

SOUTH AFRICA / JUDGMENT

**Mister Bread (Pty) Ltd v Member of the
Executive Council for the Department
of Education (102/2010) [2017]
ZAECBHC 21 (20 November 2017)
[2017] ZAECBHC 21**

COURT

Eastern Cape High Court, Bhisho

BEFORE

Hartle

CASE / FILE NUMBER

102/2010

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, BHISHO)

CASE NO: 102/2010

NOT REPORTABLE

In the matter between MISTER BREAD (PTY) LTD Plaintiff/Applicant and MEMBER OF THE
EXECUTIVE COUNCIL FOR THE DEPARTMENT OF EDUCATION Defendant/Respondent

JUDGMENT

(IN RESPECT OF APPLICATION FOR
APPOINTMENT OF A REFEREE)

HARTLE J

[1] The plaintiff launched an application on 3 March 2017 in which it seeks the appointment of a referee as provided for in section 38 of Superior Courts Act, No. 10 of 2013. It says that the parties agreed to such a step in a pretrial conference held on 14 March 2016. The defendant does not deny the agreement, but contends that the conditions for the appointment of a referee have not been met.

[2] The notice of motion is framed in the following terms:

“1. That the examination and financial analysis of the documents discovered by the Plaintiff in Part 1 of the First Schedule of its Discovery Affidavit dated 2 February 2012 be referred to an independent referee appointed by the parties, for enquiry and report.

2. That in the event that the parties do not agree on a referee to be appointed, the court will appoint the independent referee.
3. That the above Honourable Court give the referee such powers as the court deems fit to enable the referee to conduct the examination of the documents and to conduct the enquiry; and that such powers should include, but not be limited to powers to:
 - 3.1 Summon witnesses for purposes of such enquiry;
 - 3.2 To order such witness/es to attend at a time and place specified and to answer questions;
 - 3.3 To order such witness/es to provide specified documents.
4. That the parties share the costs occasioned by the appointment of the referee; alternatively, that costs occasioned by the appointment of the referee be costs in the cause.
5. That the remuneration of the independent referee be determined by the above Honourable Court in terms of section 38 (6) of the Superior Court Act No. 10 of 2013.
6. That Respondent is ordered to pay the costs of this application in the event that Respondent opposes this application.
7. Granting the applicant such further and/or alternative relief as the Honourable Court may direct.”
- [3] The defendant opposes the matter on the bases that the application is premature, and that the relief as set out in the notice of motion towards this end is insufficient and inappropriate.

[4] Summons was issued in the main action on 10 February 2010 for payment

of the sum of R9 728 772.00, comprising of several claims, plus interest at the legal rate from 23 June 2006 for some of the claims,

and from 1 June 2009 in respect of the remaining claims. The plaintiff’s first claim, in its own name, is based on service level agreements entered into by it with the Department of Health for the delivery of bread and other nutritional products to certain schools in the province between 2003 – 2006. This claim is in the sum of R1 305 720.00 and represents the balance alleged to be owing under various agreements concluded from time to time. The second claim relates to similar services provided to the Department of Health by Amandla Bakery, with which entity the plaintiff was in a joint venture. The amount claimed in this respect is R661 394.00 and represents an unpaid balance. There are ten other claims making up the balance of the total sum claimed in the summons, also premised on service level agreements entered into by the different suppliers identified in the particulars of claim with the Department of Education, similarly for the delivery

of bread and other supplies to listed schools over the relevant period. The plaintiff alleges that it has taken cession of these claims from the listed suppliers, as well as from its partner in the joint venture, Amandla Bakery.

[5] A special plea of prescription raised by the defendant was separately disposed of and dismissed in a judgment delivered on 14 April 2015 per Malusi AJ, as he then was. It appears from the judgment

that the defendant's other special plea of non-joinder of the Department of Health, which entity was alleged to have initially

issued the relevant tenders and to have been responsible for the administration of the Primary Schools' Nutrition Programme as its own initiative until its transfer to the defendant in 2004/5, was abandoned during the separated trial.

[6] On the issue of the merits of the action, the defendant observes in the present application that:

"(o)n a proper analysis of the plea it will be seen that the issue of the cessions and service level agreements, and consequently the delivery of goods, are denied and placed in dispute. These issues and the merits of the matter being the (defendant's) liability to pay the (plaintiff) (if any) have not yet been adjudicated by this honourable court."

[7] In respect of all the ceded claims, the allegations are similar, and in all instances, except for the claims of Lavelikwezi Woman's Organisation and Amandla Bakery, the defendant appears to have admitted however that each of the cedents were awarded tenders to source, supply and deliver bread to targeted schools in terms of the Primary Schools' Nutrition Programme. It has also admitted that the cedents' (barring the two entities just mentioned), right title and interest in respect of each of their claims against the defendant were properly ceded to the plaintiff.

[8] The defendant also admitted in its plea that the material terms of the contracts in each instance were as stipulated in the tender documents, service level agreements and letters of award issued from time to time by the defendant, including the obligation to pay fees in accordance with the payment provision contained in paragraph 43 of the General Conditions and Procedures applicable in each case.

[9] It is accordingly difficult to appreciate why the defendant presently suggests that all the cessions and service level agreements are supposedly in dispute.[1]

- [10] Be that as it may, it is quite evident from the pleadings, as they presently stand, that delivery of the goods in each instance is denied, as is the plaintiff's contention that in respect of each claim it and/or the relevant cedent accordingly became entitled to fees in terms of the separate contracts in the several amounts contended for, which amounts the defendant has failed to pay. The defendant also denies that various shortfalls remain or that the Department acknowledged liability and gave undertakings to pay the various amounts.
- [11] Leaving aside the defendant's nascent plea of invalid cessions, service agreements and letters of award, and his bald denial of delivery or liability in his plea, at the heart of the dispute between the parties is the quantum of the plaintiff's several claims.
- [12] Towards this end the plaintiff faces the mammoth task of putting up each invoice and proof of delivery to establish liability in respect of each claim for all the relevant periods, as also the fact that payment has not been received, or was short paid. The proof of these contentious facts is to be gleaned from thousands of discovered documents which make up two shipping containers presently being stored in Mthatha. This obligation on its part, considering the onus which it bears on the pleadings to prove its case, looms large and is one of the bases upon which it submits it is necessity bound

to bring the present application. Ironically, although the defendant has performed his own reconciliation based on which he reckons the plaintiff has been overpaid to the tune of approximately R6 million, he has not amended his plea so as to attract any onus to himself to prove such payments. The plaintiff complains that the litigation has reached a stage where the only practical way it can be advanced is if the mass of discovered documents is referred for investigation by a referee in the manner contemplated by section 38 of the Superior Courts Act in accordance with its agreement reached with the defendant in this regard.

- [13] Before I deal with the agreement recorded in the relevant pretrial minute, it is necessary to consider what the Plaintiff's position is in respect of its obligation to make discovery. On 2 February 2016 it filed an initial discovery affidavit. Part 1 of the first schedule is twelve pages long and contains 162 items. 161 of these refer to "submissions and claims for payment" to the defendant by itself and the cedents for various terms of different years. A further discovery affidavit was filed by it in respect of the special plea hearing, which refers to correspondence between the parties bearing on the prescription

issue. This affidavit is not relevant for present purposes, although it appears from a bundle produced by the plaintiff at the prior trial that reconciliations in respect of each claim were alluded to in the statutory demands foreshadowing the issue of the action. I expect that it must have been based on these that the plaintiff was able to state what the outstanding balance was in respect of each claim.

- [14] The plaintiff filed a further supplementary discovery affidavit for purposes of the special hearing. Thereafter the defendant served and filed a request for particulars for trial in which is sought the precise details of all the invoices making up all the amounts claimed for services delivered by the various service providers which make up some parts of the claim.

Evidently by agreement only some the questions raised in the request for particulars for trial were replied to, such as related to the hearing of the special plea. The plaintiff has not filed a reply in respect of the remaining questions, neither has the defendant seemingly requested that it reply or taken any steps to compel it to do so.

[15] The defendant also filed a notice in terms of rule 35 (3), dated 25 February 2016, in which it required the plaintiff to make available to it, in accordance with sub-rule 6, copies of the relevant cession and service level agreements, “proof of deliveries with Principal’s signature and official school stamp”, and “copies of all invoices with proofs that they were submitted to the Department of Education by service providers cited in the particulars of claim and Mr. Bread” (Sic). The defendant disputes that the plaintiff has given full discovery pursuant to this notice. It appears that the plaintiff has indeed not formally replied to the notice as provided for in that sub-rule, or sub-rule

6. I will shortly return to this aspect.

[16] I turn now to deal with the pivotal agreement recorded in the minute of the parties’ pretrial conference held on 14 March 2016[2]. In it the following matters, inter alia, were considered and agreed upon against the backdrop of the anticipated dispute concerning quantum:

“1.1 The estimated duration of the trial could not be determined or agreed upon as same is dependent on the issues determined once full Discovery has taken place as per paragraph 1.2 hereof;

1.2 The Plaintiff is to make full discovery of all documentation relevant to its claims by 2 May 2016. Defendant will attend to conduct a reconciliation and provide Plaintiff with the results of this reconciliation within 60 days after Discovery. If any disputes in re the quantum of Plaintiff’s claim remains after this process, the parties agree to the appointment of a referee in terms of Section 38 of the Supreme Court Act, 2013.

1.3 ...

1.4 The parties agree that a referee is to be appointed in respect of the quantum of the Plaintiff’s claim only, subject to paragraph 1.2 being complied with.

1.5 The parties agree to the appointment of a referee in terms of S 38 of the Supreme Court Act, 2013, in the event that the quantum of Plaintiff’s claim is still in dispute after Plaintiff has discovered and Defendant has attended to the reconciliation and provided Plaintiff with a copy thereof.

1.6 The parties considered whether it is possible to settle the quantum, or any aspect thereof at this stage. It was agreed that this question will be revisited once Plaintiff has attended to Discovery as agreed per paragraph 1.2 and Defendant has concluded and provided Plaintiff with its reconciliation.

1.7 The Defendant was requested to agree to the appointment of a referee in terms of s38 of the Supreme Courts Act, 2013. Defendant agreed to the appointment of a referee in the event that the quantum of Plaintiff's claim is still in dispute after Plaintiff has discovered and Defendant has attended to the reconciliation and provided Plaintiff with a copy thereof.

1.8 It is agreed that the Plaintiff has the duty to begin and bears the onus to proof the merits and quantum of its claim." (sic)

- [17] Evidently three milestones were required to be achieved pursuant to the parties' agreement. Firstly, the plaintiff was to make full discovery. Secondly, the defendant was to conduct a reconciliation and provide the plaintiff with the result thereof. Thirdly, the parties were expected to attempt to resolve the quantum of the plaintiff's claim, or any aspect thereof. It was only once a dispute in respect of quantum remained, after each party had done what was expected of them to do, that is, if they could still not find accord in respect of the issue of quantum, that the appointment of a referee would then become a reality.
- [18] The plaintiff contends that the conditions for the appointment of a referee have been met and that the court should therefore give effect to the parties' express agreement. It submits that "full discovery" has been given by it as envisaged by paragraph 1.2 of the pretrial minute. The defendant also purportedly attempted a reconciliation, albeit a patently incorrect one in the plaintiff's view, which it does not consider itself duty bound to revise. Despite this a dispute remains which is the prerequisite for the appointment.
- [19] The defendant has an entirely different take on the matter as well as an alternative interpretation of the relevant passages of the pretrial minute. He promotes the expectation that the merits, which are evidently also still in dispute, were required to have been disposed of first before the issue of quantum could be entertained. This is supposedly what the parties meant, so his argument goes, when they agreed that the appointment of a referee would only apply regarding the quantum of the claim. Secondly, he submits that the appointment would only have become relevant once the plaintiff had fully discovered, which it has not. It is on these two grounds that he resists the implementation of their agreement that a referee be appointed. In his view the requirement that he provide a reconciliation report does not even arise.
- [20] Firstly, concerning the issue of the merits being dealt with as a prerequisite before quantum can be dealt with, all the minute stipulates is that the enquiry by the referee be confined to the issue of quantum. This does not in my view raise any expectation that the issue of merits be separated and disposed of first before the issue of quantum can be tackled.
- [21] In any event the defendant does not appear until presently to have suggested any separation of quantum from the merits. To the contrary, in an earlier pretrial meeting held on 30 March 2012, the parties recorded in their minute, with regard to this aspect, that:

“No final decision has been taken by the parties at this stage. The parties discussed the issue of separation in terms of Rule 33(4) and resolved that it would depend on the outcome of the jointly undertaken quantum process referred to in paragraph 1. A final decision on separation will be taken later.”

- [22] The quantum process referred to in paragraph 1 of that minute in turn entailed that the defendant would “initiate a process of reconciliation involving invoices, proofs of delivery and the Defendant’s payment. Once this process was concluded instructions regarding the quantum payable would be obtained”.
- [23] It is self-evident that, up until now, the “jointly undertaken quantum process” has not yet been concluded and that the decision on the issue of separation remains deferred thereby. Incidentally, although the defendant presently holds out for a separation of merits from quantum, I sound the caution that this is not necessarily an appropriate matter for such an order as the plaintiff’s burden to establish delivery, and the other aspects evidently still in dispute according to the defendant, may well involve an analysis or examination of the very agreements, letter of award, invoices, proofs of delivery, submissions and claim payments that will also form the subject matter of the proof necessary to establish the quantum of its various claims.
- [24] Further, it is not apparent from any of the correspondence exchanged between the parties about the impugned agreement that the defendant ever raised the expectation of a separation of quantum from merits. To the contrary, after the agreement was reached, his attorneys carried on an inspection of the discovered documentation in Mthatha with an auditor, inter alia, evidently in accordance with its terms. It is improbable that they would have gone to this effort or incurred these costs if a separation of quantum from merits was first required.
- [25] I am therefore not in agreement with the defendant’s contention, which strikes me as being opportunistic, that this application is premature because the issue of liability is still in dispute.
- [26] Concerning the issue of discovery, it is significant in my view that the defendant complains for the first time in the answering affidavit filed on his behalf that the plaintiff has not formally replied to its rule 35 (3) notice. He claims further that whereas some documentation in terms of paragraph 1, 3 and 4 of the notice was provided to him (he does not raise any grumble about what was supposedly not put up), the documentation referred to in paragraph 2 thereof, being copies of service level agreements entered into between the department of education and the service providers cited in the plaintiff’s particulars of claim have not yet been provided, despite various requests therefor. This last challenge appears contrived when regard is had to the correspondence exchanged between the parties’ legal representatives concerning their mutual obligations arising from the pretrial agreement.

[27] The defendant put up a copy of his attorney's letter to the plaintiff's dated 22 March 2017, written after the fact, to refute that the launch of the present application was justified. In it, it is suggested on his behalf that the appointment of a referee is premature because there has been no response to his request that the plaintiff provides certain documentation. His stance indicated in the letter is instructive:

"We refer to your letter dated 23rd January 2017 and the application for Appointment of a Referee in this matter.

We are surprised that an application is now being brought whereas there has been no response to our email of 30th August 2016 in which we enquired if it was possible that the Proofs of Deliveries (PoD) for terms 2, 3 and 4 of 2006 be provided for inspection by client's team at your offices. As you are aware, when client was in Mthatha, PoD excluding the ones for terms 2, 3 and 4 of 2006 were inspected and your client provided the team with a spread sheet which we were subsequently advised that it contained a calculation error and omitted data in respect of term 2, 3 and 4 of 2006.

Since the PoD for the abovementioned terms were not provided to our client's team when an audit was conducted in Mthatha and the spreadsheet provided by your client to client's team omitted data in respect of these terms, client instructed us to first inspect these Proofs of Deliveries before calculations can be redone on the amended spreadsheet furnished to us including data which was previously omitted. As stated, a response to our request to inspect the outstanding Proofs of Deliveries has not been forthcoming.

We are of the view that your clients' application is premature in that our client has not been afforded the opportunity to inspect the outstanding PoD and it should be withdrawn. We therefore propose that arrangements be made for client's team to inspect the PoD at your offices as it will be costly and time consuming for client's team to go to Mthatha."

[28] It is self-evident firstly that the basis for the defendant's challenge to the present application indicated in the letter is a different one to the complaint raised by him in the answering affidavit. The plaintiff's supposed default highlighted in the letter, written after the present application was launched, also does not appear to have been flagged as a concern by the defendant before its launch. To the contrary, the defendant had drawn a line in the sand pursuant to its supposed finding that the plaintiff had been overpaid, indicating to the plaintiff in no uncertain terms on 29 June 2016 that that was the end of the process and that it was not prepared to provide a comprehensive reconciliation because of its adverse conclusion reached. Why does the issue of the plaintiff's supposed failure to put up these delivery notes become an issue nine months after the defendant has stated that he does not consider it necessary or worth his time or the expense to provide a comprehensive reconciliation? Even after it is brought to his attention that he is mistaken about the Department having overpaid the plaintiff he makes no fuss about the "Proofs of Deliveries." What the letter does give away in my view is that the defendant reflects on his situation only when he is in a tight corner, and then in an opportunistic fashion. It is interesting too to

observe that when the shoe pinches, the threat is made that the inspection must now take place at his attorney's offices, rather than in Mthatha where the containers are in situ.

[29] The plaintiff's reply to this communication was put up as an attachment to its replying affidavit. In it the plaintiff's attorneys advise that their failure to respond to the letter dated 30 August 2016 has no bearing on the merits of the present application whatsoever and that all documentation, including the proof of deliveries referred to by the defendant, were made available for the defendant's inspection during his attorney's

visit to Mthatha in May 2016. As indicated above, this supposed default on the part of the plaintiff was not raised in the

defendant's answering affidavit at all although it was foreshadowed in his attorney's letter dated 22 March 2017.

[30] The defendant is further not entirely candid when it accuses the plaintiff of having failed to discover the service level agreements. If one has regard to the correspondence exchanged between the parties' attorney, it was explained to the defendant that certain of these were no longer available, but could be construed from the corresponding letters of award which ostensibly provide that the original service level agreements entered into are extended and on what terms. The defendant does not disclose to this court that he was asked to indicate whether he would accept these letters of award "in lieu of" the service level agreements. Instead of dealing with this request, the defendant advised instead of the supposed overpayment which, in its view, put paid to the impugned agreement being given effect to. The plaintiff in turn refuted that the defendant's supposed adverse findings had rendered the agreed upon process redundant. It pointed out that the defendant's conclusions were ill informed because they were based on incorrect spreadsheets which the plaintiff itself had made available to his attorneys on the occasion of their inspection of the discovered documents in Mthatha. The defendant failed to respond to the plaintiff's attorney's invitation to revisit the inspection with the correct information at hand and the issue of the service level agreements fell by the way side.

[31] Incidentally, it appears anomalous that the defendant purports to now need the service level agreements, after the plaintiff has explained its dilemma in this regard, whereas they were not even placed in contention by him in his plea. I expect that he must have had sight of the very agreements in order to plead as he did in this respect.

[32] The plaintiff disagrees that it has not done what was expected of it to do as a minimum pre-requirement for a discussion around the settlement of quantum. It alleges that a proposal was made to the defendant's attorneys after the pretrial conference by way of a letter dated 16 March 2016 to circumvent the costly copying of the documents which would be necessary in the ordinary course of it making discovery. It proposed instead:

“1. That the parties agree to the appointment of a referee in terms of section 38 of the Supreme Court Act, consequent to which an application will be made to court for his appointment and full description of his duties, powers and responsibilities;

2. That both parties provide the referee with the documentation in their possession, or provide access to the relevant documentation, without the necessity to make copies and incur the massive expense associated therewith on the understanding that the referee will consider these documents against the background and outstanding issues as per the pleadings;
3. That the referee shall have all the powers necessary and/or incidental for purposes of finally determining all issues pertaining to liability and the quantum of the Plaintiff's claim;
4. That the parties agree to be bound by the determination of the referee in so far as it relates to both the liability of the Defendant to pay / if any, and the quantum of such payment.” (Sic)

[33] The plaintiff asserts that this proposal was reasonable, in the spirit of the pretrial minute and designed to assist the parties and the court in coming to a determination of quantum without making copies of thousands of documents which it estimated would cost between R500 000.00 and R1 000 000.00, over and above

its attendance fees for making the copies which it warned it would seek the recovery of upon taxation. Not unreasonably, it insisted that payment be made by the defendant before any copies could be made.

[34] A reminder of the astronomical costs associated with the copying of the relevant documentation in the form of an email was sent to the defendant's attorneys on 30 March 2016, but this elicited no

response. The defendant did however reply to the letter of 16 March 2016 by letter dated 7 April 2016. The contents of this letter appear to endorse what was agreed between the parties at the pretrial conference. The defendant proposes in this respect that:

“a week be set aside during which education officials and persons selected by the plaintiff be allowed to peruse the documentation relevant to this matter in Mthatha. The purpose of the perusal will be to select only those documents which need to be copied, rather than simply copying all the documents contained in the two shipping containers.”

[35] This counter proposal was to avoid having to pay the plaintiff for its photocopying charges up front, which the defendant frankly indicated it was unable to do. The defendant further informed the plaintiff that it would revise its position to pay for copies it strictly required after its perusal aforesaid.

[36] The plaintiff's attorneys were amenable to the inspection on the defendant's terms and were in fact present in Mthatha to facilitate the process in May 2016. It was after this perusal that the defendant requested copies of the relevant sessions and service level agreements. The sessions were provided, but the plaintiff indicated its stance concerning the service level agreements as indicated above. The plaintiff requested details of documentation still to be copied at the defendant's request and asked when it could expect to receive his reconciliation

report. Letters of award were also provided, but instead of indicating if these were acceptable for the defendant's purposes, the plaintiff was at this point advised of the adverse finding aforesaid and invited to withdraw its claim and reimburse the Department. The defendant avoided the plaintiff's attorney's request to get on with providing the comprehensive reconciliation report promised for the same reason. Most surprisingly this compelling finding has never prompted the defendant to amend his plea

to allege an overpayment, neither has he filed a counterclaim to recover the substantial overpayment.

[37] Three weeks later, the Plaintiff's attorneys wrote to the defendant and pointed out certain errors in the spreadsheets which had been provided to the defendant's attorneys at the inspection. It clarified that, for one, the data pertaining to Amandla Bakery had contained a "totaling error". The second error, which the plaintiff believes was responsible for the defendant's putative adverse findings that the department had overpaid on the claims, is that they had omitted the data in respect of terms 2, 3 and 4 of 2006. The defendant was requested to redo its calculations and to revert with a comprehensive revised report. It was in response to this request that the defendant finally opined that the expectation for it to provide such a report had been overtaken by events.

[38] Whilst offering the defendant another opportunity for inspection, the plaintiff placed the defendant on terms, failing which it threatened to bring the present application.

[39] On 23 January 2017 the plaintiff's attorneys wrote to the defendant's inviting them to a further pretrial conference to discuss their failure and/or refusal to provide a complete and concise reconciliation report pursuant to their attendance in Mthatha to inspect the discovered documentation, and to give the go ahead for the appointment of a referee under the circumstances. The plaintiff says that no response was received to this communication, which it took as an indicator that the defendant was not interested in resolving the issue.

[40] There is no real dispute of fact in my view that the plaintiff has substantively discovered.

[41] It is noteworthy that despite the defendant's recent protest in respect of the plaintiff's failure to have formally responded to its rule 35 (3) notice, it never noted any prejudice by virtue thereof, neither did it seek to compel compliance by the plaintiff of its obligation to discover comprehensively if it believed that it has not complied with this sub-rule, or sub-rule 6. It was only after the launch of this application that the defendant warned that the application

was precipitate and called upon the plaintiff to provide him with the delivery notes, notably concerning the period in respect of which the plaintiff had conceded it had erred on the spreadsheets provided to it at the inspection. This is however a far cry from complaining against the plaintiff's failure to have complied with its obligations provided for in the uniform rules to make proper discovery. Such an objection would in any event have been inconsistent with the defendant's indication in the correspondence that it would not have been feasible to make hard copies of all the discovered documentation, and that an alternative approach would have to be adopted in the circumstances.

- [42] I am further inclined to agree with the plaintiff's submission that it is most improbable that it would not have given full discovery because it would thereby have been precluded from relying on the relevant documentation upon trial, which is pivotal to the proof of its various claims.
- [43] The matter of the defendant's proposed reconciliation requires some elucidation. As indicated in paragraphs 21 and 22 above, the undertaking by the defendant to conduct his own reconciliation has been coming for a while now. Despite his criticism that it is irrelevant to the present application, the subject of the Department's lack of capacity to reconcile remittances and to quantify its debts was mentioned by Malusi J in his judgment concerning the special plea. Evidently the defendant had appointed a service provider, Ngubane & Company to perform this task. It was resolved between the parties in January 2008, prior to the issue of summons, that a reconciliation would be conducted by Ngubane for the sole purpose of confirming the accuracy of the amounts claimed by it, in other words to quantify what was payable by the Department.
- [44] In a sequel to the trial the plaintiff filed a notice in terms of rule 35(3) calling upon the defendant to produce the reconciliation referred to in evidence for its inspection. The reconciliation was not immediately made available, resulting in the plaintiff bringing an application to compel. An order was granted on 17 November 2015 directing the defendant to furnish a proper reply and inviting the plaintiff to bring an application to strike out its defence and to seek judgment in its favour in the event of the defendant's failure to comply with the order. The reconciliation was only produced by the defendant in February 2016 in response to an application brought by the plaintiff to strike out his defence. Evidently the reconciliation does not mention what payment the disbursements in fact made by the department were in respect of.
- [45] I mention this history only to indicate that much has ridden on the exercise by the defendant of his undertaking to conduct a reconciliation, which ought finally to determine the fate of the matter. More than a year after the parties' pretrial conference it is alleged on the defendant's behalf in his opposing affidavit that the Department has "attempted to prepare a reconciliation of the invoices", but immediately it is emphasized that it is in fact the plaintiff who must prove its claim. The defendant repeats that the department has conducted its own investigation to assess the plaintiff's claim "although it has no duty on it to do so". Most remarkably the defendant says nothing in his opposing affidavit concerning the

supposed adverse finding that the Department has overpaid the plaintiff to the tune of just under six million rand, a not inconsequential sum of money or event. Given the intimation that he bears no responsibility to assist the plaintiff to prove its quantum despite the long-standing offer to do exactly that, it hardly lies in the mouth of the defendant to assert that this application is premature for want of the promised reconciliation. In fact, the defendant has conveniently skirted around the issue of his obligation in this respect.

- [46] In the result I am of the view that (a) the plaintiff has offered full discovery of all relevant documentation; (b) that the defendant has had an opportunity to conduct its reconciliation (alternatively cannot attribute its failure to have done so comprehensively to any conduct on the part of the plaintiff); and (c) that a dispute still exists in respect of the quantum of the plaintiff's claim, even if that dispute is capable still of being narrowed down through pretrial processes.
- [47] In the result, the plaintiff's submission that the appointment of a referee in terms of section 38 of the Superior Court's Act, No. 10 of 2013 pursuant to its agreement is well-nigh, commends itself to me. It further strikes me how necessary the remedy is in the circumstances. I have no doubt that the parties and the court will be vexed by the plaintiff's need to produce in court voluminous copies of source documents to prove its claims and well as

the fact that it or the cedents were not paid for goods delivered to the Department in each instance. The two container loads of documentation will be multiplied several fold by the time the trial commences. The court is further not equipped capacity or time wise to traverse, analyze and compare invoices and delivery notes against receipts.

- [48] There is however merit in the defendant's contention that the relief crafted by the plaintiff in its notice of motion is insufficient as it presently stands.
- [49] It is clear from the provisions of section 38 of the Superior Courts Act that a prerequisite for the appointment of a referee is the consent of the parties thereto. The foundational requirement for such appointment, the procedure, the referee's powers, the basis for his remuneration and the legal effect of his/her report are reproduced below:

"38. Reference of particular matters for investigation by referee. —(1) ... in any civil proceedings, any Division may, with the consent of the parties, refer—

- (a) any matter which requires extensive examination of documents or a scientific, technical or local investigation which in the opinion of the court cannot be conveniently conducted by it; or
- (b) any matter which relates wholly or in part to accounts; or
- (c) any other matter arising in such proceedings,

for enquiry and report to a referee appointed by the parties, and the court may adopt the report of any such referee, either wholly or in part, and either with or without modifications, or may remit such report for further enquiry or report or consideration by such referee, or make such other order in regard thereto as may be necessary or desirable.

- (2) Any such report or any part thereof which is adopted by the court, whether with or without modifications, shall have effect as if it were a finding by the court in the proceedings in question.
- (3) Any such referee shall for the purpose of such enquiry have such powers and must conduct the enquiry in such manner as may be prescribed by a special order of the court or by the rules of the court.
- (4) For the purpose of procuring the attendance of any witness (including any witness detained in custody under any law) and the production of any document or thing before a referee, an enquiry under this section shall be deemed to be civil proceedings.
- (5) (a) Any person summoned to attend as a witness or to produce any document or thing before a referee and who, without sufficient cause—
 - (i) fails to attend at the time and place specified;
 - (ii) fails to remain in attendance until the conclusion of the enquiry or until he or she is excused by the referee from further attendance;
 - (iii) refuses to take an oath or to make an affirmation as a witness; or
 - (iv) having taken an oath or made an affirmation, fails to—
 - (aa) answer fully and satisfactorily any question put to him or her; or
 - (bb) produce any document or thing in his or her possession or custody, or under his or her control, which he or she was summoned to produce, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months.
- (b) Any person who, after having taken an oath or having made an affirmation, gives false evidence before a referee at an enquiry, knowing such evidence to be false or not knowing or believing it to be true, is guilty of an offence and liable on conviction to the penalties prescribed by law for perjury.
- (6) Any referee is entitled to such remuneration as may be prescribed by the rules or, if no such remuneration has been so prescribed, as the court may determine and to any reasonable expenditure incurred by him or her for the purposes of the enquiry, and any such remuneration and expenditure must be taxed by the taxing master of the court and shall be costs in the cause.”

- [50] Whereas the parties have agreed in principle that a referee be appointed and the peculiar outcome which would render such appointment a necessity, real consent as envisaged by section 38 appears to be lacking in the sense that they have not considered or agreed to the minutiae concerning such appointment. It is firstly not for this court to identify an appropriate referee. Although it was suggested from the bar that the referee will be an expert auditor, the plaintiff has not even identified in its papers the nature of the particular expertise required. Further, the plaintiff claims that the remedy is necessary for “the examination and financial analysis” of documents which were discovered by it in its first schedule. The point is well taken by the defendant however that it is not explained what the referee is directed to do with the discovered documentation (or which of it), or how he must assess the validity thereof, or how he is meant to quantify the plaintiff’s claims.
- [51] One has only to consider the objective behind the referral of matters for investigation by a referee, and the legal effect of such an enquiry and report, to realize that the mandate of such an expert is required to be narrowly outlined. It follows that these details should be agreed between the parties before either can be assured that the report, which is the anticipated outcome, is one which can confidently be adopted and have an effect as if it were a finding by the court in the trial action. The question is, what exact factual enquiries are required to be undertaken through this process? Whereas section 38 provides a useful tool for a court to resolve factual disputes[3] expeditiously where the court would otherwise be delayed, inconvenienced or disadvantaged[4], I am not convinced that it will serve such a purpose unless those factual disputes are unequivocally delineated.
- [52] In *Wright v Wright*[5] the High Court referred to an unreported judgment in *Gasa v Singh* N.O.[6] in which that court set out the purpose of referring a matter to a referee in terms of section 19 bis of the Supreme Court Act, the precursor to section 38 of the Superior Courts Act:

In the present matter for instance the referee would be able in her report (as already foreshadowed in the opinion of senior counsel) to pinpoint the incidents or transactions on which she relies for coming to the conclusion that the Trust was or was not the alter ego of the applicant. It is then a straightforward matter for the parties to ascertain which specific areas of the report or which incidents or transactions are in dispute and for a hearing to proceed on those aspects only. Without the report of the referee a great deal of unnecessary evidence may be led as well as extensive discovery having to be made with the consequent exchange of documents before the issues in dispute become clear. The normal Rule 37 procedures in this context are rather cumbersome and would not be of the same assistance in resolving issues and delineating the areas of dispute in relation to the significance or otherwise of particular transactions. Similarly pleadings containing as they do only the factual framework and legal conclusions relied upon are also not of great assistance. The report of the referee however, if properly compiled, will focus on those transactions that are pertinent.”

- [53] It is evident from this exposition that whereas the parties in casu were correct to agree in principle that the administration of justice would best be served by having a neutral expert cut through the volume of documents making up the proof of the plaintiff's various claims and payments purportedly made by the defendant in respect of each, the question of what is required to be examined and what factual enquiry is expected to be undertaken does in my view require further introspection. In this regard it might be necessary to compel the defendant to first produce the promised reconciliation as a means of identifying the exact areas of dispute before moving forward in the litigation otherwise the field of enquiry may simply be far too wide to traverse, and the outcome ineffectual.
- [54] The parties should perhaps also apply their minds to the way the referee is expected to conduct his enquiry under these unique circumstances. The timeframes for the work required to be undertaken must also be emphasized, given the substantial delay in finalizing this action since its issue, and the various interruptions since the debt became due, premised on the much-vaunted but unrealized expectation that the defendant would reconcile his accounts.
- [55] There is also, more importantly, the question of the referee's remuneration. The plaintiff has suggested that the parties share these costs. Implicit therein is the expectation that these will be funded out of pocket for now, even though such fees are customarily costs in the cause. Given the enormity of the task awaiting the referee as described by the plaintiff in its papers and the expectation that he will have to literally wade through at least two container loads of documentation which, from the photographs provided by the plaintiff attached to its founding affidavit, appear to be in a state of disarray, such an undertaking may prove to be prohibitively expensive. The defendant is unlikely to agree to such a proposition in my view given that he was unable to tender photocopying charges for the discovered documentation. The fee quoted to him, in a sum of between R500 000,00 and R1 000 000,00, is comparatively paltry to the anticipated costs of an expert auditor in this trial scenario. Whilst provision is made in section 38 (6) for the automatic remuneration of a referee, there should in my view be more reflection by the parties regarding what these costs will entail before making the appointment and more especially how and when the fees will be payable. It would be a pity if the finalization of the trial were to be delayed even further because the referee withholds his report pending payment. This is a reality of litigation that the parties must be astute to.
- [56] In the premises, although I am satisfied that the nature of the disputes between the parties can suitably be determined by a referee conducting a factual enquiry, the making of such an order would be premature until the parties have refined the critical aspects of the appointment and what exactly is set to be achieved thereby.
- [57] Even though the relief sought is in this sense premature, the plaintiff cannot however be faulted for having launched the application to resolve the stalemate between them and to compel the implementation of what they agreed to in principle. I am inclined to agree with the submission made on its behalf that the defendant has been obstructive in taking its

agreement forward on any basis whatsoever, let alone getting down to the terms of such an appointment. It is abundantly plain from the correspondence in my view that the defendant has been prevaricating and continually shifting the goal posts. Whist on the one hand he professes to have overpaid the plaintiff, on the other he does not want to involve himself in a process of properly reconciling accounts, instead adopting the supine attitude that it is up to the Plaintiff as dominus litis to prove its case in the full knowledge that this will involve the discovery, copying and proof of a mass of source documentation, the photocopying of which he had bluntly conceded the Department is not able to tender. Further, whereas the defendant presently complains of a lack of formal compliance by the plaintiff with the rules concerning discovery and inspection, he has not recorded or noted any prejudice or suggested how the plaintiff might ameliorate his position, if he is prepared to take one at all. This unhelpful attitude is indicated even by his opposition to the present application and his avoidance or deferring of the inevitable. The plaintiff should therefore in my view be granted its costs of the application even if the relief which I intend to grant herein has been sculpted down considerably. Had the defendant cooperated with the plaintiff as he agreed he would, the issues for examination by the referee would have crystalized by now and his appointment would not have been stalled as it has. Clearly the defendant does not share the plaintiff's desire to settle the litigation.

- [58] Erasmus confirms that the purpose of rule 37 is to promote the effective disposal of litigation: "The main object of the rule is investigating ways to avoiding costs at a stage where it can still be avoided. It is intended to expedite the trial and to limit the issues before the court. The rule is intended primarily to curtail the duration of a trial, narrow down issues, cut costs and facilitate settlements." [7] Given the critical significance of the rule in litigation, it goes against the grain for the defendant to be flouting the obligation

undertaken on his behalf, firstly to provide a proper reconciliation report - which would have as its obvious purpose to inform the settlement discussions between the parties concerning the quantum of the plaintiff's claims and narrowing the issues between them, secondly, meaningfully having such discussions and, thirdly, accepting that when those discussions are incapable of advancing the litigation in the respect agreed, giving in to the appointment of a referee. The defendant has done nothing but squirm out of his obligations under the agreement. He appears to be oblivious as well of his constitutional obligation to litigate responsibly with the public purse and to thoroughly investigate what aspects of the litigation are responsibly contestable. Unless the proposed reconciliation is properly undertaken as agreed, there appears to be no warrant in advancing his bare denial of liability and quantum and leaving it up to the plaintiff to prove its case. The Supreme Court of Appeal confirmed in *Filta – Matrix (Pty) Ltd v Freudenberg & Others* [8] that, "(t)o allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37, which is to limit issues and to curtail the scope of the litigation."

- [59] The Draft Case Management Directive applicable to this court concerning trial litigation also imposes upon both parties the obligation to limit issues as best they can[9]. It is not for the defendant to throw up his hands and to suggest that he has no obligation to assist the plaintiff who bears the onus and is dominus litis. This is especially so where he has committed himself to a process of reconciliation and settlement discussions concerning the issue of the quantum. The defendant must be held to this agreement.
- [60] Even the defendant's counsel recognize that case flow management can be a useful tool in ensuring progress, albeit they propose it as an alternative to the expense of appointing a referee. Should the parties meaningfully avail themselves of this tool, I have no doubt that they should be able to narrow down the issues more definitively. I propose to issue a case management directive herein for this reason, given the invitation by both parties for a judge to get involved on this basis. I believe that this is a compelling matter in which such intervention is a necessity.
- [61] I issue the following order:
1. It is declared that the parties' in principle agreement to appoint a referee, recorded in the pretrial minute dated 14 March 2016, should be given effect to, subject to the parties' further agreement concerning the proposed referee, the exact nature of the factual enquiry which he/she is required to conduct, the powers applicable to his/her appointment and the basis for his/her remuneration.
 2. Unless the parties can reach agreement on the detail of the appointment by the date of the case management conference indicated below, the plaintiff is given leave to move a further application for the appointment of a referee on appropriate terms on the same papers, duly supplemented as the circumstances may require.
 3. The defendant is directed to pay the plaintiff's costs of the application, including the costs of two counsel.
 4. The parties are directed to hold a case management conference on a date and before a case management judge designated by the Deputy Judge President to determine the conduct of the litigation going forward.
 5. The parties shall, prior to such conference, and by no later than the second week of the first term of 2018 meet, discuss and/or consider and attempt to reach agreement or record their stance concerning the aspects listed in Annexure "CM" hereto and/or such further matters as may bear upon the conduct of any future interlocutory application or the trial.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 7 September 2017

DATE OF JUDGMENT: 20 November 2017

Appearances: For the plaintiff : Messrs D B Ntesebeza SC and SX Mapoma Instructed by Squire Smith & Laurie Inc., King William's Town (ref. Ms Friderichs.) For the defendant : Messrs V Notshe SC and M Mayekiso Instructed by The State Attorney, East London (ref. Mrs Yako/ 232/10-P10).

Annexure "CM"

Aspects required to be addressed by the parties in anticipation of the case management conference designated by the Deputy Judge President:

1. The defendant is to indicate which of the cessions upon which the Plaintiff relies for its claims as cessionary he disputes and the nature of his objection or claim to invalidity in each instance.
2. The defendant is to indicate further which letters of award or service level agreements are in contention and the nature of his objection or defence in each instance.
3. The defendant is to indicate more specifically what is being denied in his plea to paragraphs 5-7, 12-14, 20-21, 28-29, 36-37, 45-46, 54-55, 63-64, 72-73, 81-82, 90-91, and 99-100 of the plaintiff's particulars of claim in respect of each separate claim, and to specify in what manner, or in respect of what period(s), the plaintiff/cedent fell short of complying with their obligations in terms of the contract to supply and deliver bread and other nutritional products to the listed school in the province.
4. The defendant should further indicate which of the fees, preferably in response to the plaintiff's reconciliations relied upon at the time of issue of the summons as to how the balances then owing were comprised for each claim (or its current revised reconciliations), he disagrees with and why he contends that the plaintiff is not entitled to these amounts claimed, whether substantively or quantum-wise.
5. The defendant's answers to paragraphs 3 and 4 above should be given separately with reference to each of the plaintiff's claims under the mantle of the relevant supplier's name.
6. The plaintiff is to indicate which acknowledgements of liability and undertakings to pay by the defendant it relies on in respect of each claim.
7. The defendant is requested to indicate his stance specifically in respect of each acknowledgment of liability or written undertaking to pay sought to be relied upon by the plaintiff in each instance and to state why he disavows these, if applicable.
8. Is the defendant persisting in his denial that the plaintiff/cedents have not complied in each instance with their obligations in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, No. 40 of 2002 and, if so, what is the shortcoming that he complains against?
9. Has the special plea of non-joinder of the Department of Health been permanently abandoned?

10. The parties should consider whether there are questions of law (if applicable) or fact which may conveniently be decided separately from any other issue and to motivate why they so contend.
11. The defendant is to indicate his formal stance regarding the plaintiff's compliance with his notice in terms of rule 35 (3). He must in this regard state whether he requires the plaintiff to reply formally, alternatively that he is prejudiced and the fact and extent of that prejudice which he contends still exists. He must further state which documents he requires to be made available to him for inspection.
12. In the event that further inspection of any of the discovered documentation is required, the parties are to reach agreement concerning the appropriate manner in which and where the inspection is to be undertaken, and, if copies are to be provided to the defendant, the nature of the arrangement concerning its imaging and the costs thereof.
13. The defendant must indicate whether the plaintiff is still expected to file a reply to his request for further particulars of claim and, if so, which of the paragraphs therein it is necessary for the plaintiff to still reply to.
14. The parties should indicate the status of the reconciliation report compiled at the defendant's instance, as referred to by Mr. Mtyida in his testimony at trial in January 2015, and its impact, if any, on each of the plaintiff's claims for payment of the balance in each instance.
15. If the latter reconciliation remains relevant, the defendant is to indicate in respect thereof what invoices he says the Department's

disbursed payments were made in respect of. In other words, which invoices were paid and are no longer in contention and can be taken out of the reckoning.

16. The defendant is to meet his existing obligation to provide a comprehensive conciliation report or to report on his own investigations arising from the inspection of discovered documents by his attorneys.
17. Once the reconciliation report is to hand the parties must revisit the possibility of settling the quantum for each claim, or any aspect thereof.
18. If the appointment of a referee as per the pretrial agreement cannot be avoided, or stalled any further, the parties must indicate the nature of the expertise required by the referee and which neutral expert they agree would be able to meaningfully fulfil this role.
19. The parties must thereupon agree what factual enquiry needs to be undertaken by the referee with regard to the issues of quantum then still in dispute.
20. The parties should further indicate a time frame within which the factual enquiry is to be undertaken, the modus operandi concerning the examination of the relevant documentation, and by when the report is to be submitted.

21. The parties should further indicate what arrangements are to be made concerning the payment of the remuneration to the referee for his service in this capacity, and preferably to obtain a provisional quote in this respect.
22. The parties are to prepare a minute and a draft case management order recording the above aspects discussed and agreed, or not agreed between them , and such further aspects as they consider necessary for the further conduct of the trial, the anticipated relaunch of the interlocutory application, or any other necessary applications.
- [1] In its heads of argument the defendant highlights the aspects of “the validity and transferability of the impugned service level agreements and letters of award”, and “the validity of the impugned cession agreements” as being issues in the trial ostensibly in respect of all the cessions relied upon by the plaintiff, whereas such a dispute does not appear from the defendant’s plea.
- [2] It appear that the minute was only signed by the parties in July 2016.
- [3] A referee’s report, as contemplated in section 38 of the Superior Courts Act is a finding of an expert appointed by the court to investigate and provide a report of his or her findings to the court on questions of fact. *Wright v Wright* 2013 (3) SA 360 GSJ at par [16].
- [4] *Wright v Wright & Another* 2015 (1) SA 262 (SCA) at [6].
- [5] *Supra*, at par [19]
- [6] KZD Case No. 13338/2008, 25 June 2009; 2009 JDR 0649 at pars 14 – 15.
- [7] Erasmus Superior Court Practice Vol 2 at D1 – 496.
- [8]
- [1997] ZASCA 110; [1998] 1 All SA 239 (SCA) at 247 e-f; MEC for Economic Affairs, Environment and Tourism : Eastern Cape v K Kruizenga & Henque 2189 CC t/a Wimrie Boerdery (169/2009) [2010] ZASCA 58 (1 April 2010).
- [9] The Directive behoves the parties to confer about the nature and basis of their claims and defence and the possibility of a prompt

resolution or settlement of the case even at the early first stage of their interim case management conference (paras 3 and 4 (k)), within a month of the pleadings closing. By the time of the final pretrial conference, the parties should have considered, inter alia, any proposals for expediting the trial and prospects for settlement of the case and to advise whether they have participated in mediation or other settlement efforts. (paras 11 (h) and (i)) The Directive also provides sanctions for a litigant’s failure to meaningfully engage in pretrial efforts or to meet the case management objectives (par 15).

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