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THE COURT OF APPEAL DECISION IN *BABATUNDE V. OSUN STATE COLLEGE OF EDUCATION*: THE PREREQUISITE DURATION OF RETAINERSHIP CONTRACT

*Samuel A. Adeniji**
*Oreoluwa R. Ojo-Solomon***

Abstract

In legal practice, a client may engage a legal practitioner on a case basis or enter into retainership contract where the lawyer is expected to offer a range of agreed legal service for a period of time for a fee he is entitled to even if no service is rendered at the instance of the client. Like any other enforceable contract, it is expedient to expressly state the duration and other terms of a legal retainer. Where the duration is not stated but the fees are usually pay on yearly basis, the court shall treat the same as a yearly contract subject to yearly application and approval by the client. This paper which adopts doctrinal method, examines the imperativeness of stating the duration of retainership contract by examining the Court of Appeal decision in Babatunde v. Osun State College of Education where the court held that where the intention of the parties is not expressed, same will be discovered by examining the totality of the circumstances regulating the relationship. The paper examines the effect of the judgment on legal retainership in Nigeria. It found out that; failure to specify the duration of retainership, will open same to be construed as a yearly contract subject to renewal by the client upon the application of the legal practitioner. The paper makes vital recommendations on the issue going forward before conclusion.

Keywords: Contract, Legal practitioner, Legal fees, Nigeria, Retainership

1. INTRODUCTION

The legal profession in Nigeria has its historical roots from Britain and remains one of if not the most regulated professions in Nigeria today.[1] A legal practitioner, in the course of practice, professionally owes paramount allegiance to the court as a minister in the temple of justice, to his client

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1 D.T. Eyongndi, 'The Legality of Nigerian Courts Endorsement of Nigerian Bar Association's Stamp and Seal and the Principle of *Ex Nihilo Nihil Fit*' (2020) 1(2) *Journal of Tanganyika Law Society,* Tanzania, 182-211.

and to other practitioners as professional colleagues.[2] He is expected to abide by the highest standard of professionalism and ethical decorum in the practice of his profession in accordance with the Rules of Professional Conduct for legal practitioners (RPC).[3] Thus, as a general rule, a legal practitioner is generally prohibited from engaging in any form of advertisement or open solicitation for legal work as it is regarded that, the best form of advertisement and only one legally permissible, is the professional performance/competence of a legal practitioners in the course of discharge of his duties to the court as well as his client who has engaged his services.

The foregoing notwithstanding, without breaching the RPC, it has become an accepted practice in the legal profession, for legal practitioners, in the course of their practice, to engage in professional and decorous solicitation of briefs from potential clients such as corporate bodies and government agencies through the instrumentality of legal retainership contract.[4] Like any other contract, where a legal retainer is executed, it contain vital terms and conditions regulating the contract particularly its nature, duration, consideration to be paid by the client to the legal practitioner and when same is to be paid, procedure for renewal/termination, etc. Once the contract is consummated, it creates enforceable rights and obligation between the parties which are recognised and enforceable in court in the event of a breach.[5] This is because the law is that, in the absence of any vitiating elements, parties are bound by the terms and conditions of contract they voluntarily entered into.[6] Aside this, the court is bound to espouse and determine the rights and obligations of contracting parties based on the expressed terms and conditions of their contract and not to infer extraneous matter into it save established practices regulating such a contract.[7] Hence, it is germane for contracting parties to always clearly and unambiguously state the terms and conditions of their contract to avoid unintended consequences.[8] This is because the court has a duty to interpret

2 A. Obi-okoye, *Law in Practice in Nigeria,* 2nd Ed., (Enugu, Snapp Press Nig. Ltd., 2015) 82.

3 *Ibid.*

4 M. Ediru, 'The 2007 Rules of Professional Conduct for Legal Practitioners: Issues Arising' (2016) 7(4) *The Gravitas Review of Business and Property Law* 145.

5 *Statoil Nigeria Ltd. v. Inducon Nigeria Ltd. & Anor.* [2021] 7 NWLR (Pt. 1774) 1.

6 *Baba v. Nigerian Civil Aviation Training Centre* [1991] 5 NWLR (Pt. 192) 388.

7 *Epe Resorts & Spa Ltd v. United Bank of Africa Plc.* [2018] LPELR-45310.

8 *Sonar Nig. Ltd. v. Norwind*[1987] 4 NWLR (Pt. 66) 520.

the terms and condition of a contract between the parties and not to rewrite a contract for them.[9]

Giving the privileged relationship between a legal practitioner and his client (s), with its attendant onerous ethical expectation, where there is a retainership contract, the legal practitioner must pay necessary attention to due diligence by ensuring that the details of the relationship are clearly spelt out especially its duration. The rationale is that, where there is any dispute arising from the contract, the posture of the law, expectedly, tilts to the favour of the client who is regarded as a vulnerable party between the two as the legal practitioner, is expected to be better informed. Legal practitioners who are desirous of entering into retainership contracts, must be meticulous as far as details is concern thus, what is the checklist for a successful execution of a retainership contract? Where there is a conflict on a clause in a retainership contract due to ambiguity, what is the interpretative technique adopted by the court in resolving same? What are common mistakes made by legal practitioners in the execution of retainership contract and how can they be avoided or rectified?

The above questions form the kernel of this paper which examines the Court of Appeal decision in *Barr. Dosu Babatunde v. Osun State College of Education*[10] where the Court held that, in creating a legal retainership contract, the legal practitioner, must ensure that the terms and conditions of the contract, are expressly stated particularly it duration and failure to do, the intention of the parties will be construed based on the surrounding circumstances giving attention to the fact that the legal practitioner, is at advantageous position by reason of specialised knowledge and skill. The paper is divided into four parts. Part one is the introduction. Part two succinctly discuss the duties of the legal practitioner to his client (s); part three discusses the decision in the Babatunde's case highlighting lessons for legal practitioners who might be desirous on entering into legal retainer contracts. Part four contains the conclusion and recommendations based on the finding in the preceding sections.

2. THE DUTIES A LEGAL PRACTITIONER OWE TO HIS CLIENT

From the outset, it is apposite to note that the relationship between a legal practitioner and a client is fiduciary in nature (i.e. of utmost good faith),

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9 *Afrotech Technical Services (Nig.) Ltd. v. Mia & Sons Ltd.* [2000] 15 NWLR (Pt. 692) 730.

10 [2020] 1 NWLR (Pt. 1705) 344.

as a result, in the discharge of his duties, the least expectation from the legal practitioner is for him to act in utmost honesty and fairness at all time and in all matters pertaining to the client.[11] The duty of utmost good faith requires that the legal practitioner, like Caesar's wife, must be above board on moral and ethical issues to the extent that he must not commit or aid fraud or any sharp practice against the client in the course of perfecting the client's brief. The legal practitioner at the earliest opportunity must make full disclosure of any fee he is going to earned from effectuating the client's brief which is independent of the professional fee he is entitled to receive from the client.[12] Matters of conflict of interest must be expressly disclosed irrespective of the seeming remoteness of the conflict.[13] This duty is germane because it is the foundation upon which a client relates with a legal practitioner, if trust is breached or lacking, the client becomes insecure in dealing with the lawyer hence, the legal practitioner must rigorously with all legitimate jealous, guard the integrity of the lawyer-client relationship.

The legal practitioner owes his client a duty to deploy his full attention, intellectual energy, knowledge and skill in rendering of legal services to the client.[14] As a result, within the ambits of the law to which the legal practitioner owes a higher duty, must seek to protect the interest of his client at all times even if his brief whether or not his brief has been perfected.[15] When it comes to litigation, the legal practitioner should endeavour to put up personal appearance instead by proxy unless the situation is such that personal appearance is impracticable and sufficient notice and explanation has been availed the client with assurance of good representation by the proxy.[16]The legal practitioner must adequately prepare and be conversant with the case of the client and put up convincing representation, seriousness must be demonstrably seen in the handling of the clients brief irrespective of the nature. It is professional sacrilege for a legal practitioner to be late to court proceedings or handle them with nonchalance or is reprimanded by the court for lackadaisical attitude especially where the client is present. Where the legal practitioner is prevented from being in court, adequate and necessary arrangement must be made for another to be in court either to continue with the proceedings

11 *Nigerian Bar Association v. Fobur* [2006] 13 NWLR (Pt. 996) 196 at 216.
12 *Swindle v. Harrison* (1997) 4 AER 705.
13 *Aburime v. Nigerian Port Authority* (1978) NSCC 231.
14 Rule 14(1) Rules of Professional Conduct for Legal Practitioners, 2007.
15 *Myers v. Elman* (1940) AC.
16 *Rondel v. Worsley* (1996) 3 WLR 950.

or seek an adjournment to enable the legal practitioner put personal appearance at the adjourned date.[17]

In the discharge of his duty to the client, a legal practitioner is expected not to call at the client's residence or business place to take instructions or offer any legal service. This is to preserve the prestige and integrity of the legal profession and not expose himself to avoidable perils of the profession which are precipitated by such atmosphere.[18] However, under certain permissible conditions, a legal practitioner can render legal services to the client or take instructions at his/her residence or business place. Where the client is advance in age and visiting the legal practitioner's chambers will be excruciatingly inconveniencing, or due to ill health of the client, where a client in authority requires legal services on a matter of public interest such as security and confidentiality of the discussion cannot be guaranteed in the legal practitioner's office, he can go to the house or office of the public officer instead.

The legal practitioner also must keep confidential the brief of the client. Once a client engages a legal practitioner, he/she is going to make verbal, oral and even documentary representations which might not have ever been made to any other person before. In fact, it is often said that, there are three persons who a lie must not be told to in a relationship and a client lawyer relationship is one of the three with clergy- pew and patient doctor being the other. Giving unrestricted information concerning a matter to a legal practitioner by the client will enable the legal practitioner to have a wide and clear view of the matter he is handling as well as prepare in advance against possible surprises that may arise in the course of carrying on with the matter. Such information received from the client, are held by the legal practitioner as privilege communication. In other words, the legal practitioner is expected to hold the information in confidence and he cannot be compelled to reveal the information,[19] except in a way and manner authorised by the law.[20] the legal practitioner must not use

17 *Supra* note 13.

18 Rule 22 Rules of Professional Conduct for Legal Practitioners, 2007.

19 Rule 19(1) Rules of Professional Conduct for Legal Practitioners, 2007; Section 192(1) of the Evidence Act, 2011.

20 The legal practitioner may disclose confidential information where the disclosure is necessary for the legal practitioner to defend himself, his associates and staff against an accusation of misconduct as provided for in Rules 14(3) Rules of Professional Conduct for Legal Practitioners, 2007; where the communication is in furtherance of an illegal purpose as provided by Section 192(1) of the Evidence Act, 2011; where a statute places a duty on the legal practitioner to disclose such communication for

privileged information to his personal advantage or that of a third party unless he has fully disclosed that intention to the client and the client has giving his/her consent.[21]

Where a legal practitioner is dealing with client's property, he has a duty not to convert or misappropriate the client's money/property in his possession or deal with it in a way and manner that is inconsistent with the client's interest. Where a legal practitioner receives money for and on behalf of his client, under no circumstance must the money be mixed with the legal practitioners but same must be kept in a client's account meant for that purpose.[22] Upon receipt of any property on behalf of his client, a legal practitioner must promptly as practicable, hand over same or duly inform the client of its receipt and must render proper account where there is need.[23] Where the client is indebted to the legal practitioner, they legal practitioner may exercise his right of lien over the property to induce payment but cannot sell same save pursuant to an order of a competent court of law.

Also, where a legal practitioner has accepted a brief from a client and having handled same to a particular extent and period, may decide to withdraw from same. Several reasons could justify the withdrawal of a legal practitioner from a brief after accepting and acting in same. Disagreement over payment of professional fees, manner of handling the matter, subsequent ethical dilemma, etc. However, the rule is that once a legal practitioner has accepted a brief, he shall not withdraw from same save for good cause.[24] Where the client insist on an unjust or immoral course in the conduct of the case; where the lawyers consistently and persistently disregard the advice of the legal practitioner; where there is conflict interest between the legal practitioner and the client; where a legal practitioner is joined as a party in the case he is handling;[25] where the legal practitioner is to testify on the merit of the case he is handling for his client,[26] no matter the reason, a legal practitioner withdrawing from the employment of the client, save in unexpected circumstances, must not

instance, Section 6(1) of Money Laundering (Prohibition) Act, 2011 makes it mandatory for a legal practitioner to report any activities that may pertain to money laundering by a client to the appropriate authority.

21 *Ibid.* 19(2)

22 Rule 3 of Legal Practitioners Account Rules, 1964.

23 Rule 23(2) of Legal Practitioners Account Rules, 1964.

24 Rule 21(1) Rules of Professional Conduct for Legal Practitioners, 2007.

25 Rule 17(5) Rules of Professional Conduct for Legal Practitioners, 2007.

26 *Ibid*, at rule 20(4).

leave the client in helplessness or a state of utter confusion and dissolution by not putting him/her on notice of his intention to withdraw so that the client can make necessary arrangement for change of counsel. Also, where a legal practitioner withdraws from a case, no other from the law firm with the withdrawn legal practitioner can take over the case from the client.[27]Fees received before withdrawal but which have not been earned based on work done, should be duly refunded to the client and the file with necessary documents must be handed over to the client and the remuneration should be based on *quantum meruit* claim.[28]Above is a synopsis of the duties a legal practitioner owes a client upon being briefed.

3. CONTEXTUALISING *BABATUNDE V. OSUN STAE COLLEGE OF EDUCATION*

The brief facts of this case are that the appellant is a legal practitioner and a member of the Governing Council of the respondent. During this period, the respondent, appointed the appellant as its external solicitor with a legal retainership contract by a letter dated the 21st day of April, 2009. The said appointment letter placed the retainership fee of the appellant at the sum of ₦ 768, 911.00 (seven hundred and sixty eighty thousand, nine hundred and eleven naira) only per annum. The appellant accepted the appointment and the retainership contract vide his acceptance letter of 2011. Thereafter, the appellant wrote a letter dated 16th day of November, 2011 to the respondent to demand for his retainership fee for 2011 but there was no demand for 2010. The respondent responded to the demand letter that since the appellant did not make any request for renewal of his appointment for year 2010, the appellant had ceased to be its legal retainer since January, 2010. Being aggrieved by this response, the appellant commenced proceedings against the respondent by way of originating summons seeking the court to declare that his appointment as the respondent's legal retainer under the letter dated 21st April, 2009 was a contract of or for service which was still subsisting until same was determined by the respondent; a declaration that he was entitled to be paid his annual retainer fee of ₦ 768, 911.00 (seven hundred and sixty eighty thousand, nine hundred and eleven naira) from 2010 for as long as the contract subsisted, payment of ₦ 768, 911.00 (seven hundred and sixty eighty thousand, nine hundred and eleven naira) for year 2010 and 2011

27 Rule 17(6) Rules of Professional Conduct for Legal Practitioners, 2007.
28 Rule 21(4) Rules of Professional Conduct for Legal Practitioners, 2007.

both totalling N1,537,822.00, and for such other years or fraction of year from which the contract may subsist until determined.

The appellant maintained that the retainer agreement between the parties was not just for 2009 but a continuing agreement until determined by the parties but the respondent contended that the retainership was for one year only. The respondent raised the issue of jurisdiction of the court which was dismissed by the Court. The court dismissed the appellant's suit. Being dissatisfied, the appellant appealed to the Court of Appeal. Parties filed and exchanged briefs of argument.

Argument of the Appellant: The appellant argued that the judgment of the trial court dismissing his appeal should be set aside because the court did not properly interpret the agreement between the parties. It contended that the trial court erred in law when it held that the retainership inures in the first instance for a year certain and is subject to renewal on the agreement of both parties when the agreement itself did not by any stretch of imagination say so; that the learned trial judge erred in law by treating the appellant's case as a claim for fees by charges under section 16(1) (2) of the Legal Practitioners Act, 2004 which requires the appellant to furnish the bill of charges which must contain particulars of the principal items included in the bill before commencement of action in court when the case of the appellant as revealed by evidence presented falls under fee by Agreement as envisaged by the provisions of section 15(3)(d) of the Legal Practitioners Act. He also argued that the trial court erred in law when it failed to recognise that by the respondent's failure to protest against the alleged insufficiency of particulars of contained in the letter dated 21st April, 2009 whether before or during trial, either by way of oral arguments or pleadings, it had waived the right to of objection to the insufficiency of particulars in the bill of charges as raised by the court *suo motu* in its judgment. He therefore urged the Court of Appeal to uphold the appeal and set aside the decision of the trial court.

Argument of the Respondent: The respondent contended that the claim of the appellant is for a related work done which only the National Industrial Court of Nigeria (NICN) by virtue of section 254C of the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 having regard to section 7(1) (a) (i)-(ii) of the National Industrial Court Act, 2006, can entertain and not the Osun State High Court. Hence, the appeal is incompetent. Aside this, it argued that the appellant failed to comply with the mandatory provisions of section 16(1) (2) of the Legal Practitioners Act, 2004 by his failure to give one-month notice and a bill

of charges to the respondent. It further contended that the legal retainership between the appellant and the respondent was as a result of undue influence, therefore, irregular, illegal, null and void and of no effect whatsoever.

Decision of the Court: on the preliminary objection raised by the respondent to the jurisdiction of the Osun State High Court to have been seised of the matter, the Court of Appeal which there was no cross appeal on, the court discountenanced same as same was incompetent having not arisen from any ground of appeal. The court held that based on the letter of appointment, there was a valid retainership contract between the parties.[29] The court observed that where the agreement of parties is reduced to written terms, the duty of the court is to examine the contract to see if their case is supported by the agreement as was held in *Aondo v. Benue Links Nig. Ltd*,[30]and since the contention of the parties is that, whether or not the retainership contract was meant for one year subject to renewal of continuous until determined by either of them, to ascertain their intention which is not apparent, regards must be had to the terms and condition of the contract, the conduct of the parties and the circumstances of the case as was held by the Supreme Court in *Afrotech Technical Services (Nig.) Ltd. v. Mia & Sons Ltd. & Anor*.[31] The test to be applied as stated by Eso JSC (of blessed memory) in *Sonar (Nig.) Ltd. & Anor v. Norwind & Anor,*[32] is the objective as opposed to subjective test.[33] The court therefore stated that having regards to the conduct of the parties, if their intention was that the retainership agreement should be for an unspecified term subject to determination by either of them, it would not have matter when it commenced but because it was otherwise, that was why the agreement commence retrospectively effective from January, 2009 although signed in April, 2009. In fact, it is customary for a retainer agreement to be for a year renewable with its detailed provisions captured in it. The fact that the appellant failed or neglected to write to demand for fees for year 2010 was construed as him being aware that the agreement had lapsed in 2009 and his letter of 2011 although a demand letter, was to test the water and illicit an offer for that year. The court therefore came to

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29 *Barr. Dosu Babatunde v. Osun State College of Education* [2020] 1 NWLR (Pt. 1705) 344 at 363, Para. A. 359 at Para. H.

30 (2019) LPELR-46876 CA.

31 [2000] 15 NWLR (Pt. 629) 730.

32 [1987] 4 NWLR (Pt. 66) 520.

33 *Syndicated Investment Holdings Ltd. v. NITEL Trustees Ltd. & Anor.* (2014) LPELR-22.

the conclusion that, based on the circumstances of the case and the conduct of the parties, the agreement was one meant for a year subject to renewal and having not been renewed in 2010, the respondent had no duty to pay the appellant hence, the appellant's appeal was lacking in merit and was struck out accordingly.[34]

The decision of the court is very profound and an eye-opener to legal practitioners when entering into retainership contracts. Serious attention must be paid to the terms and conditions of the contract to ensure that, all fundamental terms, such as the duration of the contract, time and mode of renewal if applicable, amount, termination etc. are clearly and unambiguously provided to forestall unintended consequences as seen in the instant case. In fact, any loophole or shortcoming in the agreement, the courts are inclined to construing it in favour of the other party and against the legal practitioner because it is expected that, giving his professional expertise, he will be diligent to ensure that the agreement is not found wanting in any material respect. The law has been and it is that, parties are bound by their contract and the duty of the court, where the intention of the parties is not obvious, is to adopt an objective as opposed to subjective examination, to demystify it and in doing so, the seemingly vulnerable party, is guarded against the stronger. The Court of Appeal laudably took judicial notice of the fact that legal practitioners do solicit for legal retainership from government and corporate bodies year in-year-out. While this is laudable, caution must not be thrown into the wind in soliciting for legal retainership. The legal practitioner must maintain the strictest level of decorum and professionalism for he is a noble man by words and conduct and not an ordinary road side merchant whose only concern is to sell his goods to the public irrespective of her he gets their attention. The content and tone of the letter must not be reduced to indirect advertisement which is a misconduct, and can attract sanction from the relevant disciplinary body.[35]

The correctness of the Court of Appeal decision here cannot be question however, the obiter dictum of the court, in relations to the person of the appellant, is short of ideal expectation. The court had remarked as follows:

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34 *Barr. Dosu Babatunde v. Osun State College of Education* [2020] 1 NWLR (Pt. 1705) 344 at 363, Para. A.

35 O.A. Adegoke, R.E. Badejogbin, and M.E. Onoriede, *Law in Practice: Professional Responsibilities and Lawyering Skills in Nigeria* (Jos: University of Jos Press Ltd., 2014) 662.

> I cannot end this judgment without commenting on the appellant, an acclaimed experienced legal practitioner of over two decades' experience. I suppose that experience is a post call one which if over two decades as at 2009 is now over three decades. It is an embarrassment to say the least for a senior lawyer at that to waste ample judicial time and tax payers' money from 2011 till date, a period of eight years for a claim of less than ₦ 2, 000, 000. Even if Counsel is afflicted with the highest degree of penury, what happened to charity? What happened to the NBA Policy on *pro bono?* What better institution to give *pro bono* service to than an educational one involved in the education of our children? And one from whom the appellant has enjoyed one year retainership fee for offering no known services. And also one on whose council he was a member. What happened to social and communal responsibilities?

The appellant is a bona fide citizen of Nigeria and the 1999 Constitution per section 36(1) grant the right of access to court to anyone who has a legally redressable wrong to seek remedy from the court which the appellant did. He did not in the circumstance, do anything unusual. The appellant needed to have been afflicted penury to have approached the court to ventilate his legitimate anger irrespective of the idiosyncrasy of the court, it is his unfettered constitutional right. Also, while legal practitioners are encouraged to engage in *pro bono* legal services especially to bodies such as the respondent, it is a matter of choice and not compulsion. Hence, a lawyer who chose not to offer *pro bono* service to a particular person, has infracted no known law and that does not mean that, such a legal practitioner may not be offering *pro bono* service to others. The point cannot be emphasised that, for smooth administration of justice, the bar and bench must extend mutual courtesy to each other and refrain from disparaging comments or conduct for they are the main actors in the judiciary.

4. CONCLUSION AND RECOMMENDATIONS

Extrapolating from the above analysis, it is crystal clear that, a legal practitioner owes his clients several duties including fidelity, deployment of skill and knowledge in the effectuating the client's brief, avoidable and disclosure of conflict of interest, privilege and confidentiality in handling information, etc. which the law expect him to discharge in good faith within the bounds of the law. While a legal practitioner is disallowed from solicitation of briefs as it calls to question ethics, the courts have taken judicial notice of the practice of legal practitioners engaging in retainership contracts with individual, corporate and even governmental

bodies to render variant legal services on agreed basis and fees. When a legal practitioner enters into a retainership contract with a client, the law expectedly, tilts towards the favour of the clients due to the superior knowledge and skill of the legal practitioner. Like any other contract, the terms and conditions of the retainership agreement must be clearly spelt out and nothing is left ambiguous and parties are bound by the terms and conditions so reached. Where there is any ambiguity and a court is called upon to interpret, the interest of the client is giving preference over that of the legal practitioner. The legal practitioner must ensure that fundamental terms such as the duration of the contract, period and mode of renewal, termination etc. are meticulously specified. Failure to specify the duration of the retainer, time and mode of renewal and any other fundamental term, in the event of a dispute, the Court is bound to construe it using an objective test based on the surrounding circumstances.