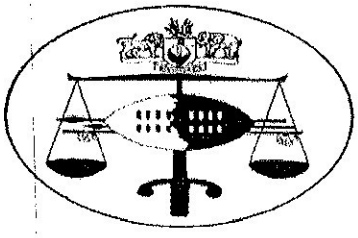
NOTE



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IN THE HIGH COURT OF ESWATINI

J DGMENT

case No. 577/20

HELD AT MBABANE In the

NEGOTIATED BENEFITS CONSULTANTS (PTY) LTD — Plaintiff

and

MEMBERS OF PARLIAMENT and DESIGNATED OFFICE BEARERS — 1st Defendant

PENSION FUND — 2nd Defendant

COMFORT SHABALALA

matter between:

Neutral Citation: Negotiated Benefits Consultants (Pty) Ltd v Members of Parliament and Designated Office Bearers and another (577/20) [2021] szsc 198 (20/10/2021)

Coram: B.W. MAGAGULA AJ,

Heard: 28th September, 2021

Delivered : 20 th October, 2021

SUMMARY Civil Law Plaintiff applies for the matter to be determined on the papers and through interpretation of the clauses of a contract Rule 37 considered _Agreefnent reached at a pre-trial conference Action proceedings by their nature require that oral evidence be led Plaintiff will not suffer any prejudice; Plaintiff Counsel entitled to 012ject to any evidence that contravenes the Parole Evidence Rule Application dismissed Costs to be costs in the cause.

JUDGMENT

INTRODUCTION

[1] In this action, the Plaintiff seek judgement against the Defendant in the sum of E540 000.00, in respect of services rendered. Plaintiff also claims tempora morae interest and costs of suit. Strangely, the Plaintiff also seek 10% collection commissio .

[2] The above claims are founded on a actuarial service agreement entered into by the parties in March 2017. The Plaintiff is a company that trades as NBC eSwatini (Pty) Ltd, dully registered as such, having its business premises at Fincorp Building in Mbabane. The first Defendant are members of Parliament and designated Office bearers pension fund (MOPADO), which is cited, as a company registered in terms of the company laws of the Kingdom eSwatini, having it principal place of business in Manzini.

[3] There is also a second Dbfendant before Court, being Comfort Shabalala. He is the principal officer of the first Defendant. He is said to be responsible for the management of the affairs of MOPADO, the first Defendant.

[4] The Plaintiff" s claim is defended by the Plaintiff and a plea has been filed. The matter has run it's ful course, in terms of rules of Court. Pleadings have

closed and the Registrar has allocated it a trial date. When the parties appeared in court on 1 3 th September 20121 the date on which the matter was allocated for trial, the parties indicated that they still wanted to engage each other in relation to the manner in which the trial will proceed. Mr. Jele indicated that he did not personally attend the pre-trial conference meeting, but he had delegated this to another junior professional in his firm. It appears that, as he was preparing the trial he formed the view that leading of oral evidence would inadvertently contravene the Parole Evidence Rule. The matter was then postponed by consent of the parties to the following day, being 1 4 th September 2021, to allow the parties to engage each other on whether a pre-trial conference can be reconstituted and the one serving before

Court be amended.

[51 On the next Court date, the parties recorded that they were unable to agree in the manner in which the matter should proceed. The point of divergence being that the Plaintiffs Counsel was of the view that this matter ought to be determined on the pape+s, without the leading of oral evidence, Yet, the Defendant's Counsel was of the view that the matter should proceed to trial, as per the agreement in pre-trial minute. More so, because the Plaintiff had insisted action proceedings, as compared to motion and the pleadings had closed. Ordinarily, the matter should have proceeded to trial, where oral evidence is normally led.

[6] The matter was then postponed to the 28 th September 2021 for arguments on whether this matter shoulc! be determined on the papers without extrinsic evidence being led, or oral evidence should be allowed. This judgment is a sequel to those arguments,

BRIEF BACKGROUND FACTS

[7] On or about the 1 7 th March 2017, the parties entered into a written service level agreement, wherein theiPlaintiffwas to provide actuarial services to the Defendant. The service level agreement which in this judgement will be referred to as the "SLA", is an annexure in the papers before Court marked "NBC 1".

[8] When the agreement was entered into, the Plaintiff was represented by it's Chief Executive Officer, Mr. Bonginkosi Dlamini and MOPADO was represented by its Boar chair person, Mr. Marwick Khumalo. The SLA agreement provides for what is termed "actuarial services" and also "other services".

[9] It appears the dispute between the parties arises exactly there. The Defendant allege that their claim emanate from services rendered under the auspices of what was classified as "a tuarial services". Yet, the Plaintiff is of the view that the services under contention were provided in terms of the what is

classification

contemplated under the of "other services .

[10] What the Court is called to determine for now, is not the merits of the contentions issues between the parties. But, whether the matter should go to a fully blowed trial, as normally anticipated in action proceedings or the matter should be adjudicated on the papers as they stand, without extrinsic evidence being led by the parties.

DEFENDANT'S ARGUMENT

[I l] The Defendants submissions in a nut shell are as follows:

11.1 There is no need for the matter to proceed to a fully blown trial since this matter turns oh the interpretation of the written agreement entered into by the parties.

1 1.2 The matter is capal}le of being determined on the papers as they stand, The central issue being whether the Plaintiff's claim has been made within the confines of the respective clauses of the service level agreement.

[12] The Defendant's contention is further that, the agreement between the parties provides two scenarios uhder which the Plaintiff would have rendered its services. First, being the actuarial services which has an agreed rate. Second, being the other services which is provided for in clause 2.3 of the SLA, which are "other services" including although not limited to, reviewing any

policies of the fund, such as investments or pensions and so on. And any other task that the actuarial service provider is suitable qualified to provide, which is not included in the actuarial services. The Defendants further contend that, there is absolutely no reasorå why the parties should lead oral evidence, as the matter pertains and centres around these issues. Therefore, the parties should argue the import of the terms and conditions of the service level agreement and the Court will be able to determine the matter solely on the papers, without the need for extrinsic evidence.

[13] The Defendant also contends that, since there is a written memorum which was signed by the parties, any attempt to introduce extraneous evidence would offend the Parole Evidence Rule. The issues are well delineated in terms of the agreement and there is absolutely no need for witnesses to be called and for oral evidence to be adduced in this matter.

[141 The Defendants further argue that, the Plaintiff is seeking to change the terms of the written contract by attempting to introduce extrinsic evidence to demonstrate that the allegFd services rendered, fall outside the scope of actuarial services as provided for in the service level agreement (SLA). It is contended by the Defendants that such evidence would in essence, contradict the terms of the SLA which requires that the parties must agree on the terms of the services that fall outside what was agreed as the actuarial services. To buttress this argument, the Defendant's Counsel referred this Court to the

case of Osman Tyres & Spares CC and another v ADT Security (Pty) ltd (2020) ZASCA 33. A state ent by Wilmo on evidence which characterise the Parole evidence rule in the foreign terms was also quoted. "in other words, where a jural act is embodied in a single memorial, or other utterances on the parties on the topic are legal material for the purposes of determining what they are the terms of the act".

[151 It is the Defendant's contention that the evidence that is sought to be introduced by the Plaintiff in essence is evidence which will seek to introduce what the parties may or \nay not have said before, during or even after the conclusion of the written contract . The written contract is the exclusive memorial of the agreement between the parties. It contains all the express terms of the contract. As such, it is impermissible for the Plaintiff to attempt to lead oral evidence to prove the terms of what the parties agreed to.

[16] The other argument advance by the Defendants is that, the evidence that the Plaintiff seek to introduce, does not fall within the exceptions of the parole evidence rule. The Defendant urges this Court to reject the insistence by the Plaintiff to have the matter referred to oral evidence. Instead this Court should allow that this matter be determined through the interpretation of the contract that was concluded between the parties.

[17] The Defendant further submi s that, even if the Plaintiff would argue that the necessity of leading oral evidence would be to prove that the claim relates to services that were provided for under clause 6.4 of the agreement under

"other services". Services under this clause, have a procedure which involves that parties must negotiate and agree on the appropriate fee to be charged.

[18] The Defendants argue ithat in light of clause 9.1 of the agreement, which stipulate that the SLA coptains the entire agreement between the parties, no representation, expressly implied or, not contained in the agreement shall be any force and effect, unless reduced into writmg and signed by both parties. In this regard, the Defendant argues that there could not have been an agreement outside this provisions. Even if such evidence is to support that there was an agreement entered into, under the umbrella of "other services" as it was not reduced into writing,

THE PLAINTIFF'S SUBMISSIONS

[19] The Plaintiff contend that tÅese are action proceedings. It is incompetent for the Defendants at this point of the proceedings, to object to oral evidence being led. The leading of oral evidence is a natural progression of a matter instituted under action proceedings that it must go to oral evidence. The Plaintiff argues that, at the conclusion of the pleadings the parties held a pretrial conference. This wa on the 4th March 2021. Subsequent to that

meeting, a pre-trial minute s produced and was signed by representatives of both parties.

[20] The Plaintiff contend therefore, that the parties are bound by the signed pretrial minute which also outlines and reflect the issues that the parties agreed will be determined by this Coult. These issues can only be proved by the leading of oral evideÅce through the witnesses of both parties. The Defendant cannot at this stage make a roundabout turn and seek to change the landscape of the case by objecting to oral evidence being led, yet these are action proceedings wh'ch allow for oral evidence to be led before an issue is determined by the Court. When I read the Plaintiffs heads of arguments and listened to the oral submissions of the Plaintiffs Counsel, I got the impression that both parties are aligned as to the legal principle espoused by the Parole Evidence Rule.l Both parties accept that the law on the parole evidence rule is that extrinsic evidence can not to be introduced where it will seek to contradict, add to Or modify the written contract. Such contract is intended to be the only document binding the parties.

[21] What the Plaintiff high lights though, is that the evidence which it seeks to lead does not in any way contradict the parole evidence rule. The evidence will not add or modify the ervice level agreement that was signed by the parties. Plaintiff further ar ues that, the evidence will infact confirm the import of the agreement signed by the parties. The Plaintiff argues that, notwithstanding clause 9.1 of the SLA which provides that the document contains the entire agreement between the parties, it is clear from the content

of certain clauses [1], that there are other instances where the parties may engage each other, for other services which are not specifically provided for in the agreement.

[22] The Defendants therefope argue that clause 2.3.3 makes room for the Defendant to engage the laintiff "for any other task" which is not included in the written memorial, being the SLA. Such engagement can either be written or oral, so the Plaintiff argues. The Plaintiff further contends that, in the matter at hand, such an engagement was oral [2]. The Plaintiff proceeds to argue that what other way is open for the Plaintiff to prove such subsequent engagement, other than t e introduction of oral evidence. The Plaintiff continues to contend that) such evidence is not sought to contradict the provisions of clauses 2.2 and 2.3 of the SLA, but it seek to prove "the additional or supplemental oral engagement" Such evidence is admissible as it falls within the so called partial integration rule.

[23] The Plaintiff asserts that, it does not seek to change the terms of written contract as alleged by the De ndants but it only seeks to introduce secondary evidence of the SLA content, and according to the Plaintiff, this falls within the exception of the so called partial integration rule. The oral evidence will

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1 Clauses 2,3.3 of the SLAS

2 Reference is made to page 6 at the book of pleading at paragraph 7.

assist the Court in determining the proper interpretation of the SLA, as the services which the Plai tiff rendered, are not included under the banner of "actuarial services" but tlhe SLA acknowledges and makes reference to such. The Plaintiff therefore al'gues that, there is no way in which the Court can be called upon to inter I ret the contents of the "other services" without allowing extrinsic evidence to that effect.

THE LAW

PRETRIAL CONFERENCE

[24] The requirement of partie who desire of having their matter placed on the roll in action proceedings, is imposed by Rule 37 of the rules of the High Court. It states as follows;

> 37. I An attorney desires ofhaving an action placed on the role as referred to in Rule 55 shall as soon as possible after the clause of pleadings and before delivering a notice in terms ofRule 55 A (l) (2) in writing request th.e attorneys actingfor all the other parties to such action to attend a co erence on a date and at a time stated at the request, being not les than 5 or more 10 days after delivery of the request, with the object *t of reaching* an agreement as to possible ways ofdetailing the duration ofsuch trial and in particular as to all or any of the following matters; (i) the possibility of obtaining admission of facts and ofdocuments,' 2 3 4*5*...

[25] There is a plethora of de isions to the effect that the purpose of rule 37 is to afford the parties an ophortunity to decipher ways to curtail the duration of the trial by redefining th issues to be tried [1] . The Court stated the following; "the pre-trial con erence procedure was introduced to shorten the length of trial, to facilitate settlements between the parties, narrow the issues and t kept cost. One of the methods the parties used to achieve this objective is to pnake admission concerning the number of issues which the pleadin s raise Admission offacts made at a rule 37 conference constitut[i] sufficient prove of those facts. The minute ofa pre-trial conferenc may be signed either by a party or his/her representative. Rule 37 is of critical importance in the ligation process. This why this Court had held that in the absence any special circumstances, the parties are not entitled to resilefrom an agreement deliberately reached at a Rule 37 conference And when, as in this, the agreement is confirmed by counsel and are then made ajudgement, the principle applies even with moreforce.

1 Road Accident Fund v Z. CT and others case 16319/2013

In the case of Emma EC for Economic Affairs, Environment and Tourism; Eastern Cape v KLAAS Kruizenga and another 2010 (ASA) SCA

THE PAROLE EVIDENCE RULE

[26] the other issue that is in contention between the parties is the applicability of the parole evidence rule it is therefore important that I state the legal position in respect thereof.

[27] The locus classicus in this area is the case of Johnson v Leal 1980 volume 3 SA 927 at page 930 where Corbet JA stated as follows:

> "It is clear tolme that the aim and effect of this rule is to prevent a party to a c?ntract which has been integrated from seeking to contradict, add or modify the written by refence to extrinsic evidence and in that way redefine the terms of the contract".

Water Meyea AJA[2] observed as follows:

> "Now this Court has accepted the rule that when a contract has been reducedto writing, the writing is in general regarded as . the exclusive memorum ofthe transaction and in a suit between the parties no evidence to prove its terms may be given save the document or econdary evidence or it contest, nor may the content of this such document be contradicted, altered added to or varied by parole evidence,,

2 In Union Government v Viannini Feno Concrete Pipes (Pty) ltd 1941 AD43 AT 47

COURT'S ANALYSIS AND CONCLUSION

[28] The Defendant's Counsel inade the application that the matter be determined on the papers, viva voce, qn the date of trial.

[29] In light of the fact that th's application was opposed by the Defendants, the Court then gave adjourned the matter and gave the parties an opportunity to sit down and re-engage each other again on the contents of the pretrial conference. Unfortunately, the parties failed to reach a consensus. If the parties had agreed and a new pretrial conference minute signed, probably the Court would not have been saddled with deciding on whether the matter should be determined th ough legal arguments or should proceed to oral evidence.

[30] The fact that the parties did not agree, entails this Court to consider whether it can order that the matter be determined on legal arguments especially when there is a pretrial conference minute is in existence which was signed by both parties.

[31] The pretrial minute is partofthe papers before Court found at page 75 at the book of pleadings. It reflects that the conference was held at the offices of Robinson & Bertram, at Ngcongwane building on the 4 th March 2021. It also reflects that representing the Plaintiff was Mr. Linda B. Nkambule and representing the Defendant was Ms Jasmin Dlalnini. I will not border to traverse on all the other issues that were discussed, but of importance, the parties agreed that the P14intiff bears the onus and assume the duty to begin and will commerce with [the leading of evidence. The duty to begin was refeng to the leading of evidence at trial.

[32] The parties also agreed that the issues to be decided by the Court were the following:

"3.4. I whether or nqt the subject servi.ces rendered and invoiced by the Plaintifffall within the scope of "actuarial services " and therefore not liable for additionalpayment.

3.4.2 whether or no the Defendant is liable for the services rendered and invoiced by the Plaintifffall within the scope "other services " and therefore liable for additional payment as invoiced

[33] The parties also agreed that the duration of the trial is estimated to be three days to conclude.

[34] Both parties signed this agr ement.

[35] What comes out of this pre-trial minute is that as of the 5 th May 2021 the parties committed that the matter will go to trial, to the extent that they engage each other on who has the onus to at that point it is clear that the parties agreed and committed that this matter will go to trail and evidence will be led during the tria

[36] The Plaintiff insists to hold the Defendant to be bound by the agreement entered into by the parti s, pursuant to the pre-trial conference. This is deduced from paragraph 4.8 of the Plaintiffs head of arguments. Where the Plaintiff argues states that parties are bound by the their pre-trial minute, which reflects the issues to be determine by the Court. As such, the issues in contention must be ventila!ed through by the leading of witnesses from both sides.

[37] The question that must be answered is; can the Court then interfere with this agreement by the parties and order that the matter be determined through legal arguments contrary to what the parties had agreed to in the

pre-trial conference? And also contrary to the natural pi'ogression of action proceedings?

[38] In the matter of Road Accident Fund [3] (supra), the Gauteng local division of Johannesburg was faced with a similar quagmire. The brief facts of that matter is that the parties had held a pretrial conference on 12th June 2017 in terms of Rule 37 of the rules of that Court. In the pre-trial conference the applicants agreed that the sole cause of the accident in which the Respondents had died, ways the issue of the negligence driving of the deriver. On the 6 th July 2017, at! a pre-trial conference meeting, the matter was certified ready for trial. On computation of the quantum in the dependence action. Counsel for the Plaintiff at that time, who was dealing with the case, had made an admission of this fact. Subsequently an application was made seeking for an order for the withdrawal of the admission that has been made in the pretrial conferenceiheld by the parties and the matter be proceeded with on both merits on and the quantum. One of the contentions that was made by the party that so ght for the pretrial conference to be amended was that the attorney that was +ealing with the

3 Road Accident Fund vs ZCT and other case No. 16319/2013

case acted erroneously in making the admission, and did so without obtaining instructions from the client. The Court refused to accept that the concession has been made erroneously. In making his remarks the Honourable Judge stated that attorneys do not just concede, without investigating a matter and such there is nothing before the Court which suggest th4t the merits of the case were different and complicated that the attorl ey mistook it for another matter.

[39] The rationale being that parties cannot resile from the agreement concluded by it's attorney at a pre-trial conference. This is because it presents to the

other side and to the oUtside world that its attorney has the necessary authority not only to conduct the trial, but also to make concessions at conferences preceding the trial, such as Rule 37 conference, which is pall' of

the trial procedures.

[40] In the matter at hand, Mr*t Jele outrightly conceded that, probably he should not have assigned a juniorlattorney to attend the pre-trial conference meeting. If he had personally attended the pre-trial conference meeting he would have dealt with it differently. As much as the concession is commendable the fact still stands. There is an agreement that is before

Court, which is binding on the parties. The parties dealt with the manner in which the issues will be determined during the trial. Which include that the matter should proceed to trial and oral evidence will be led. The Plaintiff does not wish that that agreement be changed.

[41] The proceedings before Court in their nature, are action proceedings. Ordinarily the natural procession that follows action proceedings is that oral evidence is led at trial. This is what actually the parties agreed to in the pretrial conference meetin [1] . The nature of the application that the Plaintiff moved for the matter to be argued on the papers is now contrary to what the parties agreed to during the pre-trial conference meeting. The Court is called to rule that the matter should proceed to be determined on the papers and on the clauses of the service level agreement, despite the fact that this is not reflected in the pre-trial conference minute and that the proceedings are action proceedings.

[42] When following the arguments advanced by Plaintiffs Counsel, the rationale behind this application is Ihat, if the matter goes to trial, the Defendants will adduce evidence that will contravene the Parole Evidence

Rule. Whatever the Defendants may seek to lead as proof that their claim is under what the parties agreed to be ' 'othell services" was not deliberated by the parties and it was not reduced into writing. Therefore, if the Court can open that window, then at that point the evidence will contravene the Parole Evidence Rule as it will now be extrinsic to what the parties had agreed to in the SLA. The problem with this argument is that in as much as it encapsulates the correct legal position in so far as the contravention of the Parole Evidence Rule is concerned. However, how does the Defendants know what kind of evidence the Plaintiff intends to lead. More especially since it is the Plaintiff's argument that the evidence it intends to lead in Court will not in any way contradict, add to or mo ify the service level agreement. The Plaintiff actually argues that the evidence it intend to lead will confirm the Parole

Evidence Rule.

[45] In light of this contention, how then does this Court predicts whether the evidence which the Plaintiff intends to lead will contravene the Parole Evidence Rule or not without it actually being heard and assessed.

[46] It is not part of the Plaintiffs arguments that if will suffer any prejudice if the oral evidence is allowed and if the witness or witnesses at that point, adduce evidence that violates the Parole Evidence Rule they would be able to object to that parties of the evidence forming part of the record.

[47] The trial Court has all the åecessary powers to regulate the nature of evidence that is to be adduced by Witnesses generally. In particular, the Court is open to listen to objections of any of the counsel, in event the evidence led by the various witnesses is unlawful or that inadmissible. There is no reason why even in this case, the trial Court will not entertain an objection from Defendant's counsel whel'e such evidence that is sought to be adduced contravenes the Parole Evidence Rule.

[48] It is my considered view that when balancing the interest of the parties the Court will lean towards a cautious approach between the conflicting interest of the parties. On one hand the Defendant is of the view that any evidence

that any evidence that may be led on the trial Court will contravene the Parole Evidence Rule. On the other hand, the Plaintiff is of the view that the evidence that it intends to lead will not contravene the Parole Evidence Rule, There is no prejudice in the trial being allowed to proceed in the normal way of allowing witnesses for each party to lead oral evidence. When that process unfolds, if any of the witnesses contravenes any of the rules the evidence . including the Parole Evidence Rule. Any of the counsel will be at liberty to raise that objection before the trial Court, that objection will be dealt with accordingly. The Court will adjudicate on the admissibility or otherwise of that evidence at that time.

49, For the aforegoing reasons, the Court is unable to allow the application for the matter to be determined through arguments and on the pleadings without oral evidence being led.

In the circumstances, the Court makes the following order:

49.1 The Defendant application to dispense with the leading of Ol'al evidence is hereby dismissed.

49.2 The matter to proceed to trial on a date to be determined by the Registrar.

49.3 The costs will be costs in the cause.

B.W. MAGAGULA AJ

B.W. MAGAGULA AJ

HIGH COURT OF ESWATINI

For the Plaintiff: MR. L.B NKAMBULE

For the Defendant: MR. Z.D JELE