REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 918 of 2005

ACHELLS KENYA LIMITED………………….….….……...APPLICANT

VERSUS

PHILIPS MEDICAL SYSTEMS NEDERLAND B.V…1ST DEFENDANT

DIEDERIK ZEVEN……………………...…….……..2ND DEFENDANT

RULING

The Plaintiff ACHELIS Kenya Limited filed this suit against the defendant PHILIPS MEDICAL SYSTEMS NEDERLAND B.V. AND DIEDERIK ZEVEN. The brief facts are that the Plaintiff has been a duly appointed distributor of the 1st defendants products in Kenya which distributorship was purportedly terminated by a letter written by the 2nd defendant whose contents are set out in paragraph 6 of the plaint. The letter was circulated and read by persons in locations set out in paragraph 12 and 13 of the Plaint. It is alleged that better contained defamatory material as set out in paragraphs 7,8 and 9 of the plaint. In consequence thereof the plaintiff seeks general damages for libel and defamation, aggravated damages, any other further relief that this Honourable Court may deem fit to grant and costs of this suit.

The defendant entered appearance dated 31.8.2005 and filed the same date and then presented the application subject of this ruling. It is brought by way of chamber summons under Section 6 of the Arbitration Act 1995, rule 2 of the Arbitration Rules 1997 and Section 3A of the Civil Procedure Act (Cap.21 Laws of Kenya

e orders sought are that all further proceedings in this action be stayed pursuant to Section 6 of the Arbitration Act 1995. That the Plaintiff do pay the defendants costs of and occasioned by this action including the costs of this application.

The grounds in support are set out in the body of the application, supporting affidavit, oral submissions in court and case law as well as legal provisions and legal commentaries and legal texts on the subject. The major ones are that:-

(1) The transaction leading to the proceedings herein are contractual in nature and were duly executed by both sides.

(2) Two agreements are involved both of which contain specific clauses that specify clearly that any disputes arising from the contracts should be referred to arbitration under the UNCITRAL rules.

(3) That though the action herein is defamatory in nature the same has a direct link and flaws directly

from the main contract and is also subject to the arbitration clause. It is a related dispute to the contract which is widely drafted and therefore covers tortious actions as well.

(4) They maintain that since the parties had agreed to arbitration procedure and since the suit has connection with the arbitration contract as the defamation flows from the letter terminating the contract, the proper forum for determining that dispute is an arbitration tribunal.

(5) That severance and holding of separate tribunals one dealing with the contract and another with the defamation claim might lead to conflicting decisions which might be difficult to implement.

(6) The second defendant is also covered by the arbitration clause because he signed the letter complained of on behalf of the first defendant and not in his own private capacity and any resultant damages from the action herein should the plaint succeed will be met by the first defendant and not the second defendant personally. This is so because the first defendant being a company its activities can only be executed by individuals on its behalf. The action of the 2nd defendant was executed in all the manner and in that regard that does not personally make him liable to the aggrieved party.

(7) It is their stand that if stay is to be granted then the same should be granted for the benefit of both defendants because if stay is granted in respect of the first defendant and not the second defendant the consequences will be absurd as there is a likelihood of arising a scenario of two inconsistent findings by two tribunals leading to two different conclusions.

(8) Holding of different forums for resolution of the dispute might also leading to conflict of law leading to an absurd situation whereby the arbitration proceedings will be governed by the Dutch law while the defamation proceedings will be governed by Kenyan Law.

(9) This court is urged to respect the agreement of the parties and compel them to honour the agreement. On that basis Counsel urged the Court to stop the proceedings and refer the matter to arbitration.

In reply Counsel for the Plaintiff/respondent has opposed the application on the following grounds:-

(1) By asking the Court to award costs of the main suit, the defendant applicant has taken a Step in the matter and so they have disentitled themselves to the reliefs being sought as they have invited the Courts jurisdiction in dealing with the matter. This amounts to taking a step in the matter.

(2) Although authorities relied upon by the applicant tend to show that a tort arising from a contract can be a subject of arbitration, the tort subject of these proceedings is unique as the same has a specific legislation namely the Defamation Act Cap.36 Laws of Kenya which legislation deals specifically with issues of how a claim based on defamation is to be commenced and proved. The legislature has also chosen the forum of adjudication of the same issues namely a court. By virtue of definition a Court does not include an arbitration tribunal. For this reason they maintain that the authorities cited are not relevant because parliament has provided for a forum in which such disputes are to be adjudicated.

(3) It is their stand that parties cannot agree to circumvent what a statute has laid down and if any arbitration clause purports to oust the jurisdiction of the court then those clauses can not be enforced.

(4) That since one party is not party to the arbitration clause the balance of convenience tilts infavour of refusal to stay the proceedings and have the matter adjudicated upon in Court.

On the bais of the foregoing submissions Counsel for the Plaintiff/respondent urged the court to dismiss the application and order that the matter do proceed to hearing in court. But if the court is inclined to stay the proceedings then there should be no order for costs for the main action.

In response to the plaintiff/respondents Counsel's submissions, Counsel for the defendant/applicant reiterated the earlier submissions and then stressed the following:-

(1) That on the basis of the provisions of Section 6(1) of the Act once an application has been filed the court has no option but to stay the proceedings and refer the parties to Arbitration unless if the proceedings fall within the exception which is not the case here as it has not been pleaded that the arbitration agreement is null and void.

(2) Asking for costs does not invite the jurisdiction of the court as what they are seeking are costs occasioned by the proceedings being filed in court instead of them being referred to arbitration.

(3) They still maintain that once there is a link between a tort and a contract containing an arbitration clause there is no severance. Issues relating to the tort have to be dealt with simultaneously with those dealing with the contract in the arbitration proceedings. More so when the Act relied upon by the Respondents, namely the defamation Act Cap.36 Laws of Kenya does not say that such actions must be filed and determined in court only.

(4) Their construction of Section 3(1) of the Arbitration Act is that it does not deal with matters of arbitration only. It is wide enough to deal with tortious matters affected by an arbitration claim.

They still maintain that no step has been taken in the matter and the subject matter of the proceedings is a matter fit for the arbitration proceedings.

On the Courts assessment of the matters in this application it is common ground that there is no dispute that the proceedings have a direct link to two contractual agreements to which both disputants are parties. These agreements have been annexed to the supporting affidavit of the defendant/applicant as annexture DZ1 and DZ 2. It is also common ground that both of these agreements contain an arbitration clause which read "*Dispute resolution. Any dispute, controversy or claim arising out* of or in connection with this agreement or the breach, expiration termination or invalidity thereof that cannot be settled amicability shall be solely exclusively and finally settled under the United Nationals Commission on International Trade Law Rules of Arbitration (UNICITRAL). Judgment upon the award made by the arbitrators will be final and binding. The parties were to agree that:-

(i) The appointing authority shall be International Chamber of Commerce of Paris, France.

(ii) There shall be three (3) arbitrators

(iii) The piece of arbitration shall be Amsterdam, the Netherlands.

(iv) The language to be used in the arbitration proceedings shall be English

31.2.<u>Local proceedings</u>: Notwithstanding clause 31.1 Philips is entitled to start local proceedings in order to recover over due payments, to seek interim relief's, and or to request interim conservatory measures to be taken in order to secure its interests under this Agreement".

The clause corresponding to 31.2 in DZ.2 is clause 5.3

It is also common ground that the initial operational agreement was DZ.1. However DZ.2 came into being as a result of restructuring of the 1st Defendants operations to which the plaintiff was agreeable. Annexture DZ-3 issued first and that is what led to the signing of annexture DZ -2.

In pursuance of the said agreements the second defendant wrote on behalf of the 1st defendant exhibit DZ-4 dated 2 December 2004 terminating annexture D2-1 as modified by DZ-2. This is the document which is alleged to contain defamation material. The salient features of the same are:-

(1) In the first sentence it talks of 'we refer'

(2) In paragraph 3 of the letter there is mention of representatives of our companies discussed several outstanding issues."

(3) That "*Philips based on the outcome of these discussions has reasonable grounds to fear that Achelis will default on the performance of certain material obligations under the agreement, Philips has decided to terminate the Agreement immediately per date of this letter*."

(4) Paragraph 4 "*In Philips opinion Achelis breached its obligation with regard to adhering to the general Business Principles of Philips (A.1.8. I) and is now – compliant with local law (F/7/art.29.1).*

(5) *In addition Philips establishes a lack of progress in setting up the service organization.*

(6) *Paragraph 1 of page 2 – We refer to the clause in the agreements that govern our relationship after termination and expect Achelis to adhere to the obligations therein. We demand that Achelis ceases the sale and distribution of Philips medical equipment as well as service activities if any.*

(7) *Paragraph 2 page 2 – "Philips reserves its rights especially with respect to over due payment.*

The contents of this letter annexture DZ – 15 what is alleged to have given rise to the defamation action which the plaintiff alleges were personally authorized, circulated by the second defendant for which action he should be held liable. It is contended, this action is distinct from the company' action in the contract and is either incapable of arbitration, or it does not fall into the class of actions that can be arbitrated upon or that the governing legislation precludes it from being an arbitral action.

The same contents of DZ-4 are the ones that the defendant applicant is banking on to show that they fall within the arbitration law as arbitration action in the circumstances of this case.

Both parties relied on common provisions of law with the defendant applicant saying they are within the law while the plaintiff/respondent saying they are not. In disposing off the application herein, the court has to answer the following questions.

(1) Whether there is an arbitration, agreement binding on the parties herein.

(2) *Whether the second defendant is a party to that arbitration Agreement.*

(3) *Whether the defamation Action is covered by the said arbitration agreement.*

(4) Should the court find that the arbitration agreement exists and is binding on the contracting parties and at the same time find that the defamation Act Cap.36 Laws of Kenya envisages the disposal of disputes arising from it to be settled by a court, of law as opposed to a tribunal, a question will arise as to whether the action can be severed so that the one involving the first defendant to go to the tribunal while that involving the second defendant to proceed in the current forum.

(5) Whether the defence have taken a step in these proceedings which disentitles them to the reliefs sought.

(6) Whether the proceedings are to be stayed or not.

The law conferring jurisdiction on this court to deal with this matter is the Kenya Arbitration Act No.4 of 1995. For purposes of the respondent's argument "a court" is defined in Chapter 2 Laws of Kenya, the interpretation and general provisions Act as "means" "any Court of Kenya of competent jurisdiction. Section 3(1) of the Arbitration Act defines both an arbitration agreement and an arbitration party. An arbitration agreement is defined as "means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. Where as a party is defined as "*means a party to an arbitration agreement and includes a person claiming through or under a party*".

Applying these two definitions to the facts herein it is clear that by virtue of annexture DZ-1 and DZ-2 containing arbitration clauses, they qualify to be called and are in fact called arbitration agreements. As

per the definition of a party this wound include officers acting on behalf of companies. In the circumstances of this case the Plaintiff and 1st defendant being companies, they are abstract persons. They are abstract bodies vested with legal personality. But their day to day activities is run by human persons that is why the 2nd defendant executed DZ-4 using. Plural as "*we in Philips*". Likewise that is why a director of the Plaintiff has sworn a replying affidavit. It is the finding of this court that the second defendant qualifies to be a party to the arbitration agreement as a party claiming through or under the first defendant. In fact the salient features of the letter DZ -4 as set out herein earlier on in this ruling shows clearly that there was nothing.

Personal that the 2nd defendant did as far as the alleged defamatory words are concerned. Whatever he did, he did so under the vesture of the 1st defendant only as its mouth piece. This is the only reasonable conclusion as this court does not see how else the plaintiffs could have found it fit to join the first defendant in this defamation suit.

Having established that DZ-1 and DZ-2 are arbitration agreements and that the second defendant is also a party to them the court proceeds to determine whether this defamation action is covered by the arbitration clause. The clause has already been set out herein. Reliance has been placed on the case of ASTRO VENCEDOR COMPANIA NAVIERA S.A VERSUS MABANAFT G.M.B.H.(1970) Vol.2 Lloyds reports 267 where Mocatta J. after setting out the facts of the case reviewed cases decided on the subject. One of the cases relevant was the case of WOOLF VERSUS COLLIS REMOVAL SERVICE [1948] 1 K.B which dealt with a question whether a claim for damages in tort fell within an arbitration clause. In this case an action was brought claiming damages for breach of contract or in tort. The defendants applied to stay the action and succeeded not withstanding that the plaintiff had an alternative claim in tort. At page 270 the last paragraph the learned judge observed "*The arbitration clause in the present case is as to the subject matter of claims within its ambit in the modest possible terms. That clause is not in terms limited to claims a rising "under" the contract. It speaks simply of claim. This of course, does not mean that the term applies to claims of every imaginable kind. Claims which are entirely un related to the transaction covered by the contract would no doubt be excluded; but we are of the opinion that even if the claim in negligence is not a claim under the contract yet there is a sufficiently close connection between that claim and that transaction to bring the claim within the arbitration clause even though framed technically in tort. A claim so framed in the REPOLEMIS AND FURNES, WITHY & CO.LTD [1921] 3 KB 560 as falling within an arbitration clause within the contract*". At paragraph 2 on page 271 the learned judge said "*I think therefore that the right conclusions to draw from this decision and the other authorities cited is that if a dispute arises between two parties to a contract containing a wide arbitration clause and that dispute concerns something done or not done under the contract, a claim of damages in tort will fall within the ambit of the arbitration clause if there is a sufficiently close connection between that claim and the dispute. The decision must in every case depend upon the facts, but the court should if the circumstances allow lean in favour of giving effect to the arbitration clause to which the parties have agreed*" The foregoing gave rise to the holding that if a dispute arose between two parties to a contract containing a wide arbitration clause and that dispute concerned something clear not done under the contract a claim for damages in tort fall within the ambit if the arbitration close of there was a sufficiently clause connection between that claim and the dispute.

As per the above principle the ingredients that this court must look for in deferming whether the defamation claim falls within the arbitration clause are:-

(1) There must be an arbitration clause

(2) It must be widely drafted.

(3) The defamation claim must be in relation to something done or not done arising from the contract.

(4) There must be a close connection between what is complained about and the contract.

Applying these ingredients to the matters herein it is clear that indeed there exists an arbitration clause. The same is widely drafted as it employs words such as "Any dispute, controversy or claim arising out of

or in connection with this agreement".

"*Any dispute" can embrace defamation "Controversy"* arises as to whether DZ-4 is defamatory or not. "Arising out of" is covered because DZ-4 arises out of the contract in DZ1-2. It also has connection with the contract as it arises out of termination of the contract. As for anything done or not done is also covered as it arises from something done in connection with the contract namely to terminate the contract. Something not done is also covered as the termination was supposed to be done without necessarily including words capable of having a defamatory interpretation.

It is therefore the finding of this Court that DZ-4 is within the contract.

As regards severability, it arises where it is possible to sever the action against the first defendant and have it to go to arbitration leaving that against the second defendant to proceed in court. This arises out of the argument by the plaintiff's Counsel that the claim against the second defendant can only be adjudicated under the defamation Act Cap.36 Laws of Kenya. As submitted by the applicants Counsel a perusal of all the provisions in this Act one finds nothing that suggests that matters affected by this legislation cannot be referred to arbitration. For this reason it is therefore the finding of this court that where such matters have a claim or are affected by an arbitration clause they can be a subject o f an arbitration proceedings. There is therefore no need for governance. Such a procedure has been found and held undesirable by the Court of Appeal in the case of NIAZSONS (K) VERSUS CHINA ROAD AND BRIDGE CORPORATION KENYA LTD [2001] KLR 12 where it was held inter alia by the Court of Appeal that the policy of the law is that concurrent proceedings before two or more for a disapproval. Section 6(1) of the Arbitration Act of 1995 did not permit parallel proceedings to be handled simultaneously. Upon the bringing of an application for stay of proceedings under Section 6(1) of the Act, the Respondents duty to file a written statement of defence was suspended.

On the basis of this authority, this court having found that DZ-4 is covered by the arbitration clause, severance of proceedings is disapproved. In any case the action is so intertwined that there is no clear boundary as to where the action against the 1st defendant ends and that against the 2nd defendant begins. They are one and the same. This is confirmed by the fact that a reading of DZ – 4 shows clearly that the 2nd defendant was not writing the letter, in his personal capacity, but in his official capacity.

As for the issue taking a step in the matter, the argument of the plaintiff has arisen because of the applicants request for costs of the main action. The case of NIAZSONS K LTD SUPRA spells out the steps that such an applicant is required to do in order to be entitled to the relief. In this case it was held inter alia that all that an applicant for stay of proceedings under Section 6(1) of the Arbitration Act l995 is obliged to do is to bring his application promptly. The court will then be obliged to consider three things.

(a) Whether the applicant has taken any steps in the proceedings other than the steps allowed by the Section.

(b) Whether there are any legal impediments or on the on any validity operation or performance of the arbitration agreement and

(c) Whether the suit indeed concerned a matter agreed to be referred to arbitration.

Applying the foregoing principle to the facts herein, all that this court is required to look into has been satisfied because:

(i) It has already ruled that there is a valid arbitration clause binding on the parties

(ii) No impediments have arisen in respect of the same as none of the parties have questioned their validity.

(iii) It has ruled that the defamation claim has close connection with the contract and so it is within the arbitration clause and is therefore arbitrable.

(iv) It has ruled that in line with the guidance provided by the court of appeal, severance is not approved and so the proceedings will be in the forum which is the arbitration proceedings.

(v) It has also ruled that since the second defendant was acting on behalf of the first defendant, he is covered as a party under the arbitration clause in the contract as per the definition in Section 3(1) of the Act.

All that remains is whether the applicant has complied with Section 6(1) of the Act. In order to access the facility the applicant simply entered appearance and filed the application subject of this ruling. In the same authority quoted above the right to file defence stood suspended. This court finds that the applicant has complied with Section 6(1) of the Act. Having complied with that Section then what is left is for this court to follow the command in the said proceedings which is "to stay the proceedings". The section reads: 6(1) A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings. Stay the proceedings and refer the parties to arbitration". The applicant entered appearance to gain locus standi in the matter. Taking any other step in the proceedings is limited to filing of an application for stay.

The inclusion of words costs of the main action cannot amount to taking a step in the proceedings. This finds an answer in the case OF INDIGO EPZ LIMITED VERSUS EASTERN AND SOUTHERN AFRICA TRADE AND DEVELOPMENT BANK [2002] 1 KLR 810, where Mbaluto J. held inter alia that in an agreement where parties have agreed to refer disputes to arbitration the position is that the jurisdiction to deal with sustentative disputes and differences is given to the arbitrator and then Kenyan Courts retain residual jurisdiction to deal with peripheral matters and to see that any disputes or differences are dealt with in the manner agreed between the parties under the agreement.

Since the proceedings are merely stayed the court still has its residual power on the issue of costs which can not be exercised until the mater comes back to it in the form of enforcement of an arbitral award or trial where arbitration proceedings have failed to materialize. This cannot be taken to have any effect as there is no move to strike out the pleadings. It is only after the plaint is dealt with that the issue of costs on the main action can arise. Once a decision to refer the matter to arbitration is reached the right of the court to rule on costs for the main action is suspended and remain so until parties came back to after arbitration. The request is therefore premature and can either be ignored or suspended.

In conclusion this court is inclined to allow the application dated 31st August 2005. And stay the proceedings and refer parties to arbitration in terms of file arbitration clause.

(1) The arbitration clause is binding as the same is not being challenged.

(2) The clause is widely drafted to include the defamation claim herein.

(3) Cap.36 Laws of Kenya does not bar a defamation claim from being referred to arbitration where the same arises from or has close connection with an arbitration clause.

(4) The defamation claim herein has close links and connection with the arbitration clause in the contract as it arises from the letter terminating the contract.

(5) By recognized principles of laws severance of disputes is disapproved and there is no justification for severing the one subject of these proceedings.

(6) The claim against the 2nd defendant is one and the same as that of the 1st defendant and that is why the two were sued jointly. Since the 2nd defendant was actions behalf of the 1st defendant he is deemed to be a party to the arbitration clause in the contract as per the definition in Section 3(1) of the Arbitration Act.

(7) The applicant has complied with Section 6(1) of the Act as they simply entered appearance and filed

the application for stay of proceedings.

(8) Request for costs for the action does not affect the right to stay proceedings as the same is premature or alternatively is still within the residual powers of the court as it can only be exercised after parties come back to it with an arbitral award or otherwise.

(9) Once a decision has been reached by the Court on the facts before it to refer the matter to arbitration, the court has no alternative but to follow the command in Section 6(1) of the Act by the use of the words “shall” to stay the proceedings and this is what the court has done.

(10) The applicant will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2007.

R.N. NAMBUYE

JUDGE