



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCA NO. E 007 OF 2019

KPMG EAST AFRICA ASSOCIATION..... 1ST APPELLANT

KPMG KENYA 2ND APPELLANT

-VERSUS-

RICHARD BORO NDUNGU..... RESPONDENT

JUDGMENT

1. There has been a fall out between Richard Boro Ndungu (RBN) on the one part and KPMG East Africa Association (KPMG(EA)) and KPMG Kenya(KPMG(K)) on the other. That fall out escalated into an arbitral dispute before John Ohaga as a sole Arbitrator (the Arbitral Tribunal). This matter now finds its way to this Court as an appeal brought under the provisions of section 39 of the Arbitration Act. Where it is necessary to refer to the two KPMG's together they will be called **KPMG**.

2. But before delving into the substance of the Appeal, the Court needs to determine some preliminary matters raised by the parties. I start with those of RBN which he does in a Notice of Preliminary Objection dated 22nd October 2019.

3. He argues that no appeal lies from the decision of the learned Arbitrator and the Appeal before Court is an abuse of process. The Appeal before Court is under the auspices of section 39 of the Arbitration Act which reads:-

“Questions of law arising in domestic arbitration;

(1) Where in the case of a domestic arbitration, the parties have agreed that—

(a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or

(b) an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court.

(2) On an application or appeal being made to it under subsection (1) the High Court shall—

(a) determine the question of law arising;

(b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.

(3) Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2)—

(a) if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or

(b) the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may

exercise any of the powers which the High Court could have exercised under subsection (2).

(4) An application or appeal under this section shall be made within the time limit and in the manner prescribed by the Rules of Court applicable, as the case may be, in the High Court or the Court of Appeal.

(5) When an arbitral award has been varied on appeal under this section, the award so varied shall have effect as if it were the award of the arbitral tribunal concerned.”

4. The arbitration agreement between the parties is found in Clause 1.5.12 of the East African Partnership Agreement which reads:-

“Arbitration

a) Any dispute between or question which may arise at any time between the members of the Association touching upon the construction of this Agreement on their respective rights and liabilities with respect hereto or otherwise arising in respect of matters the subject of this Agreement shall be referred to the decision of a single arbitrator to be agreed upon by the parties to the dispute failing whose agreement the arbitrator shall be selected by the Executive Committee (whose deliberations shall exclude any member of the Executive Committee who is a party to the dispute) or in default of agreement between the disputing parties and in the Executive Committee within fourteen (14 days), such arbitrator shall be appointed at the request of the disputing parties by the Chairman for the time being of the Chartered Institute of Arbitrators – Kenya Branch in accordance with and subject to the provisions of the Arbitration Act 1995 or any statutory modification or re-enactment thereof for the time being in force.

b) To the extent permissible by law, the determination of the Arbitrator shall be final and binding upon the parties.

c) If any provision of this Agreement shall be declared to be invalid, such declaration shall not be deemed to affect the validity of any of the other provision.

d) Any Arbitrator appointed in accordance with this Section shall have the following qualifications.

i. In the case of dispute arising on a legal issue:

A Qualified Professional Lawyer of not less than 15 years standing.

ii. In the case of a dispute of financial issues:

A Qualified Practicing Accountant of not less than 15 years standing.”

5. Granted, the arbitration agreement does not contemplate an appeal under section 39 but as correctly pointed out by counsel for KPMG, the parties agreed to that possibility in the course of the proceedings. This was in order for Directions issued by the Arbitrator on 30th March 2017:-

“1.12 The parties reserve the right of Appeal under Section 39 of the Arbitration Act.”

By consenting to those directions, the parties had varied or otherwise extended the provisions of clause 1.5.12 in respect to this dispute.

6. The second objection is that none of the matters presented in the Appeal are questions of law as envisaged by section 39 of the Act. Yet it is common learning that an error of law arises where a decision is not based on evidence or is at complete variance or contradiction with evidence (Total Kenya Limited vs Kenya Pipeline Company Limited [2014] eKLR). Matters which would otherwise be of fact take on a shade of a question of law if certain legal conclusions are drawn upon a misapprehension or contradiction of the facts.

7. Although the appeal raises certain issues of fact, the position by KPMG is that the Arbitral Tribunal either misapprehended the evidence or drew erroneous legal conclusions from them. The Court is reluctant to make call as to whether or not the issues raised are purely questions of fact before interrogating them. I take it therefore that a demur in this regard cannot be fairly raised as a preliminary objection.

8. The next objection is that because the Appellants had invoked their right under section 35 then they cannot concurrently move Court under section 39. Section 35 reads:-

“Application for setting aside arbitral award;

(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

(2) An arbitral award may be set aside by the High Court only if—

(a) the party making the application furnishes proof—

- (i) that a party to the arbitration agreement was under some incapacity; or
- (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or
- (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or
- (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or
- (vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

(b) the High Court finds that—

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or
- (ii) the award is in conflict with the public policy of Kenya.

(3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.

(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.”

9. Section 35 is the special regime under which a party to an Arbitration can seek the setting aside of an award on the very specific grounds enumerated there. In principle, and on this I agree with counsel for KPMG, there is nothing in the Act which makes rights under sections 35 and 39 mutually exclusive. The two are different remedies with different parameters and upon which distinct principles turn.

10. That said, it may well be an abuse of Court process for a party to re-argue grounds taken up in an Appeal in a subsequent application for setting aside. A plea of *res judicata* could be well founded. In the matter before Court, I observe that all grounds in the setting aside application are a mirror of the grounds of Appeal here. I leave it to the KPMG to choose whether it will be necessary to prosecute that application once this Appeal is determined on merit. And of course it will open to RBN to object to the section 35 proceedings should it feel that all grounds raised there have been exhaustively argued and or resolved here.

11. I then turn to preliminary issue raised by KPMG. By what he calls a replying affidavit to the memorandum of appeal, RBN swears a 221 paragraph affidavit. KPMG objects to it. These proceedings are an Appeal on questions of law and not a rehearing. The Appeal has to be determined on the basis of the evidence before the Arbitrator. And the language of section 39 does not permit a party to an Appeal to adduce further evidence. And even if that right was available it would have to be with leave of court, which has neither been sought nor granted. Without hesitation, I find that the affidavit of 23rd December 2019 is improperly on record and I do hereby strike it out.

12. What is the background to this dispute?

13. At all material times RBN was an equity partner in KPMG (K) and a member of KPMG (EA). KPMG (K) is a partnership duly constituted under the Laws of Kenya and is a member of KPMG (EA) which is an association of partnership in Kenya, Uganda, Tanzania and Rwanda carrying on the business or profession of certified public accountants and offering such services as audit, tax and advisory services under the KPMG brand or flag.

14. On 3rd October 2016, Josephat Leonard Mwaura, the chief executive officer of KPMG informed RBN that he (the C.E.O) was commencing an investigation into allegations made against RBN concerning an inappropriate relationship with one Gloria Chepkirui Koima. Gloria was the personal assistant to RBN. To facilitate those investigations RBN handed over his personal mobile phones and laptops to be subjected to forensic imaging. Such imaging would reveal if there was inappropriate communication between the two. The circumstances under which the phones and laptop were handed over by RBN to the C.E.O was under debate at the hearing.

15. RBN’s case was that he was assured that the investigations would be completed in a day or two and was in the meantime required to keep off the offices of KPMG (EA) so as not to interfere with the investigations. On 7th October 2016, he received communication that investigations were still ongoing.

16. In his view the investigations were taking longer than anticipated and this caused him anxiety. On 17th October 2016, he wrote to Trevor

Hoole, the chief executive of KPMG-Southern Africa raising his concerns about the treatment he was receiving from the local CEO. RBN felt that his constitutional rights had been breached and that the CEO had failed to observe due process and was intimidating him.

17. Upon receipt of the complaint, Trevor Hoole escalated the issue to KPMG International who dispatched two senior officers to look into the complaint. In late 2016, the CEO informed RBN that he had discussed the complaint he had made to KPMG International and that the Executive Committee (EXCO) of KPMG (K) had expressed the view that it was no longer desirable that RBN and the CEO continue with one on one meetings in relation to the allegations.

18. At the heart of RBN's grievance is that after his complaint, the CEO brought to the attention of the partnership various matters which he considered concluded. These are matters that the CEO had resolved without communicating them to the partnership. That on the basis of these matters, the CEO convened a meeting on 16th December 2016, to deliberate, inter alia, the complaint by RBN to KPMG International and action to be taken in that relation. The claimant alleges that in the meeting he was asked to leave in order to allow the parties to discuss his conduct. It was also in his absence that the CEO moved a motion for his removal from KPMG (EA). That motion, it turned out, was subsequently adjourned to 13th January 2017.

19. In the meantime, the CEO and two other partners met RBN at Capital Club in which he was informed that a decision had been taken by the ExCo of KPMG (K) to ask for his resignation in exchange for a financial settlement. RBN declined this proposition.

20. The adjourned meeting of 16th December 2016 was reconvened on 13th January 2017. In that meeting KPMG (EA) voted to remove RBN from the partnership. His removal was the trigger for the litigation that has now reached this Court. At arbitration, RBN contended that his removal was unprocedural, unfair and unlawful. That it was retaliatory and contrary to KPMG (EA)'s assurance to its members of zero-tolerance to retaliation on account of complaints raised pursuant to international procedures.

21. As for KPMG, they deny that the compulsory retirement was retaliatory. They assert a mandate to discuss the claimant's conduct and vote on the question of his removal. They contend that the claimant was accorded a fair and just hearing and was presented an opportunity to present his case and that the final decision was in consonance with the fundamental principle of utmost good faith and trust which was cardinal to the partnership.

22. After a lengthy hearing involving evidence of 3 witnesses for the Claimant and 9 for the Respondents, the Arbitrator returned an award in favour of RBN as follows:-

- i. I find and hold that the removal of the Claimant from the 1st Respondent by the purported compulsory retirement was unlawful and was null and void;
- ii. I find and hold that the Claimant has suffered loss and damage as a result of the conduct of the Respondents towards him since the commencement of investigations against him from 3rd October 2016 culminating in his purported compulsory retirement on 13th January 2017 and the announcement thereof;
- iii. I order and direct that the Respondents shall jointly and severally pay to the Claimant the aggregate sum of USD 4,519,452.00 and Kshs.1,943,172.84 in special and general damages.
- iv. I further order and direct that the Respondent shall jointly and severally effect the transfer the motor vehicle registration No. KBY 146Y to the Claimant at its net book value;
- v. I further order and direct that the Respondents shall jointly and severally provide and account to the Claimant for the sums which should have been expended on his account in respect of club membership, personal and life insurance cover, medical cover, annual subscriptions and motor vehicle comprehensive insurance, running and maintenance costs for the period from the date of his purported compulsory retirement until the date of the Award and shall, at the Claimant's election, pay the equivalent of such amounts to the Claimant or arrange to provide equivalent benefits to the Claimant for the period to the financial year ending 31st August 2019;
- vi. The amounts awarded to the Claimant shall be paid within forty-five (45) days from the date the Award is taken up by either party failing which compound interest shall accrue thereon at the rate of 5% per annum on the Kenya Shillings amount until payment in full;
- vii. The Respondent shall also pay to the Claimant's costs of the reference and the Award to be agreed, and if not agreed within sixty (60) days, to be assessed by the Tribunal.

23. The Appeal makes it necessary for this Court to discuss the highlights of the award. But the Court first reflects on its role in a section 39 appeal. The Court is requested to consider and determine questions of law arising out of an award. This Court has elsewhere discussed when a question of fact becomes a question of law. Yet it must always be remembered that in arbitration matters, the Arbitral Tribunal is the master of facts and deference will, save in exceptional circumstances, be given to Arbitrators findings on facts (see Kenya Oil Company Limited & Another vs. Kenya Pipeline Co. [2014] eKLR and D. Manji Construction Limited vs. C & R Holdings Limited [2014] eKLR). In this way, this Court does not have the freehand it would otherwise have as a first appeal court under the Civil Procedure Act. The freehand to reevaluate the evidence afresh with a view to reaching its own conclusion (with the usual caveat that some allowance must be made because unlike the Trial Court, the Appellate Court will not have had a firsthand account of the evidence). In a section 39 Appeal, the role of the High Court is somewhat circumscribed because of the deference it must accord to the arbitrator's findings of fact. This Court will endeavour to keep the straitjacket.

24. The Appellants impugn the Award on the following grounds:-

1. *The arbitrator erred in law in holding that the power to expel or compulsorily retire the respondent was not governed solely by the contractual relationship between the partners contained in the KPMG East Africa Association Partnership Agreement.*
2. *The arbitrator erred in law in holding that the relationship between the partners and the power to expel or compulsorily retire the respondent was governed by the Partnership Act 2012, which Act has never been brought into force. The governing law of partnership is the Partnership Act of 1934, Chapter 29 of the Laws of Kenya.*
3. *The arbitrator erred in law in holding that Article 47 of the Constitution and the Fair Administrative Action Act when such provisions had not been pleaded at all by the respondent and the requirement of Anarita Kirimi Njeru v The Republic (No.1) [1976-80] 1 KLR 1272 had not been observed.*
4. *The arbitrator erred in law in holding that Article 47 of the Constitution and the Fair Administrative Action Act, 2015 governed the power to expel or compulsorily retire the respondent.*
5. *The Arbitrator erred in law in holding that the pleading by the appellants that the respondent was given notice and full opportunity to address the matters which were the basis for the vote for compulsory retirement constituted an admission that the appellant had a right to be given notice and to be heard in relation to the vote against him.*
6. *The arbitrator erred in law in holding that the meeting of 3rd October 2016 between the CEO of the appellants and the respondent and the process that followed thereafter was a formal investigation of which the respondent was entitled to notice of the meeting.*
7. *The Arbitrator erred in law in stating that “no evidence has been adduced before me to prove that the Claimant (respondent) was in fact notified of EXCO’s decision” to recommend the respondent’s compulsory retirement when such evidence was set out in Paragraph 44 off the statement of evidence of Mr. Josephat Mwaura and Paragraph 16 of the statement of evidence of Mr Brian D’Souza.*
8. *The arbitrator erred in law in holding that the relationship between the partners in the first and second appellants was governed by the KPMG East Africa Staff Hand Book.*
9. *The arbitrator erred in law in construing the provisions of the KPMG East Africa Association Partnership Agreement when holding that the Partner’s meeting of 16th December 2016 had not been properly convened or conducted.*
10. *The arbitrator erred in law in construing the provisions of the KPMG East Africa Association Partnership Agreement when holding that the Partner’s meeting of 13th January 2017 had not been properly convened or conducted.*
11. *The arbitrator erred in law in holding that the vote to compulsorily retire the respondent was void.*
12. *The arbitrator erred in law in holding that the respondent had not ceased to be a partner in the appellants.*
13. *The arbitrator erred in law in holding that the facts established before the arbitrator were sufficient for the arbitrator to reach a finding that the CEO of the appellants had “acted in a retaliatory manner” against the respondent.*
14. *The arbitrator erred in law in interpreting the Remuneration Policy as preventing a partner whose unacceptable behaviour did not result in him leaving the partnership from participating in the firm wide pool, but that a partner whose unacceptable behaviour did not result in him leaving the partnership was entitled to share in the firm wide pool.*
15. *The arbitrator erred in law in drawing an adverse inference against the appellants so as to award the respondent US \$ 971,000.00 earnings for the period ending 31st August 2017 because the appellants had failed to make available the 2015 and 2016 profit allocation excel spreadsheets. Such action was punitive and unrelated to the assessment of the earnings for 2016/2017*
16. *The arbitrator erred in law in ignoring the respondent’s stated intention to retire on 31st December 2019 in assessing the damages awarded to the respondent. In so doing the arbitrator awarded damages for a period during which the respondent had not intended to continue as a partner in the appellants and thereby departed from the principle of restitutio in integrum and instead conferred the profit on the respondent.*
17. *The arbitrator erred in law in awarding profit of US \$971,000.00 for the period 1st September 2015 to 31st August 2017 plus general damages for the period after 1st September 2017 while at the same time awarding the respondent US \$ 325,000.00 in respect to drawings on account of profit for the same periods thereby making a double payment.*
18. *The arbitrator erred in law in awarding the claim for special damages of Kshs.1,943,172.84 which is in respect of items which would only be recoverable if incurred in the course of the business or by a partner who was actively engaged in earning of income for the partnership.*
19. *The arbitrator erred in law in awarding general damages of US \$ 2,382,000.00 being 3 years multiplier at US \$ 794,000.00 per*

annum.

20. The arbitrator erred in law in assessing the annual loss of profit at US \$ 794,000.00.

21. The arbitrator erred in law in holding that the respondent was entitled to US \$ 100,000.00 for the purchase of a new motor car under the Remuneration Policy.

22. The arbitrator erred in law in awarding US \$ 25,000.00 as aggravated damages.

As some of the grounds overlap and cover common themes, KPMG lumped a number together in argument.

25. The first set involve grounds 1, 3, 4 and 6. At the core of these grounds is the issue whether KPMG's power to expel or compulsorily retire RBN was governed solely by the contractual relationship between the partners contained in KPMG East Africa Association Partnership Agreement or whether it extended to Article 47 of the Constitution and the Fair Administrative Action Act.

26. KPMG argue that the crux of the claim was that RBN's removal or compulsory retirement was illegal and that all prayers flow from this complainant. KPMG contends that the relationship between it and RBN was governed by the East Africa Association Partnership Agreement. Argued time and time again by KPMG is that whether or not its conduct in respect to removal of RBN should be censured has to be examined against the provisions of the Agreement only.

27. KPMG then asks this Court to give regard to paragraph 275 of the Award in which the Arbitrator makes this finding:-

"275. For my part, I accept that if the question turns on a construction of the Partnership Agreement, then giving consideration to clause 1.3 as read with 1.5.2, there is nothing in the Agreement that required the Respondents to give the Claimant notice of the intention to pass a resolution to expel him or to give him an opportunity to state his defence."

28. KPMG thinks this to be a crucial finding and that if the Arbitrator had properly applied the law then the claim by RBN should have failed as more than 75% of the partners had resolved to expel or compulsorily retire him. KPMG is aggrieved that the Arbitrator extended the boundaries of the dispute beyond the partnership Agreement by invoking alleged breaches of Article 47 of The Constitution and the provisions of the Fair Administrative Action Act.

29. Expounding on this argument KPMG argues that "administrative action" is not defined in the Constitution and for a finding that there had been a breach of Article 47(1) it is necessary to show that an administrative act has infringed one of the following five components; "expeditious, efficient, lawful, reasonable and procedurally fair." Counsel for KPMG submits that on the principles established in Anarita Karimi Njeru v Republic (No. 1), KLR 1272 a claim for infringement of Article 47 one would have to plead the components of Clause (1) in respect of which there had been a failure and a right or fundamental freedom which had been or was likely to be adversely affected by the administrative action under Clause (2). It is argued that RBN failed to plead the necessary facts.

30. Regarding the Fair Administrative Action Act 2015, KPMG proposes that under Clause (3) (a) of Article 47 of the Constitution, review of an administrative action must be by a Court or "if appropriate, an independent and impartial tribunal." The Act does not confer such jurisdiction on an arbitrator.

31. A further point was that the constitutional directive in respect to the legislation to be made pursuant to Article 47 is that it should "promote efficient administration." The definition of administrative action in Section 2 of the FAA reads:-

"(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates."

32. KPMG assails the Arbitrator's finding that the act applies to non-state agencies including any person whose action, omission or decision affects the legal rights or interests of any persons to whom such action, omission or decision relates. They think that this holding by the Arbitrator overlooks the definition of "decision" in Section 2 of the FAA which reads:-

"Any administrative or quasi-judicial decision made, proposed to be made, or required to be made, as the case may be."

It is submitted that the Arbitrator failed to address whether the resolution of 13th January 2017 or earlier action by the CEO of KPMG constituted a "decision" within the scope of the FAA.

33. It is also emphasized that just as he failed to plead Article 47 breaches so too did RBN fail to plead contravention of the provisions of the FAA Act.

34. A significant contention raised by the Appellants is that the relationship between KPMG and RBN being of a contractual nature then the provisions of FAA have no place in the dispute. To this argument a parallel is drawn to the position held by some members of the Employment and Labour Court that decisions by employers relating to their employees did not fall within Article 47 of FAA Act. In this league are decisions in Loice Mutai v Kenya Revenue Authority [2017] eKLR and Maxwell Miyawa & 7 others v The Judicial Service Commission [2017] eKLR. Yet in fairness, counsel also drew the Court's attention to another part of the Court which holds a contrary view.

In Naomi Connie Lusiche v Barclays Bank of Kenya Limited [2018] eKLR and Kenneth Njiru Nyorani v Dodhia Packaging Limited [2012] eKLR, the courts held that Article 47 and FAA Act apply.

35. I was asked by KPMG to side with non-application of the Constitution and statute.

36. In countering these arguments, the lawyer for RBN cautions the Court on how to construe the holding of the Arbitrator in paragraph 275. It is argued that the Arbitrator did not accept that the question turned solely on the construction of the Partnership Agreement.

37. Regarding the place of the Constitution in this dispute, RBN takes the position that although a Tribunal is not called upon to make a constitutional determination, its findings on matters of fact which have a constitutional underpinning suffices. RBN cites Mativo J in David Ramogi & 4 others v Cabinet Secretary, Ministry of Energy and Petroleum & 6 others [2017] eKLR.

38. Regarding whether the constitutional or statutory breaches are sufficiently pleaded, RBN makes the point that his contention that he required written notice prior to the acts visited upon him were clearly pleaded and points to paragraphs 35, 36, 40, 54, 55, 68, 88, 96, 97, 166 and 167 of the further Amended Statement of Claim. RBN contends that his cause of action was pleaded with clarity, sufficiently detailed, conscience and in compliance with the rules of the Chartered Institute of Arbitrators. Further, that the issue whether the Arbitrator could determine alleged breach of constitutional rights was addressed by both parties and was therefore available for determination.

39. That in any event at paragraph 422 of the Award, the Arbitrator held as follows:-

“Having stated the foregoing, the answer to this issue is that the Tribunal does not have jurisdiction to determine breaches of constitutional rights.”

40. The Arbitration Tribunal held that the provisions of the FAA Act applied to the actions commenced against RBN by dint of Section 3(1) (c) of the Act which provides:-

“(1) This Act applies to all state and non-state agencies, including any person—

(c) Whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.”

41. In Paragraph 285 of the decision, the sole Arbitrator the concludes:-

“285. The Claimant, pursuant to the aforementioned provisions, was entitled to administrative action which is efficient, lawful, reasonable and procedurally fair. More specifically, the Claimant was entitled to written notice of the partners’ intention to pass a resolution to compulsorily retire him. The omission in complying with these statutory requirements would render any administrative action unlawful.”

42. Important to note is that the provisions of the FAA Act flow from Article 47 of the Constitution and the statute was enacted in deference to Clause 3 of Article 47 which required parliament to “enact legislation to give effect to the rights in this clause.” By making the finding that RBN was entitled to administrative action which is efficient, lawful, reasonable and procedurally fair, the Tribunal was in reality holding that the Partnership Agreement was bound by Article 47 of the Constitution. This is so, even though the sole Arbitrator was alluding only to non-compliance of statutory requirement.

43. Even before considering whether breaches of Article 47 or the provisions of the FAA Act were properly pleaded or were otherwise placed before Arbitration for determination (Odd Jobs vs. Mubia (1970) EA 476), the Court must first mull over whether the provisions of Article 47 of the Constitution and the FAA statute govern the relationship between RBN and KPMG.

44. For a start there is no doubt that provisions of Article 47 and FAA can apply to both state and non-state agencies. And it is easily conceded that national values binds us all not only when we apply or interpret the constitution itself, but when we apply or interpret any law (See David Ramogi Supra). The real issue here is whether Article 47 and therefore the statutory provisions of the FAA Act are applicable to the Partnership Agreement which is a private contract between the parties.

45. RBN was at all material times a Partner in KPMG (K) and their relationship was, inter alia, governed by the Partnership Agreement. As a requirement of Clause 1.1.1. (a), RBN as partner of KPMG (K) was a signatory to the agreement. There is then the Local Partnership Agreement – Kenya which governs the relationship of partners of KPMG (K). A highlight of this latter agreement is that a person ceases to be a partner of KPMG(K) when he ceases to be a member of the KPMG East Africa Association (clause 3(iii)). The understanding of the Court is that, as pleaded by KPMG, the relationship between the partners of KPMG (EA) and KPMG (K) is governed by the terms of KPMG (EA) Partnership Agreement and the Local Partnership Agreement. At this stage the point to be made is that the relationship that was the subject of the dispute was a partnership.

46. Under Section 3(1) of the Partnership Act (Cap 29) a partnership:-

“...is the relation which subsists between persons carrying on a business in common with a view of profit.”

The relationship between RBN and his partners was a partnership and private contract freely entered by each party. In addition, it was a commercial relationship.

47. In respect to how a member of any local Partnership, like RBN, could be removed by way of compulsory retirement, Cause 1.5.2 of the Partnership Agreement reads:-

“Compulsory Retirement

- a) A member in any of the Local Partnership or the Advisory Company may be removed by way of an affirmative vote to that effect of 75% or more of the members of the Association, excluding the vote of the member being so challenged.
- b) The Executive Committee shall have the option to vote to suspend a Business Unit Leader. Upon the suspension of a Business Unit Leader the members of the Association who are attached to the applicable Business Unit shall meet and elect a new leader.
- c) The Executive Committee shall have the opinion to suspend the CEO. Upon suspension of the CEO the remaining members of the Executive Committee shall as soon as practicable call a meeting of the members of the Association to consider the suspension and if appropriate appoint a new CEO.
- d) The Executive Committee shall have the option to suspend any member of the Association. Following such suspension the Executive Committee shall forthwith call a meeting of the members of the Association to consider the suspension and either reinstate the member of the Association or terminate the services of the member of the Association.
- e) Amounts due to any such member will generally be treated in the same way as debts under this Agreement. In cases involving fraud, dishonesty, criminal action or other abuse the Executive Committee reserve the right to withhold any balance due to cover possible claims against the relevant Local Partnership or Advisory Company. Where the Executive Committee intends to exercise this power, they shall have such decision ratified by the members of the Association.
- f) The following inter alia will constitute grounds for compulsory retirement and the Executive Committee may suspend such member on full pay pending the final determination of the Association as to whether such member should be removed from the Association:-
 - i. If a partner commits the offence involving fraud or dishonesty or is convicted of any criminal offence (other than a minor motoring offence.)
 - ii. Commits a serious breach of this Agreement or their respective Local Agreement which appears in the opinion of 75% of the Association to be calculated to result in the Local Partnership or Association suffering material disadvantage and which if capable of being remedied is not remedied within 14 days of a request from the Executive Committee so to do.
 - iii. If he/she becomes of unsound mind within the meaning of the Mental Health legislation from time to time in force in Kenya, Tanzania, Uganda or Rwanda as applicable.
 - iv. If he/she is an undischarged bankrupt, or otherwise has no reasonable prospect of paying or is unable to pay his debts or enters into a compromise for the benefit of his creditors generally.
 - v. If he/she fails to account for money received by him in respect of any Local Partnership transaction or
 - vi. If he/she fails to pay to the Local Partnership or Association within (30) days of being requested in writing to do so any sum owed by him to the Local Partnership or Association.
 - vii. If he/she becomes engaged in other business activities from which they would profit, without the prior consent of the Executive Committee.
 - viii. If he/she ceases to hold the requisite professional qualification, or is suspended for any period or otherwise penalized or disciplined by the disciplinary committee of their respective governing body in respect to their practice area.
 - ix. If he/she is in the opinion of 75% of the Association guilty of gross professional negligence.
 - x. If he/she is guilty (to the reasonable satisfaction of 75% of the Association members) of any deliberate or persistent breach or other continuing material breach of the professional or ethical standards of their governing body or of any conduct which harms or may tend to cause damage to or injure the reputation and good name of the Local Partnership and its practice.
 - xi. If he/she consistently under-performs or fails to provide adequate service to clients in the opinion of 75% of the Association Members including the vote of any member being so challenged.
 - xii. If he/she should refuse and or decline to consent to the issues of a third party assurance the issue of which has been approved by the Association.
 - xiii. Act in respect contrary to the good faith which ought to be observed by all Members or act in such a way as to be in the opinion of the more than 75% of the members of the Association materially detrimental to the Association as a whole or;

xiv. Any other grounds that the more than 75% of the Association Members deems fit upon the provision of six months' notice.

48. All members of KPMG (K) including RBN freely acceded to how he/she could be removed from the Partnership. It has not been pleaded by RBN that any part of the Agreement and more so clause 1.5.2 is unconscionable or oppressive. Neither has the validity or legality of the Agreement and clause 1.5.2 been brought to question.

49. The Constitution itself guarantees the right to freedom of association and right to acquire and own property. The right to form a partnership whose purpose is to carry on business in common with a view of profit is protected by the Constitution. The Court does not think it is conceivable that constitutional provisions should then be invoked to circumscribe the provisions of a Partnership Agreement which are not in themselves illegal or unconstitutional. Having not been pleaded or alleged that the provisions in the clause on compulsory retirement are inimical to the Constitution, then it would be overstretching the constitutional guarantees to require that the partnership yields to Article 47 of The Constitution in the process of retiring a partner.

50. In the preamble to the Partnership Act, it proclaims itself to be the statute to declare the law of partnership. I therefore take it that, when in Clause 1.5.11, the Agreement provides:-

“This Agreement shall be governed by the Laws of Kenya”,

Then the application of the law on partnership in Kenya is saved.

51. Section 49 of the Act provides:-

“Existing rules applicable to partnership;

The rules of equity and common law applicable to partnerships in England shall apply to partnerships in Kenya, except in so far as they are inconsistent with the provisions of this Act.”

52. An overarching and enduring common law principle of a partnership is the duty of utmost good faith of each partner to another in partnership matters and in paragraph 369 of the decision, the sole Arbitrator gives this comprehensive statement of that duty:-

“369. It is a fundamental principle of partnership law that each partner must act towards each of the other partners in all matters concerning the partnership with utmost good faith. The relationship of each partner to all the other partners is, therefore, a fiduciary one and it requires each partner to act honestly towards the other partners, to be fully accountable and completely transparent to each of them about their involvement in the business of the partnership, to account to all of them for any profit made out of partnership property or at the partners' expense, to share in all losses incurred by the partnership, to use management powers conferred by the partnership honestly and in good faith but not arbitrarily or capriciously and to hold partnership assets acquired or under that partner's control on trust for the partnership as a whole. These principles, usually referred to compendiously as the duty of utmost good faith, arising from the equitable foundations of partnership law, therefore ensure that each partner must be completely transparent in relation to everything that he does in relation to the partnership business and as to any aspect of the accounts relating to the partnership within his knowledge or control.”

53. Indeed, in the E.A Partnership Agreement each partner is required to “be just and faithful to the other partners and at all times give to the other partners' full information and explanation of all matters relating to the affairs of the partnership”. (Clause 7(i) (a)).”

54. The duty of utmost good faith is so central and significant to a partnership arrangement that it is not feasible to exclude it even by agreement of the partners. If that were to be permitted then the arrangement cannot be a true partnership.

55. In the end I prefer to reach a decision that where partners, in writing, contract on how they will relate to one another and agree on the process and manner for reaching certain decisions, then their right to freely contract should be respected. It is however expected that the partners, in implementing their partnership agreement, should adhere to the fundamental principle that underpins partnerships, which is the duty to act in good faith towards each other. So, for instance, where a partnership agreement excludes the right of a partner to defend himself before a decision to expel him is made, the power of expulsion cannot be used for some opaque and ill motive. So too, the decision should not be made without some form of notice to the expelled partner. That said, to require a partnership, in addition, to adhere strictly to the administrative prescriptions of Article 47 which have been purposefully excluded is to restrict the right of partners to freely associate with one another and to prescribe the rules of that association with a view to pursuing profit. The fundamental principles of partnership offer sufficient safeguards to a partner and there is no need to invoke the more lofty and involved guarantees of the Constitution.

56. I reach a different decision from the Tribunal. I take the view that Article 47 and the Fair Administrative Action Act have no place in this dispute. In doing, so I recall the following words of Justice Mativo in James Kuria v Republic & 3 others [2018]eKLR;

“42. The Petitioner has not demonstrated that he cannot get an effective remedy under the dispute resolution mechanism established under the statute. The attempt to clothe the alleged failure to supply information with Article 46 rights is not good enough. There must be a clear demonstration that the remedy not available, not effective, and not sufficient to address the grievances in question.

43. A remedy will be effective if it is objectively implemented, taking into account the relevant principles and values of administrative justice present in the Constitution and our law. The “deepest norms” of the Constitution should determine whether the dispute involves explicit constitutional adjudication, or whether it could safely be left to the statutory provisions. In this regard, I am persuaded beyond doubt that the adjudication of the issues complained herein can safely be left to the statutory provisions.

44. Courts abhor the practice of parties converting every issue in to a constitutional question where such issues can safely be left to the dispute resolution mechanism established under the statute. The Court of Appeal in *Gabriel Mutava & 2 Ors. vs. Managing Director Kenya Ports Authority & Another* underlined the conventional judicial policy as established by the courts over time and now settled that constitutional litigation is not open for every claim which may properly be dealt with under the alternative existing mechanism for redress in civil or criminal law as follows:-

“Then there is the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, where this Court again emphasized:-

“...In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed...”

45. A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.

46. When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.

47. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others* in which Justice O'Regan recalling the Constitutional Court's observations in *S vs. Boesak* notes that:-

“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions ofthe Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”

48. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation. At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. This leads to the second issue, namely, whether or not the Petitioner proved to the required standard that Safaricom breached the provisions of Article 46 of the Constitution and the statutory provisions guaranteeing consumer rights.”

57. I shall return to whether, therefore, because the conduct of KPMG has to be reviewed only within the context of the Partnership Agreement, then the RBN's claim ought to have failed. I was invited to reach this conclusion by KPMG. For now, I turn to consider ground 2 of the Appeal.

58. In the decision, and in particular paragraphs 260 to 269, the Tribunal makes reference to the Partnership Act No. 16 of 2012 and infers its application to the dispute. For illustration, one can look at paragraph 265 in which the Arbitrator holds-

“It is clear therefore that the relationship between the partners must be construed having regard to the Partnerships Act as read together with the Partnership Agreement.”

Reference to statute by the Arbitrator was reference to Act No. 16 of 2012 and not the Partnership Act (Cap. 29). An attempt by counsel for RBN to disassociate the decision from Act No. 12 of 2012 by making reference only to paragraph 269 of the decision is a selective reading of the decision. In that short paragraph the sole Arbitrator stated:-

“I do not construe Section 29 of the Partnership Act to be exhaustive nor to have any application to the circumstances of the present dispute.”

59. The truth of the matter is that the Arbitrator had only excluded the application of that particular provision of Act No. 12 of 2012. Yet in other parts of the decision, the Tribunal applies the provisions of the Act. See for instance in paragraph 370 where he makes reference to section 10 as the statutory foundation of the principles of good faith. Again in paragraph 396 he invokes section 16 of the Act in regard to the responsibilities of the partners.

60. The Partnership Act No. 16 of 2012 has not been brought into force and I cannot see any useful insistence that it should have applied to this dispute. On this I agree with counsel for KPMG that the relevant law was the Partnership Act (Cap. 29). On this issue the debate that is left is whether the Arbitrator's reliance on a wrong statute substantially altered the outcome of his decision.

61. Prior to the meeting that resolved to remove him, there had been meetings between RBN and the CEO of KPMG (K). One such meeting was that of 30th October 2016 in which the CEO confronted RBN with the allegation of the inappropriate relationship between RBN and his PA which the CEO intended to investigate. RBN argues that in view of the seriousness of the allegations made against him, he was entitled

to a written notification of the allegations and notice of the meeting. KPMG on the other hand state there was no formal complaint or investigation and there was no need for notification.

62. In finding for RBN, the Tribunal held that the allegations made against RBN were serious and so were the investigations that were undertaken after the meeting. The Claimant handed over his mobile telephone and laptops, he was required to leave the office so as not to interfere with the investigations. In the end the investigations lasted beyond two days and required the involvement of skilled resources. I do not hear KPMG assail the Arbitrator's finding of fact that the allegations made against RBN were of serious nature. Secondly, that although they may have been characterized as informal, the investigations themselves were detailed and included mapping and forensic examination of the mobile telephones and laptops of the Claimant. It is therefore difficult to fault the Arbitrator's finding (and remember he is the master of facts) that the matter was not "a brief, discreet enquiry". As a matter of good faith, it seems fair that RBN should have been given prior notice of these serious allegations to enable him prepare his answer to them. I am unable to fault the Arbitrator's finding.

63. The Court now turns its attention to a set of grounds of Appeal whose discussion touches on the Tribunal's finding that KPMG was liable. These are grounds 5, 7, 9, 10 and 11.

64. Prior to the meeting of 16th December 2016, there had been communication between RBN and senior members of staff of KPMG and a physical meeting of 30th November 2016 between RBN, Josephat Mwaura, Brian D'Souza and Andrew Jackson. There was then a meeting of 15th December 2016 between RBN, Josephat Mwaura and Brian D'Souza. What transpired in these communications and meetings is not entirely agreed by the parties.

65. RBN states that through the communications and meetings he learnt that there was an intention not just to discuss his complaint but also his past conduct. Matters which in his view had been closed. KPMG on the other hand takes the position that the information passed to RBN was significantly more. KPMG's case is that RBN was informed that a resolution for his compulsory retirement would be put at the partners meeting of 16th December 2016.

66. On his part the Arbitrator concluded:-

"336. What is in contest is whether or not the Claimant was informed that ExCo had formed the view that there was an irredeemable breakdown in trust and that they would be recommending his compulsory retirement to the meeting of 16th December 2016. The Claimant denies having been informed of the decision by ExCo but makes the admission that he had been informed that his past conduct would be discussed at the meeting.

337. No evidence has been adduced before me to prove that the Claimant was in fact notified of ExCo's decision, and I have therefore come to the conclusion that he was not informed that ExCo would be recommending his compulsory retirement."

67. I am urged by KPMG that the Arbitrator would not have reached this answer on a proper consideration of the evidence before him. This is the gist of ground 7.

68. On the part of RBN, counsel reminds Court that an Arbitrator is a master of the facts before him and it is always within the Arbitrator's mandate pursuant to Section 20(3) of the Arbitration Act to determine the weight of any evidence. Section 20(3) reads:-

"The power of the arbitral tribunal under subsection (2) includes the power to determine the admissibility, relevance, materiality and weight of any evidence and to determine at what point an argument or submission in respect of any matter has been fairly and adequately put or made."

69. This Court need not underscore that matters of fact can evolve into a question of law if it is so apparent that the Trial Tribunal failed to consider some evidence or misconstrued the evidence before it so that the conclusion reached is so perverse that no Tribunal considering the same evidence could have reached that decision.

70. The Arbitrator, discusses the meeting of 15th December 2016 in three paragraphs (335 to 337) and to be fair to KPMG, there was no analysis of the evidence of what transpired at that meeting. It is therefore falls to this Court to make that analysis.

71. At hearing this is what transpired in respect to the meeting of 15th December 2016:-

"Mr. K. A Fraser: Were you also told at that meeting that ExCo have decided to recommend your compulsory retirement because of the irredeemable breakdown in trust between you and the partners."

Mr. Richard Boro Ndungu; Mr. Arbitrator Sir, there is no other way to describe it, that is a lie. I was not told any such thing at that meeting."

72. As to the two others who were in that meeting, the evidence of Mr. Mwaura is s;

"Mr. Kithinji Marete: Did you notify Mr. Ndungu of the decision of the meeting of the 28th to compulsorily retire him?"

Mr. Joseph Mwaura: Yes, I did."

73. Mr. D'Souza evidence was:-

“Mr. Kithinji Marete: When did you know that there was an issue about his compulsory retirement Sir?

Mr. Brian D'Souza: When did I know?

Mr. Kithinji Marete: Yes

Mr. Brian D'Souza: Specifically let me recall this on the 15th of December.

Mr. Kithinji Marete: Where did you get to know about that?

Mr. Brian D'Souza: In a meeting with Richard himself that I attended with CEO.”

74. So there is these rival positions. The word of RBN against that of D'Souza and Mwaura. There does not seem to be additional evidence by either side that tips the evidence of one over the other. This becomes even clearer when the Court evaluates the evidence as to whether RBN may have been aware, prior to the meeting of 16th December 2016, that his expulsion was on the cards. For now, it has to be recalled however that it is KPMG who pleaded the contents of the meeting (see paragraph 40 of the Amended Statement of Defence) and it was upon KPMG to prove that Defence. Given the Court's view that what was before the Tribunal was simply word of one side against the other, the Court is unable to reach any different outcome from the Arbitrator.

75. Yet as it may turn out whether or not the Claimant was informed at this meeting of ExCo's decision to recommend his compulsory retirement may not relieve KPMG of liability.

76. I turn to examine the conduct of KPMG against the provisions of Clause 1.3 as read with Clause 1.5.2 so as to find out whether in fact it acted against its duty of good faith as pleaded by RBN. As earlier held by Court there is no basis to scrutinize the conduct of KPMG through the lenses of Article 47 of the Constitution or the provisions of the Fair Administrative Action Act.

77. The meetings that discussed the removal of RBN were those of 16th December 2016 and 13th January 2017, the latter being an adjourned meeting of the former. One of the complaints by RBN is that the meeting of 16th December 2016 was convened and conducted unprocedurally and in breach of the Partnership Agreement by failing to specify the nature of the meeting and to notify the members including RBN that the motion for the “Claimant's removal” would be tabled at the meeting.

78. The Notice for the meeting of 16th December 2016 reads:-

“Dear all

I refer to my earlier notice of the meeting and now confirm that we have sufficient confirmations to proceed with the meeting on 16th December 2016. The meeting shall be held at Kempinski, starting at 8.00 am.

The Agenda for the meeting shall include

- 1. Call to order and preliminaries**
- 2. Preamble**
- 3. Consideration of complaint on international hotline, recommendations and way forward.**
- 4. Consideration of recent complaint by Richard Ndungu, final determination and action thereon.**
- 5. Setting the tone for the new year and beyond.**
- 6. Updates: Global, EMA, Africa, EAP**
- 7. Any other business**

I have a few people who have indicated that they may be unable to attend. Please identify a Partner who is attending and give them your proxy in writing under copy to me.”

79. Clearly, that a vote would be taken for the compulsory retirement of RBN was not included in the agenda. Indeed, the following was the Arbitrator's observation:-

“During cross-examination, the Respondent's witnesses stated that from their reading of the Notice as issued, they could not tell that there would be a vote for the compulsory retirement of the Claimant.”

80. At the Tribunal, KPMG takes the position that Mullins v Laughton and others [2002]EWHC2761(Ch) sets out the legal principles to be followed in these circumstances. That the decision sets out three points:-

- i. Firstly, that the mere fact that partners have been looking for grounds to expel and have been keen to do so does not call the exercise of that power of expulsion into question of itself.
- ii. Secondly, in general, a partner need not be given an opportunity to explain his conduct or to argue his corner before he is expelled.
- iii. Thirdly, the mere fact that the power of expulsion is by some way wrongly exercised does not by any means necessarily justify a dissolution.

81. At the Appeal, KPMG persists on this position of the law and during the oral highlights senior counsel Fraser emphasized that on the Partnership Agreement there was no need to tell RBN why KPMG was considering retiring him nor was there need to give him an opportunity to address them and that they could have made the decision merely by way of a written resolution. That there was no need for a meeting at all.

82. Let me consider these positions from the standpoint of the Agreement and the overarching need for an action taken to be done in good faith.

83. The decision to compulsorily retire RBN was taken pursuant to the provisions of clause 1.5.2 (a) + (f):-

“Compulsory Retirement

a) A member in any of the Local Partnership or the Advisory Company may be removed by way of an affirmative vote to that effect of 75% or more of the members of the Association, excluding the vote of the member being so challenged.....

f)The following inter alia will constitute grounds for compulsory retirement and the Executive Committee may suspend such member on full pay pending the final determination of the Association as to whether such member should be removed from the Association:-.....

84. From the words of sub-clause (f), the removal of a member is effective upon a final determination of the Association in that regard and in the circumstances of RBN it would have to be an affirmative vote to that effect of 75% or more of the members of the Association, excluding the vote of the member being so challenged. Nevertheless, the provision is silent as to how the vote is to be taken.

85. It is also true that the provision of the clause is silent as to whether the member to be challenged ought to be given notice that his removal is under consideration. Yet the Court does not hear any argument that even at this possibly late hour in the partner's membership in the Association, the Association should not act in good faith towards him. While a partnership agreement may not have provision for a partner to defend himself or to argue his case or corner (and there is no begrudging that), it would have been patently unjust for the exiting member to be ambushed with removal. Even though the partner need not be given an opportunity to explain or defend himself, a notice presents him a chance to lobby or beseech the co-partners not to proceed with the drastic decision. Only then can the co-partners be said to have acted in good faith towards the challenged member. Even the decision of Mullins(supra) does not suggest that a notice is not necessary. Indeed, Neberger J underscored the need for notice as follows;

“98. Furthermore, out of the blue, and without warning, Mr. Mullins was told on the morning of 28 June that he was being excluded from the Bristol and Exeter offices, which he had previously run, and that his involvement with BKR was immediately at an end. This was at a meeting of which he had been given minimal warning (even though it had been arranged some time ahead) and for which he had therefore had no time to prepare himself. In particular, he was given no opportunity to talk to the other partners, to find out what they had been told and what they believed, and why they wanted him to go. The evening before the meeting, he had, unknown to him, been locked out of the Bristol and Exeter offices, which, up to that time, he had run.

99. In the period leading up to the meeting, Mr. Travers was getting support for an attack on Mr Mullins both by visiting the Bristol and Exeter offices and by contacting the other A partners. There was no detailed investigation or report (as with Mr. Udall). Despite Mr Laughton and Mr Clements having said otherwise, I do not think that most of the other partners were told much more than that was in Mr Clements memorandum. Mr Mullins was not told anything about what was going on, or what had gone on between 10 and 21 June, until he attended the meeting, even though he returned from holiday on 24 June.

100. Over and above this, the conduct of the meeting by Messrs Laughton, Travers and Clements did not, to my mind, comply with the duty of good faith to Mr Mullins. I accept that one must avoid the dangers of being unrealistic, and that one must judge the behaviour of Messrs Laughton, Travers and Clements by reference to the relatively tough and abrasive regime which prevailed at BKR. However, even taking that into account, I consider that the way in which Mr Mullins was “bounced”, both into and at the meeting, was outside the comparatively wide range of acceptable behaviour which accords with the duty of good faith between partners. He was not only set up in terms of attending the meeting without any significant warning, but the conduct of the meeting similarly involved a set-up. I think that the meeting was arranged with a view to shocking or surprising Mr Mullins into agreeing to resign (which I accept he got near to doing), and then, while he was still in a state of shock, telling him the financial consequences, by the exercise of the defendant's purported rights under clause 7 of the protocol. That is not the way in which partners should behave to each other. Bullying, seeking to trap and intentionally taking by surprise with a view to shock, in hope of obtaining an advantage for the co-partners and a disadvantage for the partner concerned, must in my view amount to a breach of good faith.”

86. This Court is unable to agree with KPMG's position that just because the need for notice is not expressly provided in the Partnership Agreement or other KPMG Document, then no notice is necessary.

87. And if it is accepted that a determination can only be taken in a meeting of the Association then the provisions of Clause 1.3 became relevant. Clause 1.3 (c) reads:-

“Every Association Meeting shall be called by at least seven days' notice in writing (exclusive of the day on which it is served or deemed to be served and of the day for which it is given). The notice shall specify the place, the date and the time of such Association Meeting and the nature of the business to be considered shall be given, in a manner as may be prescribed by the Association or the Executive Committee, to all the members of the Association; PROVIDED THAT a Meeting may be called by shorter notice than that specified in this Agreement if so agreed by all the Members.”

88. Because a notice specifying the nature of the business to be considered is required to be given to all the members then the member to be removed would have notice of a proposed motion for his removal. Whilst he may not be required to defend himself, the Association would have carried out its duty of good faith to him by not ambushing him with the harsh decision.

89. In this instance KPMG decided that the decision under Clause 1.5.2 needed to be made in a meeting of 16th December 2016. This Court has set out that notice and observed that the motion for the removal of RBN was not specified in it.

90. KPMG has argued at some length that the motion for removal of RBN could properly be considered under item 4 of the Agenda which reads:-

“Consideration of recent complaint by Richard Ndungu. Final determination and action thereon.”

Further, that RBN was aware that his partners were considering his compulsory retirement. Let me close in on these two propositions.

91. KPMG argue that in respect to the complaint by RBN, a determination had been made by Mr. Cranston and Mr. Simons that:-

“There was nothing in the history of how Richard had been treated that showed that he would not receive fair treatment and therefore referred the matter back to the member firm.”

92. KPMG submits that the partners were aware of the two complaints against the CEO that had been investigated by Mr. Cranston and Mr. Simons and it was right that both complaints should appear in the Agenda. Item 3 for the hotline complaint and item 4 for RBN's complaint. Dwelling on RBN's complaint, KPMG submits that meeting was to consider the complaint, to make a final determination and decide on the action to be taken. It is submitted that an integral part of the consideration and determination was the question raised by Mr. Cranston in dealing with RBN's complaint:-

“Why all this happened over the years and Richard has gotten away with all this history and what it saying regarding your partner.”

93. In an attempt to show that RBN was aware that the meeting of 16th December 2016 would be discussing not only his past conduct but also his removal, Mr. Fraser S.C. took RBN through a rigorous cross-examination.

94. RBN complained of being ambushed at the meeting with weighty matters, he testified:-

“Mr Arbitrator Sir I felt that I was being ambushed at the meeting these are weighty matters. In fact I felt that if I was going to comment on them at all I should have been allowed to prepare myself and reply in writing to be confronted in the meeting in this sort of detail I felt literally an ambush on that day. And I thought to be honest Mr Arbitrator Sir that the only matter we are going to deal with was agenda item number 4 on the agenda which is my complaint and that is what I was prepared for. These matters were not part of the agenda at all. There was no notice in the agenda that they would be discussed at all.”

95. He nevertheless concedes that he was told that his past conduct would be discussed.

96. Later the proceedings show:-

“Mr. K. A Fraser: Going back to the meeting of 16th December when you were asked to respond to what Mr. Mwaura had disclosed and you made various statements double jeopardy and so on. Did you inform your partners that you were taking legal advice?

Mr. Richard Boro Ndungu: Yes I did.”

97. This is what I make of the evidence. RBN was undoubtedly aware that the meeting would be discussing not just his complaint but also his past conduct. What is less clear is whether he had prior information that the question of his removal was definitely on the table of the meeting of 16th December 2016. He concedes taking legal advice and informing the meeting that he would take legal action if any adverse action was taken against him. That at the time he was not aware of what was within the contemplation of the CEO. That his remark was triggered by what was happening at the meeting. That he was been pushed to the wall, his past was been raked, he felt hounded and persecuted. He felt agitated and therefore reserved the right to take whatever action he felt would protect his interest which he felt was under threat at that time.

98. It seems clear to this Court that at the time RBN came into the meeting he was aware that Agenda 4 would be an expanded agenda to include a consideration of his past behaviour. It is also fairly apparent that in his mind matters could deteriorate and could eventually lead to his exit. What the evidence does not seem to clarify one way or other was whether this was because of information given to him prior to the meeting or merely a fair assessment by him of the possible outcome of what seemed to be a difficult situation.

99. It reaching this conclusion minutes of that day seem to corroborate RBN's testimony that he made the threat of legal action at a point of agitation. The minutes reads:-

“JLM granted the meeting a health break and asked RBN to compose his thoughts and make final remarks to the partners before the EAP considers this matter.”

The minutes show that on resuming, RBN asked to be accommodated. From the minutes he said many things but not once does he seem to specifically broach the possibility that he was facing a removal at that point. The minutes, on this aspect conclude:-

“He asked the partners to consider the past, how he worked and collaborated with them and left his fate in their hands.”

100. The minutes show that at this point the CEO informed the partnership of ExCo's recommendation for RBN's compulsory retirement on account of the irredeemable breakdown in trust. Given that the meeting was formally informed of ExCo's recommendation for removal after and not before RBN was invited to react to matters raised against him, then this Court cannot be certain that RBN was given prior information that the question for his removal would be part of the meeting.

101. On this the Court sides with the Arbitrator that:-

“No evidence has been adduced before me to prove that the Claimant was in fact notified of ExCo's decision, and I have therefore come to the conclusion that he was not informed that ExCo would be recommending his compulsory retirement.”

102. My view of the matter is fortified by the fact that at the time of the informal meeting of 15th December 2016, all the persons attending the meeting would have received the notice of the meeting that was due on the day following. It would be curious that they would be informing RBN that his removal would be discussed when the Notice they all would be aware of did not carry that significant matter as part of the business to be conducted.

103. It is now opportune to consider whether the meeting of 16th December 2016 was properly constituted and conducted. As noted Clause 1.3(c) of the Partnership Agreement required the notice to specify the nature of business to be discussed. The Tribunal relied on the decision in Kaye V Croydon Tramways Company [1898] 1 ch 358 in which Rigby L. J in concurring with the decision of Lindley M. R stated:-

“The question that arises is, was the purpose of this meeting fairly and language that would be understood by ordinary people disclosed. And I think it was not.....

I do not mean to say that it is necessary by notice to give full information as to the nature of the business to be transacted, but you must give, at any rate, a fair and candid and reasonable explanation of the purpose or purposes whatsoever they be, for which the meeting is summoned....My opinion is that the notice actually advertised and did not disclose the purpose – as distinguished altogether from the detailsFor which the meeting was summoned.”

104. It is clear that in the meeting of 16th December 2016 a motion for removal of RBN was considered. There was no notice that this would be part of the agenda and an attempt by KPMG to fit it into agenda 4 is tortious. A demonstration of how a proper notice of that agenda should have read is in the notice convening the meeting of 13th January 2017 which reads on the motion to be voted on:-

“In accordance with the KPMG EA Partnership Agreement, the partnership votes to remove Richard Ndungu from the Partnership and Advisory Companies.”

105. The notice of the meeting of 16th December 2016 in regard to RBN was not issued in accordance with the law and the Partnership Agreement.

106. As it is common cause that the meeting of 13th January 2017 was an adjourned meeting of 16th December 2016, no business could properly be transacted other than the business which might have been transacted at the meeting from which the adjournment took place (see **Clause 1.3 (i)** of the partnership deed). As the notice conveying the meeting of 16th December 2016 in respect to the agenda on RBN was invalid so too was the adjourned meeting whose only agenda was to vote on his removal motion. The invalidity of the meeting of 16th December 2016 in respect to RBN's removal affected all business in that regard including that transacted at the adjourned meeting.

107. The Court is now able to answer the five grounds it had set out to consider together. Grounds 7, 9, 10 and 11 fail. In respect to Ground 5, although there was no admission by KPMG that RBN had a right to be given notice and to be heard in relation to vote against him, the Court's view is that on the law and conduct of KPMG, RBN was, at least, entitled to be given notice of the intention to retire him.

108. In Paragraph 417 of the Award, the Arbitrator acknowledged that from the reliefs set out in his pleadings RBN saw his remedy as being in damages and not restoration to the partnership. In Ground 12 KPMG assails the Arbitrator for holding that RBN ceased to be a partner from the date of the Award.

109. The termination was unlawful. That has been held to be the position. RBN could have chosen to claim for restoration of the partnership or damages. He chose to pursue damages. This is clear from his pleadings. I doubt whether he had any real choice because partnerships are premised on trust between partners and once trust is broken then partners cannot or should not be forced to stay together. Another reason why it would be futile for RBN to force himself on the partnership is that the vote taken, albeit in an unlawfully constituted meeting, showed that he was no longer wanted and the partners could always marshal sufficient votes to force his removal.

110. It has to be remembered however that whilst the action of his co-partners were void, they had by conduct clearly demonstrated that they were unwilling to continue with their partnership with RBN. There was therefore an implied repudiation of the partnership contract by the co-partners. In the face of that repudiation RBN could either insist on the contract or accept it and claim damages. As stated, he chose the latter. Yet as explained he had no feasible choice to make other than accept repudiation. While I agree, as proposed by counsel for KPMG, that the last date when repudiation happened should be the date when RBN ceased to be a partner, that proposition should not detract from RBN insisting that the objective of damages is to put a party whose rights have been violated in the same position, as far as money can do, as he would have been had the rights not been violated.

111. For the reasons given I think the learned Arbitrator fell in error in holding that RBN ceased being a partner on the date of the award. I hold that he ceased being a partner on 31st August 2017. How this, if at all, impacts on the damages deserved by RBN is discussed later.

112. The Court quickly deals with Ground 8. The Arbitrator was of the view that one of the documents governing the relationship between partners in KPMG (EA) and KPMG (K) was the KPMG East Africa Staff Hand Book. The Appellant disputes this and argues that the finding ignores the evidence of Jane Mugo. The effect of that evidence is that partners needed to be aware of the staff manual so as to interact properly with the staff but that the governing document for the partners was the partnership.

113. The manner in which the Arbitrator dealt with this issue is to be found in paragraphs 294 to 300 of the Award. The Arbitrator sets out instances of how portions of the manual suggests that the manual also governs partners. In paragraph 296 the Arbitrator observes:-

“296. Clause 1.2.1. of the Manual states that all partners, employees and any other member of staff have a duty to be aware of it and to behave in accordance with it. Liability for the failure to act in accordance with this policy may rest with KPMG and/or the individual concerned. Clause 1.2.3 deals with procedure and provides as follows “*if any partner, employee or other member of staff or job applicant has any doubts or queries about this policy, then they should consult a member of Human Resources.*”

114. The Arbitrator chose the written word over Mugo’s oral testimony that the parties were merely to be aware of the staff manual. The choice made by the Arbitrator is well founded and I prefer to defer to him on the matter.

115. The minutes of 16th December 2016 attribute the following to RBN;

“He indicated that he had now recovered would like to stay until 2019 as he indicated in the April 2016 meeting.”

RBN does not dispute that he had given such signal. From this arises whether RBN deserved damages beyond a period when he had indicated he would not be part of the partnership.

116. In holding that it should not, the Arbitrator held:-

“410. Clause 1.5.3.1 of the E. A Partnership Agreement states that a partner may retire on giving notice. There has been no evidence adduced before me to prove that the Claimant had issued notice of his intention to retire.”

117. In supporting this holding, counsel for RBN submits that at the hearing KPMG had suggested a multiplier of 2 years and that in applying 3 years, the Arbitrator by and large agreed with KPMG. Counsel notes that the retirement age was 60 and a possible multiplier was 7 years but that the Arbitrator had correctly taken into account “exigencies of life.”

118. I have given some thought to the matter. At the heart of the objective of an award of damages is to put an injured party, in so far as possible, in money terms, in the same position he would be had he not suffered breach or violation. In this matter, although RBN had not given formal notice of his intention to retire on 31st August 2019, he had given that indication in at least two association meetings. By his word he would no longer be a partner after 31st August 2019. To therefore award him damages for a period beyond that would be to put him in a better position than he would have been had he retired on 31st August 2019 as he had unequivocally stated. To do so would be to confer a profit on him.

119. There is merit on Ground 16 and I allow it. The multiplier to be applied is two and not three years.

120. The Arbitrator assessed the annual loss of profit at US \$ 794,000.00 per annum. This is an average of the profit over the period until 31st August 2024 when RBN would have reached the retirement age of 60. In Ground 20 of the Appeal KPMG criticizes this assessment and urges that the Arbitrator does not demonstrate why this amount should be the damages awarded in the period for which the award is made. KPMG argues that Mr. D’Souza explained the operation of the Remuneration Policy in detail in paragraph 40 to 70 of his statement of evidence.

121. As repeatedly stated, the Arbitrator is a master of facts and KPMG has not demonstrated that there is an error in how he arrived at the average earnings of USD 794,000.00. Quite apart from stating that Mr. D’Souza explained the Remuneration Policy of the partnership, KPMG does not fault the amount reached as the loss of earnings. It does not even proffer an alternative. This criticism of the Award is therefore not well taken.

122. The award for loss of earnings was made in the spirit of putting RBN in the position he would have been had this co-partners not acted illegally. This amount was in respect of an income that had not been earned and the best the Arbitrator could do was to make an award of what RBN could possibly have earned. Just as the future is uncertain so too would be future earnings and the Arbitrator could only do as best as he could in the circumstances. It has not been demonstrated by the Appellant that he could have done any better.

123. Save for reducing the multiplier to 2 years for reasons explained earlier, Grounds 19 and 20 fail.

124. The Arbitrator took a view and held that the CEO of KPMG (K) acted in a retaliatory manner against RBN as a result of the complaint lodged against him to KPMG International. KPMG grieves that this finding ignores two things. It ignores what emerged on the cross-examination of RBN and that the answers he gave had to be material to any determination.

125. Second, the finding overlooked the evidence that Mr. Cranston had advised that those matters be disclosed to the partners. The Court was referred to various portions of KPMG's evidence to find this advice.

126. Let me start with this evidence. In his written statement Mr. Mwaura makes reference to a telephone conversation of 23rd November 2016 in which Mr. Cranston briefed Mr. Mwaura of his findings on the complaint made by RBN to KPMG International. Relevant to the matter is what Mr. Mwaura says in his last part of paragraph 38:-

“... Mr. Cranston did say that the Claimant had made reference to many other matters that I had dealt with which should have gone to the partners of the EA Association and that in the light of the complaint against me about unfair and unjust treatment by the Claimant, the partners of the EA Association were best placed to address the complaint, including all matters with compliance with the applicable law.”

127. Mr. Mwaura was cross-examined on that conversation. He stated that Mr. Cranston had asked him why he had extended that level of kindness, magnanimity and leeway to somebody who was “obviously a risk to the firm.” In the cross-examination of Ms Mugo, she, too, spoke of the concern of KPMG International that RBN had in the past gotten away with so much.

128. Mr. Jacob Gathecha and Mr. Bashir gave similar evidence. Both stated that Mr. Cranston advised that they needed to deal with leadership issues in the Tax department.

129. From this evidence this Court does not see any direction, suggestion or advice by Cranston that the past matters be discussed by ExCo or put before the Association. What I hear is KPMG International's concern, through Mr. Cranston, that RBN seems to have gotten away with so much in the past. Having communicated KPMG International's confidence that KPMG(EA) and KPMG(K) could fairly and competently deal with RBN's complaint, then it would be surprising that Mr. Cranston would be directing or advising the local KPMG on how to handle the complaint.

130. At the Association meeting, RBN's legacy issues were brought up in a manner that affected him adversely. The minutes show how it played out:-

“On account of the complaint by RBN that he had a genuine fear of retaliation, intimidation and being unfairly judge in the performance evaluation, it was noted that most of the historical issues dating back to 200 had been dealt with directly between RBN and the CEO/SP, and on account of this complaint ,it was necessary to table these before EAP for the final determination in accordance with our governance processes including the KPMG EA Partnership Agreement. JLM enumerated the full list of issues that had had dealt with and most Partners expressed surprise and shock at the enormity of the information they were receiving about RBN'S conduct which they were hitherto not privy to.

JLM noted that, in dealing with these matters, he had taken account of RBN'S previous role as CEO/SP as well as the many personal challenges and tragedies that RBN had been confronted with. It is for these reasons that he had accorded him the undue magnanimity without escalating the matters to the governance organs of the firm. However, given RBN'S complaint, it was now necessary for the supreme organ of the firm to exercise its independent judgement on the matters.”

131. The question to be asked is whether RBN would have had to face a “retrial” on those past indiscretions had he not lodged a complaint against Mwaura. One would have to stretch to find any fault in the finding by the Arbitrator.

132. The Court's view on that matter assists it to determine the next ground of Appeal (No. 14). Clause 3.5 of the Remuneration Policy of KPMG is intitled “maintenance of values and behaviour in the partnership”. Under the provision it is a misdemeanour if the conduct of a partner is sufficiently serious that it could result in consideration of exit from the partnership. Earnings for such a delinquent partner is limited to minimum for a partner and rated as “inconsistent”. The contention of KPMG is that regardless of any infraction on the procedure for compulsory retirement, there is no doubt that the conduct of Mr. Ndungu had led to consideration for exit from the partnership. The Arbitrator was therefore faulted for awarding Mr. Ndungu more than the minimum of US \$ 250,000.00 for the year ended 31st August 2017.

133. I am afraid I am unable to see it that way. KPMG chose the meeting of Association of 16th December 2016 as the forum in which the removal of RBN would be considered but as the Tribunal found (and which is upheld by this Court) the meeting was not properly convened in respect to that agenda. It cannot be said that there was ever a proper or indeed any consideration to exit RBN. Consequently, the Arbitrator's hand was not restricted by the provisions of clause 3.5 in arriving at RBN's appropriate remuneration.

134. Ground 15 is then the easier to deal with. In this ground KPMG asserts that the Arbitrator drew an adverse inference against KPMG so as to award RBN US \$ 971,000.00 as earnings for the period ending 31st August 2017 because the Appellants had failed to make available the 2015 and 2016 profit allocation excel spreadsheets.

135. What this Court has not heard KPMG argue is that the sum of US \$ 971,000.00 is wrongly reached or worked out or that the amount would not have been the true earnings of RBN albeit the issue of clause 3.5 raised earlier. Given that the veracity of this sum is not in question, RBN would deserve that remuneration for the period ending 31st August 2017 regardless of the remarks made by the Arbitrator regarding the apparent non-compliance of directions No. 3. Put differently, this award was not made as punishment for the alleged disobedience of the order. As RBN merited remuneration for the year 31st August 2017, then he was entitled to the award.

136. It is common cause that the Remuneration Policy allowed partners to draw up to a maximum of US \$ 12,500.00. The Arbitrator was of the mind that following the unlawful act of KPMG, RBN was deprived of these drawings. In the end, he directed payment of US \$ 325,000.00 to RBN as an aggregate of the monthly drawings from 1st January 2017 to 28th February 2019 less any drawings already paid to him.

137. The Court has read RBN's support of the decision but does not read a reaction to a matter of fundamental importance. Under the provisions of clause 1.5.6.1 of the partnership agreement, drawings are received as a partner's share in profit. In other words, it is not apart or in addition to the share in profits. To grant RBN earnings for profits (including estimated profit for the period after 31st August 2017) and also drawings would amount to double compensation. This ground of Appeal has to succeed.

138. At Arbitration, RBN made a claim of Kshs.1,943,172.84 being reimbursable expenses incurred by him when a member and a partner in KPMG. The Arbitrator allowed the award after stating that the claimant had produced receipts in support.

139. This Court has seen documents in support of that claim (3rd supplementary list and bundle of documents pages 642 to 656) but the issue of proof in this manner is not the objection raised by Ground 18. The KPMG argues that the items that make up the amount are only recoverable if incurred in the course of the business or by a partner who was actively engaged in earning income for the partnership.

140. KPMG assails the Arbitrator for making this award without considering the evidence of the CEO regarding the claim. In a sum Mr. Mwaura argues that:-

(a) The claim for medical expenses amounting to Kshs.969,808.40 excludes valid documents contemplated under the policy and does not qualify for reimbursement.

(b) Of Kshs.509,362 included in Paragraph 174(f), only Kshs.103,546 relates to motor vehicle maintenance for the period RBN was eligible for a car benefit that is up to 31st August 2017.

(c) Unless otherwise justified by specific business relating to the firm, all other amounts claimed were not eligible for reimbursement.

(d) Out of Kshs.454,917.13 for travel related expenses, Kshs.199,302.54 relates to the year ending 31st August 2015 which had been finalized, and the claimant has been dilatory in submitting his claim and is ineligible for reimbursement.

(e) The balance of Kshs.255,614.59 for travel related expenses need to be justified in accordance with the firm's expense claim policies, and in particular, demonstrate the value derived from the firm.

141. RBN's counsel retorts by stating that RBN went through the claim in his viva voce evidence and was duly cross-examined. Counsel then refers me to the submissions made before the Arbitrator.

142. These are my views. As regards the medical expenses of Kshs.969,808.40, the reason given by KPMG at hearing as to why the same was not reimbursable is at odds with what is taken up at the appeal. Here, the complaint by KPMG is that the expenses are not recoverable either because they were not incurred in the course of business or because RBN was not actively engaged in earning income for the partnership. At Arbitration the reason for resisting the payment was that critical documents needed to prove the claim were missing. Because of this incoherence in the position of KPMG, I am unable to fault the Arbitrator on this limb.

143. Regarding motor vehicle expenses, it has to be remembered that RBN ceased to be a partner on 31st August 2017 (See this discussion elsewhere) and any expenses after this period could not have been incurred in the course of business. Of the sum under this head, only Kshs.103,546.00 would be due.

144. There is then travel expenses which is in two sets. Of Kshs.454,917.13, other than KPMG's complaint that RBN was dilatory in submitting the claim, the Court does not sense any other objection to it. Of Kshs.255,614.59, the CEO had challenged RBN to demonstrate the value derived to the firm. In other words, that it was incurred in the course of the firm's business. RBN has not pointed out to this Court how he surmounted that argument. It will be disallowed.

145. The Court therefore allows that ground but only by disallowing the sum of Kshs.661,430.00

146. In paragraph 448, the Arbitrator holds:-

“The Respondents shall also pay to the Claimant the sum of US \$ 100,000.00 pursuant to the Remuneration Policy which entitles each partner to US \$ 100,000.00 every five (5) years for the purchase of a new car. The Claimant's entitlement to this benefit fell due on 1st May 2017, which was after his unlawful retirement, but before this Award.”

147. KPMG disagrees with this award and makes the argument that by dint of Clause 3.8 of the Remuneration Policy, the benefit is subject to availability of funds and after due consultation with COO.

148. There is no dispute, at least from KPMG's end that if its action to remove RBN was void, then he was a partner until 31st August 2017. And the Arbitrator and Court has found that action to be indeed void. So as at 1st May 2017, a period falling within his employment, RBN was entitled to US \$ 100,000.00 for the purchase of a new car. If it is the case of KPMG that this was not payable due to unavailability of funds, then it should have provided proof to that effect. This it did not do and it cannot succeed on this ground.

149. The next matter, in my estimation, is one of jurisprudential significance.

150. At the Arbitration, RBN had sought for aggravated damages. Under this head, the Arbitrator made an award of US \$ 25,000.00. KPMG argues that there is no basis for an award of exemplary or aggravated damages. Further, that this is a contractual claim where the only entitlement is compensatory damages which must be pleaded and proved as special damages. **Halsbury's Laws of England, 5th Edition Volume 29** at paragraph 324 which reads:-

“No aggravated damages for breach of contract

Aggravated damages may not be awarded in actions for breach of contract. The general rule is that the defendant's motives and conduct are not to be taken into account in assessing damages, and damages are not to be awarded in respect of insult or wounded feelings. Thus, when an employee is wrongly dismissed from his employment the damages to which he is entitled cannot include compensation for the manner of the dismissal or for his injured feelings. This was once thought to be because such matters were too remote; but the modern view is that because the defendant's motives for breach are irrelevant, any such feelings cannot in law result from the fact that the contract has been broken.”

151. In reaching the decision to award the aggravated damages, the Arbitrator relied on the Canadian decision of **Tim Ludwig PC v BDO Canada LLP** 2017 ONCA 292 and observed:-

“449. With respect to the claim for an award of aggravated damages against the Respondents jointly and severally, the Claimant has placed heavy reliance on **Ludwig** in which the Ontario Court of Appeal affirmed that aggravated damages are available for breach of a partnership agreement. The Court recognized that while partners are not employees and are governed by a separate legal regime, at common law and under the Partnerships Act the duty of good faith owed under partnership law suggests that damages for intangible harm are available under the general principle of contract damages. The intangible harm resulting from a bad faith expulsion is reasonably foreseeable and flows from the breach of the implied term of good faith present in every partnership agreement.”

152. Counsel for RBN supports this proposition and argues that RBN's claim was premised on the intangible harm and humiliation visited upon him.

153. This has not been an easy part of the Appeal but I have had to thread the needle.

154. As an essential, unlike exemplary or punitive damages, aggravated damages are intended to compensate. They are intended to compensate the victim for aggravated injury or harm caused by the conduct of the offending party. The intention is not to punish the offending party although that may end up being an unintended consequence.

155. As correctly pointed out, the common law rule that has endured is that aggravated damages is awardable in actions for breach of contract on the rule in the seminal decision of **Hadley v Baxendale** [1854] EWHC J70. In **Ludwig(supra)**, the Canadian Court held that aggravated damages can flow from a partners' breach of duty of good faith and where the (intangible) harm resulting from the breach is reasonably foreseeable. Emphasized is that at the core of a partnership contract is the duty of good faith and damages for intangible harm are available in that setting on the **Hadley v Baxendale principle**; as it is foreseeable. This is how the Court expressed itself;

“[68] Keays holds that, because employers have an implied contractual obligation of good faith in the manner of dismissal, damages for bad faith in the manner of dismissal are within the contemplation of the parties when they enter into the contract. Given the duty of utmost good faith owed between partners, confirmed in Rochweg, the reasoning in Keays should apply in the partnerships context: damages flowing from bad faith in the manner of a partner's expulsion are within the reasonable contemplation of the parties when they enter into the partnership agreement. Such damages can be awarded on the Hadley v. Baxendale principle.

[69] In other words, part of what the parties agree to when they enter into the partnership agreement is that they must treat each other with utmost good faith. The intangible harm resulting from a bad faith expulsion is reasonably foreseeable and flows from the breach of the duty of good faith, which is an implied term of the partnership agreement.”

156. This Court has understood the Ludwig decision as following the **Hadley v Baxendale** rule. And there lies this Court's hesitation in opening up aggravated damages as a possible category of damages that can be successfully pursued for breach of contract. If the aggravated injury is one that was within the contemplation of the parties at the time the contract was made, then it must obviously be compensated within the **Hadley v Baxendale** rule as being a foreseeable injury. There would be no need to label it as aggravated damages merely because it is a serious injury. It ought to arise and to be dealt within the **Hadley v Baxendale** principle.

157. The danger of treating “intangible” damages as a separate category, that is as aggravated damages, is that it will unnecessarily distort the conventional approach of awarding damages for breach of contract when it can be naturally accommodated within the **Hadley v Baxendale** rule. An additional peril is that if it is accepted that aggravated damages is available to a partnership contract because it is a contract of good

faith, then one has to be ready to contend with the argument that it must be available to all contracts of good faith such as insurance contracts. There is no knowing where that will end!

158. This Court prefers to approach this matter from a more conservative angle and to hold that RBN should have argued that the humiliation he faced amongst his colleagues was a foreseeable consequence of his partners conduct of breaching the duty of good faith and to pursue damages for that harm in the same way he sought damages for the other foreseeable harm. In principle, and unlike the Arbitrator, this Court is reluctant to hold that such damages are available as a separate head, aggravated damages.

159. As I sign off on this discussion, the Court is aware of a push to make punitive or exemplary damages available for breach of contract in certain instances. This argument faces the rival proposition that, in contract, the defendant's motive and conduct for breaching a contract is irrelevant and must count for nothing in the award for damages to the plaintiff. That debate is beyond the scope of this discussion but if punitive damages were to be available then they could some rare cases were they could extend to breach of partnership contracts. There may be instances where the conduct of the offending party is so egregious and inimical to the duty to act in good faith (for example, involving fraudulent conduct) that there could be justification to punish such conduct by an award of punitive or exemplary damages. This would be in exceptional circumstances where such conduct is so oppressive, arbitrary or extreme that it is reprehensible. There may be good policy objective for making such an award because it may serve to deter those who enter a good faith contract from casually breaching a duty which is at the very heart of such a contract. It would serve to draw a line between acceptable and unacceptable behaviour.

160. In the end, the Appellants have had limited success in the Appeal as follows:-

1. Grounds 16 and 19, the multiplier is reduced from 3 to 2.
2. Ground 17, the Court sets aside the award of US\$325,000.00.
3. Ground 18, the special damages is reduced by Ksh. 661,430.00.
4. Ground 22, the Court sets aside the award of US\$25,000.00 being aggravated damages.

161. Save for the above, the other Grounds of Appeal fail and as the failure is more substantial than the success, the Respondent shall have 2/3 of the Costs of the Appeal.

Dated, Signed and Delivered in Court at Nairobi this 22nd Day of January 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:-

Mr. Fraser S.C. for the Appellants.

Mr. Kithinji for the Respondent.