

**IN THE HIGH COURT OF THE FEDERAL  
CAPITAL TERRITORY, ABUJA  
HOLDEN AT ABUJA**

**ON THURSDAY, 17<sup>TH</sup> DECEMBER, 2020**

**BEFORE HON. JUSTICE SYLVANUS C. ORIJI**

**SUIT NO. FCT/HC/CV/280/2018**

**BETWEEN**

**LUMII XCLUSIVE DIGITAL LIMITED      ---      CLAIMANT**

**AND**

**AFRICAN SOCIETY FOR LABORATORY      }      DEFENDANT  
MEDICINE**

**RULING**

The claimant instituted this action on 21/11/2018 vide writ of summons. In paragraph 24 of the statement of claim filed along with the writ of summons, the claimant's reliefs include:

1. A declaration that a dispute has arisen between the defendant and the claimant over the termination of the claimant's contract and non-payment of the outstanding contract sums due and owing to the claimant.
2. An order of the Honourable Court compelling the defendant to abide by the terms of the Contract Agreement with the claimant requiring the

appointment of an International Arbitration to resolve any dispute between the parties.

3. An order of this Honourable Court referring the claimant's claims of outstanding contract to the tune of \$102,012.80 and \$6,000 and/or any dispute arising therefrom to an International Arbitration as provided for in the Contract Agreement of the parties.

The Contract Agreement of the parties dated 23/3/2018 is attached to the originating processes. Clause 16 thereof provides:

*In the event that a dispute arises between ASLM and LXD, all involved parties will mutually agree on International Arbitration to resolve any disputes. Each party shall bear its costs arising from any such legal action.*

Sub-clause 4 of Clause 16 of the Contract Agreement reads:

*That where there is any conflict or dispute arising in the course of this transaction, an independent arbitrator shall be appointed by both parties to resolve the dispute and the decision thereof shall bind parties.*

On 1/2/2019, the defendant filed *Motion No. M/2711/2019* for an order of the Court staying proceedings in this suit and directing parties to proceed to arbitration. That motion was granted by the Court on 7/3/2019 and the case was adjourned to 29/4/2019 for parties to report the progress of the arbitral

proceedings. The parties did not reach any consensus on the appointment of “an independent arbitrator” as provided in the Contract Agreement.

On 17/2/2020, the claimant filed *Motion No. M/5392/2020* praying the Court for: [i] an order appointing Mr. John Agada Elachi, as the sole arbitrator in this suit; or alternatively, [ii] an order appointing a sole arbitrator for the parties in this suit.

The said motion was not heard by the Court due to some intervening circumstances such as the lockdown of the Country occasioned by COVID-19 pandemic and requests for adjournment as shown in the records of the Court.

On 20/11/2020, the defendant filed *Motion No. M/12147/2020* praying for: [i] an order of this Honourable Court appointing Professor Wondwossen Kidane as the Sole Arbitrator for the parties in this suit; or in the Alternative, [ii] an order of this Honourable Court appointing a Sole Arbitrator of a Nationality other than that of the parties as the sole arbitrator for the parties in this suit.

The grounds for the application are:

1. The parties have failed to agree on a sole Arbitrator.
2. The defendant’s attempts to enable a third party, the Chartered Institute of Arbitrators, to give parties a list of suitable arbitrators that parties can choose a suitable sole arbitrator from has been frustrated by the claimant.

In support of the claimant's *Motion No. M/5392/2020* is the 18-paragraph affidavit of Istifanus Yunana, a legal practitioner in the law firm of Messrs Okunade Olorundare, SAN & Co.; attached to the affidavit are 5 exhibits. A. Ogbontolu Esq. filed a written address. In opposition, Safiya Hamza, a solicitor to the defendant, filed a 10-paragraph counter affidavit on 13/7/2020; attached therewith is 1 exhibit. Safiya Hamza filed a written address along with her counter affidavit.

Safiya Hamza filed a 10-paragraph affidavit in support of the defendant's *Motion No. M/12147/2020*; attached therewith are 8 exhibits. Samuel Adebayo Ajayi Esq. filed a written address. In opposition, Akintunde Ogbontolu Esq., a legal practitioner in the law firm of Messrs Okunade Olorundare, SAN & Co., filed a 6-paragraph counter affidavit on 7/12/2020 together with the written address of I. Yunana Esq.

At this juncture, it is necessary to refer to the proceedings of the Court on 23/11/2020 thus:

*Claimant's senior counsel [O. I. Olorundare, SAN]:*

*We have a motion filed on 17/2/2020 for the Court to appoint an arbitrator; a Nigerian resident in Abuja.*

*Defendant's counsel [C. T. Obiajunwa Esq.]:*

*We also have a motion filed on 20/11/2020 to appoint an arbitrator but a person who is not a Nigerian and who is not an Ethiopian. In view of the cost*

*that may be involved in a non-Nigerian serving as the arbitrator, I concede that a Nigerian resident in Abuja may be appointed by the Court but not the person suggested by the claimant.*

*Claimant's senior counsel:*

*I concede that the defence counsel can suggest any arbitrator to be appointed by the Court who is resident in Abuja.*

*Defendant's counsel:*

*I need about 2 weeks to consult with my clients and present the name of an arbitrator to the Court who is resident in Abuja.*

The Court then adjourned the case to 7/12/2020 for the appointment of an arbitrator. At the resumed sitting of the Court on 7/12/2020, K. OlowookereEsq., who appeared for the defendant, stated as follows:

*On 23/11/2020, we agreed to nominate an arbitrator of Nigerian origin resident in Abuja for appointment as arbitrator by the Court. Upon relaying the position to the defendant, the defendant insisted on the application of section 44[4] of the Arbitration and Conciliation Act that the proposed arbitrator be of an origin other than the origin of the parties to the arbitration. We located Mr. Justin Wilbert, an Indian Arbitrator resident in Abuja, and requested for his consent and availability to preside over the arbitration.*

In his reaction, O. I. Olorundare, SAN said:

*I do not concede the appointment of an Indian Arbitrator on the ground that at the last sitting on 23/11/2020, the defence counsel agreed to nominate a Nigerian arbitrator resident in Abuja. The cost of the arbitrator and the cost of the venue of the arbitration are the other reasons for opposing the appointment of an arbitrator that is an Indian.*

Based on the above divergent positions, I held that *“the only option open to the Court is to hear and determine the respective applications of the parties for the appointment of an arbitrator since there is no consensus on the point. ...”* Thereupon, learned senior counsel for the claimant and learned counsel for the defendant adopted the respective processes of their clients on the two applications.

From the processes filed by the parties; and the proceedings of 23/11/2020 and 7/12/2020, there is no consensus/agreement of the parties on the appointment of an arbitrator. However, in the alternative prayers in the two applications, they pray the Court to appoint a sole arbitrator. Section 7[2][b] of Arbitration and Conciliation Act empowers the Court to appoint a sole arbitrator where the parties fail to agree on the arbitrator. Section 7[2][b] of the Act reads:

*7[2] Where no provision is specified under subsection [1] of this section -*

*[b] in the case of an arbitration with one arbitrator, where the parties fail to agree on the arbitrator, the appointment shall be made by the court on*

*the application of any party to the arbitration agreement made within thirty days of such disagreement.*

Now, in the light of the agreement of the parties in Clause 16 of the Contract Agreement dated 23/3/2018 that “*parties will mutually agree on International Arbitration to resolve any disputes*”, who should the Court appoint as the sole arbitrator for the parties?

In paragraph 15 of the affidavit in support of the defendant’s motion, SafiyaHamza deposed that the application is brought to enable the Court appoint Professor WondwossenKidane, an Ethiopian National based in the United States of America as the sole arbitrator regarding the arbitral proceedings in question or “*any other arbitrator of a Nationality different from the nationality of the parties.*”

Learned counsel for the defendant stated that parties are bound by the terms of their contract. The parties agreed on International Arbitration carried out by an independent arbitrator in the event of disagreement. He referred to section 44[4] of the Arbitration and Conciliation Act, which provides:

*In making the appointment, the appointing authority shall have regard to such consideration as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.*

Samuel Adebayo Ajayi Esq. submitted that the word “*shall*” as used in section 44[4] of the Act has consistently been interpreted by the apex Court to denote “*compulsoriness and obligation*”. He referred to the case of **Ugwu v. Ararume** **[2007] 12 NWLR [Pt. 1048] 367.**

In paragraph 4[i]-[n] of the counter affidavit in opposition to the defendant’s motion, Akintunde Ogbontolu stated as follows:

- [i] That there are credible, independent, transparent and highly reputable International Arbitrators in Abuja of Nigerian nationality.
- [j] That the cost of appointing an International Arbitrator of other nationality while there are International Arbitrators in Abuja will be of high cost and will cause serious hardship on the claimant/respondent considering the sum of money being claimed by her in the substantive suit.
- [k] That as a fact, appointing a sole arbitrator of a foreign nationality will entail a tedious and long process that will defeat the fundamental objective or aim of arbitration as it will involve the process of bringing the arbitrator to Nigeria such as applying for and or getting visa for the arbitrator, paying for flight ticket, accommodation, feeding and security.



- [l] That going outside Nigeria by parties will involve getting visa for them and their respective representatives, paying for their flight tickets, accommodation, feeding and security.
- [m] That since the event of COVID-19 there has been restriction of movement of persons around the globe or in the countries of the world and the World Health Organization has advised that persons should try as much as possible to avoid travelling in order to prevent the contraction of the virus.
- [n] That bringing a foreigner to Nigeria to arbitrate on this matter or asking parties and their representatives to go outside Nigeria will expose them respectively to the deadly virus.

Learned counsel for the claimant argued that section 44[4] of the Arbitration and Conciliation Act does not make it mandatory for the Court to appoint a sole arbitrator of a nationality other than the nationalities of the parties in view of the circumstances of this case as shown in the counter affidavit. He submitted that the word "*shall*" in section 44[4] has to be interpreted to be discretionary to best fulfil the intendment of the drafters of the Act. The courts have held that even though the word "*shall*" imports command and compulsion, but sometimes, it will be interpreted as discretionary and advisory to meet the intention of the legislature. The case of **Essang v. BON Ltd. [2001] 6 NWLR [Pt. 709] 384** was referred to.

I. Yunana Esq. called the Court's attention to section 44[10] of the Act, which provides: "*Except as otherwise agreed by the parties, no person shall be disqualified from being appointed as an arbitrator by reason of his nationality.*" He posited that it is within the power of the Court to exercise its discretion to appoint an International Arbitrator who is based in Nigeria. Claimant's counsel reasoned that this will be a proactive measure to preserve and protect the health of the parties and their representatives and also to save cost and time. Mr. I. Yunana urged the Court to appoint an International Arbitrator based in Abuja as there are reputable and transparent International Arbitrators in Abuja.

I have carefully considered the facts stated in the affidavits of the parties and the views expressed by both learned counsel. There is no doubt that the fears and concerns raised in the counter affidavit and by the learned counsel for the claimant are reasonable. Be that as it may, it is important to emphasize the point that the parties in their Contract Agreement agreed on "*International Arbitration to resolve any disputes*". As rightly stated by learned counsel for the defendant, the parties are bound by their agreement. It is trite law that parties are bound by the terms of the agreement they freely entered into and the duty of the Court is to enforce the agreement of parties and not to re-write their agreement. See the case of **Jalbait Ventures [Nig.] Ltd. & Anor. v. Unity Bank [2016] LPELR-41625 [CA]**.

I am of the respectful view that in line with section 44[4] of the Arbitration and Conciliation Act - which is in Part III dealing with *Additional Provisions*

*Relating to International Commercial Arbitration and Conciliation* - the Court has a duty to “take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.” This is more so as the defendant opposed the appointment of a Nigerian arbitrator proposed by the claimant and claimant opposed the appointment of an Ethiopian arbitrator proposed by the defendant.

In order for the Court to “secure the appointment of an independent and impartial arbitrator” who is “of a nationality other than the nationality of the parties”, Mrs. H. Abdallah-Gwadabe [Senior Registrar of the Court] wrote a letter dated 9/12/2020 to the Chairman of the Abuja Chapter of the Chartered Institute of Arbitrators [UK], Nigeria Branch. The letter reads:

*LETTER OF RECOMMENDATION/REFERRAL*

*I have been directed by His Lordship, Hon. Justice S. C. Oriji of the FCT High Court sitting at Apo Division [Court 6], to write to your office.*

*There is currently a matter before His Lordship in Suit: FCT/HC/CV/280/18: LUMII XCLUSIVE DIGITAL LIMITED v. AFRICAN SOCIETY FOR LABORATORY MEDICINE. His Lordship requests your Organization to kindly assist in recommending/furnishing the Court with a list of Arbitrators within the African Continent with the exception of Nigeria & Ethiopia. Kindly note that the list should contain the Nationality of the Arbitrators. This is to enable the Court appoint an “independent arbitrator” in line with Clause 16 & 16[4] of the Contract Agreement which read:*

*Clause 16:*

*In the event that a dispute arises between ASLM and LXD, all involved parties will mutually agree on International Arbitration to resolve any disputes. Each party shall bear its costs arising from any such legal action.*

*Clause 16[4]:*

*That where there is any conflict or dispute arising in the course of this transaction, an independent arbitrator shall be appointed by both parties to resolve the dispute and the decision thereof shall bind parties.*

*The matter is scheduled to come up on Thursday the 17<sup>th</sup> December, 2020 for ruling on this issue. A prompt response will be greatly appreciated.*

*Thank you.*

Mr.ChikwenduMadumere, FCIArb, C. Arb., Chairman [Abuja Chapter], Chartered Institute of Arbitrators [UK] Nigeria Branch by letter of 14/12/2020 forwarded to the Court a list of three recommended arbitrators who could be considered to sit as arbitrators over the reference. The three names are:

- i. Dr. Sally El-Sawah - Egyptian
- ii. Ms. Eunice Lumallas, FCIArb - Kenyan
- iii. Engr. Suzanne, Rattray, FCIArb - Zambian

In another letter dated 15/12/2020, Mr.ChikwenduMadumere, FCIArb, C. Arb.recommended two more names thus:

- i. Mr. Bobby Banson - Ghanaian
- ii. Mr. Ace Anan Ankomah - Ghanaian.

The respective Resumes of the persons recommended were forwarded to the Court, which I have had the privilege and opportunity to peruse.

In exercise of the powers of the Court under section 7[2][b] of the Arbitration and Conciliation Act, I hereby appoint *Mr. Ace Anan Ankomah*, a Ghanaian,as the sole arbitrator for the parties.

From the Resume of Mr. Ace Anan Ankomah, his business address is:

Bentsi-Enchill, Letsa&Ankomah, No. 4 Momotse Avenue, Adabraka, P. O. Box GP 1632, Accra [GA-073-2077], Ghana.

His office telephone number is: +233-30-220-8888; while his Mobile telephone number is +233-24-431-5288.

His email is: [aaankomah@belonline.org](mailto:aaankomah@belonline.org).

I so order.

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HON. JUSTICE S. C. ORIJI  
[JUDGE]

*Appearance of Counsel:*

1. O. I. Olorundare, SAN for the claimant; with I.YunanaEsq.
2. M. K. AgbontienEsq. for the defendant.