ANTONYM.LIFE v MINT MANAGEMENT TECHNOLOGIES (PTY) LTD
2021 SCJ 10

SC/COM/PWS/00244/2018

IN THE SUPREME COURT OF MAURITIUS
(Commercial Division)

In the matter of:-

Antonym. Life

Plaintiff

v.

Mint Management Technologies (Pty) Ltd

Defendant

INTERLOCUTORY JUDGMENT

The plaintiff is claiming from the defendant the sum of ZAR 2,203,464 or its equivalent in Mauritian rupees at the exchange rate prevailing at the time of service of the notice '*mise en demeure'* as damages and prejudice together with ZAR 40,000 or its equivalent in Mauritian rupees representing recoverable costs pursuant to the indemnities for non-performance of the defendant's contractual obligations under the Master Services Agreement ("MSA").

The gist of the plaintiff's case as per the averments in the plaint with summons ("plaint") is that in September 2016, the plaintiff approached the defendant with a view to developing a new software application aimed at the automation and integration of its users' life and lifestyle planning which the plaintiff was to commercialise for profit as from 01 March 2017. Following presentations made by the defendant, a document entitled "Solution Go to Market" ("SGTM") comprising a four-phase software development approach was presented to the plaintiff on 21 October 2016. On 25 October 2016, a 'letter of Intent 002595' was issued by the defendant to the plaintiff and same was signed on 25 and 28 October 2016 and pursuant to that document the defendant was appointed as the software developer. Subsequently, on 15 January 2017, the MSA was signed between the parties. As part of the scope of services, the defendant was required to prepare and deliver a Master Project Plan to the plaintiff. In spite of two payments of ZAR 550,560 and ZAR 450,000 in January 2017,

the defendant failed to deliver the services and deliverables on the agreed delivery date that is 28 February 2017. The defendant also failed to provide the Project Master Plan, the developer testing and/or any periodic report for each milestone, detailed invoices, developer testing and detailed invoices setting out specifics. It is further averred that the plaintiff had to postpone the launching to 01 May 2017 and subsequently to 01 July 2017 as the defendant failed to meet the deadline. In March 2017, the plaintiff made a further payment of ZAR 1,052,904 as a last attempt to have the software development completed but the defendant failed to deliver the application. The plaintiff terminated the MSA because of the defendant's non-performance of its contractual obligations.

Before filing its plea, the defendant raised the following preliminary objections which read as follows:

1) *The defendant avers that the Supreme Court of Mauritius does not have jurisdiction to hear and entertain the plaint with summons dated 07 March 2018 entered by the plaintiff since by virtue of Clause 21 of the Master Services Agreement referred to at paragraph (B) 9 and following the plaint with summons, the plaintiff and the defendant have expressly agreed on a dispute resolution mechanism which prescribes mediation in accordance with the International Arbitration Act 2008 as the last resort, as opposed to a court action.*

2) *The plaintiff having failed to comply with the agreed dispute resolution mechanism, the defendant is not agreeable to submit to the jurisdiction of the Supreme Court of Mauritius and therefore moves that the present plaint with summons be set aside. With costs.*

It is common ground that the respective representative of the plaintiff and the defendant signed the MSA and both parties were bound by the said agreement which was produced as Document P with the consent of both Counsel in Court.

The contention of the plaintiff that the defendant cannot raise the preliminary issue of jurisdiction as it has already submitted to the jurisdiction of the Court by asking for particulars is misconceived inasmuch as it is now settled that the "*exception d'incompétence"* must be raised prior to any other defence being contemplated, it may be raised even after the exchange of particulars, or simultaneously with the plea on the merits, but not after issues

have been joined and subsequent to the filing of the plea, *vide* **Clanbrassil Co. Ltd & Anor v Copex Management Services Ltd & Ors** [2012 SCJ 192], **Fast Track Contracting Ltd v Mella Villas & Anor** [2016 SCJ 446] and **Dr Navinchandra Ramgoolam GCSK FRCP v State of Mauritius** [2020 SCJ 91]**.**

It is apposite at this stage to have a close look at clauses 21 and 25.14 of the MSA which read as follows:

> ***21. DISPUTE RESOLUTION***
>
> *21.1 If a dispute arises out of or in relation to this Agreement, no party may commence court or arbitration proceedings (other than proceedings for urgent interlocutory relief) unless it has complied with this clause.*
>
> *21.2 A Party to this Agreement claiming that a dispute has arisen under or in relation to this Agreement must give written notice to the other Party specifying the nature of the dispute. On receipt of that notice by the other Party, the Parties' representatives must endeavour in good faith to resolve the dispute expeditiously and failing agreement within 20 Business Days of the dispute, either Party, by giving notice to the other, may refer the dispute to the Parties' Chief Executive Officers (or their nominees) whom, each Party must ensure, must cooperate in good faith to resolve the dispute within 20 Business Days of the dispute being referred to them.*
>
> *21.3 If the Chief Executive Officers (or their nominees) fail to resolve the dispute within 20 Business Days of the dispute being deferred to them, the Parties must, at the written request of either party and within 10 Business Days of receipt of the request, submit to mediation, expert evaluation or determination or similar techniques agreed to by them.*
>
> *21.4 If the Parties do not agree within 5 Business Days of receipt of the notice referred to in clause 21.3 as to the dispute resolution technique and procedures to be adopted, the time table for all steps in those procedures, and the selection of compensation of the independent person required for such a technique, then the Parties, must mediate the dispute in accordance with the International Arbitration Act of Mauritius, 2008.* (underlining is mine)

25.14 ***Governing law and jurisdiction:*** *This Agreement is governed by the laws of the Republic of Mauritius. Each Party irrevocably and unconditionally submits to the exclusive jurisdiction of the courts operating in Mauritius.*

Learned Counsel for the defendant has submitted that the MSA is an international arbitration agreement inasmuch as the plaintiff and the defendant had their places of business in different States namely in Mauritius and in South Africa at the time of the signature of the agreement and clause 21.4 of the MSA provides that "*the parties must mediate the dispute in accordance with the International Arbitration Act of Mauritius 2008."*

Learned Counsel for the defendant has also submitted that the intervention of the Court should be kept to a strict minimum and focus should be given to the intention of the parties at the time they entered into the agreement. Clause 21 accordingly provides for a dispute resolution mechanism whereby the parties should first resolve to negotiation prior to involving a neutral third party who will have the power of imposing a binding decision on the parties. Learned Counsel has also invited the Court to consider clause 21 as Mediation - Arbitration (Med-Arb) clause which according to Counsel is also an arbitration clause and if there has been an obvious omission in the drafting of the said clause, the Court should seek to set it right.

Learned Counsel has further submitted that clause 21 is a valid arbitration clause and by its nature, it survives the termination of the MSA. He also submitted that it was only in the course of the submission of learned Senior Counsel for the plaintiff in Court on 05 July 2019 that the plaintiff has, for the first time, admitted that there was a "*dispute*" between the parties. He has submitted that the plaintiff should first comply with the agreed dispute resolution mechanism prior to entering the present case and the plaint should accordingly be set aside.

Learned Senior Counsel for the plaintiff has submitted that clause 21 is a dispute resolution clause and not an arbitration agreement within the meaning of section 2 of the International Arbitration Act. Learned Senior Counsel has also submitted that it is common ground that the contract has been terminated by the plaintiff, that there is a dispute and by its conduct the defendant has waived its rights to negotiate and mediate. It has further been

submitted that the notice '*mise en demeure'* was served on the defendant on 10 August 2017 and it has remained unanswered up until now.

Before deciding whether or not this Court has jurisdiction to hear and determine the present plaint, it is apposite to analyse clause 21 of the MSA and look at the intention of the parties at the time of signing the contract before determining whether the said clause is a mediation-arbitration clause or not.

In the manual **International Arbitration and Mediation – A Practical Guide** by Michael McIlwrath and John Savage, published in 2010 by Kluwer Law International BV, Netherlands, at page 85, the authors expressed their views that *parties to any international contract should consider whether it is opportune to include the requirement of mediation before proceeding to final and binding resolution in arbitration or court litigation, in order to increase the probabilities of settlement. A dispute resolution clause that contains both mediation and arbitration requirements is known as a "step" or "tiered" clause, because dispute resolution is sequenced beginning with a non-binding process such as mediation and ending with a binding process such as arbitration or litigation. The sequence also stages dispute resolution so that the least burdensome procedure for the parties (the non-binding process) is attempted first.* (underlining is mine)

The authors further provide that "*the very foundation of arbitration is party autonomy that is the parties cannot be obliged to opt for arbitration as compared to other available means resolving dispute such as litigation. The intention of the parties to refer a dispute to arbitration can only be ascertained from the wording of the agreement and it is immaterial whether or not the expression 'arbitration or arbitrator' has been used".*

Professor Clive M. Schmitthoff in 1985 at the **5th Forum on International Commercial Law** made a clear distinction between conciliation (or mediation) and arbitration in the following terms:

> *"If the parties agree on conciliation, they want an amicable settlement of their dispute with the active assistance of a third person, the conciliator, they hope at least that an amicable settlement can be achieved. But, if they agree on arbitration, they intend to adopt an adversary stance and will demand the*

resolution of their dispute by a decision, though a decision of private judges of their choice and not judges appointed by the State. Arbitration is thus closer to court proceedings than conciliation."

It is relevant to point out that a mediator is not an arbitrator. An arbitrator is a person who adjudicates on disputes submitted to him by the parties, his functions are *quasi-judicial* in nature. A mediator is one who is requested to mediate or intervene in the matter of the parties to reach an amicable settlement.

Arbitration and mediation are therefore two different processes that allow parties to resolve disputes outside Court. Mediation involves a facilitated negotiation, whereas arbitration involves a third party decision maker. In arbitration, the arbitrator looks into the legal rights arising out of a dispute and makes a binding decision whereas in a mediation, the mediator essentially helps the parties to settle their dispute by a process of discussion and narrowing differences. The mediator helps the parties to arrive at an agreed solution.

According to **Black's Law Dictionary**, arbitration *is a method of dispute resolution involving one or more neutral third parties who are agreed to by the disputing parties and whose decision is binding.*

In **Halsbury's Laws of England, 4th Edition,** arbitration is defined as *the reference of a dispute or difference between not less than two parties for determination, by a person or persons other than a court of competent jurisdiction*.

According to **Russel on Arbitration, 20th Edition**, at page 104, an arbitrator is a private judge of a private court who gives a private judgment called an award. In the words of Sir John Donaldson, 'arbitrators and judges are partners in the business of dispensing justice, the judges in the public sector and the arbitrators in the private sector.'

The term arbitration has been defined in the **International Arbitration Act 2008** ("Act") as "*an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not."*

Sections 4 and 5 of the International Arbitration Act provide that:

4. *Arbitration agreement*

(1) An arbitration agreement -

(a) may be in the form of an arbitration clause in a contract or other legal instrument or in the form of a separate agreement; and

(b) shall be in writing.

(2) An arbitration agreement is in writing where –

(a) its contents are recorded in any form, whether or not the arbitration agreement or the contract has been concluded orally, by conduct, or by other means;

(b) it is concluded by an electronic communication and the information contained in it is accessible so as to be usable for subsequent reference; or

(c) it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(3) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement in writing where the reference is such as to make that clause part of the contract.

5. Substantive claim before Court

(1) Where an action is brought before any Court, and a party contends that the action is the subject of an arbitration agreement, that Court shall automatically transfer the action to the Supreme Court, provided that that party so requests not later than when submitting his first statement on the substance of the dispute.

(2) The Supreme Court shall, on a transfer under subsection (1), refer the parties to arbitration unless a party shows, on a prima facie basis, that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed, in which case it

shall itself proceed finally to determine whether the arbitration agreement is null and void, inoperative or incapable of being performed.

(3) Where the Supreme Court finds that the agreement is null and void, inoperative or incapable of being performed, it shall transfer the matter back to the Court which made the transfer.

In the present case, the title of clause 21 reads as '*Dispute Resolution'* which is another term of 'dispute settlement', a process of resolving disputes between the parties. The clause clearly stipulates that *no party may commence court or arbitration proceedings (other than proceedings for urgent interlocutory relief) unless it has complied with this clause.* The sequence in the clause makes it clear that when a party to the agreement claims that a dispute has arisen, it must, first, give written notice to the other party specifying the nature of the dispute and the parties' representatives must endeavour to resolve the dispute expeditiously and if no agreement is reached within 20 business days of the dispute, either party may give notice to the other party and refer the dispute to their Chief Executive Officers who should resolve the dispute within 20 business days. If the Chief Executive Officers fail to resolve the dispute within 20 days, the parties must, at the written request of either party within 10 business days, submit to mediation, expert evaluation or determination or similar techniques agreed to by them. When the parties do not agree within the 5 business days of the receipt of the notice of mediation as to the dispute resolution technique and procedure to be adopted, the time table for all steps in those procedures, and the selection of compensation of the independent person required for such a technique, then the parties must mediate the dispute in accordance with the International Arbitration Act of Mauritius, 2008.

Though clause 21 is infelicitously drafted, this Court has to apply the ordinary rules of interpretation as set out in **Article 1156** of our **Civil Code** so as to give effect to the common intention of the parties.

Article 1156 of our **Civil Code** provides that-

"On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes."

It transpires from a detailed analysis of the paragraphs of clause 21 that the intention of the parties, at the time of signing the agreement was firstly to resolve the dispute amicably and when the parties fail then to go for mediation and lastly to consider arbitration as per the International Arbitration Act of Mauritius or to initiate proceedings in the exclusive jurisdiction of the courts operating in Mauritius pursuant to clause 25.4. Clause 21.1 unequivocally provides that "*if a dispute arises out of or in relation to this Agreement, no party may commence court or arbitration proceedings unless it has complied with this clause."* The parties have therefore agreed to resolve their dispute first and foremost by negotiation and mediation and if they do not succeed to find a solution, then they may contemplate arbitration or court action. It is relevant to note that the International Arbitration Act does not provide for mediation.

Learned Senior Counsel for the plaintiff has submitted that clause 21 only makes mention of the words '*mediation'* and '*mediate*' and that nowhere has the word 'arbitration' been used. Furthermore, there is no basis for the Court to intervene and rewrite the clause in the contract.

I agree with the submission of learned Senior Counsel for the plaintiff to the extent that this Court should not rewrite the clause of the contract. The role of the Court is to identify the intention of the parties at the time the contract was made and to interpret it. When interpreting a clause, a Judge should avoid rewriting it in an attempt to assist an unwise party.

Clause 21 as drafted gives the parties an opportunity to negotiate and mediate prior to contemplating arbitration in accordance with the International Arbitration Act of Mauritius or court proceedings. I differ with the submission of learned Senior Counsel for the plaintiff that the word "arbitration" has not been used in clause 21 of the MSA. In fact, in the first paragraph of clause 21 the word "arbitration" is mentioned. What is gathered from the intention of the parties is that they unequivocally agreed for resolution of the dispute by way of negotiation and mediation prior to arbitration under the International Arbitration Act or court process. Clause 21 clearly sets out dispute resolution procedures as preconditions for arbitration or court action. In fact clause 21 is more than merely an arbitration agreement inasmuch as it provides for precondition procedures to be complied with prior to arbitration.

In the Singapore case of **International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another [2013 SGCA 55]**, the Cooperation Agreement contained a dispute resolution mechanism which prescribed in clause 37.2 that any dispute shall first be resolved by a specified mediation procedure. The arbitral tribunal rejected the applicant's challenge by way of a preliminary ruling on jurisdiction. The application was dismissed by the High Court and the appellant appealed to the Court of Appeal which reversed an arbitral tribunal's preliminary ruling on jurisdiction. The Court of Appeal held that "*where the parties have clearly contracted for a specific set of dispute resolution procedures as preconditions for arbitration, those preconditions must be fulfilled. In the case before us, it could not be said that the parties intended that some meetings between some people in their respective organisations discussing some variety of matters would be sufficient to constitute compliance with the preconditions for arbitration. This can be seen from, among others, the decision of the United States Court of Appeals for the* ***Seventh Circuit in DeValk Lincoln Mercury, Inc, Harold G DeValk and John M Fitzgerald v Ford Motor Company and Ford Leasing Development Company 811 F 2d 326 (7th Cir, 1987)*** *(more commonly cited as "****DeValk Lincoln Mercury, Inc v Ford Motor Company****"). That was a case involving a motion by the defendants for summary judgment upon the plaintiffs' failure to comply with a pre-litigation mediation clause. The Court rejected the plaintiffs' argument that they had substantially complied with the clause on the basis that they had met the purpose of that clause, which, it was argued, was to give the defendants notice of a potential claim and to allow the defendants to attempt to settle the claim prior to litigation. The reasoning in that case is consistent with our own view that where a specific procedure has been prescribed as a condition precedent to arbitration or litigation, then absent any question of waiver, it must be shown to have been complied with."*

I agree with the contention of learned Counsel for the defendant that the plaintiff should first comply with the step-by-step procedures prior to entering the present case or considering arbitration as provided by the International Arbitration Act.

It is surmised from the averments in the plaint that on 15 January 2017 the representatives of the plaintiff and the defendant signed the MSA and the plaintiff allegedly paid the defendant the total sum of ZAR 2,053,464. The plaintiff intended to launch the product by 01 March 2017 but it was postponed to 01 July 2017 as the defendant failed to complete the deliverables. On 15 May 2017, the plaintiff's representative wrote to the

defendant and expressed its concern about the fundamental material breach of the MSA and gave a delay of 10 days for the defendant to remedy same. On 18 May 2017, the defendant replied and questioned the plaintiff as to whether the defendant should treat the letter as a notice of dispute under clause 21.2 of the MSA. By way of letter dated 19 May 2017, the plaintiff informed the defendant that it was in no way declaring any dispute under the MSA but requested for the source code to be provided. On 20 May 2017, the source code was made available but it was not usable for the purposes of the software development. It is also averred that on 01 June 2017, the plaintiff terminated the MSA by giving the defendant 5 business days' written notice. On 09 June 2017, the plaintiff formally requested the defendant to pay the sum of Rs 2,110,120 failing which the plaintiff would consider legal action against it. It is further averred that on 10 August 2017, the plaintiff caused to serve a *mise en demeure* on the defendant through Nthabiseng Mary Machaba, an Attorney employed at DMO Incorporated Attorney in South Africa. In the said *mise en demeure* the defendant was called upon to reimburse the plaintiff the sum of ZAR 2,203,464 within 5 business days.

At this juncture, it is relevant to note that a *mise en demeure* is merely "*un acte par lequel le créancier d'une obligation demande au débiteur de remplir son engagement. Il s'agit d'une déclaration formelle manifestant la volonté du créancier d'être payé", vide (**Note 54 Rép.Civ. Dalloz Vº mise en demeure).***

Article 1146 of the Mauritian Civil Code provides that "*des dommages et intérêts ne sont dus que lorsque le débiteur est en demeure de remplir son obligation."*

The contention of learned Senior Counsel for the plaintiff is that by causing a '*mise en demeure'* to be served on the defendant, the plaintiff has declared dispute and by remaining idle the defendant has waived its right to negotiate.

It is noted that nowhere in the plaint has any averment been made that the representative of the plaintiff has initiated negotiation or mediation with the defendant. By serving a *mise en demeure* in August 2017, the plaintiff has formally requested the defendant to pay for the damages and prejudice suffered but the plaintiff has as per the averment in the plaint never initiated any negotiation and mediation with the defendant's representative as provided under clause 21 of the MSA.

Learned Senior Counsel for the plaintiff has also submitted that if the Court finds that clause 21.4 is nevertheless an arbitration clause, then the defendant should have lodged a section 5 claim of the International Arbitration Act as the Commercial Division of the Supreme Court is not competent to hear a section 5 claim and the defendant has refused to make a section 5 claim despite being served a notice. I am of the view that it is premature for the defendant to lodge a section 5 claim of the International Arbitration Act as the preconditions (negotiation and mediation) for arbitration have not been complied with.

Having concluded that clause 21 is a set of dispute resolution procedures and preconditions for arbitration or court action and in the absence of any averment in the plaint as to whether any negotiation and mediation were being held, it cannot be said that the preconditions have been complied with. Even though a '*mise en demeure'* was served on the defendant and the latter has remained idle, it cannot be inferred that the defendant has waived its right to negotiate. The present action has therefore been prematurely entered.

For the reasons given above, I uphold the preliminary objections and non-suit the plaint. With costs.

G Jugessur-Manna
Judge

14 January 2021

For Plaintiff:	**Mr B Sewraz, SA –** **Mr D Basset, SC together with** **Mr H Dhanjee, of Counsel**
For Defendant:	**Miss Attorney P Geemul –** **Mr N Hurnaum, of Counsel together with** **Miss J Mootoosamy, of Counsel**