

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 6011/2010

In the matter between:

MOSIUOA ERNEST MOFOKENG

Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL OF
THE FREE STATE GOVERNMENT
(DEPARTMENT OF EDUCATION)

Respondent

CORAM:

LEKALE, J

HEARD ON:

7 AUGUST 2014

JUDGMENT BY:

LEKALE, J

DELIVERED ON:

4 SEPTEMBER 2014

The matter was heard on 7 August 2014 and these are reasons for judgment.

INTRODUCTION AND BACKGROUND

- [1] On 7 August 2014 I dismissed the applicant's application for separation of trial issues made in terms of Rule 33(4) of Uniform Rules of Court (the Rules) with costs and indicated that reasons would be furnished on request by either party. The applicant filed a request for such reasons on 25 August 2014 and these are, therefore, my reasons for the order in question.
- [2] The parties are engaged in an action in which the applicant, as the plaintiff, claims specific performance of a contract for transportation of learners concluded between the parties.
- [3] On 18 July 2013 the parties held a pre-trial conference in terms of Rule 37(4) of the Rules whereat they, *inter alia*, agreed that the issues in dispute should be separated in terms of Rule 33(4) for trial purposes and that the trial court shall first adjudicate the question whether the respondent, as the defendant, repudiated or lawfully cancelled the learner transportation contract and that other issues shall stand over for later adjudication. The parties, further, agreed at that conference that the respondent shall bear the onus of proof and the duty to begin in respect of the relevant question. In its plea the respondent raised, *inter alia*, two special pleas.
- [4] When the matter was supposed to proceed to trial on 20 August 2013 the respondent's legal team advised the applicant's legal team that they did not consider the respondent bound by the pre-trial agreement in respect of separation of issues, the onus

and the duty to begin. The matter was, thus, postponed with costs standing over for later adjudication.

- [5] On 26 February 2014 the applicant set the matter down for trial on 26, 27 and 29 August 2014. On 23 June 2014 the applicant launched the instant application which the respondent opposed vehemently.

ISSUES IN DISPUTE

- [6] The parties are effectively at variance on whether or not the issue as to whether the respondent repudiated or lawfully cancelled the contract can be conveniently decided separately from any other question regard being had to the pre-trial agreement and the two special pleas raised by the respondent in the action.

CONTENTIONS BY THE PARTIES

- [7] Mr Pienaar, for the applicant, painstakingly pointed out that the respondent is bound by the pre-trial agreement and there exists no special circumstances for it to resile from the same insofar as it entered into the same after it had ample opportunity to consider the contents, as well as the proposals which were sent to it as a draft Rule 37 minute on 12 July 2013 with the conference being held on 18 July 2013. The respondent's first special plea has not prospects of success because the

applicant's claims, both main and first alternative, are not subject to the provisions of the Legal Proceedings Against Certain Organs of State Act 40 of 2002. The same applies to the second special plea, because the applicant's particulars of claim were amended to indicate that the parties unsuccessfully attempted to settle the dispute by mediation.

- [8] Mr Khoza submitted for the respondent that the pre-trial agreement with regard to separation of issues is not binding on the court insofar as the separation does not facilitate the disposal of the matter. In his view, the two special pleas raised by the respondent should, in line with the usual practice, be disposed of *ante omnia*. According to him the application constituted typical abuse of court process because the issue could have served before the trial court, which is the most competent to deal with the same. The agreement amounts to a wrongly made concession on matters of law and it can, thus, not be supported by the court.

APPLICABLE LEGAL PRINCIPLES

- [9] It is correct, as Mr Pienaar submitted, that a party is not entitled to resile from an agreement deliberately reached at a Rule 37 conference in the absence of any special circumstances in the light of the fact that the rule in question was introduced to shorten the length of trials, to facilitate settlements between the parties, narrow the issues and to curb costs.

(See: **MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another** 2010 (4) SA 122 (SCA) at 126 [6].)

- [10] It is further true, as Mr Khoza contended, that a concession which is wrong in law is not binding on the court and the court does not hesitate to reject the same.

(See: **Matatiele Municipality and Others v President of the RSA and Others** 2006 (5) SA 47 (CC) at par [67].)

- [11] Where a court is approached to sanction separation of issues, it bears the duty to satisfy itself that the separation will serve the desired purpose and it is not just simply bound by the agreement between the parties.

(See: **Adlem and Another v Arlow** 2013 (3) SA 1 (SCA) at 3E – F.)

- [12] A judge seized with the matter is normally the best competent or qualified to make the decision as to whether or not the trial should proceed in a piece meal fashion.

(See: **Sibeka and Another v Minister of Police and Others** 1984 (1) SA 792 (W) at 794H.)

APPLICATION OF LEGAL PRINCIPLES AND FINDINGS

- [13] The respondent's special pleas raise the question whether or not the applicant could institute action against the respondent, as an organ of State, in circumstances where it had not given the respondent, as the defendant, proper notice in terms of section 3 of Act 40 of 2002 and the question whether or not the applicant complied with the provisions of clause 27 of the Learner Transportation Contract, which requires the parties to attempt to resolve disputes amicably by mutual consultation before instituting legal actions.
- [14] As correctly submitted for the respondent, such special pleas, if successful, have the effect of disposing of the matter *ante omnia*. In fact, where applicable, Act 40 of 2002 prohibits institution of legal proceedings against organs of State without a six months' notice having been given to the relevant organ of State. Both special pleas, by their very nature, deserve the attention of the court before anything else.
- [15] In my judgment it was, therefore, not convenient to separate the issues in the manner agreed upon by the parties at the pre-trial conference. I was, further, persuaded by the respondent that it was probably wrong in law for the respondent's legal representative at the Rule 37(4) conference to concede that the respondent bears the onus of proof and duty to begin on the issue in question.

[16] Mr Pienaar, effectively, invited the court to consider the merits of the special pleas raised and I declined to get involved because only the trial court is competent, in my view, to adjudicate such pleas. Sitting as I was, I only had to determine whether or not it was not convenient to separate the issues in the manner desired by the applicant.

[17] I was also of the view that the trial court was the most competent to decide the issue of separation in the present matter for it would be able to weigh up the advantages of such separation against the disadvantages with all the relevant information at its disposal.

[18] The issue identified by the applicant as deserving of separation is, in my view, part of the merits of the matter between parties, while the special pleas are clearly matters of law which can conveniently be dealt with *in limine* without touching on the merits of the matter.

COSTS

[19] In its papers the respondent asked for costs including costs attendant on employment of two counsel. The applicant, on its part, submitted that, in the event of the application being dismissed, costs be reserved or be directed to fall in the main action and that they not include costs of two counsel.

[20] In argument Mr Khoza correctly conceded that the matter did not warrant employment of two counsel and that only costs of one counsel would be fair and appropriate.

ORDER

[21] In the result I issued an order dismissing the application with costs.

L. J. LEKALE, J

On behalf of applicant:

Adv C.D. Pienaar
Instructed by:
Phatshoane Henney Attorneys
BLOEMFONTEIN

On behalf of respondent:

Adv M.G. Khoza SC
Instructed by:
State Attorney
BLOEMFONTEIN