THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION)

Misc Cause No. 627/08

UGANDA LOTTERY LTD::::::::::::::::::::::::::::::::::::APPLICANT

VERSUS

THE ATTORNEY GENERAL ::::::::::::RESPONDENT/DEFENDANT

BEFORE HON. LADY JUSTICE M.S ARACH-AMOKO

Ruling

This is an application brought by the Uganda Lottery Ltd, under S.35 of the Arbitration and Conciliation Act (Cap 4) of the Laws of Uganda, (ACA) and Rule 13 of the Arbitration Rules, seeking for orders of recognition and enforcement of an Arbitral award made on the 18th September 2008 by Hon Justice J. Ntabgoba (Rtd) in a dispute between the two parties referred to him by the High Court from HCCS No. 740 of 2003. The dispute arose as a result of the suspension of the lottery scheme that the Government had awarded the applicant under an Agency Agreement executed by the two parties.

The applicant had commenced action against Government for damages for breach of the said agreement as a result of what it termed as high handed, wanton and malicious acts of Hon Rukutana, then Ag Minister of Finance, Planning and Economic Development, who had suspended the lottery business. The Government had, naturally, denied liability.

The dispute was referred to arbitration by Court under clause 10.2 of the agency Agreement upon a request by Mrs. Robinah Rwakoojo, learned counsel for the respondent under section 5 of the ACA. The arbitrator ruled in favour of the applicant after hearing both parties, hence this application.

Section 35 of the ACA reads:

"35. Recognition and enforcement of award.

(1) *an arbitral award shall be recognized as binding and upon application in writing to the court shall be enforced subject to this section.*

(2) *Unless the Court otherwise orders, the party relying on an arbitral award or applying for its enforcement shall furnish*

(a) *the duly authenticated original arbitral award or a duly certified copy of it, and*

(b) *the original arbitration agreement or a duly certified copy of it.*

(3) *if the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language"*

Section 36 provides that:

"Where the time for making an application to set aside the arbitral award under section 34 has expired, or that application having been made, it has been refused, the award shall be enforced in the same manner as if it were a decree of the Court".

Section 34(3) provides that:

"(3) an application for setting aside an arbitral award may not be made after one month has 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 33, from the date on which that request had been disposed of by the arbitral award".

Has the applicant complied with section 35?

Annexed to the application are:

(1) A certified copy of the Agency Agreement between the Government of the Republic of Uganda and Uganda Lottery Company Ltd as 'A'.

(2) A certified copy of the Court order in HCCS 748 of 2003 referring the matter to arbitration as "B"; and

(3) The original Arbitration Cause Ruling as "C".

Mrs. Rwakoojo opposed the application on the ground that it is pre-mature in that for an arbitral award to be recognized as binding by Court and to be enforced there are certain steps that should have taken place under rules 2-4 of the Arbitration rules in the 1st Schedule to the ACA, namely that the award should have been registered and filed in Court. Then the applicant should have

served a notice of the filing on the respondent. The Rule 11 would come into play. This rule provides that:

"11. An application to enforce an award as a decree of court under section 35 of the Act, shall not be made, if no objections to the award are lodged, until the expiration of ninety days after notice of the filing or registering of the award has been served upon the party against whom the award is to be enforced and if objections are lodged, until the objection have been dealt with by the Court."

The award, if ever there was one, because the one on court record is not an award at all, should have been filed and been given a number, after which the respondent's Counsel would have had the benefit of filing the application to set it aside. The 90 days have therefore not yet elapsed, since the Applicant has not complied with the necessary requirement for enforcing arbitral awards.

The Respondent still has time within which to set aside the award, and should be given an opportunity to have its application for setting aside the award considered in the interest of justice. It is true, the rules are at variance with the Act regarding the time for setting aside an award under Section 34(3) and Rule 7, but court cannot prefer one over the other, because both of them are legal. Court would have to take a position whereby both of them are accommodated. The Rules support the enforcement of the principal legislation. They cannot be divorced from one another. The Applicant should first extract an award in FORM V under the Second Schedule, register it in court, get a number and then serve it on the Respondent, then the 90 days under Rule 11 would begin to run. Otherwise this application is premature. It should be dismissed with costs.

Mr. Barnabas Tumusingize disagreed with her. His submission is that the Applicant has fulfilled the requirements of Section 35. Section 36 is only an enabling section, which has guided him to make the said application.

The issue of filing of an award in court was provided for under Section 9(2) of the old Arbitration Act and under Rule 2 of the old Rules (Cap 55). There it is clear that there is a basis

for the rule that requires filing because there is a Section and therefore the rule is giving effect to the Section. In the new ACA, there is no equivalent to Section 9, yet the rules are the same.

On the issue of the 90 days, Mr. Tumusingize argued that, if you look at the old Arbitration Act, it did not provide for the time frame within which an application for setting aside an award would be made. It only gave powers under Section 12. That is why in the old Rules there was rule 7 which was based on Section 9(2) of the old Act and which gave 8 weeks within which to apply to set aside an award filed under Section 9(2) of the said Act.

Filing an award was therefore crucial under the old Arbitration Act because it determined or triggered off the time within which setting aside would commence, and that was 8 weeks after the notice of filing had been served.

The other important rule was Rule 14 which provided that an application to enforce an award as a decree under Section 13 (1) of the Act shall not be made if no objections to the award are lodged, till the expiration of eight weeks after notice of filing thereof has been served upon the party against whom the award is to be enforced, and if objections are lodged, till the objections have been dealt with by the court. Rules 2, 7 and 14 are actually reproduced in the new Arbitration Rules word for word, but most importantly is that unlike the old Act, the new ACA provides for time within which you can apply to set aside an arbitral award. The new ACA actually provides the time within which to set aside an award and Section 34(1) sets out the grounds for setting aside.

Further, it is a cardinal concept of statutory interpretation that where there is a conflict between a schedule and an earlier clause in the main Act, the earlier clause in the Act prevails as against the schedule. (See Statute Law 7th edition by S.D.G. Edgar at pg. 225).

It is also a cardinal rule of statutory interpretation that where a section of the Act is clear and unambiguous, and there is a conflict with a schedule, the section of the Act prevails. In this case, Section 34(3) of the ACA is clear. You get the award; you apply to set it aside within 30 days. The reasons for setting aside are well laid out. After which it can be enforced under S.35 of the ACA.

The award also conforms to the Act. Section 31(4) of the ACA which says that an arbitral award shall be made in writing and shall be signed by the arbitrator or arbitrators. Sub section 6 says the award shall state the reasons upon which it is based. It is therefore unfathomable for Mrs Rwakoojo to equate an award to a form that is given in the rules. An Arbitral award is something much more comprehensive than the form referred to.

Even if the arbitrator did not call it an award, that alone does not disqualify it from being called an award because even if you get a decree for instance, and you call it an order, it does not become one or vice versa.

As for forms, these are not cast in stone, therefore you cannot say that because a document has not conformed to a form in the schedule it must therefore be rejected. In any case, Section 72 does not say that the use of the forms is mandatory.

Mrs Rwakoojo should have followed the wisdom of the applicant in the case of Kilembe Mines Ltd –vs-BM steel Ltd, HCMC No. 2/05 which she relied on, and applied to set aside within 30 days as the applicant did in that case . She has failed to do so. The award was delivered on the 18th day of September 2008. Time started to run then, and it is now more than 30 days. This application was filed in compliance with section 36 of the ACA. Where the Act is clear as to what ought to be done, it is not necessary to go to the rules. The application is therefore properly before this court and should be granted as prayed.

The main issues for determination by this court are in my view, whether there is a proper award and if so, whether the application for its recognition and enforcement is pre-mature or not.

The document annexed to the application as 'C' is really an award, although it is entitled "Arbitration Cause Ruling". This is because it complies with the definition in S.2(b) and the criteria set down in Section 31 of the ACA as far as the form and contents of an award is concerned.

Section 2(b) reads:

"Arbitration award" means any award of an arbitral tribunal and includes an arbitral award"

Section 31 provides that an award shall be in writing and shall be signed by the arbitrator. It shall state the reasons upon which it is based unless the parties agreed otherwise. It shall also state the date and place of arbitration and a signed copy shall be delivered to each party. I cannot therefore fault the former Principal Judges' award. It meets all the above criteria. It is therefore an award.

Form V is not an award; it is a summary of the contents of an award. It is not even referred to in the main Act. It is therefore unclear under to me which section of the ACA it sprang from. It is like a decree and not a judgment. It is consequently of no use in the absence of the detailed arbitral award because it doesn't even show the reasons for the award.

The fact that the award has not been registered and given a serial number is a mere technicality. The main Act is clear and unambiguous. At the end of the proceedings, an award is given by the arbitrator. If a party is unhappy with the outcome, it shall file an application to set aside the award within 30 days on the grounds set out in the Act (See. S. 34 ACA). Where the 30 days have expired or an application to set aside an award has been refused, then the award shall be enforced in the same manner as if it where a decree of the court, subject to section 35 of the Act. The rules provide for 90 days and both counsel for the applicant and respondent have acknowledged that this is indeed in conflict with the 30 days provided for by the Act. As Mr. Tumusingize rightly pointed out, and I had occasion to cross check the provisions of the old Arbitration Act and rules he cited, it appears this is a result of cutting and pasting the provisions of the old rules onto the new rules without ensuring that there was no conflict between them and the ACA. It has therefore led to this confusion and in the absence of any ambiguity in the Act, the Act prevails over the rules. S.S Edgar states in his Statute Law (7th Edn Sweet and Maxwell 1971 at p. 225) as follows; on this point:

"The schedule is as much a part of the statute, and in as much as an enactment as any other part, but if an enactment in a schedule contradicts an earlier clause, the clause prevails against the schedule".

On the same page, the learned author says:-

"As a general rule, "forms in schedules are inserted merely as examples, and are only to be followed implicitly so far as the circumstances of each case may admit"; consequently it may sometimes happen that there is a contradiction between the enactment and the form in the schedule. In such a case, "it would be quite contrary to the recognized principles upon which courts of law construe Acts of Parliament to restrain the operation of an enactment by any reference to the words of a mere form given for conveniences' sake in a schedule" (underlining is mine for emphasis).

The learned author goes on to state that in some cases the form is imperative and must be strictly followed, eg in the case of Bills of Sales Act (1878) Amendment Act. In the instant case, I do not think so. Section 72 of the ACA does not say so.

It reads:

"72 Forms

The forms set out in the second schedule to this Act or forms similar to them, with such variations as the circumstance of each case require, may be used for the respective purposes in that schedule and if used shall not be called in question"

The use of Form V is therefore not mandatory. Consequently, the application is not premature; the award was delivered on the 18th September 2008, in the presence of the respondent's Counsel, Mrs Rwokoojo. She had 30 days from that date within which to apply to set aside the award if she so wished. By the time this application was heard by this court on the 11th December 2008, the 30 days had long since lapsed and no such application had been filed before this court. It is therefore inconceivable that this court should deny the applicant the fruits of its award for the sake of a speculative application by the respondent; which may never be filed in any case.

For these reasons, I agree with Mr. Tumusingize that the applicant has met the requirements of section 35 of the ACA for the recognition and enforcement of the award dated 18th September 2008 in HCCS No. 740 of 2003. The application is accordingly granted as prayed.

No order is however, made as to costs against the Respondent since this is an inevitable application under the ACA.

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M.S Arach-Amoko

Judge

9/1/2008

Ruling delivered in court in the presence of:

(1) Mrs. R.Rwakoojo for Attorney General.

(2) Mr. Mr. Bernard Mutyaba holding brief for Mr. Barnabas Tumusingize for applicant.

(3) Okuni Charles Court Clerk.

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M.S Arach-Amoko

Judge

9/1/2008.