

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY  
IN THE ABUJA JUDICIAL DIVISION  
HOLDEN AT JABI ON THE 30TH DAY OF MARCH, 2022  
BEFORE HIS LORDSHIP, HON. JUSTICE J. ENOBIE OBANOR  
SUIT NO: FCT/HC/M/1273/2021**

**BETWEEN**

**MRS. OMONIKE OМУYA-----APPLICANT**

**AND**

**DR. (MRS) ZAINAB SHINKAFI BAGUDU-----RESPONDENT**

**RULING**

**(DELIVERED BY HON JUSTICE J. ENOBIE OBANOR)**

This action was commenced at the instance of the Applicant vide a Motion on Notice with Motion No. FCT/HC/1273/2021, dated 29<sup>th</sup> November, 2021 and filed on 30<sup>th</sup> November, 2021 pursuant to Section 5(2)(b), 7(2)(b) and Article 3 of the 1<sup>st</sup> Schedule of the Arbitration and Conciliation Act CAP A18 LFN 2004; Order 19 Rules 8 and 11-(a) of the Rules of this Court. The Motion seeks the following:

1. AN ORDER of this Honourable Court referring the dispute between the Applicant and the Respondent, arising from the MEMORANDUM OF UNDERSTANDING dated 7<sup>th</sup> August, 2020, between the Parties afore described to Arbitration under the Arbitration and Conciliation Act and any other applicable laws.
2. An Order of this Honourable Court directing the Parties to this Arbitration within (30) days of the order, to appoint (3) three eminently qualified and competent Arbitrators in furtherance of the dispute arising from the Memorandum of Understanding dated 7<sup>th</sup> August, 2020, between the Applicant and the Respondent.

3. AN Order of this Honourable Court directing the Arbitral Tribunal appointed by or at the instance of this Honourable Court to perform and conclude its functions in this case within a period of 3 months commencing from the date of the first sitting of the Tribunal.
4. And for such Orders or further Orders as this Honourable Court may deem fit to make in the circumstances of this case.

In support of the Motion, the Applicant filed an affidavit of 10-paragraphs deposed to by Shenkah Orajekwe Esq. Documents were attached as exhibits A-F and accompanied with Applicant Counsel's written address dated 29<sup>th</sup> November, 2021.

On the part of the Respondent, his Counsel filed a counter-affidavit of 8 main paragraphs deposed to by one Ibrahim Olajide, which was accompanied also by a written address of the Respondent's Counsel.

In further response, Counsel to the Applicant filed a Further and Better Affidavit of 10 paragraphs deposed to by one Shenkah Orajekwe, a legal practitioner in the office of the Applicant's Counsel. A document was annexed as exhibit F1. Respondent on his part filed a Reply on Points of Law.

The brief fact of the Applicant's case as contained in the Affidavit of the Applicant is that by a Memorandum of Understanding dated 7<sup>th</sup> August, 2020, the Applicant as Author and Creative Content Producer of a Children's book titled 'Giwa the giant Fish' and the Respondent as Sponsor of the aforesaid book agreed to produce one thousand (1000) copies of the Author's book for a sponsorship fee of £17,000 (Seventeen Thousand Pounds) payable by the Sponsor. The Memorandum of Understanding between the Applicant and the Respondent dated 7<sup>th</sup> August, 2020, is annexed herewith and marked 'Exhibit A'.

The Applicant averred that by clause 14 of the Memorandum of Agreement between the Applicant and the Respondent, the

Author (Applicant) agreed to provide the full manuscript and the sponsor (Respondent) shall provide (50%) fifty percent of the total sum of £17,000 (Seventeen Thousand Pounds) to commence production.

However, according to the Applicant, after the execution of the said Memorandum of Understanding, the Respondent made a deposit of £2,000 (Two Thousand Pounds) only, on 20<sup>th</sup> August, 2020, being less than the 50% initial deposit agreed by them under the Memorandum of Understanding. Nonetheless, the Applicant commenced production of the books as agreed under the Memorandum of Agreement.

On 31<sup>st</sup> of August, 2020, the Respondent through her agent Saratu Bukar, purported to have terminated the Memorandum of Understanding between the Applicant and the Respondent and demanded a refund of the £2,000 (Two Thousand Pounds) deposit made to the Applicant. A copy of the communications via emails between the parties and agent is also attached as exhibit B.

Further, on the 7<sup>th</sup> of December, 2020, Respondent's Solicitors wrote a letter demanding the refund of the sum of £2,000 initial and incomplete deposit paid to the Applicant on the ground that Applicant purportedly failed to make full disclosure of his intent for the 'Giwa the Giant Fish' book production.

The Applicant on his part informed the Respondent that the execution of the production was already at an advanced stage consuming over the £2,000 (Two thousand Pounds) initial and incomplete deposit made by the Respondent and Applicant was unwilling to make a refund. Rather, since the Applicant had performed her own part of the agreement, she was entitled to a specific performance of the entire contract or damages arising therefrom.

It was also stated by the Applicant that all efforts to resolve the dispute and respective claims of breach of contract between the

Applicant and the Respondent have failed on account of the breaches committed by the Respondent.

The Applicant further stated that by virtue of the Settlement of Dispute Clause 1 and 2 of the Memorandum of Understanding between the Applicant and the Respondent, any dispute arising from the agreement shall be referred to Arbitration under the Arbitration and Conciliation Act if parties fail to resolve their dispute within a period of (60) sixty days. He also stated that parties are desirous of submitting the dispute to arbitration for possible settlement.

The Respondent in its Counter Affidavit admits paragraph 5(a), (c), (e), (f) of the Applicant's Affidavit and also admitted paragraph 5 (b) only to the extent that the sum of 2,000 pounds was paid to the Applicant. With respect to 5(e), the Respondent maintained that the Memorandum of understanding was terminated as a result of misrepresentation by the Applicant and that was the reason its solicitor demanded for refund of the said 2,000 pounds.

The Respondent in its averment states that paragraph 5(d), (g), (h) and (k) are untrue and only admitted paragraph 5(i) only to the extent that only a text message was sent by the Applicant to the Respondent.

It was also admitted by the Respondent in paragraph 4(i) that parties agreed that all claims, questions or differences shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act. However, according to the Respondent, they were not served with a notice of arbitration and that the purported Exhibit F attached by the Applicant in its affidavit was never served on the Respondent and that it does not contain address of the Respondent, general nature of the Claim, indication of the amount involved and a proposed number of arbitrators and statement of claim.

In response to the Counter Affidavit of the Respondent, the Applicant filed a Further and Better Affidavit wherein it stated at paragraph 6 that it inadvertently omitted to annex exhibit F without page no 2 and attached a complete copy of exhibit as exhibit F1.

## **ISSUES FOR DETERMINATION**

The Applicant's Counsel formulated the following issues for determination:

***Whether the Applicant has placed sufficient materials before this Honourable Court for the grant of this application seeking:***

***(a) Referral of the dispute between the Applicant and the Respondent to Arbitration for possible settlement?***

***(b) Appointment by the parties of three (3) eminently qualified Arbitrators to hear and determine the dispute between the Applicant and the Respondent?***

***(c) Order of this Honourable Court directing that the Arbitrators appointed pursuant to prayer (b) above conclude their findings and deliver an Award in this matter within a period not exceeding three (3) months?***

The Respondent on the other hand, distilled the following issue for determination:

***Whether the Applicant is entitled to the grant of the Reliefs sought in his application?***

The Applicant in his written address submits by virtue of the Settlement of Dispute, Clause 1 and 2 of the Memorandum of Understanding between the Applicant and the Respondent (Exhibit A), any dispute arising from agreement shall be referred

to Arbitration under the Arbitration and Conciliation Act if parties fail to resolve their dispute within a period of (60) sixty days.

Counsel further contended that Applicant has shown by affidavit evidence in support of this application that it is now over sixty (60) days since the commencement of the dispute between the Applicant and the Respondent without an amicable resolution. He referred the Court to the letter from Applicant's Counsel, Messers J. B. Daudu and Co to Respondent's Counsel, dated 6<sup>th</sup> January, 2021, annexed as 'Exhibit E'. Further on this point, the Applicant posited that she is desirous of submitting the dispute between herself and the Respondent to arbitration for possible settlement and has served the Respondent a Notice or Intention to refer the dispute between the parties herein to Arbitration.

He submitted that Applicant having fulfilled the requirement of the law, this Honourable Court is imbued with the Jurisdiction to refer the dispute arising between the Applicant and the Respondent to arbitration for possible settlement. He referred me to the provisions of Section 5(2)(B) of the Arbitration and Conciliation Act CAP A18 LFN 2004 and to the case of ***Sino-Afric Agriculture & Ind Company Limited & Ors Vs Ministry of Finance Incorporation & Anor (2013) LPELR 22370CA.***

Counsel also submitted that the Court in exercising its power to order appointment of arbitrators is enjoined to exercise its discretion having due regard to the qualifications required of the arbitrator, by the subject matter of arbitration agreement and such other considerations, which secure the appointment of an independent and impartial arbitrator including the liberty of the parties to nominate one arbitrator each who will then nominate a third arbitrator to ensure impartiality and avoid a voting tie. He referred the Court to Sections 6, 7 (1), (2) (a)-(b) and (5) of the Arbitration and Conciliation Act CAP A18 LFN 2004, which states:

Finally, Counsel urged the Court to hold that the instant Application is made in good faith, meritorious and to grant all the reliefs sought.

The Respondent in his Written Address argued that while it is not in doubt that there exists an arbitration clause, it is pertinent to submit that the arbitration clause provides for recourse to the Arbitration and Conciliation Act. Where this is the case, it means that the provisions of the Arbitration and Conciliation Act must be adhered to by both parties to the agreement and this honourable court. Counsel further posited that the conditions stipulated for assuming jurisdiction were restated by the Supreme Court in the case of **NWANKWO V. YAR'ADUA (2010) 12 NWLR (PT 1209) 518 @ 510**

Respondent's Counsel heavily contended that it is the law that arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the Respondent. The said notice of arbitration as provided under Article 3(3) must contain a demand that the dispute be referred to arbitration, the names and addresses of the parties, a reference to the arbitration clause or the separate arbitration agreement that is invoked, a reference to the contract out of which or in relation to which the dispute arises, the general nature of the claim and an indication of the amount involved if any, the relief sought, a proposal as to the number of arbitrators if the parties have not previously agreed thereon. He placed reliance on the case of **MEKWUNYE V. IMOUKHUEDE (2019) 13 NWLR (PT. 1690) PG. 439**. He also cited Article 2 of the Arbitration Act.

The law in Section 7(2)(a)) of the Arbitration and Conciliation Act states that if a party fails to appoint an arbitrator within days of receipt of a request to do so or if the two arbitrators fail to agree on the third arbitrator, the appointment shall be made by the court on the application of any party to the arbitration agreement. It therefore means that the powers of the court cannot be stretched to the point of requiring it to make an order

for parties to appoint arbitrators in the first place. The law as it stands limits the exercise of power of the court in the right circumstances as provided under the law, to where the condition precedent of notice of arbitration has been fulfilled, to appointing one arbitrator. He cited the case of **B.C.N.N. LTD V. BACKBONE TECH. NET. IN. (2015) 14 NWLR (PT. 1480) PG. 511.**

At the end Respondent's Counsel urged me to resolve this issue in his favour.

I have carefully read and digested the said final Written Addresses of Counsel for the parties. I have equally perused the Reply on point of law filed by the Applicant. I have also given due consideration to the affidavit evidence given by the Applicant and the Respondent respectively.

From the affidavit of both parties and by virtue of the Settlement and Dispute Clause 1 and 2 of the Memorandum of Understanding between the Applicant and the Respondent, it is not in dispute that parties agreed that all claims, questions or differences shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, if parties fail to resolve their dispute within 60 days (see paragraphs 6(a) and paragraph 4(i) of the Applicant's Affidavit in support of Motion and the Respondent's Counter Affidavit, respectively.

It should be noted that by the application before the Court, it is premature for the Court to make any pronouncement that touches on the main suit at this interlocutory stage. See the case of **ADENUGA V. ODUMERU (2002) 8 NWLR (pt. 821) P. 163 at P. 188 paragraphs F-G.** So I shall restrict myself to the issue that borders on Clause 1 and 2 of the Memorandum of Understanding.

From the Affidavit of both parties and their written addresses, the main issue in my humble opinion, between the parties is:



**whether the condition precedent for the referral of this dispute to arbitration is fulfilled or not?**

So in order to remain focused on the core dispute between the parties, I shall be guided by the above issue for the determination of this Application.

Article 3 (3) of the First Schedule to the Arbitration Act, 2004, provides for the condition precedent for the initiation of arbitral proceedings. It is hereby reproduced as follows:

***"1. The party initiating recourse to arbitration (hereinafter called the "Claimant") shall give to the other party (hereinafter called the "Respondent") a notice of arbitration.***

***2. Arbitral Proceedings shall be deemed to commence on the date in which the notice of arbitration is received by the Respondent.***

***3. The Notice of arbitration shall include the following:***

***a) a demand that the dispute be referred to arbitration;***

***b) the names and address of the parties;***

***c) a reference to the arbitration clause or the separate arbitration agreement that is involved;***

***d) a reference to the contract out of or in relation to which the dispute arises***

***e) the general nature of the claim and on indication of the amount involved, if any;***

***f) the relief or remedy sought;***

***g) a proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon."***

See also the case of ***MEKWUNYE V. IMOUKHUEDE (supra)***

The Respondent vehemently contended that the purported Notice of Intention (Exhibit F, attached to the Affidavit of the Applicant) referring this dispute to Arbitration by the Applicant does not contain address of the Respondent, general nature of the claim and an indication of the amount involved, a proposal as to the number of Arbitrators and statement of Claim.

The Applicant on his part contended that the condition precedent for the initiation of arbitral proceedings has been fulfilled. He referred the Court to Exhibit F and F1 attached to his Affidavit in Support of Motion and Further and Better Affidavit, respectively.

I have seen Exhibit F and I have equally seen Exhibit F1 attached to the Better and Further Affidavit, which was not controverted by the Respondent. In the said Exhibit F1, I have noticed that one Oyokunyi Asuquo Esq. received the original copy of the Notice of Arbitration letter pursuant to Article 3 of the 1<sup>st</sup> Schedule of the Arbitration and Conciliation Act. I have seen the name and address of parties in the letter. I have also noted that the said letter contains: contact in issue, dispute resolution clause, nature of claim, relief sought and proposed number of arbitrators.

It is already settled that an affidavit evidence constitutes evidence and must be so construed, hence, any deposition which is not challenged or controverted is deemed admitted. See the case of ***EYOP INDUSTRIES LTD V. EKONG (2021) LPELR-55837(CA)***. Accordingly, it is my humble view that looking at Exhibit F and F1, the requirement/condition precedent for the initiation of arbitral proceedings has been fulfilled and the contention of the Respondent's Counsel is misconceived and I so hold. Therefore, the argument of the Respondent's Counsel, who has been acting on behalf of the Respondent via different correspondence with the Applicant's Counsel that the Respondent has not been served personally will not hold water and I so hold.

It is also the law that where arbitration clause is embedded in a document, it constitutes an agreement that if any dispute occurs with regard to the obligations which the parties have undertaken to each other, such dispute should be settled by a body or tribunal of their own constitution and choice. see the case of ***WILLIAMS V WILLIAMS, (2014) 15 NWLR (pt 1430) page 213 at 216 ratio 2.***

However, where in the Arbitration Clause parties did not specify the number of Arbitrators to be appointed under the agreement, the number of Arbitrators shall be deemed to be three. See Section 6 of the Arbitration and Conciliation Act 2004.

Thus, Section 7 provides the procedure to be followed in the appointment of Arbitrators as follows:

**7. (1) Subject to Subsection (3) and (4) of this Section, the parties may specify in the arbitration agreement the Procedure to be followed in appointing an arbitrator. (2) Where no procedure is specified under Subsection (1) of this section- (a) in the case of an arbitration with three arbitrators, each party shall appoint one arbitrator and the two thus appointed shall appoint the third, so however that (i) if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so by other party; or (ii) if the two arbitrators fail to agree on the third arbitrator within thirty days of appointments, the appointment shall be made by the Court on the application of any party to the arbitration agreement; (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.**

See the case of ***C.O. OGBUGHALU & SONS (NIG) LTD V. UNILEVER (NIG) PLC (2016) LPELR-41501(CA) and MEKWUNYE V. IMOUKHUEDE (supra)***

By the Affidavit evidence of the parties particularly paragraph 6(a) of the Applicant's Affidavit in support of Motion on Notice and paragraph 4(i) of the Respondent's Counter Affidavit, parties are not opposed to submitting themselves to arbitration pursuant to the Arbitration Clause in the Memorandum of Understanding dated 7<sup>th</sup> August, 2020. Accordingly, the following Orders are hereby made:

1. This matter/dispute arising from the Memorandum of Understanding between the parties is hereby referred to Arbitration pursuant to Section 7 of the Arbitration and Conciliation Act, 2004 and all other relevant provisions in the said Act.
2. Parties are hereby Ordered to appoint 3 eminently qualified and competent Arbitrators within 30 days pursuant to Section 7 of the Arbitration and Conciliation Act, 2004 and all other relevant provisions in the said Act.
3. The Arbitral Tribunal so appointed by parties are hereby given 4 months to conclude its functions in this case commencing from the date of the first sitting of the Tribunal.

That is the ruling of this Court.

**SIGNED**

**HON. JUSTICE J. ENOBIE OBANOR**

**(PRESIDING JUDGE)**