the circumstances as Airlink was selected by the Claimants due to its wealth in regional airline experience and its expertise in flying local routes and regional routes in and out of South Africa. There is no market for the Claimants for a similar agreement and as such the Airlink must specifically perform its obligations.*

43. *Granting specific performance will do more justice in the circumstances given the time, expense and effort the Claimants have expended in reliance in meeting their obligations as per the joint venture agreement between the parties. The Claimants have taken steps to perform the Shareholders Agreement. The Share capital in the Company has been increased and Shares in the Company have already been allotted to Airlink. Feasibility studies have been conducted by the Claimants and costs in relation to the same have been incurred.*

44. *The Claimants and Airlink have already acted on the Shareholders Agreement Specific performance is therefore the appropriate remedy in the circumstances.*

45. *Airlink must also pay for the damages naturally arising from the delayed performance of its obligations under the Shareholders Agreement. The joint venture has been delayed for over a year and Airlink in addition to specifically performing its obligations must pay damages in addition for the delay in performance.*

46. *An award for the damages would be inadequate in the circumstances. The Claimants have taken steps with the regulators and also with the allotment of Shares to the Respondent. Top officers of Airlink have also been appointed as Directors in the Company. The Claimants have also engaged the consultancy services of various experts in the aviation industry on the reliance that Airlink would perform their obligations by providing the necessary capitalization for the Company.*

Particulars of Special Damage

47. *The joint venture between Airlink and the Claimants was scheduled to Commence sometime in September, 2015.*

48. *Airlink's failure to provide the Company with the necessary capitalization has delayed the operations of the Company as a result of which the Company have suffered damage in terms of loss of business and projected profits.*

49. *The Company would have operated at least 64 rounds of trips from Lusaka to Ndola per month, 32 rounds of trips from Lusaka to Mfuwe and 32 rounds trips from Lusaka to Livingstone.*

50. *That the total revenue that the Company would have made for the round trips on all the domestic trips was projected at USD 1 067 527-75 per month.*

51. *The Company would have also incurred a total of USD 865, 206 expenses in the running of the joint venture and its operations per month with a net profit of USD 202,321-75.*

52. *The Company's total projected profits for 8 months starting from the month of September, 2015 to April 2016 is USD 1 618 573-98. There is now produced a copy of the operating results average per month starting September 2015 to April 2016 for domestic operations of the Company and a worksheet showing the workings on the projected profits is now produced in the Claimants' Bundle of Documents and marked "**CD16**". The amount continues to accrue.*

53. *Furthermore, the Claimants incurred costs in the sum of USD 110,000 (excluding taxes) in relation to the following:*

53.1 *Advising on the structure of the joint venture.*

53.2 *Preparation of Agreements incidental to the joint venture;*

53.3 *Negotiating with Chibesakunda & Co. who were acting for Airlink at the time and preparing the necessary documents;*

53.4 *Attending to obtaining the AOC, ProFlight documentation and preparation of premises, hardware and equipment.*

54. *The Company also engaged the specialized consultancy services of Captain Godfrey Mulundika on the operations of the joint venture whose costs were pegged at the sum of USD 40 000-00 excluding taxes, Mr. Zumla's specialized consultancy cost for advising and assisting the Company with the merger in the sum of USD 60,000-00 excluding taxes and Mr. Kunda's technical consultancy costs in consulting him to complete the AOC process and procedure are pegged at the value of USD20 000-00 excluding taxes.*

55. *In addition, after the disagreement between Airlink and Mr. Zumla on the hangar lease, the hangar suffered a loss of business as it would have accrued a monthly rental of the sum of USD 5 000-00 from August, 2014 to date making a total loss of USD 120 000-00 excluding taxes and the loss suffered still continues to accrue.*

*56. There is now produced in the Claimants' Bundle of Documents copies of the documents to support the claim for special damages marked as "**CD17".***

57. The Claimants now claims for:-

57.1 *An order for specific performance that Airlink specifically perform its obligations under the Shareholders Agreement and damages for delayed performance and in the alternative, damages for breach of the Shareholders Agreement and all consequential losses."*

Thus, the Arbitral Tribunal pointed out the "**Dispute**" and "**Contentions of the Parties"** in Clauses 1.3 and 3 of the Arbitral Award in the following words:-

"1.3 **The Dispute**

*The Claimants firmly believe and assert that there was in this matter a valid and concluded agreement which the Respondent has breached and which the Arbitral Tribunal should enforce by an award of **Specific performance and/or damages**. The Respondent on the other hand asserts that the Claimants are not entitled to any remedy since the agreement had not come into effect so that their withdrawing from it was not a breach. (emphasis is the Court's)*

3. CONTENTIONS OF THE PARTIES

3.1 The Claimants contend that there was a concluded and binding

agreement which was part performed but which the Respondent breached. The Respondent should be made to ***specifically perform the agreement and or should pay damages.*** *(emphasis is the Court's)*

3.2 *The Respondent contends that the agreement had not become effective and they were entitled to pull out without being liable either in damages or specific performance.*

The Arbitral Tribunal then proceeded to award damages by reasoning as follows:-

" 6. 12 ***The problem in this arbitration is that the Respondent seeks to avoid Liability for any alleged breaches largely on the footing of their own Action and/or omissions: They did not provide the start-up funds; they did not complete the needful under the Wet Lease Agreement; the offending shareholding structure which they have managed to shoot down was their idea; finally, they abruptly walked away from the Joint venture on account of disagreement over the lease of a hangar from a third parry corporate entity owned or controlled by CW 2. As CW 1 remarked, they behaved badly. Sadly and probably quite unwittingly, their walking away put an end to their proposed deception and possible illegality.***

6.13 ***The EX TURPI CAUSA RULE precludes the recovery of anything through litigation [and by analogy, through arbitration] by Claimants in***

transactions tainted by illegality in its broader sense. The Casillis were major players on the side of and on behalf of the Claimants and they were party to the Voting Agreement. CW1 freely admitted to being aware all the while that the Respondent wanted to have the majority shareholding. The MOU in Clause 2.2.8 quoted earlier clearly shows that all concerned knew that the Respondent and the Casillis [at any rate Mrs. Casilli] would enter into a suitable agreement acceptable to these parties, and it turns out that this was the Voting Agreement.

6.14 *The Founder Members I find on the totality of the evidence to have been innocent and not privy to the shareholding deception. In this regard, I have not acceded to the spirited submissions and arguments by Counsel for the Respondent to the effect that they must all be taken to have been complicit and privy. As a matter of credibility, I accept what Mr. Zumla and Mr. Casilli said on the point. The founder members and, of course, the 1st Claimant as a mere metaphysical and juristic entity, were innocent and not tainted by the deception. Accordingly, it is my considered finding and determination that they are clearly entitled to the universal remedy of damages for the overarching breach of Agreement involved in the series of breaches pointed out at 6.12 above.*

6.16 *The major damages of a compensatory nature in these proceedings*

would be the loss of the money the Shareholders expected to get out of the Joint Venture. The figures were based on projections and were hotly disputed. It was claimed in the pleadings and the contested evidence that the Joint Venture expected income in the region of USD$ One Million per month. Skilful cross-examination showed that, although CW 4 was quite sincere and genuine in his testimony, nevertheless there was an ever present danger of embellishment and exaggeration; that the expectations may very well have been grossly unrealistic. To counter this and doing the best that I can on what was generally barely satisfactory evidence, [and because of an unavoidable duty placed on all Plaintiffs or Claimants to mitigate their losses] I have to limit the duration of the loss to a period of no more than twelve months and the monthly expected income to no more than half what was projected per month. This produces expected Joint Venture income of far more modest figures gross. It was common cause and the Claimants quite properly conceded this in their pleadings that there were heavy expenses such that they did not expect profits of more than USD$ 202,321-75 per month. This would give all the Shareholders an income of roughly USD 2,400,000-00 over a twelve month period. This figure I find to be quite realistic. It was common cause that the Founder Members' stake or shareholding in the Joint Venture would have been diluted to 18%. Their share of the Two point Four Million Dollars

therefore works out to be USDS 432,000-00 to be shared in the proportions of their shareholdings in the Joint Venture. It is my finding and decision that the justice of this arbitration will be served by awarding the Founder Members damages of USD$$ 432,000-00. "

From the foregoing, it is clear that the Arbitral Tribunal outlined the dispute in paragraph 1.3 of the Award "**which the Arbitral Tribunal should enforce by an Award of Specific Performance and/or damages"**

Further, the Arbitral Tribunal in paragraph 3.1 outlined the Respondents' contention on the Agreement that the Applicants "**should be made to specifically perform and or should pay damages."**

The Arbitral Tribunal, however, declined to award Specific Performance and the reasoning is in paragraphs 6.10 and 6.11 of the Award which I find necessary to reproduce herebelow:-

6.10 ***Another ISSUE canvassed very vigorously was the question of the shareholding structure represented to be one thing in the official applications to the Regulator and in the documents at PACRA but in reality quite something else on account of a Voting Agreement concluded between the Respondent and the Casillis, although the 1st Claimant is also recited therein as a Party. It has been submitted***

on behalf of the Respondent that an inference should be drawn from certain aspects of the evidence that all the Claimants, founder members included, were aware of the deception being practiced; and that such deception resulted in breaches of the applicable laws. The laws and conventions applicable in the aviation industry have been canvassed quite extensively and, I might add, quite convincingly in the submissions by Learned Counsel for the Respondent in support of a proposition that the effective shareholding structure brought about by the Voting Agreement giving the majority to one-Zambians ran counter to the law and vitiated the approval obtained, as it turned out, by misrepresentation. The result would run counter to the promises in Clause 3 of the MOU where the Zambian majority shareholding was to have been maintained in order "not to jeopardize the validity of SKYWAYS Air Service Licence."

6.11 *The Casillis were, of course, openly privy to the Voting Agreement. CW 2 (Mr. Zumla) denied any knowledge of it when cross-examined on the point and purely as a matter of credibility, I find no reason to disbelieve him. However, the evidence from CW 1 and from RW 1 established that the whole Joint Venture was premised on the Respondent taking control. This would explain why they were the only ones to put up all the financing; why they were expected to make all the payments; and why their Planes and Crews were to operate the Joint Venture. I have to agree with the submission that to enforce the Joint Venture in the*

Shareholders Agreement as modified by the object of the Voting Agreement in these Circumstances would run counter to public policy and the scheme adumbrated in the Aviation Statutes and Conventions articulated in the submissions. The Civil Aviation Act, 2016 (No. 5 of 2016) restates the earlier Statutes and captures the applicable international conventions quite well. The submissions were on the right track and on this ground alone, quite apart from anything else, the remedy of Specific Performance requested by the Claimants and stipulated for as the only appropriate one in one of the Clauses in the Shareholders Agreement cannot possibly be entertained. Besides, as previously observed, the Shareholders Agreement was not an end in itself but a process in the Joint Venture. If there was to be Specific Performance, it would have to be of the entire Joint Venture, complete with Specific Performance of the Wet Lease Agreement, and that there would have to be active collaboration among key players who have instead already fallen out irretrievably. I still recall the evidence of CW 1 under cross-examination when he recounted how the transaction reached a point of no return after an acrimonious conversation involving racial remarks."

That left the claim for damages for breach of agreement as the other remedy available to the Respondents (who were the Claimants).

Consequently, the Arbitral Tribunal, particularly in paragraph 6.16 cited above referred to the pleadings, the contested evidence and, inter alia, stated that **" it**

was common cause and the Claimants quite properly conceded that in their pleadings that there were heavy expenses such that they did not expect profits of more than US$ 292,321-75 per month. This would give all the Shareholders an income of slightly US$ 2,400,000-00 over a twelve month period. This figure I find to be quite realistic."

The U$ 202,321-75 net profit was specially pleaded in paragraph 51 of the Statement of Case.

The Arbitral Tribunal then proceeded to award a total of US$ 432,000-00 damages to the Founder members who are the 2nd, 3rd and 4th Respondents to be shared in the proportion of their shareholdings in the joint venture so as to serve the interests of justice. The US$ 432,000-00 was awarded after a finding that the founders Shares in the joint venture would have been diluted to 18% - and this after taking into account the **EX TURPI CAUSA RULE** as relates to the Respondents' claim for damages.

Before I conclude on this limb of Ground 1, I find and determine that the Respondents' initial position – which was subsequently not persued – that the award of expectation damages was under "**further and other relief as the Tribunal may deem fit"** as simply startling. There is nothing in the Arbitral proceedings that even remotely suggest or point to this argument and it is no wonder the Learned Counsel for the Respondents Mr. Madaika abandoned this position at the hearing.

I must hasten to mention that the award of US$ 432,000-00 as expectation damages to the Founder Members was in fact part of the damages of a compensatory nature that the Arbitral Tribunal had referred to in paragraph 6.16 of the Final Award.

In ending, and for the avoidance of any doubt, the Applicants' contention on expectation damages as limb (a) of the first Ground lacks merit. Instead, I find and determine that the Award herein did not deal with a dispute not contemplated by, or falling within the terms of the submission to arbitration, and did not contain decisions on matters beyond the scope of the submission to arbitration by awarding expectation damages to the 2nd, 3rd and 4th Respondents in the total sum of US$ 432, 000-00.

I now come to limb (b) of Ground 1; *that the Arbitral Tribunal went beyond the scope of the submission to arbitration when it ruled that the Applicant was in breach of the Wet Lease Agreement.*

Indeed, it cannot be disputed that the Arbitral Tribunal stated in paragraph 6.12 of the Final Award that the Applicant had breached the Wet Lease Agreement. However, as correctly argued by the Respondents' Learned Counsel, Mr. Madaika, the Arbitral Tribunal was in paragraph 6.12 merely tabulating the various breaches on the part of the Applicant and did not award any of the Respondents any relief for breach of the Wet Lease Agreement.

I find that the Arbitral Tribunal's pronouncement on the Wet Lease Agreement having been breached by the Applicant was mentioned as an instance of the breaches made by the Applicant and as *OBITER*. I, therefore, find and determine also that in the absence of any relief awarded to the Respondents for breach of the Wet Lease Agreement, the Arbitral Tribunal did not act beyond the scope of the submission to arbitration.

In any case, even if the Applicants' contention was correct, that the Arbitral Tribunal erred at law to rule on the Wet Lease Agreement, it cannot be the basis for me to set aside the Arbitral Tribunal's Final Award as there was no award made for breach of the Wet Lease Agreement. At the most, under **Section 17(2)(a)(iii)** only that part of the "Award" on the Wet Lease Agreement can be set aside and not the whole Final Award.

Turning to limp (c) of Ground 1; *that the Arbitral Tribunal went beyond the scope of the submission to arbitration when the Tribunal entered that the Applicant pay the sum of US$ 20,000-00 as reliance damages to Captain Mulundika, who was neither a party to the Arbitration proceedings nor the subject of an Arbitration Agreement between him and the Applicant.*

From where I stand, I am of the view that the applicant has misconstrued the Arbitral Award in relation to the US$ 20,000-00 reliance damages. The Award of the US$ 20,000-00 was not to Captain Mulundika but to the 1st Respondent, a party to the arbitration.

At paragraph 7.2 on page 22 of the Final Award, the Arbitral Tribunal stated as follows:

> " 7.2 ***It is my further FINDING AND DECISION that the 1st Claimant (1st Respondent) is entitled to recover from the Respondent (Applicant) reliance damages of US$40,000-00 to be paid over to Mr. Kunda and Capt. Mulundika."***

In fact, the Arbitral Tribunal at paragraph 6.15 of the Final Award lucidly explained the basis of reliance damages to proper parties as follows:-

> 6.15 ***Evidence was led in support of various claims made in the pleadings. Some claims were raised on behalf of third parties which are not competent in these proceedings, an example being Eastern Safari's rentals strictly speaking due from the Joint Venture of the 1st Claimant once reconstituted. Indeed, the emails at the time of withdrawal showed that the Respondent's officials were looking out for the 1st Claimant as reconstituted to acquire a beneficial interest in the hangar for the kind of money expected to be expended. The only kind of third party claim which can be entertained is that where a proper party, such as the 1st Claimant and the Founder Members incurred expenditure, loss or obligations in reasonable reliance upon the Respondent performing their side of the transaction. The claims by Captain Mulundika and Mr. Kunda who were assigned duties and***

special tasks for the benefit of the Joint Venture and who were actually paid some of their earlier dues by the Respondent fall within this latter category. The other reliance losses would obviously include the expenditure wasted in processing the PACRA and other documentation and in reversing the whole thing following the cancellation of the transaction.

I consequently find and determine that the Arbitral Tribunal did not go beyond the scope of the submission to arbitration as alleged by the Applicant as the Award of US$ 20,000-00 was not made to Captain Mulundika but to the 1st Respondent, as a party to the arbitration, that had incurred the debt to Captain Mulundika.

Ground 1 in its entirety accordingly fails.

GROUND 2.

The Award rendered by the Tribunal on 8th November, 2017 and 16th January, 2018 be set aside for being contrary to public policy to the extent that the Tribunal awarded expectation damages outside the scope of the submission to Arbitration.

The Applicant's argument on this ground is largely a repetition of the arguments made in ground one in relation to expectation damages awarded to

the 2nd, 3rd and 4th Respondent except that the contention now is to set aside the Award on public policy considerations.

When dealing with Ground 1, on expectation damages, I have already found and determined that the Award of expectation damages to the 2nd, 3rd and 4th Respondents was not outside the scope of the submission to arbitration. I have given reasons for the finding and determination which equally apply in relation to Ground 2 herein. Consequently, I am not persuaded that the Award can be set aside for being contrary to public policy as the expectation damages were within the scope of the submission to arbitration.

Ground 2, therefore, fails.

GROUND 3.

The Award rendered by the Arbitral Tribunal on 8th November, 2017 be set aside for being contrary to public policy to the extent that the Arbitral Tribunal awarded expectation damages to the 4th Respondent notwithstanding the fact that the said Respondent did not prosecute his claim, if at all.

The Applicant's argument in essence is that the 4th Respondent neither pleaded expectation damages nor testified during the Arbitral proceedings and, therefore, could not have been awarded expectation damages.

The Respondents' position is that the 4th Respondent was one of the Respondents that pleaded loss of business and profits in the Statement of Case. Further, that in a joint claim, Claimants are not bound to all give testimony personally.

When dealing with the first limb of Ground 1, on expectation damages – I have found and determined that expectation damages was pleaded by the Respondents including the 4th Respondent. I have also accepted why the Arbitral Tribunal awarded the 2nd, 3rd and 4th Respondents the expectation damages and how the amount was to be apportioned to the 2nd, 3rd and 4th Respondents. In my view, the fact that the 4th Respondent did not personally testify could not have been reason *per se* to disentitle him to expectation damages. The Arbitral Tribunal had adequate basis for awarding the 4th Respondent the expectation damages, as one of the Founder Members.

GROUND 4.

The Award rendered by the Arbitral Tribunal on 8th November, 2017 be set aside for being contrary to public policy to the extent that the Tribunal awarded reliance damages outside the scope of the submission to arbitration.

As earlier stated, the Applicant's arguments under this Ground were covered by its arguments in Grounds 1 (c) 5 and 7. The reliance damages referred to – from my perspective – are the Award of

i) US$ 20,000-00 to Captain Mulundika and

ii) US$ 175, 000-00 to the 1st Respondent.

I, consequently, adopt my findings and determination on Grounds 1 (c), 5 and 7. The reliance damages awarded were not outside the scope of the submission to Arbitration and, therefore, Ground 4 fails.

GROUND 5.

The Award rendered by the Arbitral Tribunal on 8th November, 2018 be set aside for being contrary to public policy to the extent that the Arbitral Tribunal proceeded to award reliance damages to the Respondent in the absence of any evidence to support a claim for reliance damages.

The Applicant's position, in essence, is that special damages in form of reliance Damages was not proved by way of documentary or independent evidence which fact was also acknowledged by the Arbitral Tribunal in paragraph 16.18 of the Final Award. It was argued that all that the Respondents did was to present a figure of US$ 350,000-00 as reliance damages and gave a breakdown of this figure.

The Respondent, on the other hand, contended that the damages that were awarded were all pleaded for in the Statement of Case and proven by evidence in the Witness Statements and the viva voce evidence of the two Witnesses for the Respondents.

It may be observed that the Arbitral Tribunal in paragraph 16.18 of the Award made a finding that the fact that thrown away or wasted costs in legal, consultancy and technical advisory are recoverable and hardly needs any debate. I agree with the position taken by the Arbitral Tribunal in this regard and to the extent that the Arbitral Tribunal made an intelligent guess in the circumstances to award half of the amount, that is to say, US$ 175, 000-00 cannot be the basis of setting aside the Award for being contrary to public policy.

I find and determine that the Tribunal's reasoning and conclusion in awarding the US$ 175,000-00 in the circumstances did not go beyond mere faultness or incorrectness and constitutes a palatable inequity as per the test of **Gubbay C. J.** adopted by our Supreme Court in **Zambia Revenue Authority v Tiger Limited and Zambia Development Agency** (supra)

Ground 5 equally fails.

GROUND 6.

The Award rendered by the Arbitral Tribunal on 8th November, 2017 be set aside for being contrary to public policy to the extent that the Tribunal proceeded to award reliance damages to the Respondent in the absence of any evidence to support a claim for reliance damages.

In relation to the Award to Captain Mulundika, I have already dealt with the issue

under Ground 1 (c). Suffice it to restate my finding and determination that the same was properly awarded.

On the Applicant's argument that the damages of US$ 432,000-00 ought to have excluded the amounts due to third parties, that is Eastern Safari Limited and Amagrain, I find no basis for such an argument considering how the Arbitral Tribunal went about to award the damages.

In this regard, I have endeavored to diligently go through the Supplementary Award dated 16th January, 2018 and I am convinced that Clause 4 reveals how the Arbitral Tribunal arrived at the damages of US$ 432,000-00 in total. The Arbitral Tribunal stated, inter alia, as follows:-

> ***" The way I had dealt with the unsatisfactory evidence in the Final Award ought to show that I was engaged in doing the best in order to arrive at a figure that would do justice. The result was what the Courts have called variously "guesstimate" (see e.g Mary Patricia Soko v The Attorney General (1988-89 ZR 158 or "Intelligent and Inspired guesses "(see eg Mhango v Dorothy Nyambe (1983) ZR 61; Midlands Breweries v Munyenyembe (2012), ZR 133)."***

Clearly, the damages were neither awarded at the Court's own motion as alleged nor was the Arbitral Tribunal supposed to have deducted amounts for Eastern Safaris' Limited and Amagrain in arriving at the damages.

In fact, the Arbitral Tribunal went on to state in **Clause 5** of the Supplementary Award that:-

> ***" The arguments and submissions by the Respondent (Applicant herein) appear to presuppose that there had been established very definite, clear and precise figures which can enable computation with mathematical precision; figures which establish a multiplier and a multiplication which can simply be multiplied. I made no such finding. Therefore, I do not accept that there are errors within Article 33 and AWARD that there will be changes to the damages in the Final Award."***

The parties have to take cognizance of **Clause 5** reproduced above on how the Arbitral Tribunal arrived at the challenged quantum of damages , where ever in the Grounds – which overlap at times – the issue arises.

GROUND 7.

The Award rendered by the Arbitral Tribunal on 8th November, 2017 be set aside for being contrary to public policy to the extent that the Tribunal awarded reliance damages notwithstanding express provision in the Shareholders Agreement to the effect that the parties would bear their own costs for negotiation and implementation of the joint venture.

The Applicant's contention is that by awarding reliance damages, the Arbitral

Tribunal acted outside the express provision of **Clause 28** of the Shareholders Agreement which stated that each party was to bear and pay its own costs and expenses of and incidental to the negotiation, drafting, preparation and implementation of the Agreement.

The Respondents countered that the Applicant cannot derive a benefit from its own default/under an agreement which the Applicant breached.

Further, that on a true interpretation of **Clause 28** of the Shareholders Agreement, the costs and expenses referred to are those related to negotiation, drafting and implementation of the Shareholders Agreement and not for breach of the Agreement.

I will put it in this manner: It is common cause that the Joint Venture envisaged in the Shareholders Agreement never materialized. The Arbitral Tribunal's finding was that there was a breach by the Applicant. I cannot, therefore, agree more with the Respondents' Learned Counsel's submission that the costs and expenses mentioned in **Clause 28** did not apply.

To illustrate further and conversely, had the Respondents claimed the costs and expenses mentioned in **Clause 28** after the venture envisaged in the Shareholders' Agreement had materialized, the Respondents would not have been entitled to the costs and expenses for negotiation, drafting, preparation and implementation of the Agreement (in the event of such a claim).

Ground 7 also fails.

GROUNDS 8 AND 9.

The arbitration process including the analysis of evidence and the Award was not in accordance with the arbitration procedure as agreed by the parties and as set out in the Order for Directions and is therefore contrary to public policy.

The tall and short of the Applicants' contention is two-fold: First, that the Arbitral Tribunal did not adhere to the procedure agreed upon by the parties and set out in the Order for Directions to follow strict rules of evidence; prominently being the damages Award was in the absence of any evidence. Secondly, that a reasoned Award was not rendered on all issues of fact and law raised by the parties as parties had also agreed was to apply.

The Respondents, however, argued that the fact that the Order for Directions stated that strict rules of evidence were to apply did not mean the parties had raised the standard of proof from a balance of probabilities.

Further, that contrary to the Applicant's assertion, a reasoned Award was rendered as the Arbitral Tribunal dealt with the issue in controversy as revealed by the Arbitral Tribunal and the Arbitral Tribunal was not expected to go paragraph by paragraph and make a pronouncement on every paragraph in the Statement of Case and Statement of Defence.

I hasten to dispel the Respondents' argument that by referring to strict rules of

evidence, the Applicant was raising the standard of proof from a balance of probabilities. The Applicant did not assert and is not asserting as such. My understanding is that the Applicant's quarrel with the Arbitral Tribunal is that the strict rules of evidence on proof of reliance and expectation damages was not adhered to.

On close examination of the Applicant's argument, I am of the view, and I find that, the Arbitral Tribunal substantially complied with the need to adhere to strict rules of evidence in awarding reliance and expectation damages. There were figures pleaded in the Statement of Case which, after hearing of the Respondents' Witnesses, the Arbitral Tribunal evaluated and made a determination on the quantum.

The figures presented to the Arbitral Tribunal were not plucked from the air but instead were from losses, costs and expenses and from the evidence which was adduced before the Arbitral Tribunal.

On the alleged failure by the Arbitral Tribunal to make a reasoned award on all issues raised by the parties, I do not find any such failure. The Arbitral Tribunal already pointed out the dispute in **Clause 1.3** of the Final Award. From the pleaded matter, I find that this was exactly the dispute submitted for arbitration.

Grounds 8 and 9 consequently fail.

GROUND 10.

The Shareholders Agreement as read with the Voting Agreement was contrary to public policy and the dispute thereof was therefore not capable of determination by arbitration.

The Applicant's contention being that by virtue of what the Arbitral Tribunal stated in paragraph 6.11 of the Final Award, that to enforce the venture envisaged in the Shareholders Agreement as modified by the object of the Voting Agreement would run counter to public policy, the Arbitral Tribunal did not have Jurisdiction to then award the damages.

According to the Applicant, the Arbitral Tribunal had in paragraph 6.11 found the Shareholding Agreement as read with the Voting Agreement in violation of public policy and the Aviation legislation.

The Respondents' counter argument was that the Shareholders Agreement and the Voting Agreement were distinct and separate Agreements.

The Respondents further asserted that the Voting Agreement was an illegal private agreement between the Applicant and the 5th Respondent from which the Applicant stood to benefit. Apart from the 5th Respondent, the rest of the Respondents were innocent parties as they did not participate in the illegality of the Voting Agreement and cannot be deprived of their rights under the Shareholders Agreement.

On this, I entirely agree with the overall submission of the Respondents' Learned Counsel to the effect that ***EX TURPI CAUSA RULE*** applied against the Applicant in the circumstances of this matter. The Rule prevents the Applicant from using its own illegalities to keep the innocent Respondents from being awarded what was due to them as damages for breach of Contract. The Arbitral Tribunal found that the Founder Members and the 1st Respondent as a "**metaphysical and juristic entity**" were innocent and, thus, the damages awarded to them.

The Arbitral Tribunal came to the decision to award damages to the Founder Members after considering the prevailing facts. The Arbitral Tribunal did so to prevent injustice being occasioned, and this the Tribunal expressed in paragraph 6.16 of the Final Award; that

> ***" ... the justice of this arbitration will be served by awarding the Founder Members damages of US$ 432,000-00."***

I would even go further that it would in itself have been contrary to public policy to have allowed the Applicant escape liability to innocent parties on account of the illegality of the Voting Agreement which the Applicant perpetrated.

For the avoidance of any doubt, I do not agree with the Applicant's assertion that **Section 6 (2)** of the **Arbitration Act** takes away an Arbitral Tribunal's jurisdiction to award relief to innocent parties to an illegal Contract.

In any event, my reading of what the Arbitral Tribunal said in paragraph 16.11 of the Final Award does not convince me to accept the assertion that the Arbitral Tribunal found the Shareholders Agreement to have been contrary to public policy.

I find and determine that the dispute herein was capable of determination by arbitration and no conflict with public policy existed.

In a nutshell, all the Grounds for setting aside the Arbitral Award dated 8th November, 2017 and 16th January, 2018 have not succeeded. The application is, instead, dismissed for lack of merit.

The Respondents shall have their costs against the Applicant, same to be taxed in default of Agreement,

Leave to appeal is granted.

Delivered at Lusaka this 12th September, 2019,

HON. JUSTICE SUNDAY B. NKONDE, SC
HIGH COURT JUDGE