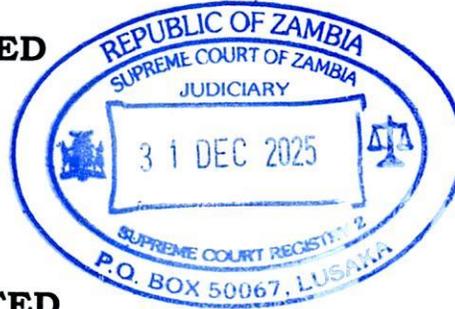


**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

APPEAL NO. 10/2023

BETWEEN:

SA AIRLINK (PTY) LIMITED



APPELLANT

AND

ZAMBIA SKYWAYS LIMITED

1ST RESPONDENT

YUOSUF VALLI ZUMLA

2ND RESPONDENT

LEWIS KUNDA

3RD RESPONDENT

SULEMAN AHMED PATEL

4TH RESPONDENT

GILLIAN LEE CASILLI

5TH RESPONDENT

DIEGO GAN-MARIA CASILLI

6TH RESPONDENT

Coram : Malila, CJ, Kaoma and Mutuna, JJS
on 2nd September, 2025 and 31st December, 2025

For the Appellant : *Mr. D. M. Chakoleka and Mr. M. Nalishuwa of Messrs
Mulenga Mundashi Legal Practitioners*

For the Respondents : *Mr. J. Madaika and Ms. S. K. Banda of Messrs J and
M Advocates*

J U D G M E N T

Mutuna, JS, delivered the judgment of the Court.

Cases referred to:

- 1) *China Henan International Cooperation v G and G Nationwide (Z) Limited*, Appeal No. 199 of 2016
- 2) *Zambia Revenue Authority v Tiger Limited and Zambia Development Agency*, SCZ Selected Judgment No. 11 of 2016
- 3) *Phillip Mhango v Ngulube and Others*, (1983) Z.R. 61
- 4) *Attorney General v D. G. Mpundu*, (1984) Z.R. 6
- 5) *Zimbabwe Electricity Supply Authority v Maposa*, 1999 (2) ZLR 452 (S)
- 6) *Kafue District Council v James Chipulu*, (1995 - 1997) Z.R. 190
- 7) *Kabwe International Transport Limited and Another v Njelekwa*, SCZ Judgment No. 12 of 1998
- 8) *Victoria Findlay Huwiler v CPD Properties Limited and 2 Others* (HPC 182 of 2014) [2015] ZMHC 109
- 9) *Anzen Limited and Others v Hermes One Limited (British Virgin Islands)* [2016] UKPC 1
- 10) *Wilson Masauso Zulu v Avondale Housing Project Limited*, (1982) Z.R. 172
- 11) *Khalid Mohamed v The Attorney General*, Appeal No. 3 of 1981
- 12) *Official Assignee v Chartered Industries of Singapo Limited* (1977 – 1978) SLR (R) 435
- 13) *Mary Patricia Soko (Suing as next friend of the Minor Child, Prisca Mwanza) v The Attorney General*, (1988 – 1989) Z.R. 158
- 14) *Philip Mhango v Dorothy Ngulube and Others*, (1983) Z.R. 61
- 15) *Midlands Breweries (PVT) Ltd v Munyenyembe*, (2012) 1 Z.R. 133
- 16) *Fratelli Locci Sri Estrazion Minerarie v Road Development Agency*, HPC/ARB 493 of 2016
- 17) *Mohamed S. Itowala v Variety Bureau De Change*, (2001) Z.R. 96
- 18) *Finance Bank Zambia Limited v Weluzani Banda and 162 others*, Appeal No. 217 of 2016
- 19) *David Chiyengele and 5 Others v Scaw Limited*, Appeal No. 2 of 2017

Legislation referred to:

- 1) *Arbitration Act, 1996*
- 2) *Law Reform (Miscellaneous Provisions) Act, Cap 74 of the Laws of Zambia*

Other Works referred to:

- 1) Mustill MJ and Boyd SC, *The Law and Practice of Commercial Arbitration in England* (2nd edn, Butterworths 1989)
- 2) Redfern A, Hunter M, Blackaby N and Partasides C, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004)
- 3) Bryan A. Garner (ed), *Black's Law Dictionary* (7th edn, West Group 1999)

Introduction

- 1) The hallmark of arbitration is party autonomy, which involves the parties' choice of arbitrator, the applicable law and rules to the arbitral procedure, the limits of the arbitrator's powers and jurisdiction, to mention but a few. This is what sets arbitration apart from court litigation. Arbitration is also a consensual process because the parties not only have to agree to resort to it but also how it is to be conducted.
- 2) The arbitrator's powers and jurisdiction are, therefore, defined and curtailed by the parties. He can only do those acts which he is authorised by the parties to do and his decision should be within the boundaries defined by the parties as constituting their dispute.

This power is defined and curtailed in this manner unless the parties reach an impasse on any issue in which event, the arbitrator's decision will break the impasse. This is the default position and the time when the arbitrator's powers are triggered.

- 3) Since the process is consensual in nature, it binds those persons who have agreed to initiate it. These are referred to as the parties to the arbitration agreement or the proceedings as defined by **section 2(1)** of the **Arbitration Act**, (the **Act**) and are the only persons who can make a claim through the process and benefit from it.
- 4) The appeal in this matter is a challenge launched against the award by an arbitrator in accordance with **section 17** of the **Act**. It is an attack against the award of certain damages made by the arbitrator to the respondents and one Captain Mulundika. The contention being that the manner in which he awarded these damages, contravenes the agreement of the parties, the law and public policy.

Background

- 5) Sometime in the year 2014, the 6th respondent, a businessman of Italian descent, engaged in negotiation with the appellant, a South

African airline operator, with the intention of entering into a joint venture with the 1st respondent. The purpose of the joint venture was for the parties to collaborate in the operation of domestic and international flights.

- 6)** The appellant, 1st, 5th and 6th respondents, consummated their negotiations by entering into a memorandum of understanding (MOU). By clause 7.2 of the said MOU, the parties agreed that they would enter into a detailed agreement to govern their relationship within 180 days of executing the MOU. Pursuant to this, the appellant, 2nd, 3rd, 4th, 5th and 6th respondents, entered into a shareholder agreement (SHA) on 29th October, 2014. The 1st respondent's share capital was also increased and the appellant was allotted 49% shares while the 5th and 6th respondents held 33% of the shares.
- 7)** The 1st respondent proceeded to undertake its obligations in pursuance of actualizing the agreement of the parties but later a disagreement arose between the appellant and 2nd respondent regarding the lease of a hanger. This resulted in the appellant withdrawing from the joint venture and refusing to pay the sum of

USD300,000.00 which was due on the shares allotted to it. The appellant claimed that the SHA was ineffective despite the allotment of the shares to it.

8) The 2nd, 3rd, 4th, 5th and 6th respondents were aggrieved by the appellant's decision and commenced arbitration proceedings by invoking clause 23 of the SHA. They sought the following reliefs:

8.1) An order for specific performance of the obligations imposed on the appellant by the SHA, damages for delayed performance and in the alternative, damages for breach of the SHA and all consequential losses;

8.2) Special damages of *USD1,618,573.98* being the 1st respondent's loss of business resulting from the breach;

8.3) Special damages in the sum of *USD350,000.00* being the aggregate of the actual legal, consultancy and technical advisory costs incurred as a result of the proposed joint venture;

- 8.4) Loss of profits from the period May 2015, until a date determined by the arbitrator;
- 8.5) Interest on any damages and special damages awarded from the date when the cause of action arose, to the date of award pursuant to **section 4** of the **Law Reform (Miscellaneous Provisions) Act, Chapter 74** of the **Laws of Zambia**;
- 8.6) Further or other reliefs the tribunal may deem fit; and,
- 8.7) Costs.

Despite the fact that the 1st respondent was not a party to the SHA, from which the dispute arose, it was made a party to the proceedings by virtue of claiming under the other respondents in accordance with **section 2(1)** of the **Act**.

After the exchange of pleadings, the arbitrator held a hearing and delivered his award.

Decision of the Arbitrator

- 9) The arbitrator found in favour of the respondents and awarded the sums of: *USD432,000.00* expectation damages to the 2nd, 3rd and

4th respondents; *USD40,000.00* to the 1st respondent to be paid over to the 3rd respondent and one Captain Mulundika; *USD175,000.00* reliance damages to the 1st respondent and, interest on the monetary awards at the average short term dollar deposit rate to be ascertained by the parties from Bank of Zambia. On the issue of costs, the arbitrator directed the parties to bear their respective costs.

- 10) Following the delivery of the award, the appellant requested the arbitrator to correct the award pursuant to **Article 33** of the **Model Law**. It contended that there was an error made by the arbitrator in the computation of the award of *USD432,000.00* expectation damages to the 2nd, 3rd and 4th respondents. The appellant contended further that these damages were awarded on the arbitrator's own motions as they were not specifically pleaded.
- 11) After considering the request, the arbitrator rendered what he termed a supplementary award declining to grant the appellants request. He based his decision on his finding that the amount of *USD432,000.00* was arrived at through the art of "guesstimates"

due to the insufficient evidence placed before him and not the computation of any figures.

12) The appellant was unhappy with the two awards rendered by the arbitrator and launched an application in the High Court to set them aside. The application was pursuant to **section 17** of the **Arbitration Act**. This **section** sets out the only recourse against an arbitral award which is setting aside on the grounds of:

12.1) Incapacity by a party to the arbitration agreement;
invalidity of the arbitration agreement;

12.2) Want of notice of the appointment of the arbitrator or proceedings by one of the parties;

12.3) The award dealing with a dispute that was not contemplated by the parties or submission to arbitration;

12.4) Composition of the tribunal or procedure adopted by the tribunal not being in accordance with the agreement of the parties;

- 12.5) The award has not yet become binding on the parties or has been set aside;
- 12.6) The subject matter of the dispute not being arbitrable under Zambian law;
- 12.7) Award being in conflict with public policy; or, the award being induced or effected by fraud corruption or misrepresentation.

The application before the High Court and decisions by the court

- 13) The appellant commenced the application before the Learned High Court Judge by way of originating summons pursuant to **section 17(2)** of the **Act**. The reliefs sought by the appellant were as follows:
 - 13.1) The award rendered by the arbitrator 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;

- 13.2)** The awards rendered by the arbitrator on 8th November, 2017 and 16th January, 2018, be set aside for being contrary to public policy to the extent that the arbitrator awarded expectation damages outside the scope of the submission to arbitration;
- 13.3)** The award rendered by the arbitrator on 8th November, 2017, be set aside for being contrary to public policy to the extent that the arbitrator awarded expectation damages to the 4th respondent notwithstanding the fact that he did not prosecute his claim, if at all;
- 13.4)** The award rendered by the arbitrator on 8th November, 2017, be set aside for being contrary to public policy to the extent that the arbitrator awarded reliance damages outside the scope of the submission to arbitration;
- 13.5)** The award rendered by the arbitrator on 8th November, 2017, be set aside for being contrary to public policy to the extent that the arbitrator proceeded to award reliance

damages to the respondent in the absence of any evidence to support a claim for reliance damages;

- 13.6)** The award rendered by the arbitrator on 8th November, 2017, be set aside for being contrary to public policy to the extent that the arbitrator awarded reliance damages in respect of a non-party to the arbitration proceedings;
- 13.7)** The award rendered by the arbitrator on 8th November, 2017, be set aside for being contrary to public policy to the extent that the arbitrator awarded reliance damages notwithstanding express provision in the SHA to the effect that the parties were to bear their own costs for negotiation and implementation of the proposed joint venture;
- 13.8)** 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 order for directions;

- 13.9)** To the extent that the arbitration process was not in accordance with the arbitration procedure as agreed by the parties, the award is contrary to public policy;
- 13.10)** The SHA as read with the voting agreement was contrary to public policy and the dispute arising thereof was, therefore, not capable of determination by arbitration.
- 13.11)** 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 arbitrator by the parties;
- 13.12)** The court may grant the applicant any other relief it may deem fit or necessary; and,
- 13.13)** The applicant be granted costs of and incidental to this action.
- 14)** After the Learned High Court Judge heard the matter, he rendered his decision by firstly acknowledging that he was not sitting as an appellate court to interrogate the merits and demerits of the

arbitrator's decision in so far as determination of the application before him was concerned. He went on to state that his role was limited to determining whether the appellant had laid before him sufficient facts warranting the setting aside of the award in accordance with **section 17** of the **Act**. The Judge concluded his opening remarks by confirming that the onus lay on the appellant to prove the grounds alleged for setting aside of an arbitral award.

- 15)** The Learned High Court Judge then proceeded to consider the grounds advanced by the appellant, starting with ground 1 which alleged that the award dealt with a dispute not contemplated by the parties or not falling within the terms of the submission to arbitration. Therefore, the decision of the arbitrator contains decisions beyond the scope of the submission to arbitration.
- 16)** The Judge set out the matters which were alleged to be beyond the scope of the submission to arbitration and then compared them to the pleadings which the respondents submitted to the arbitrator and his decision on those matters which began by declining to order specific performance. He went on to hold that the matters before the arbitrator as they related to his award of damages of

USD432,000.00 were specifically pleaded and that the award was arrived at after the arbitrator considered the pleadings and evidence tendered by the parties.

- 17) He then proceeded to consider whether the determination by the arbitrator that the appellant breached the wet lease was beyond the scope of the submission to arbitration and held that the consideration and decision made by the arbitrator on this issue was made by way of *obiter dicta*. As a consequence of this, the arbitrator did not award any damages for breach of the wet lease.
- 18) The last consideration by the Judge under ground 1 related to the appellant's challenge against the award of USD20,000.00 as reliance damages to Captain Mulindika who was not a party to either the arbitration proceedings or the arbitration agreement. The Judge considered the award of the said amount and found that it was not made to Captain Mulindika but to the 1st respondent, who was a party to the proceedings. He went on to find that the arbitrator explained in detail the basis of his award of the reliance damages, to what he termed, "*proper parties*".

- 19)** As regards grounds 2, 3 and 4 which challenged the award on the ground that it contravened public policy, the Learned Judge had no difficulty in dismissing them based on the determination he made in respect of ground 1.
- 20)** In respect of grounds 5 and 6 which alleged that the award of damages contravened public policy because there was no evidence to support them, the Judge, while acknowledging that the arbitrator did find the evidence scanty, still went ahead to dismiss the grounds. He found that the arbitrator was on firm ground when he awarded the damages by making intelligent guesses due to the scanty evidence in support of the claims. In addition, he found that the appellant had failed to meet the threshold for setting aside of an award based on public policy.
- 21)** Coming to ground 7 of the application which challenged the award of reliance damages on the ground that it contravened clause 28 of the SHA, which expressly stipulated that the parties would bear their own costs for negotiations and implementation of the joint venture, and was thus contrary to public policy, the Judge began

by setting out the contentions of the parties. He held that since the joint venture which was envisaged in the SHA did not crystalize, the provisions of clause 28 did not apply. According to the Judge, the provisions of clause 28 would only have been applicable if the joint venture envisaged in the SHA had crystalized.

22) The Judge then considered grounds 8 and 9 which alleged that the arbitration process, including the analysis of the evidence and the award, were contrary to the procedure agreed upon by the parties and as defined in the order for directions, thus contrary to public policy. He began by explaining the challenge mounted here by the appellant as follows:

22.1) The arbitrator 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. The crucial point here being that the award of damages was made in the absence of supporting evidence; and,

22.2) The arbitrator omitted to render a reasoned award on all issues of fact and law raised by the parties.

- 23)** In dealing with the contention raised in paragraph 22.1, the Judge found that the arbitrator substantially complied with the need to adhere to strict rules of evidence in awarding the damages in issue. He found further that there were figures pleaded in the statement of the case which were evaluated by the arbitrator after hearing the respondents' witnesses, following which the arbitrator made a determination on the quantum of damages to be awarded. The Judge concluded that the figures were not "plucked" from the air but were based on actual losses, costs and expenses incurred by the respondents as revealed in the evidence adduced before the arbitrator.
- 24)** As for the contention raised in paragraph 22.2, the Judge found that there was no failure on the part of the arbitrator to render a reasoned award on all issues presented to him. He found further that the arbitrator's definition of the dispute which was before him fell squarely in line with the pleadings submitted to him.
- 25)** The last ground which the Judge dealt with was ground 10 alleging that the SHA, as read with the voting agreement, was contrary to

public policy, therefore, the dispute arising therefrom, was not capable of determination by arbitration. The Judge agreed with the arbitrator's finding that the appellant having perpetrated the illegality in the voting agreement could not benefit from it. However, the founder members, the 2nd, 3rd and 4th respondents, along with the 1st respondent, a meta physical and juristic entity, were innocent and could not be deprived damages they were entitled to. He held further that it would be against public policy to allow the appellant to escape their liability to innocent parties as a consequence of the illegality of the voting agreement which it perpetrated. The Judge concluded that **section 6(2)** of the **Act** does not take away an arbitrator's jurisdiction to award relief to innocent parties to an illegal contract.

- 26)** The Judge concluded by dismissing the application and condemning the appellant to costs. This prompted the appellant to appeal to the Court of Appeal.

Appeal to the Court of Appeal and decision of the Court

- 27)** The appellant advanced 11 grounds of appeal before the Court of Appeal as follows:

- 27.1)** The court below erred in law and in fact when it held that the expectation damages awarded by the arbitrator to the 2nd, 3rd and 4th respondent had been pleaded despite the evidence on record clearly showing that no such damages had been pleaded by the respondents;
- 27.2)** The court below erred in law and in fact when it held, in the absence of any evidence whatsoever, that the respondents had abandoned their assertion to the effect that the expectation damages granted by the arbitrator to the 2nd, 3rd and 4th respondents had been granted under the respondents' claim for further and other relief;
- 27.3)** The court below erred in law and in fact when it found and held that the arbitrator substantially complied with the strict rules of evidence, which finding and holding was contrary to the order for directions which required a strict compliance with the rules of evidence as opposed to substantial compliance;

- 27.4)** The court below erred in law and in fact when it held that the arbitrator did not go beyond the scope of the submission to arbitration when he found that the appellant was in breach of the wet lease agreement, which finding is against the position of the law to the effect that an arbitrator's jurisdiction is circumscribed by both the pleadings and the arbitration agreement which is the subject of the arbitral pleadings;
- 27.5)** The court below erred in law and in fact when it held that the arbitrator did not award any damages for breach of the wet lease agreement notwithstanding clear evidence on the record showing that the arbitrator actually granted damages for what it termed a series of breaches of contract by the appellant which included the alleged breach of the wet lease agreement;
- 27.6)** The court below erred in law and in fact when it held that the arbitrator rightly awarded expectation damages to the 4th respondent despite the fact that the said respondent did

not prosecute his case, which position was contrary to the order for directions to the effect that the rules of evidence were to be strictly complied with;

- 27.7)** The court below erred in law and in fact when it completely neglected to make a determination on the appellant's contention to the effect that the arbitrator, in considering the claim for reliance damages, did not discount the claims which were being made by non-parties to the arbitration, notwithstanding the fact that the appellant adduced sufficient evidence to show that the claim for reliance damages in the sum of *USD350,000.00* comprised claims by non-parties to the arbitration;
- 27.8)** The court below erred in law and in fact when it held that the arbitrator was right to award reliance damages to the respondents in the absence of any evidence whatsoever to prove such damages;
- 27.9)** The court below erred in law and in fact when it held that the costs in clause 28 of the SHA did not apply because the

joint venture envisaged never materialized, which position was contrary to the express provisions of clause 28 of the SHA and consequently offending the provisions of the **Act**;

27.10) The court below erred in law and in fact when it found and held that the arbitrator did not fail to provide a reasoned award on issues in contention, which holding was not supported by the evidence on record which clearly showed that the arbitrator did not adjudicate on all the issues in contention between the parties; and,

27.11) The court below erred in law and in fact when it held that the arbitrator had jurisdiction to award damages notwithstanding the fact that enforcement of the SHA had been found to be contrary to public policy.

28) After the Court of Appeal heard the appeal, it dismissed it and upheld the decision of the Learned High Court Judge in its entirety. The court also dismissed the appellant's argument that since the respondents did not lead evidence to prove the quantum of damages awarded, they should have been awarded nominal and

reasonable damages. It ruled, in this regard, that the arbitrator was on firm ground when he awarded the amounts he did because the dispute involved an international joint venture and large sums of money in foreign currency. Therefore, unlike in the case the appellant relied upon which involved local organisations and individuals, any awards made based on intelligent guesses could not be nominal. The court also awarded costs to the respondents.

Appeal to this Court and arguments by the parties

29) The appellant was unhappy with the decision of the Court of Appeal and launched this appeal advancing 13 grounds of appeal as follows:

29.1) The court below erred in law and in fact when it held that the expectation damages that were awarded to the 2nd, 3rd and 4th respondents were pleaded despite the record clearly showing that the said damages were never pleaded and were not the subject of any evidence by any of the witnesses who testified before the arbitrator;

- 29.2)** The court below erred in law and in fact when it held that the arbitrator strictly complied with the strict rules of evidence notwithstanding clear evidence on record showing that the arbitrator sought to rectify the deficiencies in the respondents' evidence;
- 29.3)** The court below erred in law and in fact when it held that the arbitrator was justified in making intelligent guesses when awarding the respondent special damages despite the agreed position of the parties for the strict rules of evidence to be applied;
- 29.4)** The court below erred in law and in fact when it justified the making of a pronouncement and finding by the arbitrator on the wet lease agreement despite the fact that the wet lease agreement fell outside the scope of the dispute submitted for adjudication by the parties;
- 29.5)** The court below erred in law and in fact when it held that the wet lease agreement was only referred to by the arbitrator in *obiter* despite evidence on record clearly

showing that one of the breaches for which damages were awarded was the breach of the wet lease agreement;

- 29.6)** The court erred in law and in fact when it applied the High Court Rules to arbitration proceedings to justify the 4th respondent's entitlement to expectation damages despite his failure to adduce evidence to prove his claim;
- 29.7)** The court below erred in law and in fact when it held that the 4th respondent was entitled to damages despite not adducing any evidence to prove his claim, which holding is contrary to the established principle of the law of evidence on the need for each claimant to prove their claim;
- 29.8)** The court below erred in law and in fact when it held, in the absence of any evidence on record, that the claim by the 4th respondent was covered in the testimonies of the other shareholders and witnesses, as well as documents;
- 29.9)** The court below erred in law and in fact when it held, in the absence of any legal authority, that the principle on nominal

damages awarded by way of intelligent guesses applies only to local companies and individuals as opposed to international joint ventures involving huge amounts of money in foreign currency;

29.10) The court below erred in law and in fact when it held that clause 28 of the SHA did not cover reliance damages for breach of contract despite the said clause clearly showing that it was meant to cover all expenses incurred in reliance of the respective promise of the parties;

29.11) The court below erred in law and in fact when it held that the arbitrator rendered a reasoned award despite evidence on record clearly showing that the arbitrator did not determine all the issues that were submitted to him by the parties;

29.12) The court below erred in law and in fact when it held that the arbitrator had jurisdiction to adjudicate on a dispute arising from a SHA which could not be enforced on grounds of public policy; and,

29.13) The court below erred in law and in fact when it held that grounds 7 and 8 of the appeal before the Court of Appeal raised by the appellant amounted to an appeal on the merits as opposed to an application for setting aside despite the fact that a perusal of grounds clearly reveals that there was no appeal on the merits against the decision of the arbitrator.

- 30)** Prior to the hearing, counsel for the parties filed heads of arguments. In advancing the arguments relating to ground 1 of the appeal, counsel for the appellant relied on **section 17(2)(a)(iii)** of the **Act**. They submitted that the **section** makes it clear that an award may be set aside where it deals with disputes on matters that were not submitted to the arbitrator by the parties. According to counsel, an arbitrator's jurisdiction is confined to matters that have been submitted to him by the parties for his determination.
- 31)** Advancing their arguments, counsel explained the importance of parties identifying the issues in dispute submitted to the arbitrator for purpose of clearly defining his jurisdiction. They referred to a

passage from the text by the learned authors **Sir Michael J. Mustill and Stewart C. Boyd, *The Law and Practice of Commercial Arbitration in England***, which states, inter alia, as follows:

“... in other instances, the dispute opens up a wide field of issues or potential issues; and in these cases, it is desirable to carry out, in one form or another, a process whereby the issues are defined in writing. This process has two main functions. Firstly, it serves to inform the arbitrator of matters which he must decide when making his award. If he awards on issues which have not been left to him for decision, he commits misconduct and may be acting in excess of jurisdiction. It is equally misconduct if he fails to deal in his award with matters which he has been appointed to decide.”

Explaining the foregoing passage from the text, counsel stated that an arbitrator falls foul of his jurisdiction when he decides on issues that are either, not submitted to him, or when he fails to determine the precise issues that have been submitted to him.

- 32) We were then referred to our decisions in the cases of ***China Henan International Cooperation v G and G Nationwide (Z) Limited***¹ and ***Zambia Revenue Authority v Tiger Limited and Zambia***

Development Agency² that the **Model Law** is part of our **Act** and that the two should be read together. To this end, counsel referred to **Article 34(2)(a)(iii)** of the Model Law which by and large mirrors the provisions of **section 17** of the **Act**. They also referred to the text, **Law and Practice of International Commercial Arbitration**, by **Redfern, Hunter with Blackaby and Partasides**, which confirms that one of the grounds for setting aside an award is where an arbitrator exceeds his power by dealing with matters that have not been submitted to him.

33) Applying the foregoing principle of law to this matter, counsel contended that the arbitrator exceeded his jurisdiction when he awarded damages to the 2nd, 3rd and 4th respondents because they did not plead the damages in the statement of case as they were awarded by the arbitrator. The pleadings which revealed a claim for damages for loss of business in the statement of case, were only made in respect of the 1st respondent.

34) To this end, counsel submitted that the Court of Appeal erred when it held that the pleadings relating to 2nd, 3rd and 4th respondents appearing at paragraphs 48 to 57 of the statement of case include

a claim for loss of business by these respondents along with the 1st respondent projected at *USD1,067,527.75*. They submitted that the paragraphs refer only to the 1st respondent which is the company referred to in those paragraphs as having suffered the loss claimed.

35) To reinforce their arguments, counsel referred us to the respondents' arguments in the High Court where they conceded that the 2nd, 3rd and 4th respondents did not specifically plead or claim for loss of business. That, they justified the award of these damages to the three by contending that it fell under the prayer for further and other relief endorsed in the statement of case by the respondents. Counsel countered this by submitting that a perusal of the award reveals that the arbitrator did not award any damages under the prayer for further and other relief.

36) Counsel also drew our attention to portions of the affidavit in opposition filed by the respondents which alleged that the appellant misconstrued the meaning of submission to arbitration because it is not restricted to specific claims contained in the pleadings; submission to arbitration relates to the nature of the dispute

envisaged under the arbitration agreement; an arbitrator has power to make any award so long as it falls within the ambit of the dispute submitted in accordance with the scope provided under the arbitration agreement and evidence tendered; the arbitrator draws his jurisdiction from statute and from the arbitration agreement and not the pleadings; and, expectation and reliance damages need not be specifically described as such in the pleadings in order for an award to be made. The only requirement is for such damages to be proved by way of evidence led.

- 37)** Counsel described the approach taken by the respondents in the preceding paragraph in proving the entitlement of the 2nd, 3rd and 4th respondents to damages as “*unacceptable*”. According to counsel, if indeed the damages complained of were pleaded, the respondents should simply have pointed to the specific paragraphs in the pleadings where the damages were so pleaded. They reproduced the endorsement on the statement of case and reiterated that it revealed that there was no claim for damages as was awarded to the 2nd, 3rd and 4th respondents.

38) As for the evidence led at the hearing, counsel submitted that it was bereft of any reference to the disputed damages. They quoted passages from the 2nd and 3rd respondents' witness statements as follows:

“Personally, I have lost an income that was pre-agreed with the respondent for my consultancy services as I expended a considerable amount on time and energy on advising and assisting the company on merger with the respondent. My total cost is in the sum of USD60,000.00 excluding taxes.”

And;

“Personally, I should have earned the sum of USD2,500.00 as consultancy fees for the work I did towards the joint venture for the first three months and USD7,500.00 thereafter. These monies have never been paid to me and respondent as a result of its breach ought to pay these sums.”

According to counsel, the evidence led by the 2nd and 3rd respondents, was very specific as to the expectation damages they were seeking from the arbitrator. These damages were not totaling the sum awarded by the arbitrator of *USD432,000.00*.

- 39) Under ground 2 of the appeal, counsel attacked the holding by the Court of Appeal that the Learned High Court Judge was on firm ground when he held that the arbitrator substantially complied with the strict rules of evidence. The position taken by counsel was that the respondents did not lead oral evidence or produce documentary evidence to support the claim for special damages. This, according to counsel, led the arbitrator to resort to intelligent guesses to compensate for the lack of evidence.
- 40) To reinforce their arguments, counsel reproduced passages from the award which have been quoted later in this judgment. They submitted further that the law is very clear with respect to the evidence required to prove special damages and referred to the case of **Phillip Mhango v Ngulube and Others**³, where we said that a party claiming special loss must do so with evidence that makes it possible for the court to determine the value of the loss with a fair amount of certainty.

41) Our attention was also drawn to the case of ***Attorney General v D. G. Mpundu***⁴ in which we reiterated the need for a litigant claiming special or unusual damages to particularize and expressly plead them. The rationale for this is anchored on the principle that a defendant must be warned and put on notice of the compensation which the plaintiff intends to seek from the court. For this reason, counsel submitted, a defendant must be availed all the documents which the plaintiff relies on in proving the claim.

42) According to counsel, since the arbitrator described the damages sought by the 1st respondent as special damages, there was need for sufficient evidence to be laid before him especially that order for directions number 2 issued by the arbitrator specifically stated that the parties agreed that the strict rules of evidence would apply. As a consequence of this, the arbitrator's act of engaging in intelligent guesses or guesstimates was a unilateral act falling outside the agreement of the parties in respect of the conduct of the proceedings.

43) Counsel proceeded to attack the conduct of the arbitrator from the public policy angle alleging that his decision to award reliance damages despite acknowledging that there was no evidence to support the claim, falls squarely in the test we set for an award that offends public policy in the case of ***Zambia Revenue Authority v Tiger Limited and Another***². In that case we cited with approval the test laid down by the Supreme Court of Zimbabwe in the case of ***Zimbabwe Electricity Supply Authority v Maposa***⁵, as follows:

"Where, however, the reasoning 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 acceptable moral 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."

Counsel also drew our attention to **section 17(2)(b)(ii)** of the **Act** which states that an award may be set aside by the court if it finds that it is in conflict with public policy.

44) The arguments by counsel in relation to ground 3 of the appeal mirrored those advanced under ground 2 of the appeal. The only departure was as follows:

44.1) The reference to our decisions in the cases of ***Kafue District Council v James Chipulu***⁶ and ***Kabwe International Transport Limited and Another v Njelekwa***⁷. In the former case, we restated our decision in ***Mhango v Ngulube and Others***¹⁴ that in pursuit of doing justice, notwithstanding indifference and laxity on the part of litigants, the courts have frequently been driven into making intelligent and inspired guesses as to the value of special losses on meager evidence, while the latter set out the principles in award of damages for loss of expectation of life. According to counsel, the award of *USD175,000.00* made by the arbitrator was neither nominal or reasonable especially that it included claims by third parties who were not entitled to the award and, therefore, departed from the principles set out in the two cases.

- 44.2)** The reference to **section 17(2)(a)(iv)** of the **Act** by which a court is empowered to set aside an award if the arbitration procedure adopted by the arbitrator was not in accordance with the agreement of the parties, or, failing such agreement was not in accordance with the **Act** or the law of the country where the arbitration took place.
- 45)** With respect to grounds 4 and 5 of the appeal, counsel faulted the Court of Appeal for holding that the arbitrator was on firm ground when he commented on the wet lease agreement since it was not the subject of the dispute. Counsel attacked the Court of Appeal for failing to acknowledge that the arbitrator's actions amounted to considering matters beyond those presented to him by the parties in the pleadings. They also contended that the court erred when it failed to hold that, since the wet lease agreement did not have an arbitration agreement, the arbitrator could not make a determination on it without the consent of the parties.
- 46)** To support the second argument in the preceding paragraph, counsel referred to the case of ***Victoria Findlay Huwiler v CPD***

Properties Limited and 2 Others⁸ which cited a decision of one of the then House of Lords, now Supreme Court, England and Wales in the case of ***Anzen Limited and others v Hermes One Limited***⁹ that consent of the parties is the hallmark of arbitration. They urged us to hold that since the consideration by the arbitrator on the wet lease agreement was not preceded by the consent of the parties, the arbitrator exceeded his jurisdiction when he based his decision on it.

- 47)** The next arguments advanced by counsel addressed the holding by the Court of Appeal that the reference to the wet lease agreement was by way of *obiter dicta*. The position taken by counsel was that since the damages awarded were based on the arbitrator's finding that there was a breach of the wet lease agreement by the appellant, which entitled the founder members of the 1st respondent and the 1st respondent to damages, the consideration was not by way of *obiter dicta*.
- 48)** To reinforce their arguments, counsel reproduced portions of the arbitrator's award 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 actions and/or omissions. They did not provide the start-up funds; they did not complete the needful under the wet lease agreement; the offending of the shareholding structure which they have managed to shoot down was their idea; finally, they abruptly walked away from the joint venture on account of a disagreement over the lease of a hanger from a third party corporate entity owned or controlled by CW2” ...

And,

“... 6.14 The founder members and of course the 1st claimant as a mere meta physical and juristic entity, were innocent and not tainted by the deception. Accordingly, it is my considered findings 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.”

The underlining in both portions of the award set out above is the appellants for emphasis only.

- 49)** In addition, counsel submitted that the respondents acknowledged that the damages awarded arose from the arbitrator’s finding that the appellant breached the wet lease agreement and that the findings were on firm ground because they had prayed for *“further*

and other relief as the tribunal may deem fit...". This, prayer, according to the respondents, armed the arbitrator with power to award damages for breach of the wet lease agreement although the dispute did not arise from it.

50) The arguments in respect of grounds 6, 7 and 8 of the appeal focused on the award of damages to the 4th respondent. The misgivings by the appellant in the decision of the Court of Appeal related to the following: the reliance by the court on **order 14 rules (2) and (3)** of the **High Court Rules** in justifying the award of those damages; the upholding of the award of the damages despite the fact that the 4th respondent did not adduce any evidence to prove his claim; and, the holding that the 4th respondent's claim for damages was supported by the evidence tendered by the other respondents and witnesses, along with the documents produced.

51) As for the first misgiving, counsel argued that the arbitrator's award of reliance damages to the 4th respondent, which was upheld by the two courts, is an affront to the principle that a claimant bears the burden of proving his case as stated in the decisions of this court in the cases of ***Wilson Masauso Zulu v Avondale***

Housing Project Limited¹⁰ and ***Khalid Mohamed v The Attorney General***¹¹. Counsel argued that the 4th respondent was required to adduce sufficient evidence to establish his case to justify the award of the damages.

52) In addition, counsel submitted that the 4th respondent's fate was compounded by the fact that the parties had agreed to apply the strict rules of evidence in accordance with order for directions number 2. Therefore, a party making allegations in support of a claim was compelled to lead evidence to substantiate those allegations. In the case of the 4th respondent, he failed to produce any evidence to support the claim for damages. Further, a perusal of the transcript of proceedings before the arbitrator reveals that none of the four witnesses who testified on behalf of the respondents stated that they did so not only on their behalf but also that of the 4th respondent. Concluding arguments on the issue, counsel submitted that the Court of Appeal erred when it proceeded on the assumption that the 4th respondent had pleaded expectation damages and was, therefore, entitled to them without presenting evidence to support the claims. The award of the said

damages, they submitted, was also contrary to public policy justifying the setting aside of the award.

- 53)** As for the last misgiving which related to the reliance on **order 14 rules (2) and (3)** of the **High Court Rules**, counsel argued that this was a misdirection on the part of the Court of Appeal because the parties did not agree on the application of those **Rules** in the conduct of the arbitration proceedings. There was thus, no justification for the court to apply those **Rules** in justifying the award of damages by the arbitrator to the 4th respondent, especially that there was no evidence supporting such an award. Besides, there is no provision in the **Rules** which provides that a claimant can be awarded damages without prosecuting their case.
- 54)** In respect of ground 9 of the appeal, counsel for the appellants attacked the reasoning by the Court of Appeal which justified the award of damages by the arbitrator based on intelligent guesses by holding that the same were nominal damages which were high due to the nature of the transaction and parties involved. The holding of the court which is in issue is as follows:

“6.26 Before we move away from this ground, we noted that the appellant argued that in view of the cited case of *Kafue District Council v James Chipulu*⁶ and *Kabwe International Transport Limited and Another v Njelekwa*⁷, the award made on an intelligent guess ought to be nominal and reasonable in the circumstances. The cited cases involved local organisations and individuals whilst the present case involved an international joint venture involving large sums in foreign currency.”

The submissions by counsel regarding the foregoing holding by the Court of Appeal were as follows:

- 54.1)** The court misdirected itself when it held that the principle that awards made on intelligent guess should be nominal and reasonable only in cases involving local entities and transactions involving local currency;
- 54.2)** The principle of awarding nominal damages is firmly entrenched in the authorities cited by the court and does not permit the exceptions suggested by the court; and,

- 54.3)** Nominal damages are awarded where there is no evidence to enable an adjudicator quantify the loss arising from a breach of contract.
- 55)** Turning to ground 10 of the appeal, counsel faults the interpretation given to clause 28 of the SHA by the Court of Appeal. According to counsel, by clause 28 of the SHA, the parties agreed that they would bear their respective legal costs and expenses of and incidental to the negotiation, drafting, preparation and implementation of the SHA. Since the damages awarded by the arbitrator as reliance damages fell in the category of costs envisaged under clause 28 of the SHA, the arbitrator erred when he awarded them and the Court of Appeal should not have upheld the award.
- 56)** Arising from the foregoing, the High Court and the Court of Appeal misinterpreted clause 28 of the SHA when the two held that the costs envisaged by the clause did not relate to compensation resulting from loss suffered as a consequence of breach of the SHA. Counsel submitted that the reliance damages awarded fall within the scope of clause 28 of the SHA, and since the clause was one of

the terms in the contract, pursuant to **Article 28(4)** of the **Model Law**, the arbitrator was compelled to determine the dispute in accordance with the contract entered into by the parties.

57) Advancing the argument in the preceding paragraph, counsel submitted that the arbitrator's duty to determine the dispute according to the contract entered into by the parties was reinforced by the principles of sanctity of contracts and public policy which enjoins courts to enforce contracts entered into by persons with capacity and willingly. Counsel submitted that the court's interpretation of clause 28 of the SHA breached these principles because it altered the contract.

58) The other limb of counsel's argument was that since the interpretation given to clause 28 of the SHA was not an issue before the arbitral tribunal, the court departed from the content of the award and, therefore, exceeded the complementary and supervisory role of the courts as defined by this court in the case of ***China Henan International Cooperation v G and G Nationwide (Z) Limited***¹.

59) The argument under ground 11 of the appeal was that the Court of Appeal erred when it held that the arbitrator's award was a reasoned one. Counsel argued that the award was not reasoned because it omitted to address some of the issues presented to the arbitrator as follows:

59.1) Whether the appellant's withdrawal from the joint venture amounted to a breach of contract;

59.2) Whether the SHA could be terminated;

59.3) Whether the alleged improper termination of the SHA had been pleaded by the respondents;

59.4) Whether at the point of termination, the SHA had become effective;

59.5) Whether the payment made by the appellant to Amagrain constituted partial payment of the capitalized sum; and,

59.6) Whether the appellant breached clause 18 of the SHA.

Based on the foregoing alleged omissions by the arbitrator, counsel urged us to set aside the award as it is not a reasoned award. They relied on a decision by a Singapore court of **Official Assignee v Chartered Industries of Singapore Limited**¹² in which the court held that since the arbitrator failed to decide on all matters or issues referred to him, the award was defective and, therefore, void.

- 60)** The arguments in respect of ground 12 of the appeal addressed a jurisdictional issue. Counsel contended that the Court of Appeal erred when it held that the dispute between the parties was arbitrable despite the finding by the arbitrator that enforcement of the SHA would violate public policy. They submitted that the holding by the court that it was the voting agreement, and not the SHA, which violated public policy was a clear departure from the finding by the arbitrator.
- 61)** Counsel proceeded to cite portions of **section 6(2)** of the **Act** and contended that the primary concern of the court should have been to determine whether the arbitrator had authority to proceed and award damages to the respondents, having found that enforcing

the SHA would violate public policy. **Section 6(2)(a)** of the **Act** states 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.”

The position taken by counsel was that **section 6(2)(a)** does not leave room for the arbitrator to exercise his discretion to proceed with determination of a matter arising from an agreement which is contrary to public policy. Once a matter is said to arise from an agreement which is contrary to public policy, an arbitrator cannot award any relief because he lacks jurisdiction.

62) Lastly, the appellant’s arguments addressed ground 13 of the appeal. The arguments challenged the holding by the Court of Appeal that grounds 7 and 8 of the appeal to that court, which questioned the arbitrator’s award of damages to the 4th respondent, on the ground that no evidence was led in support of the award, amounted to an attack against the award on the merits. As such, the court could not entertain the grounds because its role in setting aside of an award is not to review it on the merits.

- 63)** Counsel submitted that the challenge against the award, as articulated in grounds 7 and 8 of the appeal before the Court of Appeal, was on procedural issues regarding compliance with the rules of evidence which the parties agreed the arbitrator should strictly abide by. We were urged to allow the appeal.
- 64)** In opening the arguments in response to the appeal, counsel for the respondents submitted that the appeal was grossly misconceived because it challenged the decision of the Court of Appeal and High Court. These courts, according to counsel, did not render the awards which were the subject of the application to set aside, but merely held that the appellant's application to set aside did not meet the threshold set by **section 17** of the **Act**. As such, their decisions cannot be the subject of appeal.
- 65)** Moving to the substantive arguments relating to the appeal, in response to ground 1 of the appeal, counsel argued that the award made by the arbitrator in respect of expectation damages was specifically pleaded by the respondents in the amended statement of case and the documents which accompanied it. This fact,

counsel submitted, was acknowledged by the Court of Appeal when it held at paragraph 5.1 of its judgment that the 1st respondent expected to incur a total of *USD865,206.00* in expenses and a net profit of *USD202,321.75*.

- 66)** Counsel then submitted that at paragraph 52 of the judgment, the Court of Appeal held that the 1st respondent company projected total profits of *USD1,618,573.98* for eight months from September 2015 to April, 2016. These holdings by the court are as a consequence of the statement of case and supporting documents which were filed before the arbitrator making reference to losses which the respondents expected to incur as a result of the appellant's breach of the contract. It was these losses, according to counsel, which the arbitrator termed as expectation damages. Therefore, the arbitrator did not exceed the scope of the submission to arbitration in accordance with **section 17(2)(a)(iii)**, when he awarded the said damages.
- 67)** To reinforce the arguments in the preceding paragraph, counsel submitted as follows:

- 67.1)** The appellant is aggrieved not at the award of damages to the 2nd, 3rd and 4th respondents but rather the phrase used to describe these damages;
- 67.2)** The arbitrator correctly referred to the damages awarded as expectation damages because they arose from certain expectations which the respondents had when entering into the SHA;
- 67.3)** Both the statement of case and supporting documents submitted to the arbitrator refer to losses which the respondents expected to incur as a result of the appellant's breach of the contract. It is these losses which the arbitrator awarded as expectation damages; and,
- 67.4)** The 2nd and 3rd witnesses that appeared before the arbitrator, along with Captain Godfrey Mulundika, specifically claimed expected profits and consequential loss which is what the arbitrator termed expectation and reliance damages.

As a consequence of the foregoing, the appellant has no justification to state that the arbitrator exceeded the scope of the submission to arbitration when he awarded the expectation and reliance damages to the 2nd, 3rd and 4th respondents. The award is thus, not amenable to setting aside in accordance with **section 17(2)(a)(iii)** of the **Act**.

68) In response to ground 2 of the appeal, counsel argued that the ground of appeal is a repetition of ground 1 of the appeal. They accordingly, relied on the arguments made under ground 1 of the appeal.

69) Responding to ground 3 of the appeal, counsel argued as follows:

69.1) The arbitrator was on firm ground when he made an intelligent guess when awarding damages because in doing so he did not introduce any new claims but awarded what was pleaded;

69.2) For as long as the rules of evidence allow the award which the arbitrator made, he did not depart from the parties'

agreement that the strict rules of evidence would apply to the arbitration;

69.3) An adjudicator is permitted at law to apply an intelligent guess where it is difficult to arrive at an appropriate figure as a measure of damages. The rationale for this being that it is an acknowledged fact that human interaction is not perfect and there are instances where it is impossible to compute an exact amount to award as damages; and,

69.4) The appellant has not cited any statute or precedent to the effect that where the parties have agreed that the strict rules of evidence will apply, when enforcing such an agreement, the arbitrator cannot make intelligent guesses. There is an abundance of case law on intelligent guesses, which was cited by the arbitrator as follows: ***Mary Patricia Soko v The Attorney General***¹³; ***Mhango v Dorothy Ngulube***¹⁴ and ***Midlands Breweries v Munyenyembe***¹⁵. According to counsel, all these are decisions of our Court which support the approach taken by the arbitrator in

awarding the damages and which the appellant has not countered.

70) Counsel's short reply to grounds 4 and 5 of the appeal on the arbitrator's reference to the breach of the wet lease agreement was that the arbitrator referred to the breach only by way of *obiter dicta*. He did not make any award of damages as a consequence of the said breach.

71) In response to grounds 6, 7 and 8 which questioned the arbitrator's award of damages to the 4th respondent, counsel argued as follows:

71.1) It is not necessary for all claimants in an action to testify in order for their claim for damages to be upheld;

71.2) Evidence was presented to the arbitrator by the witnesses who testified before him and their evidence applied to the 4th respondent as well because the agreement from which the dispute arose applied to all the respondents;

71.3) The claim submitted to the arbitrator was a joint claim by all of them;

- 71.4)** The case of ***Wilson Masauso Zulu v Avondale Housing Project***¹⁰ referred to by the appellant does not support its position because it does not articulate the position taken by the appellant that to be entitled to damages, a claimant must testify;
- 71.5)** Ground 7 of the appeal is couched in such a manner that it invites us to review the arbitrator's consideration of the evidence and how he arrived at the reliance damages awarded. It is, therefore, akin to an appeal against the arbitrator's award as opposed to an application to set aside; and,
- 71.6)** The facts of this case are distinguished from the facts in our decision in the case of ***Zambia Revenue Authority v Tiger Limited and Zambia Development Agency***² relied upon by the appellant. In that case, the arbitrator's award was set aside because it held a non-party liable. The excess of jurisdiction by the arbitrator in that case, was very apparent which is different from the situation in this case.

72) With respect to ground 9 of the appeal, while counsel for the respondents agreed with the principle in the ***Kafue District Council***⁶ and ***Kabwe International Transport Limited***⁷ cases which the appellant relied upon, they submitted that the Court of Appeal was on firm ground when it held that the award by the arbitrator was justifiable on the ground of the international nature of the agreement and the amounts involved which were denominated in foreign currency. Counsel also agreed with the observation made by the Court of Appeal that in articulating the ground of appeal, the appellant sought to attack the award on the merits rather than due process.

73) Counsel's arguments in respect of ground 10 merely agreed with the position taken by the Court of Appeal in respect of the interpretation it gave to clause 28 of the SHA. While acknowledging that the clause provided for the parties to bear their respective costs and expenses for negotiation, drafting, preparation and implementation of the agreement, they contended that the clause conspicuously failed to encompass any provision for compensating

the aggrieved party for loss suffered as a result of breach of the SHA.

74) Reacting to ground 10 of the appeal, counsel argued as follows:

74.1) A reasoned award does not necessarily have to be exhaustive in detail in articulating the decision of the arbitrator;

74.2) An award will be considered as reasoned where it reveals that the arbitrator considered the parties' arguments, their evidence and the applicable law in arriving at a decision;

74.3) The arbitrator fully addressed his mind to all the arguments put forward by the appellant as was correctly held by the Court of Appeal; and,

74.4) It is a fundamental principle of law that courts are generally reluctant to interfere with arbitral awards arising from the doctrines of party autonomy and finality of awards. These two doctrines underscore the importance of preserving an arbitrator's decisions as long as it meets the minimum

threshold of reasonableness. The arbitrator in the present case, exercised his authority in accordance with the rules and procedure governing the arbitration process and it was for this reason that the Court of Appeal refused to set aside the award.

- 75)** Next, counsel addressed ground 12 of the appeal and explained the contention by the appellant as alleging that when considered together, the SHA and voting agreement were in conflict with public policy. According to counsel, both the arbitrator and Court of Appeal found that the SHA was not in conflict with public policy but that the voting agreement was what was in conflict with public policy.
- 76)** They then defined public policy in accordance with our decisions in the cases of ***Fratelli Locci Sri Estrazion Minerarie v Road Development Agency***¹⁶ and the ***Zambia Revenue Authority***² and submitted that in view of the definition ascribed to public policy in these cases, the Court of Appeal found the appellant's arguments misconceived because the SHA was in no way in conflict with public policy. Neither was there any reason for the appellant to

connect the SHA to the voting agreement because the two were separate and distinct agreements.

77) Counsel explained further that the voting agreement was a private arrangement between the appellant and 5th and 6th respondents intended to solely help the appellant gain more voting rights in the 1st respondent than what was permissible by the civil aviation regulations. Since it was the appellant which proposed and benefited from the voting agreement, it is caught up in the *ex turpi causa* principle and cannot, therefore, benefit from its own wrong doing. This, however, does not deprive the 1st, 2nd, 3rd and 4th respondents from enforcing their rights under the SHA as they were not party to or complicit in the illegality arising out of the voting agreement.

78) Concluding arguments on the issue, counsel relied on our decision in the case of ***Mohamed S. Itowala v Variety Bureau De Change***¹⁷ and submitted that while the appellant cannot benefit from its own wrong doing, it cannot prevent innocent respondents from their entitlement to damages.

- 79)** Lastly, counsel responded to ground 13 of the appeal. They began by setting out in great detail the various decisions of this and other courts reaffirming the principle that a court does not sit as an appellate court to review an award of an arbitral tribunal on the merits but rather considers whether due process was followed. This principle arises from party autonomy which is the hallmark of arbitration and the finality of awards. Counsel concluded that the application as conceived by the appellant, invites the court to look into the merits of the arbitrator's award which is contrary to the law and cases cited. We were urged to dismiss the appeal.
- 80)** At the hearing, counsel for the parties by and large restated the arguments in the written texts presented before us. The departure was slight and has been referred to in our consideration of the appeal.

Consideration and decision of the Court

- 81)** In presenting and arguing this appeal, counsel for the appellant have advanced 13 grounds of appeal and directed the arguments to these grounds of appeal. Counsel for the respondents has responded in like manner. In our consideration and determination

of the appeal, we have identified 10 issues as falling for determination which we have distilled from the 13 grounds of appeal.

82) The 10 issues falling for determination are as follows:

- 82.1)** Whether the award rendered by the arbitrator deals with a dispute not contemplated by the submission to arbitration;
- 82.2)** Whether the arbitrator adopted a procedure which was not in accordance with the agreement of the partes in respect of application of the strict rules of evidence;
- 82.3)** Whether the arbitrator exceeded his jurisdiction when he considered the wet lease agreement;
- 82.4)** Whether the Court of Appeal erred when it held that the consideration by the arbitral tribunal of the wet lease agreement was *obiter dicta*;
- 82.5)** Whether the 4th respondent was entitled to an award of damages in light of the fact that he did not tender evidence;

- 82.6)** Whether in awarding nominal damages, a court or arbitrator is at liberty to distinguish the quantum to be awarded based on the amount and currency in dispute and nationality of the parties;
- 82.7)** Whether the Court of Appeal erred in its interpretation of clause 28 of the SHA;
- 82.8)** Whether the arbitrator rendered a reasoned award;
- 82.9)** Whether the arbitrator had jurisdiction to adjudicate upon a dispute arising out of the SHA which could not be enforced on the ground of public policy; and,
- 82.10)** Whether the Court of Appeal erred when it held that grounds 7 and 8 of the appeal before it attacked the merits of the arbitrator's award rather than challenge due process.
- 83)** We begin our consideration with the first issue of whether the award dealt with a dispute not contemplated by the submission to arbitration. This issue arises from ground 1 of the appeal and the contention by the appellant is that the damages which were

awarded to the 2nd, 3rd and 4th respondents were not in accordance with the claims made in the statement of case. Therefore, the arbitrator's decision exceeded the scope of the submission to arbitration and was amenable to setting aside in accordance with **section 17(2)(a)(iii)** of the **Act**.

84) The jurisdiction of an arbitrator is defined by the submission to arbitration. This normally takes the form of an agreement in writing by the parties, setting out the background to the dispute and the issues which the parties have identified as falling for determination by the arbitrator. In Zambia, the practice is that the parties rarely prepare a submission to arbitration because at the point at which it is required to be submitted, they will already have been embroiled in the dispute such that they can hardly agree on anything.

85) The consequence of this is that the arbitrator then has to navigate through the pleadings submitted to him by the parties to ascertain the issues in contention. This is the default position we have referred to in the earlier part of this judgment.

86) In the matter with which we are engaged, the parties did not agree on or prepare a submission to arbitration. They did, however, exchange pleadings which formed the basis upon which the arbitrator was to identify the issues in contention. Here, we must stress that because of the principle of party autonomy we have referred to earlier, an arbitrator is bound to identify the issues in dispute within the four corners of the pleadings submitted to him. He must also limit his determination of the dispute only to these four corners.

87) Having established that the arbitrator's mandate or jurisdiction in this matter arose from the pleadings, we have had a look at the amended statement of case submitted to him by the respondents for purposes of determining whether, the award made to the 2nd, 3rd and 4th respondents was actually claimed, and therefore, within his jurisdiction to determine. We have also looked at the statement of defence but decided it is not relevant in our determination of the claims deployed before the arbitrator because it does not have a counterclaim.

88) The relevant portions of the amended statement of case showing the claim for damages are as follows:

- “48. Airlinks failure to provide the company with the necessary capitalisation has delayed the operations of the company as a result of which the company [has] suffered damage in terms of loss of business and projected profits.
49. The company would have operated at least 60 round trips (between) Lusaka (and) Ndola per month, 30 round trips (between) Lusaka (and) Mfuwe and 30 round trips (between) Lusaka (and) Livingstone.
50. That the total revenue that the company would have made for the round trips on all domestic (flights) was projected at *US\$1,067,527.75* per month.
51. The company would have also incurred a total of *USD865,206* expenses in the running of the joint

venture and its operations per month with a net profit of *USD202,321.75*.

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 claimant's bundle of documents and marked "*CD16*". The amount continues to accrue ...

57. The claimants now claim for:

57.1 ...

57.2 Special damages resulting from Airlink's breach as follows:

57.2.1 Damages in the sum of *USD1,618,573.98* being the company's loss of

business resulting from the Airlinks
breach; ...”

89) We have no difficulty in holding that this aspect of the damages as reflected by the paragraphs of the amended statement of case relates only to the 1st respondent, described as the company. In the determination of the issue whether or not the damages claimed, as identified from this portion of the pleadings, were payable, the arbitrator was compelled to only consider the 1st respondent’s entitlement to such damages.

90) We dismiss the argument by the respondents which endorsed the holding by the lower courts that these damages, termed expectation damages were actually pleaded by the 2nd, 3rd and 4th respondents as well. We also agree with the argument advanced by the appellant at paragraph 38 of this judgment that the award by the arbitrator was not even supported by the evidence led by the 2nd and 3rd respondents. The evidence led by these two witnesses merely reflected claims of *USD60,000.00* and *USD7,500.00* respectively and not the colossal amount awarded. To the extent, therefore, that these three respondents did not specifically plead

those damages or lead evidence in support of the quantum of damages awarded, the arbitrator's award contains decisions on matters beyond the scope of the submission to arbitration defined by the pleadings.

91) In arriving at the foregoing decision, we also accept the argument by counsel for the appellant that the award of damages to the 2nd, 3rd and 4th respondents could not be sustained under the respondents' prayer for further and other reliefs as contended by the respondents. This is the case because, there was no such award made under that prayer by the arbitrator. This is a point we address in more detail later in this judgment along with the question of the evidence tendered in support.

92) We now turn to consider the second issue of whether the procedure adopted by the arbitrator was in accordance with the agreement of the parties. This issue deals with grounds 2 and 3 of the appeal which respectively relate to the challenge by the appellant that the procedure adopted by the arbitrator veered off the course agreed by the parties in terms of application of the strict rules of evidence

and the formula to be adopted in the award of damages. That is to say, was there agreement by the parties that in awarding damages, the arbitrator could determine the quantum by making intelligent guesses. The appellant is also aggrieved at the fact that the arbitrator made an award to Captain Mulundika who was not a party to the proceedings.

- 93)** The contention by the appellant is that at the scheduling conference, one of the agreements made by the parties was that the strict rules of evidence would be applicable in the determination of the dispute. Therefore, a claim would only be sustained if a party making it tendered sufficient and credible evidence to prove it. It contended further that the arbitrator could not determine the quantum of damages to be awarded based on what he considered just and equitable. At the hearing, Mr. D. Chakoleka submitted that the arbitrator could only proceed as he did in awarding damages based on what he considered just and equitable and applying guesstimates, if the parties had so authorised him in accordance with **Article 28(3)** of the **Model Law**.



- 94) In response, the respondents restated the arguments made in respect of ground 1 of the appeal. They stated further that the arbitrator was on firm ground when he made intelligent guesses in awarding damages in line with decisions of this Court. Counsel also submitted that in arriving at the award of damages, the arbitrator considered the documentary evidence that was presented before him.
- 95) The principles of *ex aequo et bono* (according to what is equitable and good or applying principles of fairness) and *amiable compositeur* (amicable conciliator applying notions of fairness and equity) were introduced into our law when we adopted the Model Law with the repeal and replacement of the **Arbitration Act, Cap 40** with the **Act**. They allow an arbitrator to determine a dispute by applying equity and fairness by ignoring the strict rules evidence. The two principles are enshrined in **Article 28** of the **Model Law** which empowers an arbitrator to decide a dispute based on the two principles only if the parties have expressly empowered him to do so. This is a departure from litigation where Judges have a discretion and are allowed by the **Constitution** and court rules to apply equity and fairness in rendering decisions.

96) In quantifying the damages he awarded, the arbitrator began by acknowledging that there was insufficient evidence to assist him in determining the quantum of damages. He then proceeds to apply fairness and equity in his determination of the quantum. For completeness, we are compelled to quote the passages from the two awards which reflect what we have stated in the preceding paragraph. The reasoning by the arbitrator on the two major damages awarded was as follows:

96.1 “The major damages of a compensatory nature in these proceedings would be the loss of 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 by USD One Million per month. Skillful cross examination showed that, although CW4 was quite sincere and genuine in his testimony, nevertheless, there was an ever-present danger of embellishment and exaggeration; that the expectation

may very well have been grossly unrealistic. To counter this and doing the best that I can on what was generally barely satisfactory evidence ... It is my finding and decision that the justice of this arbitration will be served by awarding the founder members damages of USD432,000.00".

96.2 One other head of reliance damage needs to be considered. A sum of *USD350,000.00* was claimed ... That such costs are recoverable, hardly needs any debate; The only problem is 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 submissions to invite the tribunal to make an intelligent guess ..."

96.3 "The way I had dealt with 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 ‘guesstimates’ ... ‘intelligent and inspired guesses’ ...”

The underlining is ours for emphasis only.

- 97)** What is apparent from the extracts from the awards we have quoted in the preceding paragraph is that; there was insufficient evidence to enable the arbitrator assess and quantify the damages of *USD430,000* and *USD175,000* which he awarded; he therefore, adopted the notions of justice and fairness in arriving at these awards; and, the request for him to adopt this procedure and thus, make intelligent guesses was made by the respondents in the final submissions.
- 98)** At the preliminary meeting, the parties agreed on the application of the strict rules of evidence. This is apparent from the order for directions which the arbitrator issued afterwards. The agreement to apply strict rules of evidence meant that the arbitrator was compelled to arrive at his decision after considering relevant and competent evidence. The relevant evidence was such evidence

which tended to prove the damages claimed while competent evidence was that which was reliable and legally permissible. By engaging as he did, in what he termed “guesstimates”, the arbitrator totally veered off the path agreed upon by the parties in that he abandoned their agreement and instruction to him to abide by the strict rules of evidence.

- 99) In his pursuit of fairness and justice as he called it, the arbitrator assumed the role of *amiable compositeur* and acted *ex aequo et bono*, which was, against the wishes of the parties. **Article 28** of the **Model Law** bars an arbitrator from acting as such unless he is so authorised by the parties. It states in the relevant part as follows:

“(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the substance of the dispute ...

(3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.”

The arbitrator justified proceeding as he did on the premise that he had been requested to do so by the respondents in the final submissions. The problem with this is two-fold:

99.1) The request made by the respondents in the final submission was a one-sided request and cannot be referred to as an agreement by the parties in accordance with **Article 28**; and,

99.2) By **Article 18** of the **Model Law**, the arbitrator was compelled to treat the parties equally and give each a full opportunity to be heard. His action of only entertaining the request by one set of parties to the dispute contravened this **Article**. Therefore, the procedure adopted in arriving at the award contravened the law as well and thus amenable to setting aside pursuant to **section 17(2)(a)(iv)** of the **Act**.

100) As regards the award of damages to Captain Mulundika, counsel for the appellant contends that these should not have been awarded because Captain Mulundika was not a party to the arbitration agreement or proceedings, therefore, the arbitrator

contravened the agreement of the parties in awarding these damages.

101) The position taken by the respondents, is that this award was not made to Captain Mulundika but to the 1st respondent (a party) to be paid over to Captain Mulundika. Both the High Court Judge and Court of Appeal accepted this argument. At the hearing, we engaged Mr. Madaika on this award and asked him if there was precedent in our past decisions or those of other courts where a relief was granted to a party to proceedings for the benefit of a non-party or to be paid to a non-party. He conceded that there was no such precedent and urged us to adopt the reasoning of the High Court and Court of Appeal and in doing so, set precedent.

102) It is important that we set out the reasoning of the arbitrator in rendering the award to Captain Mulundika before we determine it. The arbitrator stated that it was his further finding and decision that the 1st claimant (1st respondent in this appeal) was entitled to recover from the respondent (appellant in these proceedings) reliance damages of *USD40,000.00* to be paid over to Mr. Kunda and Captain Mulundika.

103) In the introductory part of this judgment, we have defined parties in relation to the arbitration agreement and proceedings and stated that it is only parties who can resort to, claim and benefit from arbitration proceedings. To the extent, therefore, that this award was made to a non-party or third party to the arbitration agreement and proceedings, it was in conflict with public policy and amenable to setting aside in accordance with **section 17(2)(b)(i)** of the **Act**. The fact that the arbitrator said it was an award to the 1st respondent, a party, to be paid over to a non-party does not alter the fact that the beneficiary of the award was a non-party. The definition of party in **section 2(1)** does extend to non-parties only where they claim through or under a party to the agreement. Captain Mulundika was not claiming through or under the 1st respondent and, in any event, the 1st respondent was not a party to the agreement from which the dispute arose as we have explained in paragraph 8 of this judgment. It was, in the opinion of the arbitrator, claiming through or under the other respondents

104) The decision in the preceding paragraph is anchored on our earlier one in the case of ***Zambia Revenue Authority v Tiger Limited and Zambia Development Agency***². In that case, we held that the award of an arbitrator which found a third party to the arbitral proceedings liable, was in conflict with public policy. The converse is also applicable that a third party to proceedings cannot claim a benefit from arbitration proceedings and it would offend public policy as defined in the case referred to.

105) The next issues concern the consideration by the arbitrator of the breach of the wet lease agreement and the holding by the two courts below that the consideration was by way of *obiter dicta* which had no bearing on the arbitrator's award of damages. These issues are 3 and 4 and address grounds 4 and 5 of the appeal. The portions of the award from which the High Court and Court of Appeal made the decision are set out in paragraph 48 of this judgment.

106) The Court of Appeal reviewed these portions of the award and agreed with the finding by the Learned High Court Judge that the reference to the wet lease agreement by the arbitrator was by way

of *obiter dicta* and, as such, had no bearing on the arbitrator's award of damages. The arbitrator did not, according to the court, depart from the agreement of the parties.

107) The interpretation we have given to these portions of the award are that the arbitrator begins by listing the series of breaches he found had been committed by the appellant which included what he termed its failure to "... *complete the needful under the wet lease agreement*". He then went on to say that as a consequence of the series of breaches committed by the appellant, the respondents were "... *entitled to the universal remedy of damages ...*".

108) Blacks Law Dictionary, by Bryan A. Garner, 7th edition at page 1100 defines *obiter dictum* (which is often shortened to *obiter dicta*) as "a *judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case therefore not precedential ...*". The portion of the award which are in dispute here can, by no means, be referred to as a comment which is *unnecessary to the decision* made by the arbitrator or that they are made by the way and in passing or incidental. The

reference to the wet lease agreement was by way of a finding of fact that the appellant breached it among other series of breaches committed. The respondents were, therefore, entitled to damages.

109) To the extent that the arbitrator's award contained decisions on a dispute arising from an agreement which was not the subject of the arbitration i.e. the wet lease agreement, which was not agreed or contemplated by the parties, it is amenable to setting aside in accordance with **section 17(2)(a)(iii)**.

110) The next issue for consideration is issue 5 which relates to grounds 6, 7 and 8 of the appeal. It contests the award of reliance damages to the 4th respondent on the ground that he did not lead evidence to support his claim. The appellant contended that the award by the arbitrator of reliance damages to the 4th respondent which the Court of Appeal upheld was contrary to the agreement of the parties that the strict rules of evidence would apply. Counsel argued further that the reference to **Order 14 rules (2) and (4)** by the Court of Appeal was also in contravention of the parties' agreement.

111) The fact that the 4th respondent did not testify before the arbitrator is not in dispute. In addition, we have already said in the earlier part of this judgment that the parties agreed on application of the strict rules of evidence and we explained the need for the arbitrator to consider relevant and competent evidence before making any award of damages.

112) Counsel for the respondents have argued that the other witnesses that testified for the respondents gave evidence which supported the 4th respondent's claim. They have, however, not referred us to such evidence and our efforts to thresh through the undergrowth of all the evidence tendered before the arbitrator, have been an exercise in futility because there is no evidence that was led to support the award of damages made to the 4th respondent. This is compounded by the fact that even the endorsement on the statement of case, which we have reproduced at paragraph 88 of this judgment, has no specific claim related to the 4th respondent.

113) The Court of Appeal sought to justify the award by relying on **Order 14 rules (2) and (3)** of the **High Court Rules**. The **Order** states as follows:

“2. When a person has jointly with other persons an alleged ground for instituting a suit, all those other persons ought ordinarily to be made parties to the suit ...

3. Where more persons than one have the same interest in one suit, one or more of such persons may be authorised to sue or to defend in such suit for the benefit of or on behalf of all parties so interested.”

Order 14(2) speaks to the need for all persons with an interest in a suit to be so joined to the proceedings. The rationale for this is the need to avert duplicity of actions anchored in the same cause of action and for finality of matters so that disputes involving a number of parties are resolved in one action. The 4th respondent had an interest in the action and was, therefore, a party to it.

114) On the other hand, **Order 14(3)** speaks to the management of group actions. That is to say, in an action with more than one

plaintiff or defendant, the parties can nominate one of their number to sue or defend the action on their behalf.

115) The problem we have with the reference to **Order 14** by the Court of Appeal, is three-fold:

115.1) Although **Order 14 rules (2) and (3)** relates to joint actions and management of joint claims and defences, the facts of this case do not reveal that the 4th respondent resorted to **rule (3)** and authorised one of the respondents as claimants before the arbitrator to pursue the claim on his behalf. The title of the matter before the arbitrator identified each respondent in their individual capacity. It did not refer to any of them suing on behalf of the 4th respondent;

115.2) Secondly, we have already set out the basis upon which the arbitrator awarded reliance damages to the respondents who included the 4th respondent. He acknowledged the lack of evidence to support the claims and made an intelligent guess which procedure we said was contrary to agreement of the parties. There can, therefore, be no justification in the

argument by counsel for the respondents that the evidence of other witnesses proved the 4th respondent's claim. The Court of Appeal, therefore, erred when it accepted this argument; and,

115.3) In the case of *Finance Bank Zambia Limited v Weluzani Banda and 162 others*¹⁸, we held that in a class action one of the plaintiffs could launch the action on behalf of other plaintiffs as long as it was clearly spelt out in the originating process. This fact notwithstanding, each of the plaintiff were compelled to lead evidence before a court to support their claims. The approach taken by the arbitrator also contravened this precedent.

116) The next is issue 6 which relates to the holding by the Court of Appeal regarding the powers of a court or tribunal to award nominal damages. This issue arises out of ground 9 of the appeal. The ground of appeal relates to the award of reliance damages in the sum of *USD175,000.00* by the arbitrator. In the earlier part of this judgment, we have held that this award should be set aside because it was against the agreement of the parties in terms of

application of the strict rules of evidence. We would thus be engaging in an academic exercise if we consider it again.

117) Suffice to say that there was a misdirection on the part of the Court of Appeal when it attempted to explain the award by the arbitrator applying the principle of nominal damages which principle is different from that of applying intelligent guesses. The arbitrator awarded the damages by applying the principle of an intelligent guess. The Court of Appeal sought to justify it by reference to the principle of nominal damages. The principle of an intelligent guess as explained in the *Mhango*¹⁴ case is that in order to do justice, notwithstanding the indifference or laxity of most litigants, the courts have frequently been driven into making intelligent or inspired guesses as to the value of special losses on meagre evidence.

118) The principle of nominal damages, on the other hand, is applicable where there is proof of an infraction or breach of contract but the damage suffered is not proved as opposed to insufficiency of evidence to assess quantum of damages. The award is merely made to compensate for the infraction hence, nominal in nature. This is

in line with what we said in the case of ***David Chiyengele and 5 Others v Scaw Limited***¹⁹.

119) The next issue, 7, relates to ground 10 of the appeal and hinges on the interpretation given by the Court of Appeal to clause 28 of the SHA. The contention by the appellant is that the arbitrator's award of what he termed reliance damages comprised expenses the parties agreed to bear in accordance with clause 28 of the SHA. Therefore, the award by the arbitrator condemning the appellant to pay the expenses incurred by the respondents, incidental to the negotiation of the joint venture, contravened the agreement of the parties.

120) In justifying the award of the reliance damages by the arbitrator, the Court of Appeal interpreted clause 28 of the SHA. The arbitrator did not interpret clause 28 of the SHA and neither did he justify the award of reliance damages on the interpretation of clause 28 of the SHA. When a matter comes up before a court on an application to set aside, the role of the court is to determine, as

we have said earlier in this judgment, if any or all of the grounds set out in **section 17** of the **Act** have been satisfied.

121) The court does this by examining the award and the road map leading up to the award. It does not venture beyond the award and start interpreting clauses in a contract which were not interpreted by an arbitrator.

122) Turning now to the 8th issue of whether the arbitrator rendered a reasoned award which arises from ground 11 of the appeal. The appellant's contention is that the award was not reasoned because the arbitrator omitted to rule on the six issues identified in paragraph 59 of this judgment.

123) If indeed there was an omission on the part of the arbitrator to rule on the issues which the appellant's contends he did not rule on as per paragraph 122 of this judgment, the recourse available to the appellant is not setting aside but rather a request for an additional award in accordance with **Article 33(3)** of the **Model Law**. the **Article** states as follows:

“Unless otherwise agreed by the parties, a party with notice to the other party may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the tribunal considers the request to be justified, it shall make the additional award within sixty days.”

The Article clearly sets out the steps to be taken when a party feels that any of the claims laid before the arbitrator have not been considered. It does not provide for setting aside on the ground that an award is not reasoned neither is such a reason one of the grounds prescribed by **section 17** of the **Act**.

124) The next issue 9, is a jurisdictional issue which hinges on the enforceability of the SHA. It emanates from ground 12 of the appeal and arises from the findings in respect of enforceability of the SHA, regard being had to the voting agreement. The contention here is that since the SHA contravened public policy, the award which flowed from it was in conflict with public policy and, therefore, amenable to setting aside in accordance with **section 17(2)(b)(ii)** of the **Act**.

125) As the appellant has quite rightly argued, **section 6(2)(a)** of the **Act** does stipulate that a dispute arising out of an agreement that is contrary to public policy shall not be capable of determination by arbitration. In addition, a court is empowered under **section 17(2)(b)(ii)** of the **Act** to set aside an award which is in conflict with public policy. The appellant contends that, since the arbitrator found the enforcement of SHA would be contrary to public policy, the awards rendered by the arbitrator as a consequence of the dispute arising from it are contrary to public policy.

126) The arbitrator in his reasoning did acknowledge the fact that the SHA was a separate and stand-alone agreement from the voting agreement. His appointment as arbitrator was pursuant to the said SHA as evidenced by the letter to this effect from the then President of Law Association of Zambia, dated 27th January, 2016, at page 333 of the record of appeal. The arbitrator acknowledged this fact in the introductory part of the award where he made reference to the arbitration agreement which was clause 23 of the SHA.

127) Based on what we have stated in the preceding paragraph, the parties submitted themselves to the jurisdiction of the arbitrator. Later in the award, the arbitrator explained how the 5th and 6th respondents, in conjunction with the appellant, initiated and executed the voting agreement which had the effect of making the appellant, a foreign entity, a majority shareholder in the 1st respondent's. This was the illegality which the arbitrator found to be contrary to public policy and contained in the voting agreement and not the SHA. For this reason, we agree with the arguments advanced by the respondents that the SHA was a standalone document separate from the voting agreement.

128) The last issue arising from ground 13 of the appeal questions the determination made by the Court of Appeal in respect of grounds 7 and 8 which were before that court. These two grounds both questioned the award of expectation and reliance damages. Since we have extensively dealt with the subject matter of this ground of appeal in the determination of other grounds of appeal, we do not think it necessary for us to consider the issue again.

129) Before we end our consideration of the issues before us, we revert to grounds 2, 6, 7, 8 and 10 of the appeal. In these grounds, we were also invited to set aside the award based on **section 17(2)(b)(ii)** that the awards were in conflict with public policy. The allegation in respect of grounds 2, 6, 7 and 8 were that the award of the damages contravened public policy because there was no evidence led to support them.

130) On the other hand, the allegation under ground 10 was that the award of damages contravened public policy because it went against the wishes of the parties as reflected by clause 28 of the SHA. We dismiss these two arguments because they do not meet the thresh hold for public policy we set out in the case of ***Zambia Revenue Authority v Tiger Limited and Zambia Development Agency***² that an award will be set aside where the reasons or conclusion in the award go beyond mere faultiness or incorrectness and constitute an inequity that is so far reaching and outrageous in its defiance of logic or accepted standards, that a sensible or fair minded person would consider that the concept of justice in Zambia would be intolerably hurt by the award.

131) Summary of our decision

131.1) With respect to the first issue of whether the award dealt with a dispute not contemplated by the submission to arbitration, we hold that the arbitrator's decision strayed outside the scope of the submission to arbitration and it is amenable to setting aside in accordance with **section 17(2)(a)(iii)** of the **Act**. We hold that the damages awarded to the 2nd, 3rd and 4th respondents were not in accordance with the claims made in the statement of case. We accordingly allow ground 1 of the appeal;

131.2) As for the second issue of whether the procedure adopted by the arbitrator was in accordance with the agreement of the parties, we hold that the procedure adopted by the arbitrator of applying guesstimates in determining quantum of damages was in breach of the parties' agreement. Further, his decision to award Captain Mulundika the sum of *USD20,000.00* was in conflict with public policy because he was not a party to the proceedings. As a result, we allow grounds 2 and 3 of the appeal;

131.3) Regarding the third and fourth issues which relate to the consideration by the arbitrator of the wet lease agreement, we hold that the award contained decisions on a dispute which was not contemplated by the parties. We accordingly allow grounds 4 and 5 of the appeal;

131.4) As for issue 5, we hold that the arbitrator's award of reliance damages to the 4th respondent was contrary to the agreement of the parties, we accordingly allow grounds 6, 7 and 8 of the appeal;

131.5) Coming to issue 6, we hold that since we have held that the arbitrator's decision contravened the agreement of the parties when he failed to apply the strict rules of evidence, the issue has been rendered otiose. Ground 9 is accordingly allowed;

131.6) As for issue 7, we held that the Court of Appeal misdirected itself when it interpreted clause 28 of the SHA in justifying the arbitrator's award of reliance damages. We accordingly allow ground 10 of the appeal;

131.7) As for issue 8, we hold that the award rendered by the arbitrator was reasoned. Recourse to an omission by the arbitrator to rule on matters referred to him for determination lies in a request to an additional award as opposed to setting aside. Ground 11 fails and we dismiss it;

131.8) As for issue 9, we hold that the SHA was a separate agreement from the voting agreement which the arbitrator found to contravene public policy. Ground 12 of the appeal fails and we dismiss it; and,

131.9) As for issue 10, we hold that its determination has been rendered otiose by the holdings we have made in relation to the arbitrator's award of expectation and reliance damages. Ground 13 of the appeal nonetheless succeeds.

Conclusion

132) The appellant has substantially succeeded in advancing the appeal. We accordingly allow it and set aside the judgments of the High Court and Court of Appeal. In doing so, we uphold the application to set aside both the award and supplementary awards.

The costs will be the appellants in all the three courts and they shall be taxed in default of agreement.

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**M. MALILA
CHIEF JUSTICE**

DCJ

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**R. M. C. KAOMA
SUPREME COURT JUDGE**

[Handwritten Signature]

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**N. K. MUTUNA
SUPREME COURT JUDGE**