THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS CIVIL APPLICATION No. 0598 OF 2021

(Arising from Arbitration Cause No. 0003 of 2021)

PARSHA INTERNATIONAL LTD T/a } CHAMPION BET / SLOTS } …… APPLICANT

VERSUS

HOMEBET LIMITED …… RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The respondent is a corporate bookmaker entity dealing in sports betting business among other types of betting, games of chance and wagering activities. On or about 12th January, 2021 it executed a franchise agreement with the applicant whereupon it was supplied with sixty (60) slot machines on lease. The respondent installed the machines at its various outlets within the country. Seven days into the performance of the franchise arrangement the applicant switched the machines off its network on account of the respondent's failure to secure a licence from the National Lotteries and Gaming Board. The applicant demanded for a return of its slot machines pending licencing. The respondent having refused to return the machines, the applicant with the help of the police undertook their forceful recovery. This prompted the respondent to apply to court for the appointment of an arbitrator. The dispute was thus referred by court to a single arbitrator in accordance with the dispute resolution mechanism agreed upon by the parties in their contract.

The arbitrator on 22nd March, 2021 decided in favour of the respondent finding that a Constitutional Court injunction in force at the time of execution of the agreement overrode all legal requirements for licencing until the final decision of that court, yet to be delivered, regarding the lawfulness of the National Lotteries and Gaming Board activities under the relevant law. The injunction in effect stops the Board from enforcing penalties for operation of sports betting business without a licence. The pending Constitutional decision concerns the constitutionality of

those laws. The arbitrator found that the applicant had wrongfully terminated the franchise agreement. The respondent was awarded shs. 97,155,000/= as special damages; shs. 213,637,500/= in general damages both awards carting interest at the rate of 6% per annum from the date of the award until payment in full; and shs. 16,000,000/= in costs. The respondent on 22nd April, 2021 proceeded to file the award for recognition and enforcement by court.

b. The application.

The application is made under the provisions of section 34 (1),(2) (a) (vii), (b) (ii) an (3) of *The Arbitration and Conciliation Act* and Order 52 rules 1 and 3 of *The Civil Procedure Rules*. The applicant seeks an order setting aside the arbitral award on grounds that it is inconsistent with provisions of the Act, public policy and the franchise agreement executed between the parties on 12th January, 2021.

c. Affidavit in reply

In her affidavit on reply, the respondent averred that the application for setting aside the award having been filed more than a month after delivery of the award, is time barred. Dissatisfaction with the terms of the award is not a justification its being set aside as the court does not sit in appeal over the award. The application is a disguised appeal and is therefore misconceived. There is nothing in the nature or content of the award that is against public policy.

d. Submissions of counsel for the applicant.

M/s Jabo and Co. Advocates on behalf of the applicant submitted that in resolving the dispute, the arbitrator failed to take into account the fact that clause 1 (b) of the franchise agreement executed between the parties on12th January, 2021 the respondent was required to comply with the "laws of Uganda that govern the industry under *The Lotteries Act*." The respondent was required to place the machines at locations that do not contravene the lotteries laws and regulations of Uganda. The respondent was under an obligation to procure all Central and Local Government licenses that authorise it to operate gaming business, in respect of all its business premises. The respondent

breached all these requirements. The applicant was unaware of the respondent's business not being licenced at the time of execution of the franchise agreement. It was erroneous of the arbitrator to have found on one hand that the respondent was not duly licenced but on the other that the injunction operated as a temporary licence. This was in total contravention of the spirit of the franchise agreement which requires strict compliance with the laws and regulations relating to the business of sports betting. The arbitrator decided in contravention of the Act when she failed to apply the laws strictly. Clause 5 of the franchise agreement exempted the applicant from any liability arising out of performance of the agreement. It was erroneous of the arbitrator to have granted the respondent relief despite that clause. This contravened section 28 (5) of the Act which required her to decide the dispute in accordance with the terms of the contract, taking into account the usages of the trade applicable to the transaction.

Furthermore, it was erroneous of the arbitrator to have overlooked the argument that it was the respondent's obligation to seek enforcement of the interim injunction order of the Constitutional Court against the regulator. The applicant had no *locus standi* in that regard. When the applicant sought renewal of its license with the regulator, the application was rejected on grounds that the respondent was not licensed to operate that type of business. The applicant was thus justified in regarding the franchise as repudiated. The award is on conflict with public policy and the law in so far as the arbitrator came to the conclusion that the injunction in effect overrides the law and stops the Board from enforcing penalties for operation of sports betting business without a licence. It was wrong for the arbitrator to have imposed the burden of facing off with the regulator upon the applicant yet the applicant lacked *locus standi* to do so.

e. <u>Submissions of counsel for the respondent</u>.

M/s Prudens Law. Advocates on behalf of the respondent submitted that the application is time barred for having been filed more than a month following its delivery. The award was received on 22nd March, 2021 yet the application was filed on 23rd April, 2021. The application does not establish any of the grounds specified by *The Arbitration and Conciliation Act* as justifying the setting aside of an award. The applicant instead seeks to have the award re-evaluated by Court, which is not within the mandate of the court.

f. The decision.

It is a fundamental notion that parties generally commission arbitrators to read their contract and interpret it for them. Arbitrators are thus contractually empowered to provide the parties with a definitive interpretation of their agreement. It follows that parties are bound by an arbitral award and are obliged to abide by and comply with it. The substantive issues which the arbitrator(s) determined cannot be the subject of review by the courts because arbitration, by its nature is final. Once filed, a court is obliged to recognise the award as binding and to enforce the pecuniary obligations imposed by the award as if it were a final decision of the court. An award is not subject to appeal or to any other remedy except those provided for in *The Arbitration and Conciliation Act*.

By stating that "except as provided in this Act, no court shall intervene in matters governed by this Act," section 9 of *The Arbitration and Conciliation Act* seeks to restrict the court's role in arbitration. The section, clearly in mandatory terms, restricts the jurisdiction of the court to only such matters as are provided for by the Act. The provision epitomises the recognition of the policy of parties' autonomy which underlies the concept of arbitration. Consequently, there are only three categories of measures under the Act which involve courts in arbitration namely; (i) such measures as involve purely procedural steps and which the arbitral tribunal cannot order and/or cannot enforce, e.g. issuing witness summons to a third party or stay of legal proceedings commenced in breach of the arbitration agreement; (ii) measures meant to maintain the *status quo* like granting of interim injunctions or orders for preservation of the subject matter of the arbitration (interim measures of protection); and (iii) such measures as give the award the intended effect by providing means for enforcement of the award or challenging the same (see *Coppee-Lavalin SA/NV v. Ken-Ren Chemicals and Fertilizers Ltd [1994] 2 All ER 465*). It is against that background that this application raises three pertinent issues as follows;

1. Whether the application is time barred.
2. Whether the arbitral award contravenes provisions of *The Arbitration and Conciliation Act.*
3. Whether the arbitral award is in conflict with the public policy of Uganda.

First issue; whether the application is time barred.

Section 34 (3) of *The Arbitration and Conciliation Act* provides that An application for setting aside the 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 a party can apply to set aside an arbitral award. This limitation may serve to prevent applications that may be made in bad faith and also to ensure that decided matters are put to rest. When an application is barred by limitation, the court cannot competently proceed to set aside the award (see *Roko Construction Ltd v. Mohammed Mohammed Hamid, C. A. Civil Appeal No. 51 of 2011*).

According to section 1 (qq) of *The Interpretation Act*, "month" means a month reckoned according to the Gregorian calendar. The Gregorian calendar happens to be a solar calendar with twelve months of 28–31 days each. It has 4 months that are 30 days long and 7 months that are 31 days long. February is the only month that is 28 days long in common years and 29 days during leap years. Therefore reference to "one month" in *The Arbitration and Conciliation Act* is ambiguous in so far as it could be any period from 28 to 31 days. For purpose of promoting fair notice and help secure the right to procedural due process, ambiguity in statutes of limitation to the extent that they affect causes of action, ought to be resolved in favour of citizens or to be strictly construed against curtailment of the right. For that reason that court is inclined to construe the reference to a month as meaning 31 days.

Section 34 (1) (a) of *The Arbitration and Conciliation Act* further provides that in computing time for the purpose of any Act (a) a period of days from the happening of an event or the doing of any act of thing shall be deemed to be exclusive of the day in which the event happens or the act or thing is done. In the instant case, the award was received on 22nd March, 2021. Therefore the time began to run on 23rd March, 2021 and the thirty days one elapsed on Thursday 22nd April, 2021. The application was filed on 23rd April, 2021. In his submissions in rejoinder, counsel for the applicant argued that the fees for the application were paid and the pleadings presented to court on 22nd April, 2021 but were rejected at the registry because of the administrative requirement of concurrent written submissions to be filed, hence the filing on 23rd April, 2021.

Since a pleading is properly filed until fees are paid (see *UNTA Exports Ltd. v. Customs [1970] E.A 648* and *Musango Margaret v. Musango Francis [1979] HCB 226*), on the facts of this case the date of filing is deemed to have been the day fees were paid and pleadings presented at the registry, i.e. 22nd April, 2021. The applicant should not be penalised for not having been able to conclude the process of filing that day due to non-compliance with the court's practice, which is yet to attain the force of law. This issue is accordingly answered in the negative; the application is not barred by limitation.

Second issue; whether the arbitral award contravenes provisions of *The Arbitration and Conciliation Act*.

When a court reviews an arbitration award, it should not concern itself with the merits of the determination. If the arbitrator has acted within his or her jurisdiction, has not been corrupt and has not denied the parties a fair hearing, then the court should accept his or her reading as the definitive interpretation of the contract even if the court might have read the contract differently. Save for specified circumstances, parties take their arbitrator for better or worse both as to decision of fact and decision of law. Section 34 (2) of *The Arbitration and Conciliation Act* sets out the limited instances where a party can apply to set aside an arbitral award. The applicant in the instant case has raised three grounds in this application in respect of which the relevant provisions of the Act provide as follows;

> (2) An arbitral award may be set aside by the court only if—
>
> (a) the party making the application furnishes proof that—
>
> (vii) the arbitral award is not in accordance with the Act;
>
> (b) the court finds that—
>
> (ii) the award is in conflict with the public policy of Uganda.
>
> (3) An application for setting aside the 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.

An arbitral award is considered not to be in accordance with the Act when any of the following occurs, namely; (i) when the appointment of the arbitrator(s) and the arbitration proceedings were not done as per the agreement between the parties as well as the laws selected by the parties; (ii) the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his or her case; (iii) the adversarial principle was not respected; (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or failing any such agreement, was not in accordance with the Act; (v) the arbitral tribunal violated its mandate.

In their submissions, counsel for the applicant have not raised any of the grounds envisaged by section 34 (2) (a) (vii) of *The Arbitration and Conciliation Act* which are more or less related to matters of jurisdiction, procedure and the fundamental procedural rights. Counsel have instead advanced arguments that go to the findings of the arbitrator on the merits. Taken as a whole the gravamen of counsel for the applicant's argument is that the arbitrator misconstrued the franchise agreement and the evidence, and misapprehended the law. The applicant is clearly dissatisfied with the findings of fact and interpretation of the law made by the arbitrator and claims that the award made by the arbitrator is not supported on the evidence presented in the arbitral proceedings. Counsel for the applicant is in effect asking this court to re-examine the law and evidence placed before the arbitrator and arrive at a different conclusion. These are arguments which would typically be made by a party in support of an appeal.

For reasons of upholding arbitration agreements and promoting cost-effective and efficient resolution of disputes, if the award is within the submission and contains the honest decision of the arbitrator after a full and fair hearing of the parties, a court will not set it aside for error, either in law or fact. Unlike judgments of lower courts, the arbitration award cannot be reversed by courts because of legal errors in the written award. "Error of law" by the arbitrator is not expressly listed among the grounds for vacating an arbitration award. The court should therefore desist from direct or indirect interference in the arbitral tribunal's task of deciding on the merits of the dispute and therefore a decision as to whether or not there is a contravention of the fundamental policy of Ugandan law should not entail a review of the merits of the dispute. Even a manifestly wrong application of a provision of the law or an evidently false factual finding does not justify

the setting aside of an arbitral award. The dicta of Ringera, J in *Christ For All Nationals v. Apollo Insurance Co. Ltd [2002] 2 EA 366* is instructive in this regard;

> Justice is a double edged sword. It sometimes cuts the plaintiff and at other times the defendant. Each of them must be prepared to bear the pain of justice's cut with fortitude and without condemning the law's justice as unjust…in my judgment this is a perfect case of a suitor who strongly believed that the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of grounds for doing so. He must be told clearly that an error of fact or law or mixed fact and law or of construction of a statute or contract on the part of the arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards and parties to arbitration must learn to accept awards, warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the Arbitration Act.

Arbitration does not warrant correct decisions. Every advocate proposing an arbitration clause to be included in a contract for his or her client (and every client) should be aware of the arbitration maxim, *De Maximis non Curat Lex* (you cannot complain after a stupid award). The rationale is that the risks to which the parties have consented are erroneous fact finding and a legally incorrect decision. The legal system established by *The Arbitration and Conciliation Act* expects that the parties or the court will appoint people capable of rendering a faithful, honest and disinterested opinion, in whose professional expertise they have confidence.

The theory of arbitration hence is that the parties to an arbitral agreement knowingly take the risks of error of fact or law committed by the arbitrators and that this is a worthy "trade-off" in order to obtain speedy decisions by experts in the field whose practical experience and worldly reasoning will be accepted as correct by other experts. It would be inimical to the concept of finality of arbitration if the courts were to routinely interfere with the findings of an arbitral tribunal. A mere error in the law or failure on the part of arbitrators to understand or apply the law, is not sufficient ground to set aside an award of arbitrators under *The Arbitration and Conciliation Act.* The court simply may not re-judge the decision of the arbitrators on the merits. Since the parties chose to arbitrate their dispute rather than engage in judicial proceedings, the courts will not be overly technical as to such essentials as understanding the facts, interpreting the law, or analysing the evidence.

When an award is filed in court on motion to confirm and enforce, the court's powers are narrowly circumscribed. A court sitting on appeal can re-examine the law and evidence placed before the inferior forum and arrive at a different conclusion but section 34 (2) of *The Arbitration and Conciliation Act* does not authorise the High Court to sit on appeal over an arbitral award. The High Court under that section is only concerned with the propriety of the arbitral process and must restrict itself to the specific grounds for setting aside an arbitral award as therein. To do otherwise could mean this court would be exceeding its mandate under the Act.

The court's function is merely to determine whether the arbitrators' award falls within the four corners of the dispute submitted and the decision is not clearly repugnant to the purposes and policies of the Act. Thereafter, the award will not be overturned because it is based on a misinterpretation of law or insufficient supporting facts. Since the applicant has not established any violation envisaged by section 34 (2) (a) (vii) of *The Arbitration and Conciliation Act,* this issue is answered in the negative. The arbitral award does not contravene provisions of *The Arbitration and Conciliation Act*.

Third issue; whether the arbitral award is in conflict with the public policy of Uganda.

Arbitrations are primarily a matter of private law in which parties are deemed to be of equal footing. Neither party has a privilege because of its social or political status. Yet, the modern doctrine of public policy rests on the idea that enforcing an arbitral award is a matter of public law. According to section 34 (2) (b) (ii) of the Act, a court can set aside an arbitral award if it finds that the award is in conflict with public policy since no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. Although the court should bow to the interpretation that the arbitrator has rendered, it is also the function of the court to make certain that the enforcement of the arbitral award will not constitute a violation of law. Public resources should not be employed for the execution of awards that are injurious to public morality or interest. Being a mandatory rule that trumps the parties' contractual agreement, an award that is against public policy it is not void, yet it is unenforceable; hence considerations of public policy could prevent a lawful award from yielding results.

Public policy manifests the common sense and common conscience of the citizens as a whole; "the felt necessities of the time, the prevalent moral and political theories, intuitions…." (see Oliver Wendell Holmes, Jr., *The Common Law* (1881) at p. 1). Public policy is "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed . . . the policy of law or public policy in relation to the administration of the law" (*see Egerton v. Earl of Brownlow [1853] Eng R 885, (1853) 10 ER 359*). Certain acts or contracts are said to be against public policy if they tend to promote breach of the law, of the policy behind a law or tend to harm the state or its citizens (see *Cooke v. Turner (1845) 60 Eng. Rep. 449 at 502*).

Although public policy is a most broad concept incapable of precise definition, an award could be set aside under the Act as being inconsistent with the public policy if it is shown that either it was: (a) inconsistent with the Constitution or other laws of Uganda, whether written or unwritten; or (b) is inimical to the national interest of Uganda or; (c) is contrary to justice and morality. The first category is clear enough. In the second category would be included, without claiming to be exhaustive, include the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Uganda. In the third category would be included, again without seeking to be exhaustive, such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals (see *Christ For All Nationals v. Apollo Insurance Co. Ltd [2002] 2 EA 366*).

Consequently, an award will be considered to be in conflict with public policy if, *inter alia*; (i) the making of the award was induced or affected by fraud or corruption; or (ii) it is in contravention of the fundamental policy of the Constitution or other laws of Uganda; or (iii) it is in conflict with the most basic notions of morality or justice, including acts which would be generally detrimental or harmful to the citizens of the county (the general public), e.g. promotion of unlawful conduct and breach of law. In other words "public policy" covers only fundamental principles that are widely recognised and should underlie any system of law according to the prevailing conceptions in Uganda. The invoked principle of public policy does not need to be universally recognised, as the Courts in Uganda are willing to maintain, and defend if necessary, the fundamental values strongly embedded in the Ugandan legal tradition, even if such values are not necessarily shared

in other (equally important) parts of the world. Among the principles that can be considered as belonging to public policy within the meaning of section 34 (2) (b) (ii) of the Act, are; the prohibition against abuse of contractual or legal rights, the principle of good faith, the prohibition of expropriation without compensation, the prohibition against discrimination, the principle of proportionality and the protection of minors and other persons incapable of legal acts. An award will be set aside when it is incompatible with public policy not just because of its reasons, but also because of the result to which it gives rise.

As incidences of violation of public policy, counsel for the applicant presents a two pronged argument; that it was wrong for the arbitrator to have faulted the applicant for not seeking the enforcement of the interim injunction order of the Constitutional Court against the regulator, yet the applicant had no *locus standi* in that regard; and that the award is on conflict with public policy and the law in so far as the arbitrator came to the conclusion that the injunction in effect overrides the law and stops the Board from enforcing penalties for operation of sports betting business without a licence. Those are arguments that go to the merits in respect of which the court defers to the findings of the arbitrator.

Enforcement of the award of special and general damages and costs for breach of contract in a dispute that is not founded upon a claim injurious to the public, that is not inconsistent with the Constitution or other laws of Uganda, whether written or unwritten, which is neither inimical to the national interest of Uganda nor contrary to justice and morality, cannot be said to be in conflict with public policy. Since the applicant has not established any violation envisaged by section 34 (2) (b) (ii) of *The Arbitration and Conciliation Act*, this issue is answered in the negative. The arbitral award is not in conflict with the public policy of Uganda. For all the reasons above the application fails and is dismissed with costs to the respondent. As a result in accordance with section 36 of *The Arbitration and Conciliation Act*, the respondent is granted leave to enforce the arbitral award made in its favour.

Delivered electronically this 19th day of July, 2021

……Stephen Mubiru……..
Stephen Mubiru
Judge,
19th July, 2021.