IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: A265/2018

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO

In the matter between:

THE MINISTER OF POLICE **Appellant**

and

PIERRE CHRISTO VAN DER WATT **First Respondent**

THE SHERIFF: PRETORIA EAST **Second Respondent**

JUDGMENT

KUBUSHI J (MOLOPA J AND JANSE VAN NIEWENHUIZEN J, CONCURRING)

This judgement is handed down electronically by circulating to the parties' representatives by email and by uploading on Caselines.

INTRODUCTION

[1] This appeal challenges the refusal of a rescission application in respect of two settlement court orders granted by two different Judges at different times and under different circumstances. The first order relates to liability (merits) of the claim while the second relates to *quantum*.

[2] The issue is whether the two judgments or orders obtained by the first respondent against the appellant can be rescinded on the ground that the settlement agreements that underlay the said judgments or orders are legally invalid because they were entered into without the requisite mandate and/or authority of the appellant.

[3] In argument, the appellant contends that the said settlement agreements are invalid in that the appellant never gave the State Attorney instructions to negotiate and settle the issue of merits or *quantum* of the claim. The appellant's argument is that it in fact expressly instructed the State Attorney not to settle the issue of merits and provided no other instructions in respect of the *quantum* part of the claim, but that the State Attorney must defend the matter. According to the appellant, the State Attorney had no authority and/or mandate to enter into the settlement agreements to its prejudice. The State Attorney had only a general mandate to defend the matter and in order to enter into such settlement agreements with the first respondent, required a special mandate, which the appellant had not granted.

[4] The first respondent's argument is that the settlement agreements are not invalid because the appellant's legal team had the requisite authority to negotiate and conclude the two settlement agreements on behalf of the appellant. The contention is that even though the appellant had not granted the State Attorney the instructions to enter into such settlement agreements, on his part (the first respondent), there was

apparent or ostensible authority on the part of the State Attorney; that is, the appellant had given the first respondent the impression that there was a mandate given to the State Attorney to settle the matter. In that sense, the first respondent relies, in his case, on the ostensible authority of the State Attorney.

[5] The appeal, as it were, turns on the narrow point of law of whether the State Attorney, acting on behalf of its client, the Minister of Police (the appellant herein), had the requisite authority and/or mandate, in particular the apparent or ostensible authority, to enter into settlement agreements with the first respondent, resulting in the two judgments being granted against the appellant by consent.

MATRIX

[6] The appeal emanates from a civil claim instituted by the first respondent against the appellant for unlawful arrest and subsequent detention as well as assault on him (the first respondent) by the members of the South African Police Service ("SAPS"), who were at the time alleged to have been acting in their capacity as employees of the appellant.

[7] At all material times hereto, the appellant was represented by the State Attorney. The appellant's case was in particular handled by Ms Nangomso Qongqo ("Ms Qongqo") an attorney from the State Attorney's Office. It is said that on receipt of instructions, Ms Qongqo had addressed a letter to the appellant, in particular the SAPS Legal Services, advising that there were good prospects of success in the defence of the case. It is common cause that before the matter could be set down for trial, the parties agreed to separate the issues, that is, the liability was separated from the *quantum* part of the claim.

[8] The matter was, thus, set down for hearing on the merits on 22 October 2015. At such hearing the appellant was represented by Ms Qongqo, as attorney, and Advocate Thabethe, as counsel ("the legal team"). It is said that, on that day, members of SAPS who were to testify in the matter were present in court and ready to testify in defence of the claim.

[9] What, however, transpired was that the parties entered into settlement negotiations that resulted in judgment being granted against the appellant by agreement between the parties. As Ms Qongqo did not have instructions from the appellant to settle the matter, she first telephoned the appellant for such instructions. Ms Qongqo talked to Col Mahube, who it is said that, based on the advice previously received from Ms Qongqo that the appellant had a good case to defend the matter, instructed Ms Qongqo not to settle the matter but to proceed with the trial. Despite such instructions, Ms Nqongqo and Advocate Thabethe went on to settle the merits in favour of the first respondent at 50% apportionment of the first respondent's agreed or proven damages. The settlement was made an order of court.

[10] On receipt of information from the State Attorney that the matter has been settled in favour of the first respondent, the appellant instructed the State Attorney to apply for the rescission of that judgment on the ground that Ms Qongqo did not have instructions and/or authority to settle the merits in favour of the first respondent.

[11] Before the order granted on the merits could be rescinded, the *quantum* part of the claim was set down for trial and without any further instructions from the appellant, Ms Qongqo, again entered into a settlement agreement with the first respondent. By agreement between the parties, judgment was entered against the appellant for an

amount of R724 984, 53 based on the agreed 50% apportionment. The order was also made an order of court.

[12] The appellant having instructed a new legal team, approached the court below for the rescission of the two court orders granted against the appellant, presumably by consent.

BEFORE THE COURT BELOW

[13] In the court below the appellant had instituted an application for the rescission of the two court judgments or orders based on the ground that:

13.1 the agreements are legally invalid and the judgments or court orders purportedly obtained on the basis thereof are erroneously granted or obtained without the requisite mandate of the appellant;

13.2 alternatively, the agreements were obtained without the requisite mandate of the appellant and it is therefore in the public interest and the interest of justice that they be rescinded.

[14] The court below, decided the rescission application on the common law ground of *iustus* error. The issue that came for determination before that court was whether or not there was just and probable ignorance of the two judgments on the part of the appellant's erstwhile legal representatives. In this regard, the court below found that the appellant dismally failed to indicate any just and probable ignorance on the part of the appellant's erstwhile attorney and counsel. The court below instead found that in fact the opposite was proved, namely that the appellant's legal team acted contrary to the direct and explicit instruction given to them by the appellant.

[15] On that basis, the court below came to the conclusion that since the first respondent was not a party to any discussion between the appellant and its erstwhile legal team when the instructions were obtained, and were merely advised of the instructions, they acted in a *bona fide* manner when entering into settlement negotiations, nothing untoward could be attributed to their conduct. This, therefore, according to the court below, was a matter between the appellant and its legal representatives. The application was, as a result, dismissed with costs.

[16] The appellant then brought an application for leave to appeal, which was also dismissed with costs by the court below. Nevertheless, on application to it, the Supreme Court of Appeal granted the appellant leave to appeal to the Full Court of this Division.

ON APPEAL

[17] The appellant approached this court on the ground that the court below misdirected itself as to the law and facts in respect of its judgment and consequently the judgment ought to be set aside.

[18] Before us, the parties argued the appeal mainly on the basis of the law. The main question being whether or not the State Attorney and/or the appellant's legal team had the ostensible authority to bind the appellant. A further point of law argued was whether there was *iustus* error on the part of the appellant.

DISCUSSION

[19] As earlier stated, the focus of the judgment of the court below fell on the ground of *iustus* error. I beg, therefore, to start first with this issue.

[20] Although the court below found for the first respondent on the basis of the principle of *iustus* error, it, however, did not apply the principle correctly. Therefore, for the reasons that follow hereunder, it is my view that the principle of *iustus* error does not find application in the circumstances of this case.

[21] The application that served before the court below was premised on the proposition that by virtue of the claimed lack of authority, the settlement agreements were void and unenforceable. Building on that, it was argued that the resultant court orders, stood to be rescinded.

[22] The court in *Moraitis,*[1] stated the following:

> "[17] . . . In regard to their contentions based on Mr Moraitis' alleged lack of authority to conclude the settlement agreement on behalf of Moraitis Investments and the Moraitis Trust another principle comes into play. This is that the court can only grant a consent judgment if the parties to the litigation consented to the court granting it. If they did not do so, but the court is misled into thinking that they did, the judgment must be set aside. This is something different from avoiding a contract on the grounds of fraud, duress, misrepresentation or the like. In those cases, the injured party has an election to abide by the agreement. When one is concerned with an absence of authority to conclude the agreement in the first

[1] Moraitis Investments (Pty) Ltd and Others v Montic Diary (Pty) Ltd and Others 2017 (5) SA 508 (SCA) ("Moraitis").

place, that is not a matter of avoiding the agreement, but of advancing a contention that no agreement came into existence."

[23] From the above passage it is clear that the principle of *iustus* error applies where there is an agreement in place that the party concerned wants to get out of or avoid. Where, however, lack of authority is an issue, the expected outcome of which is that there is no agreement in place, the principle of *iustus* error does not apply.

[24] It is common cause that in this matter, the appellant relies on the State Attorney's lack of authority. It is the appellant's case that the agreements contended for by the first respondent are invalid for want of authorisation. As stated in *Moraitis*, when one is concerned with an absence of authority to conclude the agreement in the first place, that is not a matter of avoiding the agreement, but of advancing a contention that no agreement came into existence. To that extent, the appellant's submission based on the State Attorney's alleged lack of authority to conclude the settlement agreements on behalf of the appellant, means that the appellant was contending that there were no agreements in place. On that basis alone, the appellant cannot and could not rely on *iustus* error as a ground for the rescission of the court orders.

[25] The question of whether or not an order or judgment can be rescinded on the ground of *iustus* error was dealt with in the Supreme Court of Appeal in *Moraitis*, wherein the court opined as follows:

> "[12] . . . A judgment can be rescinded at the instance of an innocent party if it was induced by fraud on the part of the successful litigant, or fraud to which the successful litigant was party. As the cases show, it is only where the fraud – usually in the form of

perjured evidence or concealed documents – can be brought home to the successful party that *restitutio in integrum* is granted and the judgment is set aside. . .

[13] Apart from fraud the only other basis recognised in our case law as empowering a court to set aside its own order is *justus* error. . ."

[26] From the above quoted passages, it is clear that a judgment can be rescinded at the instance of an innocent party if it was induced by fraud on the part of the successful party, or fraud to which a successful litigant was a party, which is not the case in this matter. According to *Moraitis*, apart from the fraud, the only other basis recognised as empowering a court to rescind its own order is *iustus* error, namely, fraudulent misrepresentation, mistake, etc.

[27] If the appellant seeks to rely on *iustus* error, it must show that it was avoiding a contract on the grounds of either fraud, duress, misrepresentation or the like. Firstly, the appellant's counsel has conceded in argument before us that the appellant is not relying on fraud. Secondly, the facts of this case do not allow the appellant to rely on any of the *iustus* error grounds.

[28] The appellant wants to argue that by having not granted the State Attorney the mandate to settle the claim as the State Attorney did, the State Attorney misrepresented to the court that she had the necessary mandate to settle the matter when in fact she did not have such authority; or that the court was misled to believe that the State Attorney had the necessary authority to consent to the judgments.

[29] This, however, is not the law. As already alluded to in *Moraitis*, in order to rely on misrepresentation, as the appellant seeks to do, the misrepresentation must be based on the conduct of the first respondent. It should be the first respondent that misled the court to believe that the State Attorney had the necessary authority to bind the appellant.

[30] It is not in dispute that the misrepresentation on which the appellant seeks to rely is not based on the conduct of the first respondent as the successful party, but on the conduct of the appellant's own legal team. The principle of *iustus* error could not apply under the circumstances.

[31] It follows, therefore, that the appellant's argument that the court having been misled by its legal team, the orders must be rescinded, is without merit.

[32] It is on that basis that I hold that the grounds of rescission based on the principle of *iustus* error do not avail the appellant in this matter and that the principle was wrongly applied by the court below.

Ostensible or Apparent Authority

[33] The appellant sought the rescission of the two court orders on the ground that the appellant's erstwhile attorney and counsel entered into settlement agreements without a mandate to do so from the appellant. Accordingly, absent such mandate, the agreements are legally invalid and the judgments or court orders therefore, erroneously sought or granted and ought to be rescinded.

[34] In his defence, the first respondent argues that the appellant is bound by its counsel's apparent authority to compromise, which apparent authority cannot be

limited by the alleged instructions given to the appellant's attorney and/or counsel of which the first respondent and his legal team as well as the court were not aware of.

[35] As already stated. the appellant having submitted that there was no authority granted to the State Attorney to settle the matter, it means that the appellant was arguing for settlement agreements that are non-existent. The issue, therefore, turns on the question of whether there was an agreement concluded between the appellant and the first respondent. The answer to this question lies upon the type of authority that was conferred on the State Attorney by the appellant. Therefore, the central issue to be decided on this point, is whether the State Attorney had actual or apparent authority to conclude the agreement of settlement that underlay the two court orders.

[36] In order for the settlement agreements to be in place, the appellant must have authorised the State Attorney to conclude the agreements. That is, the State Attorney must have the authority to bind the appellant. It is common cause that the State Attorney, in this matter, was not authorised to conclude the settlement agreements, hence the first respondent's reliance on ostensible authority of the State Attorney, for his defence.

[37] Counsel for the appellant rightly submitted that the State Attorney does not have the authority to settle or compromise a claim where she is acting against the express instructions of the client. It is the appellant's case that the State Attorney was expressly informed that the matter should not be settled and that it should proceed to trial. As regards the merits, the evidence is that Col Mahube from the appellant Legal Services telephonically informed Ms Qongqo that the merits should not be settled. After receiving information that the merits had been settled to the prejudice of the appellant, the State Attorney was instructed to apply for the rescission of that judgment

which was not done. In respect of the *quantum* part of the claim, no contrary instructions (special authority) were provided to the State Attorney by the appellant to settle the matter. In fact, in this regard, Ms Qongqo did not seek instructions from the appellant to settle the *quantum*. The only instructions that were furnished to the State Attorney was for the State Attorney to defend the claim as advised by Ms Qongqo.

[38] This argument by the appellant's counsel, seeks to conflate actual and ostensible authority. As a general rule, attorneys, like the State Attorney, do not have authority to settle or compromise a claim without the consent of the client.[2] Particularly, as in this case, where instructions not to settle were expressly provided.

[39] Where counsel misses the point is that such instructions, given to the State Attorney by the appellant, constitutes actual authority and not apparent authority. Counsel's reliance on *Kruizenga*[3] that where there is great prejudice a special mandate ought to be granted is an indication of the conflation of the two authorities. The special authority that he is contending for, if granted, would constitute actual authority.

[40] Actual authority is constituted by the conduct of the principal when he or she confers the necessary authority, either expressly or impliedly, on the agent to perform a juristic act on behalf of the principal. The agent requires such authority for the act to bind the principal. The agent is then taken to have actual authority. Such authority does not authorise the agent to settle or compromise a claim. This the agent can only

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[2] Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government v Mathebula and Others (2012/22469) [2016] ZAGPJHC 187 (4 July 2016) ("Mathebula") para 21.

[3] MEC for Economic Affairs, Environment & Tourism v Kruizenga (169/2009) [2010] ZASCA 58 (1 April 2010) ("Kruizenga").

do with the consent of the principal. Actual authority operates where a client sues an attorney for exceeding his authority.

[41] Ostensible or apparent authority, on the other hand, is the authority of an agent as it appears to others. This would occur where the principal denies that she conferred authority on the agent. The third party who concluded the juristic act with the agent may then plead that the principal had conducted herself in a manner that misled the third party into believing that the agent has authority. Put differently, the misrepresentation leads to an appearance that the agent has the power to act on behalf of the principal. While this kind of authority may not have been conferred by the principal, it is taken to be the authority of the agent as it appears to others.[4]

[42] The difference is also that even if the State Attorney had the actual authority not to compromise the claim, and she, as in this matter, nonetheless exceeds her actual authority or acts contrary to the express instructions of the appellant, the latter may nevertheless be contractually bound to the settlement on the basis of the State Attorney's apparent or ostensible authority.[5] Ostensible authority is said to the power to act as an agent indicated by the circumstances, even if the agent may not truly have been given the power.[6]

[43] The argument by the appellant's counsel insisting that there were express instructions to the State Attorney not to settle the matter, is in that regard, unsustainable.

[44] In *Hlobo*, the court, dealing with the question of whether a client may be estopped from denying the authority of his attorney to settle or compromise a claim,

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[4] Makate v Vodacom (Pty) Ltd 2016 (4) SA 121 (CC) ("Makate") para 46.
[5] Mathebula
[6] Makate para 75.

stated in *obiter* that 'the apparent authority of an attorney to compromise is not limited by instructions unknown to the other party'.[7]

[45] The court in *Kruizenga*,[8] also dealing with the question of estoppel, was persuaded by the principle even though it was made *obiter* in *Hlobo*, and endorsed it. Thus it became part of our law. The principle was applied with approval in the Constitutional Court in *Makate* and in *Mathebula*.

[46] It has been held that, it is well-established that to hold a principal liable on the basis of the agent's apparent authority the representation must be rooted in the words or conduct of the principal, and not merely that of his agent. The presence of ostensible or apparent authority, is established if it is shown that a principal by words or conduct has created an appearance that the agent has the power to act on its behalf. Nothing more is required. The means by which that appearance is represented need not be directed at any person. In other words, the principal need not make any representation to the person claiming that the agent had apparent authority.[9]

[47] Similarly, like in *Kruizenga*, the first respondent contends that the representation from the appellant in this case relates only to the appointment of the State Attorney to defend the claim and to instruct counsel in this regard. The first respondent's true case is that by appointing the State Attorney to defend the claim, the appellant represented to him, and he reasonably believed, that the State Attorney had the usual and customary powers associated with its appointment.

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[7] Hlobo v Multilateral Motor Vehicle Accidents Fund (3/99) [2000] ZASCA 69; 2001 (2) SA 59 (SCA) (28 November 2000) ("Hlobo") para 10.

[8] MEC for Economic Affairs, Environment & Tourism v Kruizenga (169/2009) [2010] ZASCA 58 (1 April 2010) ("Kruizenga").

[9] Makate Para 47.

[48] The appellant's contrary argument is that the appellant's conduct to establish the authority to the State Attorney pertains to Col Mahube's express contrary instruction not to settle the matter on the merits; the written advice from Ms Qongqo that there is a good case to defend; the appellant instruction to rescind the judgment and order granted against it on the merits; and the fact that no contrary instructions (special authority) in regard to the *quantum* was given to the State Attorney. The proposition by the appellant's counsel, in this regard, is that the first respondent relies on the general authority to execute a special mandate.

[49] However, that the State Attorney acted without instructions or was expressly informed not to settle the matter or exceeded her instructions, is not the test. The test is the conduct represented to the third party by the principal, in this instance, the conduct represented to the first respondent by the appellant. It is the first respondent's case that the appellant represented to him that the State Attorney alternatively the appellant's legal team had the authority to settle the matter. The conduct that made the first respondent believe that the appellant's legal team were authorised to settle the matter was the mere appointment of the State Attorney by the appellant to defend the claim. The alternative instructions given to the State Attorney plays no role at all.

[50] Based on the afore going, I have to conclude that by merely appointing the State Attorney to represent the appellant in resisting the first respondent's claim, the appellant represented to the first respondent and to the world at large, that the State Attorney had the necessary authority to settle the claim. There was no information conveyed to the first respondent's legal representatives that the settlement reached was against the express instructions of the appellant and for that reason they must reasonably have believed that the State Attorney and counsel had the requisite

authority to settle the claim. The appellant is accordingly bound to the settlement agreement on the basis of the State Attorney's apparent authority.[10]

[51] It is only when the agent (the State Attorney) has acted by actual authority that the question of whether or not she exceeded her instructions or acted to the prejudice of the appellant, comes into play. Where ostensible authority is at play, what transpired between the principal and its agent is not considered. At this stage, what, is of cardinal importance is the conduct of the principal (the appellant) as presented to the third party (the first respondent).

[52] All the judgments referred to by the parties, in this instance, are distinguishable to the current matter in that all of them were dealing with the defence of estoppel. *Makate* is further distinguished by the fact that no attorney was involved and the case played out in the private space. However, on principle the cases are not distinguishable.

[53] The principle, as already stated, was initiated, though *obiter*, in *Hlobo*. The court in *Kruizinger* endorsed that principle which was further applied with approval in *Makate* and *Mathebula*.

[54] The upshot of this principle is that, where the State Attorney is appointed on behalf of the State to defend a case and nothing is conveyed to the other side about the limitation of the State Attorney's authority, the State Attorney can conclude an agreement with the other party which is binding on the State.

[55] To establish apparent authority on the appellant's part, the first respondent avers that the conduct of the appellant in appointing the State Attorney to represent it

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[10] Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government v Mathebula and Others (2012/22469) [2016] ZAGPJHC 187 (4 July 2016) para 30.

was enough, nothing more was required. By appointing the State Attorney as its legal representative, the appellant represented that the attorney and hence counsel appointed by the State Attorney, had authority to settle the claim. The first respondent reasonably believed, that the State Attorney had the usual and customary powers associated with that appointment which would include instructing counsel to defend the claim, and to make the necessary concessions. In other words, the appellant represented to the first respondent and to the outside world that the State Attorney had the authority not only to conduct the trial but also to make concessions to conclude the settlement agreement from which the appellant now wishes to resile.

Equity and Justice

[56] The appellant's claim in the alternative is that since the orders were obtained without the requisite mandate of the appellant, it is therefore in the public interest and the interest of justice that they be rescinded.

[57] It is my view that equity and justice militates in favour of the first respondent in the circumstances of this case.

[58] The concept of apparent authority was introduced into law for purposes of achieving justice in circumstances where a principal had created an impression that its agent had authority to act on its behalf. If this appears to be the position to others and an agreement that accords with that appearance is concluded with the agent, then justice demands that the principal must be held liable in terms of the agreement.[11] To allow the appellant to resile from such agreements, it would mean practically that attorneys can no longer assume that their colleagues are authorised to make important

[11] Makate at para 65 read with Mathebula at para 28.

decisions in the course of litigation without the principal's independent confirmation. This cannot be countenanced.

[59] Factors like the intention of the appellant to defend the claim, the private instructions given to the State Attorney not to settle the claim, and any other factor that the appellant seeks to bring forward to enable it to resile from the agreements does not bear scrutiny when a defence of ostensible authority has been raised. The only factor that can assist the appellant is if the first respondent was informed that the claim was being settled without the instructions of the appellant. There is no evidence on record that indicates that the appellant had knowledge of the private instructions between the appellant and the State Attorney.

ORDER

[60] Consequently, I propose that the appeal be dismissed with costs including the costs of two counsel.

E.M KUBUSHI

JUDGE OF THE HIGH COURT

L.M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT

[redacted]

N. JANSE VAN NIEWENHUIZEN

JUDGE OF THE HIGH COURT

Appearance:

Appellant's Counsel	: Adv. D.T Skosana SC
	Adv. Mbhalati
Appellant's Attorneys	: **S NGOMANE INC. ATTORNEYS.**
First Respondent's Counsel	: Adv. A B Rossouw SC
	Adv. J C Van Eeden
Appellant's Attorneys	: **GILDENHUYS MALATJI INC.**
Date of hearing	: 21 October 2020
Date of judgment	: 20 January 2021