IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT COURT 10, AREA 11, GARKI, ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE S. B. BELGORE

MOTION NO. FCT/HC/M/9029/2021

DATE: 04-07-24

B E T W E E N

1. **PHILKO TRAVEL AGENCY LIMITED**
2. **MR. PHILIPPE WHBE**

} **PLAINTIFFS/APPLICANTS**

AND

1. **EGYPTAIR AIRLINES**
2. **ACCESS BANK PLC**

} **DEFENDANTS/RESPONDENTS**

R U L I N G

(DELIVERED BY HON. JUSTICE S. B. BELGORE)

The Plaintiffs/Applicants vide a Motion on Notice with Motion No. M/9029/2021 dated 6th day of December, 2021, brought pursuant to **Order 43 Rule 1** of the Rules of this Court and **Section 2 of the Arbitration and Conciliation Act** prayed the Court for a single relief.

It is for leave for the 1st Plaintiff to revoke the Arbitration Agreement between it and 1st Defendant as contained in Article 22 of the General Sales Agency Agreement dated 2007. And for scheduling the adjourned suit for hearing in this Court.

The application is premised on 7 grounds. They are;

1. That upon the stay of proceedings of this case pending Arbitration, Plaintiffs had issued Notice of Arbitration on IATA in accordance with IATA Arbitration Rules.

2. IATA promptly notified the Plaintiffs that IATA does not arbitrate between Airlines and their agents and so lacked jurisdiction to arbitrate.

3. The intentions of the parties herein to settle their dispute via Arbitration under the Arbitration Rules of IATA has become impossible, IATA's lack of jurisdiction.

4. That a Notice of Revocation of the Arbitration Agreement has been served on the 1st Defendant by the Plaintiffs, but the 1st Defendant, has failed, refused or neglected to accede to the revocation of the Arbitration Agreement.

5. That the said lack of jurisdiction by IATA has rendered the Arbitration agreement impossible to perform and therefore revocable.

6. That the Court is empowered, by the Arbitration and Conciliation Act LFN 1990 to grant leave to a party to an Arbitration Agreement to revoke same.

7. That the only option left is to litigate the dispute.

In support of this application is a 15 paragraphs affidavit with 6 (six) Exhibits attached and a written address. He placed reliance on the depositions contained in the affidavit and as well adopted his written address as his oral argument in urging the Court to grant his application.

He further submitted that the Court should strike out the 1st Respondent's Motion on Notice with Motion No. M/336/2022 seeking extension of time to regularize their counter affidavit filed out of

time. He equally urged me to strike out the counter affidavit already filed.

The 2nd Respondent that was present in Court did not object.

The Exhibits attached are as follows;

Exhibit 1 is the Plaintiffs' mail to IATA requesting Arbitration in line with the agreement.

Exhibit 1A is the request for Arbitration.

Exhibit 1B is the General Sales Agency Agreement dated 2007 containing the Arbitration agreement.

Exhibit 1C – is the Motion of the 1st Defendant urging the Court to refer the matter filed in Court to IATA for arbitration in line with the agreement.

Exhibit 2 – is series of mail from IATA declining jurisdiction to arbitrate.

Exhibit 3 – is the E-mail exchange between 1st Plaintiff and Travel Agency (IATA) Commissioner for Europe.

Exhibit 4 – is IATA Arbitration Rules.

Exhibit 5 – is the Notice of Revocation of the Arbitration sent to the 1st Defendant.

Exhibit 6 – is the 1st Defendant's letter declining to revoke the arbitration agreement.

I think at this juncture, the brief facts of this case will be necessary. The Court had made an order for stay of proceedings in line with the arbitration agreement between the 1st Plaintiff and the 1st Defendant contained in the General Sales Agency Agreement (GSA) dated 2007. The order staying proceedings was made on the 27th February, 2018. According to the Plaintiffs/Applicants, IATA had responded that they do not possess the jurisdiction to arbitrate between an airline and its agents. See Affidavit in Support, particularly paragraphs 3, 4 and 5.

On the contrary, the position of facts according to the 1st Defendant/Respondent is that the Plaintiff/Applicant has not followed the provision of the Rules of Arbitration that provides that request for Arbitration shall be made in writing to the Director General of IATA. See paragraph 5(x), (xiii), (xvi) and (xvii) of the counter-affidavit respectively.

In their written addresses, they both submitted one issue each for determination in resolving this application.

According to the 1st Defendant, the issue for determination is:

> "whether the Plaintiffs can validly invoke the jurisdiction of this Honourable Court to revoke the Arbitration Agreement between the

> Plaintiffs and the 1st Defendant on the ground that the Arbitration agreement has become impossible of performance when the right procedure to commence arbitration under the IATA rules of arbitration has not been complied with?"

While the Plaintiffs/Applicants couched its own thus;

> *"Whether by the refusal of or lack of jurisdiction of IATA to conduct the arbitration as agreed by parties, the Arbitration agreement is revocable at the instance of the 1st Plaintiff, a party to the arbitration agreement"*

It is the submission of the Applicant's Learned Counsel that parties freely chosen IATA arbitration as the tribunal of their own constitution and choice for the settlement of their dispute and that no other forum shall be employed for such an arbitration. He referred to the case of **MEKWUNYE VS. IMOUKHUEDE (2019) L.P.E.L.R. – 48996 (SC).**

The crux of this application according to Mr. Okeke who is the Applicant's Counsel is that IATA Arbitration Clause has been irretrievably frustrated because IATA declined jurisdiction to arbitrate

between them and as such the parties to the contract have been relieved of any obligation to perform the contract. He cited the case of **OBAYUWANA VS. GOVERNOR BENDEL STATE & ANOR.(1982) L.P.E.L.R. – 2160 (SC).**

He further contended that it behooves either party to initiate the Arbitration by a request to the Director General of IATA as stipulated under the rules and that the 1st Defendant/Respondent who did nothing to ascertain the jurisdiction of IATA to so arbitrate is estopped from contending that there is no jurisdiction to arbitrate.

He finally submitted that the Defendant has responsibility also to refer the matter to IATA for adjudication. He made reference to the case of **BILANTE INTERNATIONAL LTD. VS. NDIC (2011) L.P.E.L.R. – 781 (SC).**

As for the 1st Defendant's Counsel he submitted that this Court cannot assume jurisdiction to revoke the arbitration Clause under the IATA rules of arbitration as the necessary steps to commence arbitration under the IATA rules have not been taken by the Plaintiffs and as such impossibility of performance has not arisen. He referred to the case of **UAC VS. MACFOY (1961) 3 ALL E.R.** He argued further that initiation of arbitration under the IATA rules of arbitration is to be made to the Director General IATA in writing. And that the

Plaintiffs have not shown any request for arbitration directed to the Director General of IATA in Montreal Canada. What they did and shown is a series of email to customer care officers and travel agent Commissioner for Europe.

He now contended that there is no where that request in writing to the Director General of IATA for arbitration under IATA rules can be said to have been complied with by email to either customer care of IATA OR TO THE TRAVEL AGENT Commissioner for Europe. He said the law is also very clear that where a mode for doing a thing or performing an act is expressly stated, that mode and no other must be employed. He cited the case of **AKANDE – ADEOLA & ANOR. VS. SEGUN & ORS.(2015) L.P.E.L.R. – 40031 (CA).**

I have considered the arguments and submissions of both Learned Counsel for and against the grant of this application.

However, I want to start by resolving the issue of counter affidavit which the Applicants' Counsel urged the Court to strike out from its record. The Learned Counsel to the 1st Defendant was not in Court on the 12th February, 2014 when this instant application was moved in Court and ruling reserved.

It would be recalled however, that on the 20th January, 2022 the said counter-affidavit was regularized vide a Motion on Notice

with Motion No. M/336/2021 which the Court graciously granted. And as such, the counter affidavit has formed part of record of this Court in this case and the Court cannot jettison it or close its eyes against the said counter affidavit.

So, the application of the Applicants' Counsel to strike out the counter affidavit cannot be granted and it is hereby refused.

Now, what is the merit of this application? There is no doubt that there is a valid arbitration agreement between the parties. Secondly, both parties agreed that the arbitration shall be conducted according to the IATA rules of arbitration. See **Clause 22 General Sales Agency Agreement**.

Article 2 of the IATA Rules provide thus:

> *"Where parties have agreed by means of an arbitration clause in an agreement that any dispute arising between them concerning the agreement shall be settled under IATA Arbitration Rules, any party may initiate arbitration proceedings by submitting a request in writing to the Director General of IATA"*

The big question now is did the Plaintiffs/Applicants comply with the above provision of the Rule when initiating the process of arbitration under the General Sales Agency Agreement dated 2007?

Without wasting time, the answer is capital NO. This fact was not denied by the Applicants. This is because, they said they sent an email to the customer care of IATA which process and procedure is at variance with what the rule says. See paragraphs 3, 4 and 5 of supporting affidavit and Exhibit 1, 1A, 1B and 1C respectively.

The law is trite and settled from plethora of unbroken chain of authorities, that the cardinal principle in the interpretation of statutes is that the meaning of a statute or legislation must be derived from the plain and unambiguous expression or words used therein rather than from any notion that may be entertained as to what is just and expedient.

The literal rule of interpretation is always preferable. See **PDP & ORS. VS. INEC & ORS. (supra).**

For the above reason, I agree entirely with the 1st Defendant/Respondent's Counsel when he wrote at paragraph 4.11 of his written address thus;

> *"Thus for the Plaintiffs to succeed in this application, they must show that they have made a request in writing to the Director General of IATA and not some faceless, behind the screen customer care officer who is probably an out sourced staff and who is employed to deal with customers' complaint in relations to the actions of IATA"*

Finally, for the Applicants to succeed in their claim that there is frustration and that the performance of the Arbitration Agreement is impossible, they have to follow the procedure as laid down by Article 2 of the IATA Rules.

Therefore, I find no merit in this application and it is hereby refused.

Signed

S. B. Belgore
(Judge) 04-07- 2024