THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEALS No. 95 OF 2013

CORAM: Hon. Lady Justice Catherine Bamugemereire JA
Hon. Mr. Justice Stephen Musota JA
Hon. Lady Justice Irene Mulyagonja JA

WARID TELECOM:::::::::::::::::::::::::::: APPELLANTS

VERSUS

PUNCH TELECOM (U) LTD:::::::::::::::: RESPONDENT
(Arising Out of Civil Suit No.31 of 2008)

JUDGMENT OF CATHERINE BAMUGEMEREIRE JA

Background

Punch Telecom (U) Ltd, the Respondents, entered into a Franchise agreement with the Appellants, Warid Telecom with the understanding that the Appellants would appoint and did appoint the Respondent to solicit potential customers and to sell the Appellant's products in the territories of Wandegeya and Nateete, in Kampala District. Upon signing the agreement, the respondent company searched for shop outlets in the area in question, paid rent for a period of one year, made renovations, bought the requisite furniture, and recruited employees. The franchise agreement required the Respondents to make available working capital amounting to UGX 506,000,000 by the 6th day of February,2008. This float was required to meet the expected surge in demand on the launch date of the 7th day of February, 2008. The Respondent deposited UGX

370,000,000 on its bank account on the 6th day of February 2014. This act was met with disapproval from the appellants who caused the termination of the agreement by the Appellants under Clause 17.1 of the Franchise Agreement, without notice to the Respondents. The trial court subsequently ordered the appellant to pay the respondent UGX494,999,000 in general damages for failure to give a 7 days' notice together with interest of 23% p.a on the general damages for failure to give a 7 days' notice together with interest. The appellant was dissatisfied with the judgment of the High Court, hence this appeal. The grounds;

1) That the learned trial judge erred in law and fact in awarding general damages of UGX494,990,000 to the respondent having found that breach of clause 5.1 (xxix), (xxxvii) of the franchise agreement by the respondent was not sufficient reason entitling the appellant to terminate the franchise agreement.
2) That the Learned Trial Judge erred in law and fact in awarding of general damages of UGX494,990,000 which was contrary to clause 17.4 of the franchise agreement excessive in the circumstances and injudicious in all respects.
3) The learned trial judge erred in law and fact by awarding interest on general damages at the rate of interest of 23% p.a from the 7th day February 2008 until payment in full after a finding that lack of sufficient working capital by the respondent to carry out the business was a contractual condition that went to the root of the contract.

4) The learned trial judge erred in law and fact in evaluation of the evidence on record thereby arriving at a wrong decision.

Representations

The appellant is represented by Katende, Ssempebwa & Co. Advocates and the respondent is represented by Nsibambi & Nsibambi Advocates.

Submissions of the Appellants

Counsel faulted the trial Judge for finding that the termination of the franchise agreement was under clause 17.2 and not 17.1. The appellant had given the respondent up to the launch date to deposit UGX 560,000,000 for stock and preregistered SIM cards. It was counsel's contention that if the appellant had terminated the agreement seven days before the launch it would have amounted to premature termination.

Counsel invited this court to find that the termination was in accordance with clause 17.1 and not under 17.2 as found by the learned trial judge. Counsel further faulted the Judge for awarding damages since the clause relied on to terminate the contract did not require notice. Counsel further took issue with quantum of UGX494,990,000 and were totally opposed to the award of interest at all but more so to the award of interest at 23% p.a.

Respondent's Submissions

Counsel for the respondent submitted that the appellant wrongly terminated the franchise agreement by not giving the respondent the requisite notice as was required under clause 17.2 of the agreement hence a breach by the appellant. Counsel submitted that as a result of the termination, a loss of over UGX 1 billion was incurred by the respondent. He invited this court to find that the trial court correctly assessed the damages taking into consideration the fact that the respondent had already spent sizeable amounts of money to organise the launch. Counsel agreed with the trial judge that the interest rate was justifiable at a 23% interest rate p.a.

Considerations of the Appeal

This Court bears the duty to reappraise the evidence and draw inferences of fact. **See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.113-10.** While discussing the duty of the first appellate court in the case of **Uganda v George Wilson Simbwa, Criminal Appeal No. 37 of 2005,** the Supreme Court stated as follows:

> ***"This being the first appellate court in this case, it is our duty to give the evidence on record as a whole that fresh and exhaustive scrutiny which the appellant is entitled to expect and draw our own conclusions of fact. However, as we never saw or heard the witnesses***

give evidence, we must make due allowance in that respect."

It is indeed the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and reappraisal before coming to its own conclusion see **Father Nanensio Begumisa and three Others v Eric Tiberaga SCCA 17of 2000**. This court makes due allowance for the fact that it has neither seen nor heard the witnesses and therefore will draw its own inference and come to its own conclusions. **See Lovinsa Nankya v Nsibambi [1980] HCB 81) and R v Pandya 1957 EA 336.** I constantly keep the above principles at the back of my mind.

I will handle Grounds No. 1 and No.2 together. Ground No.1 states as follows

1. **The learned trial judge erred in law and fact in awarding general damages of 494,990,000 ugx to the respondent having found that breach of clause 5.1 (xxix), (xxxvii) of the franchise agreement by the respondent was not sufficient reason entitling the appellant to terminate the franchise agreement.**

While Ground No. 2 states that,

2. **The Learned Trial Judge erred in law and fact in awarding of general damages of 494,990,000 ugx which was contrary to clause 17.4 of the franchise agreement excessive in the circumstances and injudicious in all respects.**

Under Ground No.1 the counsel for the appellant found issue with the trial court when it did not find that clause 5.1 (xxix) gives the respondent the duty to have working capital and in (xxxvii) the respondent consents to comply with all instructions from the appellant.

Clause 5.1 (xxix) of the franchise agreement stipulates as follows;

> ***Upon execution of this agreement the franchisee shall ensure that adequate financial resources are available to the franchisee by way of working capital, and otherwise ensure that the franchisee is able to fulfil the obligations herein contained. The monthly working capital required for the various types of franchise of WARID is set forth in the operation manual and the franchisee agrees to comply with the same.***

Clause 5.1 (xxxvii) stipulates that,

> ***The franchisee agrees to comply with all advice and instructions given by WARID regarding the operation of the business or the WARID franchise business.***

In contesting the findings of the trial court counsel for the appellant relied on the franchise clauses to submit that the 2 clauses proved that the respondent had a duty to raise working capital and to comply with instructions from Warid Telekom regarding the launch.

Counsel further submitted that clause 17.1, relied on to terminate the agreement did not require the appellant to give the respondent any notice. This close provides that:

> ***17.1 this agreement may be terminated at anytime without prior written notice by WARID if.***
> ***iv) the franchisee does not perform in accordance with the targets specified in writing by WARID from time to time and has been put on probation in accordance with sub clause 5.1 (xxi)***

While Counsel relied on Clause 17.1 to justify the termination without notice, he does not mention that this clause has a condition for probation. The evidence as adduced does not have the franchisee on probation at any point. It ought to be noted that mere reminders did not amount to probation, therefore the appellant could not terminate without notice and indeed owed the respondent 7 days prior notice. Having found that the appellant did owe the respondent notice prior to the termination I find that the appellant breached the franchise agreement by terminating without notice. I therefore resolve Ground No. 1 in favour of the respondent.

In regards to Ground No.2 the issue of grant of general damages was ably considered in **Administrator General v Bwaniika James & 9 Ors SCCA No.7 of 2003** it was held that

"It is trite law that an appellate court should not interfere with an award of damages by a trial court unless the award is based on an incorrect principle that Is manifestly too high or too low. In the instant case, the learned justices of appeal interfered with the award of damages by the trial court and awarded a lower figure of ugx 93,995,560 ugx from the figure 424,891,540 ugx."

While indeed the trial Judge has latitude, and may have been justified to award damages, I find the award excessive taking into the consideration of these three facts.

First, the respondent's failure to deposit the entire working capital on the account of the respondent in time was a breach on the respondent's part since it was a reciprocal promise to receiving the warid merchandise. The law on contracts dealing with reciprocal promises is clear where one party (the promisor) cannot fulfil their part of the promise and time is of the essence as was in this case, the other party can terminate under **Section 47 (1) Contracts Act 2010.**

It is said that the respondent lacked funds to finalise this contract. PW1 testified that Punch telecom had inadequate financial resources and admitted that at the time of buying stock they did not have sufficient funds and were heavily indebted. The respondent therefore contributed to the breach since there was also no practical way the appellant would have anticipated the breach from the side of the

respondent given the fact that all franchisees were given 2 weeks to raise the working capital.

While it's true that the appellant sent the respondent reminders to deposit the money this did not amount to notice. The initiative made by the appellant to communicate with the respondent about clearance of the working capital should have prompted the respondent to clear this deposit in time.

Regardless, the franchise agreement required the appellant to give notice of 7 days, that was never given prior to the termination hence the damages.

The respondent claimed to have lost close to UGX1 billion Ugandan shillings, but this loss can not be justified since the respondent seeks general damages instead of special damages. In computing general damages courts are concerned with placing the injured party in the situation he was before the injurious harm.

In Kabandize v Kampala Capital City Authority (CACA No. 36 of 2016)

> ***The rule is that the general rule regarding award of general damages was that the award was such a sum that would put the person who had been injured as adjudged by court in the <u>same position</u> as he/she would have been had he not sustained the wrong for which he/she was getting compensation.***

If the purpose of general damages is to restore the claimant to the same position he was before the wrong, I find that damages of UGX 494,990,000 are exorbitant.

Taking into consideration the fact that appellant refunded the respondent's security deposit of UGX 20,000,000 and all the respondent's working capital deposited 2 days after the termination was reimbursed and the premises were taken over by Orange Telecom hence an indication that the loss suffered was containable, I do not see the justification for the general damages that were awarded.

I equally find that there was no ill-motive in the termination but rather a necessary action to protect oneself commercially. The respondent being a telecom company with its reputation was on the line; termination was a defensible mechanism to protect the integrity of the Warid Franchise System.

Consequently, I find that the general damages awarded were uncalled for and hereby set them aside.

Ground No.3:

The learned trial judge erred in law and fact by awarding interest on general damages at the rate of interest of 23% p.a from the 7th day February 2008 until payment in full after a finding that lack of sufficient working capital by the respondent to carry out the business was a contractual condition that went to the root of the contract.

In **Crown Beverages Ltd v Sendu Edward, Supreme Court Civil Appeal No. 01 of 2005** it was emphasized that:

> **"...An appellate court will not interfere with the award of damages by a trial Court unless the trial Court acted upon a wrong principle of law, or the amount awarded is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff was entitled."**

As discussed above, the appellant returned the respondents' entire deposit of working capital two days upon the termination of the franchise agreement. In the circumstances and without an award for damages, interest would not accrue.

In **Sietco v Noble Buildings (u)ltd SCCA. No. 31 of 1995 [1997] KALR**, the Justices quoted the principle laid down by Lord Denning in Harbutt's "Plasticine" Ltd versus Wayne Tank and Pump Co. Ltd [1970]1 QB 447,

> ***"An award of interest is discretionary. It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money: and the defendant has had the use of it himself. So, he ought to compensate the plaintiff accordingly"***

Ground No. 3 succeeds; The award of interest fails in light of setting aside the general damages. The award of interest is therefore set aside.

Ground No. 4

The learned trial judge erred in law and fact in evaluation of the evidence on record thereby arriving at a wrong decision.

With respect, I can see no substance in Ground No.4 . On the contrary, it appears to be nothing more than a minor variation on the other grounds, which I have already considered.

This ground is therefore superfluous havng been sufficiently dealt with in all the other grounds. It is dismissed.

In conclusion and as earlier noted; this appeal is resolved as follows:

1. Having found that the appellant did owe the respondent notice prior to the termination I find that the appellant breached the franchise agreement by terminating without notice. I therefore resolve Ground No. 1 in favour of the respondent. I find that this matter attracts nominal damages amounting to UGX 10,000,000 for the breach of the 7day notice.
2. In regards to Ground No. 2 I found that while an appellate court should not interfere with an award of damages by a trial court unless the award is based on an incorrect principle or is manifestly too high or too

low. I found the award of UGX 494,990,000 was exorbitant and amounted to a form of double payment since all the respondent's working capital had been re-imbursed two days after the termination of the contract by the appellant.

3. **Ground No. 3 succeeds;** The award of interest fails in light of setting aside the general damages. The award of interest is therefore set aside.

In the final result, this appeal is decidedly majorly in favour of the appellant save for the issue of notice. . The Appellants are therefore hereby granted costs in this court and in the court below.

Dated at **Kampala** this ..15th.. **day** of .....feb..... **2022**

CATHERINE BAMUGEMEREIRE
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

CIVIL APPEAL NO. 95 OF 2013

(Arising from the Judgment of Justice Bashaija, J in High Court Civil Suit No. 31 of 2008)

WARID TELECOM :::::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

PUNCH TELECOM (U) LTD:::::::::::::::::: RESPONDENTS

CORAM: HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE IRENE MULYAGONJA, JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment by my sister Hon. Justice Catherine Bamugemereire, JA.

I agree with her analysis, conclusions and the orders she has proposed.

Dated this 15th day of feb 2022

Stephen Musota

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram; Bamugemereire, Musota, Mulyagonja, JJA)

CIVIL APPEAL NO. 95 OF 2013

WARID TELECOM.....APPELLANT

VERSUS

PUNCH TELECOM (U) LTD.....RESPONDENT

(Arising from the judgment of G. Kiryabwire J, (as he then was), delivered on 2nd November, 2011)

JUDGMENT OF IRENE MULYAGONJA, JA

I have had the benefit of reading in draft the judgment of my learned sister Hon. Lady Justice Catherine Bamugemereire, JA.

I entirely agree with the reasoning thereof and the final order that the appeal should only succeed in part, as proposed.

Dated at Kampala this 15th **day of** feb **2022**

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Irene Mulyagonja

Justice of Appeal/Constitutional Court