**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE. 279 OF 2017**

**ZANELE INVESTMENT HOLDING LIMITED……..……PLAINTIFF**

**VERSUS**

**ALEXANDER FORBES EMERGING**

**MARKETS (PTY) LIMITED……..……DEFENDANT**

**RULING**

## Introduction

1. In international arbitration, there is evident tension between the legislative direction that limits courts' intervention and encourages the contractual autonomy of the parties to resolve their disputes by arbitration on the one hand and the urge by the court to sustain its jurisdiction on the other hand. The two cross- applications in this cause invite such tension. The applications also demonstrate the competing complexities which often occur when parties to an arbitration agreement fall out and cease being keen on any private dispute resolution.

2. The principal issue in the two applications is whether the dispute that is before the court ought to be determined through arbitration or litigation. Through the court's prompting, however, an issue *in limine*, as to whether the court has jurisdiction to entertain this suit is to be determined.

## Background

3. There is somewhat a (hi)story on the facts leading to the instant litigation. I summarize the same infra.

4. The Plaintiff is a corporate entity duly constituted in accordance with the Laws of Kenya. Its main undertaking involves medical insurance.

5. The Defendant, formerly known as Alexander Forbes Afrinet Investment (Pty) Limited, on the other hand is a foreign corporate entity. It is organized and registered in accordance with the laws of South Africa. It is domiciled in the Republic of South Africa. It offers, inter alia, financial services.

6. On 7 September 2012, the Plaintiff and the Defendant entered into a loan agreement ( "the Loan Agreement") pursuant to which the Defendant agreed to lend the Plaintiff monies, inter alia, to fund the Plaintiff's purchase and acquisition of Alexander Forbes HealthCare Limited ("AFHL"). AFHL, in the Plaintiff's view, was an apparently struggling going concern.

7. For purposes of consummating the acquisition the Plaintiff, the Plaintiff's directors as well as the Defendant and other third parties also entered to several other agreements ("the other Agreements"). There was an Escrow Agreement (of 6 September 2012 between and among the Defendant, a shareholder in the Plaintiff and Anjarwalla & Khanna Advocates). There was also a sale of shares agreement (between and among the Defendant, AFHL and a shareholder in the Plaintiff Company). There were also: a Deed of Adherence, a Deed of Waiver consent and Power of Attorney both as schedules to the sale of shares agreement.

8. The Loan Agreement as well as the other Agreements was preambled by a Term Sheet dated 11 June 2012 which outlined the parties, the commercial terms and other transactional terms.

9. The Loan Agreement contained a detailed arbitration clause. The loan amounts were also inter alia, provided as payable directly to AFHL. Repayment of the amounts under the Loan Agreement was to be made to such accounts as would be designated by the Defendant.

10. Fast forward to 2017.

11. On 20 April 2017 the Defendant claimed default on the part of the Plaintiff and demanded payment of Kshs. 554,149,247.96. When the Plaintiff failed to react to the demand by way of payment, the Defendant on 28 April 2017 declared a dispute. The Defendant then proposed prospective arbitrators. The Plaintiff later denied liability and counter-accused the Defendant of various transgressions as well as breaches. The Plaintiff also denied the intended arbitration in South Africa could kick off for want of jurisdiction. The Plaintiff's denials and counter-accusations are contained in a prolix letter penned on 12 May 2017 by its counsel to the Defendant's counsel.

12. Undaunted but satisfied that the Plaintiff would not be a party to the appointment of an arbitrator, the Defendant approached the designated appointing authority, the Arbitration Foundation of South Africa (AFSA), to appoint an arbitrator. The approach prompted the Plaintiff to launch this suit.

**This suit**

13. The Plaintiff's claim is that the Defendant was allegedly in breach of the Loan Agreement as well as the other Agreements. The Plaintiff contends as well that obligations in the Term Sheet were not honoured. Additionally, the Plaintiff contends that the Defendant has unjustly enriched itself by reason of its own default and transgressions. Despite such default, breaches and unjust enrichment the Plaintiff complains that the Defendant has sought to recover the amount of Kshs. 554,149,247.96/= from the Plaintiff on the basis of the Loan Agreement which according to the Plaintiff was tainted with illegalities and was entered into in violation of public policy.

14. Additionally, the Plaintiff whilst not denying the existence of the arbitration clause contends that as the applicable law is stated to be the laws of Kenya and of South Africa, the nature of the transaction is such that the transaction ought to be in Kenya due to the special circumstances of the transaction. Further, the Plaintiff contends that the Loan Agreement is not a stand-alone agreement but has to be read alongside the other Agreements which, inter alia, provide for the arbitral seat in Kenya. The Plaintiff also avers that there are already criminal investigations underway in Kenya hence the need to avoid any dispute resolution outside Kenya.

15. By way of relief, the Plaintiff seeks an injunction to stay or restrain the arbitral proceedings involving the two parties "*over the dispute arising out of the Loan Agreement … and all other ancillary agreements thereto*". The Plaintiff also seeks a declaration that the Loan Agreement and the other Agreements are unlawful, illegal, anti-public policy and unenforceable. Additionally, the Plaintiff seeks a declaration that the Defendant's claim for Kshs. 554,149,247.96 is unlawful and equates unjust enrichment. Finally, the Plaintiff also seeks judgment against the Defendant in the sum of Kshs. 121,000,000/=.

16. The Plaintiff insists that it is the local courts which have jurisdiction and not the South African courts or the arbitral tribunals in South Africa.

17. The Defendant pursuant to Section 6 of the Arbitration Act has filed no Defence statement but has alongside the appearance filed an opposing application which seeks to stay the suit and have the dispute resolved by arbitration.

18. The Defendant naturally contends that the correct forum for the dispute is the arbitral forum to be constituted by the AFSA pursuant to Clause 31 of the Loan Agreement. The Defendant wants all issues in the instant suit also referred to arbitration besides its claim. Critically, the Defendant contends that this court lacks the requisite jurisdiction to entertain this suit and adjudicate the issues raised.

**The issue**

19. At my prompting, the parties argued, *in limine*, the issue as to whether or not this court is seized with the requisite jurisdiction to entertain the suit. The existence of an arbitration agreement as well as the Defendant's status as a foreign entity dictated that the issue of jurisdiction be dealt with definitively.

20. Neither the merit nor demerits of the parties' applications or the suit itself is therefore currently of concern.

**Position of the parties**

21. The Plaintiff's position was urged by Mr. Oscar Litoro appearing together with Ms. Muriithi.

22. According to Mr.Litoro, the court's jurisdiction was obtained under *s.*14 of the Civil Procedure Act (Cap 21) as read together with Order 5 Rule 21 (e) and (f) and Rule 22 (3) of the Civil Procedure Rules.

23. Mr. Litoro submitted that the applicable law was both Kenyan and South African law but that as the Loan Agreement and the Agreements were contrary to public policy and crimes had been committed with the local jurisdiction, the arbitration could not take place in South Africa or at all. Additionally, Mr. Litoro submitted that there was no dispute to be referred to arbitration.

24. Ms. Cosima Wetende urged the Defendant's position.

25. Ms. Wetende asserted that the court lacked jurisdiction to entertain the matter as the parties had expressly agreed to refer their disputes to arbitration in South Africa and also selected the governing law as South African Law. Referring to the 10th Edition of Blacks' Law Dictionary, Ms. Wetende contended that there was a major difference between the two phrases "applicable law", as insisted upon by Mr. Litoro, and "governing law".

26. According to Ms. Wetende, applicable law was that which "affected or related to a particular person, group or situation and having direct relevance": see **Black's Law Dictionary 10th Ed p. 120**. Governing law, on the other hand, was the substantive law guiding the contract. Counsel added that the parties in the instant case had agreed to have any dispute arising from the contract resolved by arbitration in South Africa. Counsel consequently submitted that the action ought to be stayed pursuant to Section 6 of the Arbitration Act as the court lacked the jurisdiction to determine the dispute.

27. With regard to the fact that the Defendant is a foreign entity, Ms. Wetende contended that there was no evidence before the court that the case fell within the exceptions under Order 5 Rule 21 of the Civil Procedures Rules. Counsel urged that the Plaintiff be directed to raise its allegations and the claims by way of defense in the arbitral proceedings.

**Analysis and determination**

28. The question of jurisdiction, in this case, took two angles, namely; the assumption by the court of jurisdiction over a foreign entity and the existence of an undisputed arbitration agreement between the parties.

29. It is common cause that the Defendant is a corporate entity registered in accordance with the laws of South Africa. Its central place of business is also in South Africa.

30. It is clear from the pleadings that the Plaintiffs suit is pegged on the Loan Agreement made on or about 7 September 2012. The Loan Agreement was executed in Sandton, South Africa. The Defendant then offered to extend a loan facility to the Plaintiff, with part of it already having been advanced. The advance, it is not in dispute, was to be made and was indeed made in South Africa. The Defendant is domiciled in South Africa so could only make payments from or in South Africa. The Plaintiff contends that part of the agreed payment (or advance) was not made.

31. The repayment was to be made to such account as was to be designated by the Defendant. My perusal of the pleadings and documents filed in court reveal only one bank account designated by the Defendant. The account was a foreign account. The account details were as follows: A/C holder- Defendant, Bank- FNB, A/C Number- 621761108689, Branch code- 255005. Effectively, payment as well was to be directed to the foreign account by the Plaintiff.

32. The Defendant claims it honored its obligations. The Defendant asserts the Plaintiff has failed to honor its obligations leading to a dispute under the Loan Agreement and thus the need for arbitration in South Africa. The Plaintiff on the other hand insists the Defendant is in breach and that the applicable law is the Kenyan law and thus there is jurisdiction.

33. There is no doubt that jurisdiction is critical and without it a court must not make one more step: see **The *MV Lillian S*S [1989] KLR 1**. Jurisdiction itself flows from the Constitution or the law subject to any limitations embodied thereon: see the Supreme Court of Kenya in **Republic *v* Karisa Chengo & 2 others [2017]eKLR**

34. With regard to foreign defendants, the path taken by the law is that courts in Kenya will not assume jurisdiction in relation to matters arising out of contract unless the circumstances fall within the provisions of Order 5 Rule 21 of the Civil Procedure Rules.

35. In **Raythoon Aircraft Credit Corporation & Another *v* Air Al-Faraj Ltd [2005]eKLR**, that Court of Appeal (per Githinji JA) stated as follows:

> ***"… Raythoon is a foreign corporation…not trading within the jurisdiction by a subsidiary at the time it was sued and it is not domiciled in Kenya. In such a case the High Court will not assume jurisdiction in relation to any matter arising from the contract unless the contract is of the nature specified in Order V Rule 21 (e)"***.

(See also **Fonville *v* Kelly III & Others [2002] 1EA 71**)

36. Much earlier in **Karachi Gas Co. Ltd *v* Issaq [1965] E.A 42** the court stated as follows:

> ***"… the two main issues which arise in this appeal are first, whether the supreme court had jurisdiction and secondly, whether the contract was frustrated. As regards the first of these issues, the defendant was out of the jurisdiction and was neither domiciled nor ordinarily resident in Kenya. In such a case, the courts of Kenya will not assume jurisdiction in relation to any matter arising out of contract <u>unless the circumstances fall within the provisions of Order V Rule 21 of the Civil Procedure Rules 1948.</u> This rule details the circumstances in which service of the summons or a notice of summons may be allowed out of the jurisdiction in order to give effect to a jurisdiction, inter alia, if contract is made in Kenya or if the proper law of contract is Kenya or if a breach is committed within Kenya"*** [emphasis mine]

37. Much more recently in **Hakken Consulting Ltd & 2 Others *v* Seven Seas Technologies Ltd [2017]eKLR** the court stated as follows with regard to foreign Defendants:

> ***"[14] It is clear that jurisdiction of the High Court hinges on the provisions of Order 5 Rule 21***

***of the Civil Procedure Rules in so far as foreign defendants are concerned. <u>Where any one of the indexed instances is met then jurisdiction may not be denied</u>. What is of import is that the one of the reasons to allow service to be effected out of jurisdiction is actually shown to exist."*** [emphasis in the original]

38. The relevant rule 21[of Order 5] itself reads as follows:

***21. Service out of Kenya of a summons or notice of a summons may be allowed by the court whenever-***

***a) The whole subject matter of the suit is immovable property situate in Kenya (with or without rents and profits);***

***b) Any act, deed, will, contract, obligation or liability affecting immovable property situate in Kenya is sought to be construed rectified, set aside, or enforced in the suit;***

***c) Any relief is sought against any person domiciled or ordinarily resident in Kenya;***

***d) The suit is for the administration of the personal estate of a deceased person who at the time of his death was domiciled in Kenya, or for the execution (as to property situate in Kenya) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of Kenya;***

***e) The suit is one brought to enforce, rectify, rescind, dissolve, annual, or other-wise affect a contract or to recover damages or other relief for or in respect of the breach of a contract-***

***i. Made in Kenya; or***

***ii. Made by or through an agent trading or residing in Kenya on behalf of a principal trading or residing out of Kenya; or***

***iii. By its terms or by its legislation to be governed by the Laws of Kenya ; or***

***iv. Which contains a provision to the effect that any Kenya court has jurisdiction to hear and determine that suit in respect of that contract, or is brought in respect of a breach committed in Kenya, of a contract, wherever made, even though such a breach was preceded or accompanied by a breach out of Kenya which rendered impossible the performance of the part of the contract which ought to have been performed in Kenya; or***

***f) the suit is founded on a tort committed in Kenya;***

***g) any injunction is sought as to anything to be done in Kenya, or any nuisance in Kenya is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or***

***h) any person out of Kenya is a necessary or proper party to a suit properly brought against some other person duly served in Kenya.***

39. There is no general , all purpose jurisdiction over foreign defendants. It is not even an issue of proportionality, fair play or substantial justice as was suggested by Mr. Litoro. Neither is it about geographic bounds. It is a specific-conduct linked jurisdiction as indexed under Rule 21. Section 14 of the Civil Procedure Act would be inapplicable in the circumstances.

40. In the instant case the Plaintiff has sued on the basis of the Loan Agreement. The contract was not

made in Kenya. It was executed by both parties in Sandton, South Africa. One entity is domiciled outside Kenya. The contract expressly states that the governing law is South African Law. It also does not contain a clause conferring jurisdiction on any Kenyan court. Additionally, part of the breach alleged is one that occurred outside Kenya. The Defendant is stated to have failed to effect some payments.

41. I am not convinced that the Plaintiff's claim would fall under Order 5 Rule 21(e) of the Civil Procedure Rules. Additionally, the Plaintiff also failed to move the court to assume jurisdiction by granting leave for the summons or notice thereof to be served upon the Defendant in accordance with the machinery stipulated under Order 5 Rule 23.

42. I would have stopped here but it would be apposite to also consider jurisdiction from the perspective of the Plaintiff's claim to restrain the arbitral proceedings set to commence in South Africa.

43. From the onset, I have little doubt that a court of law has hermetical powers to prevent arbitration, the same way it has express statutory powers to compel it.

44. In my view, where there is a valid arbitration agreement there should however exist special circumstances to warrant a stay of arbitration. Thus if there is already an on-going arbitration on the same subject, a court may successfully be called upon to plug or discontinue any latter arbitral proceedings. If there is also no dispute to be arbitrated then the court ought to be ready ensure that unnecessary costs are not expended in any purported arbitration. Likewise where there is no valid arbitration agreement, a court may also successfully be moved to halt the arbitration.

45. The Plaintiff's suit is however different save for the claim that there is no dispute.

46. The Plaintiff seeks to have the arbitration barred on the basis that it would be contrary to public policy to proceed with the arbitration. It is also contended effectively that the arbitral forum has no jurisdiction as there is no dispute.

47. The Plaintiff does not however contest the extensive arbitration agreement. The arbitral clause reads as follows:

> ***31.1 …save in respect of those provisions of this Agreement which provide for their own remedies which would be incompatible with arbitration, a dispute which arises in regard to:-***
>
> ***31.1.1 the formation or existence of; or***
>
> ***31.1.2 the interpretation of; or***
>
> ***31.1.3 the carrying into effect of;***
>
> ***31.1.4 either of the parties' rights and obligations arising from; or***
>
> ***31.1.5 whether or not there has been a breach of this Agreement or an Event of Default or a Potential Event of Default has occurred or whether or not any indemnity is applicable; or***
>
> ***31.1.6 The cancellation or termination or purported termination or cancellation of or arising from the termination or cancellation of; or***
>
> ***31.1.7 The validity, enforceability, rectification or proposed rectification of; or***
>
> ***31.1.8 Any documents furnished by the parties pursuant to the provisions of, this agreement, or out of or pursuant to this Agreement (other than where an interdict is sought or urgent relief may be obtained from a court of competent jurisdiction), shall be submitted to and decided by arbitration.***

***31.2 That arbitration shall be held:***

***31.2.1 before an arbitrator***

***31.2.2 With only the parties and their representatives (including legal representatives), present thereat;***

***31.2.3 at Sandton, South Africa.***

> ***It is the intention that the arbitration shall, where possible, be held and concluded 21 (twenty one). business days after it has been demanded. The parties shall use their best endeavors to procure the expeditious completion of the arbitration.***

***31.3 Save as expressly provided in this Agreement to the contrary, the arbitration shall be held under the aegis of the South African Arbitration Foundation of Southern Africa ("AFSA") for purposes of the appointment of the necessary arbitrator only as provided for in clause 31.5 below (but shall not be administered by AFSA unless the parties agree). The arbitration legislation in South Africa shall apply, but solely and exclusively applying the Uniform Rules of the High Court in force at the time, unless the parties and the arbitrator agree in writing to any departure therefrom and the extent of such departure. To the extent to which any provision of this Clause 31 is inconsistent with the Uniform Rules of the High Court in force at the time, the provisions of this clause shall prevail to that extent and if there is any dispute in relation to such inconsistency or alleged inconsistency and/or as to which rules prevail, the arbitrator shall be entitled to determine such dispute (which determination shall be final and binding on the parties) applying such rules and procedures as the arbitrator considers appropriate.***

***31.4 The arbitrator shall be appointed by agreement between the parties or, failing such agreement, appointed in terms of the Rules of the AFSA, to which the parties bind themselves.***

***31. 5 The arbitrator referred to in clause 31.4 above shall be, if the matter in dispute is principally:-***

***31.5.1 a legal matter, an impartial practicing advocate of not less than 15 (fifteen) years' standing, or an impartial admitted attorney of not less than 15 (fifteen) years' standing;***

***31.5.2 An accounting matter, an impartial practicing chartered accountant of not less than 15 (fifteen) years' standing;***

***31.5.3 Any other matter, an independent person agreed upon between the parties to this Agreement or appointed in terms of the Rules of AFSA on the basis set out in clause 31.4.***

***31.6 If the parties fail to agree whether the dispute is of a legal, accounting or other nature within 5 (five) days after the arbitration has been demanded, it shall be considered a matter referred to in clause 31.6.1.***

***31.7 The arbitrator shall be obliged to give his award in writing fully supported by reasons. The arbitrator's award shall be final and binding on the parties to the dispute.***

***31.8 Furthermore the arbitrator, where the arbitrator considers same to be appropriate:-***

***31.8.1 May, in addition to any other award he may be able to make:***

***31.8.1.1 Rescind or cancel this Agreement or determine that a party has lawfully rescinded or cancelled or is entitled lawfully to rescind or cancel this agreement or require specific performance, with or without an award of damages.***

***31.8.1.2 Shall make such order as to costs as he deems just.***

***31.9 Either party shall be entitled to have the award made an order of court of competent jurisdiction.***

***31.10 Any dispute shall be deemed to have been referred or subjected to arbitration hereunder when either party gives written notice to the other of the dispute, demands arbitration and requests the appointment of an arbitrator.***

***31.11 The provisions of this clause constitute an irrevocable consent by the parties to any proceedings in terms hereof, are severable from the rest of this Agreement and shall remain in effect even if this Agreement is terminated for any reason.***

***31.12 The parties shall keep the evidence in the arbitration proceedings and any order made by any arbitrators confidential.***

***31.13 The arbitrator shall have the power to give default judgment, on written application by any party, if either party fails to make submissions on due date and/or fails to appear at the arbitration.***

48. The Arbitration Act , No 4 of 1995 ( "the Act") guides matters arbitration. It applies to both international and domestic arbitration: see *s.*2 of Act. The court must not be in a hurry to intervene unless as provided for under the Statute: see *s.*10 of the Act. The push is for non-intervention.

49. Section 17 of the Act grants an arbitral tribunal the right to rule on its own jurisdiction. Jurisdiction in these respects includes whether there is a valid arbitration agreement. Jurisdiction also invites a question of arbitrability and whether any issue (or alleged dispute) referred to the arbitrator is an issue which falls within the ambit of the arbitration agreement. The parties had agreed on how the forum is to be constituted. Once constituted, this court must extend the the respect and allow the arbitrator to decide on his jurisdiction.

50. When consequently the Plaintiff raises questions and issues of a Loan Agreement and an arrangement tainted with illegality and being contrary to public policy, in my view such questions go to the core of the arbitral forum's jurisdiction. Pursuant to *s.*17(1),(2) & (3) of the Act, the first stop ought to be the arbitral tribunal itself. The tribunal must render itself on whether or not it has jurisdiction.

51. Where a party questioning the arbitral tribunal's jurisdiction is however not satisfied with the determination, he may move the court, subject to the curial law or the law applicable to the reference as well as the proper law of the arbitration agreement which regulates the obligation of the parties to settle their dispute by arbitration.

52. My reading of *s.*17 of the Act would not allow me to conclude that this court may be seized of any jurisdiction at this point in time and in the circumstances of this case. The Plaintiff must first raise the issues before the arbitrator before moving this court, if both the proper and curial law allow her. The suit in these respects is consequently pre-mature, to say the least.

53. On the claim by the Plaintiff that there is no dispute worthy of being placed before an arbitrator, I will limit myself.

54. According to the 12th Edition of the Concise Oxford English Dictionary (2011), the word "dispute" means a disagreement or argument, to question the truth or validity of a statement or alleged fact. In fairly simple terms, dispute means not being in agreement. Lacking in consensus.

55. A careful reading of Clause 31 of the Loan Agreement shows that if a dispute exists concerning, inter alia; the carrying into effect of the Loan Agreement or concerning either of the parties' rights and obligations arising from the Loan Agreement or whether or not there has been a breach of the Loan

Agreement or even the validity and enforceability of the Loan Agreement, the dispute was to be referred to arbitration.

56. There is in my view a dispute between the parties. It concerns payment of monies allegedly owed. It also concerns the enforceability and validity of the Loan Agreement when the Plaintiff talks of transgressions of the law. The dispute is actually further demonstrated by the Plaintiff's uncooperativeness as far as Clause 31 of the Loan Agreement is concerned.

**Conclusion and Disposal**

57. I find that the suit in so far as the Plaintiff's claim against the Defendant, a foreign entity, is for breach of contract is an abuse of the process, the court not having assumed any jurisdiction as provided for under Order 5 Rule 21 of the Civil Procedure Rules. I also find that the Plaintiff's suit in so far as it seeks to prohibit the arbitration in South Africa of an alleged dispute between the Plaintiff and the Defendant on the basis of alleged illegalities, violation of public policy and want of arbitrability is also prematurely before this court.

58. By dint of the doctrine of *Kompetenz-Kompetenz*, the arbitral forum is the proper and convenient forum for the Plaintiff to raise the objection followed with an appeal to a court of law, as the agreed proper and curial law may direct.

59. This court consequently has no jurisdiction to entertain this suit.

60. The cumulative effect of all the foregoing is that the suit is struck out with costs to the Defendant.

**Dated, signed and delivered at Nairobi this 28th day of September, 2017.**

***J.L.ONGUTO***

***JUDGE***

***Advocates :***

***Ms . C. Wetende for the Defendant***

***Mr O. Litoro for the Plaintiff***

***A.Atelu- Court Assistant***