THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 260/2020

In the matter between**:**

AYANDA IRVIN KUNENE	**FIRST APPELLANT**
KGOSI GUSTAV LEKABE	**SECOND APPELLANT**
HASSAN EBRAHIM KAJEE	**THIRD APPELLANT**

and

THE MINISTER OF POLICE	**RESPONDENT**

Neutral citation: *Kunene and Others v Minister of Police* (260/2020) [2021] ZASCA 76 (10 June 2021)

Coram: DAMBUZA, MOCUMIE and SCHIPPERS JJA and EKSTEEN and MABINDLA-BOQWANA AJJA

Heard: 18 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be at 10h00 on 10 June 2021.

Summary: Civil procedure – rescission of compromise agreements made orders of court – State Attorney's ostensible authority – State Attorney conceding merits and tendering quantum against the Minister of Police – grounds for rescission of compromise agreements under common law are only fraud, *justus error* or any other just cause – compromise agreements must also be grounded

on the principles of legality and the rule of law which outweigh ostensible authority - where the conduct of the State Attorney results in the subversion of the administration of justice – court orders embodying underlying compromise agreements rescinded.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Keightley J, sitting as court of first instance): judgment reported *sub nom Minister of Police v Kunene and Others* [2020] 1 All SA 451 (GJ)

The appeal is dismissed with costs against the second and third appellants; on an attorney and client scale, which include the costs of two counsel where so employed.

JUDGMENT

Mocumie JA (Dambuza and Schippers JJA and Eksteen and Mabindla- Boqwana AJJA concurring)

[1] This case concerns the rescission of two court orders granted consequent to settlement agreements concluded by the State Attorney on behalf of the respondent, the Minister of Police (the Minister), and the first appellant's legal representatives. In terms of the first order, granted on 6 February 2017 by the Gauteng Division of the High Court, Johannesburg per Tsoka ADJP, the Minister was directed to compensate the first appellant, Mr Ayanda Irvin Kunene (Mr Kunene), for all the proved and/or agreed damages arising from an unlawful assault on him by members of the South African Police Service (SAPS) on 7 August 2013. The second order, granted by the same court (Matojane J) on 2 March 2018, directed the Minister to pay R34 077 000 as damages suffered by Mr Kunene as a result of the unlawful arrest, detention and assault on him by the police.

[2] The Minister then approached the high court in July 2019 seeking an order to rescind both court orders on the basis that the State Attorney had no authority to conclude the underlying settlement agreements. The matter came before

Keightley J. This appeal is against her judgment, in terms of which she rescinded the two court orders. The appeal is with the leave of the high court.

[3] The facts which form the background to the dispute are largely common cause. On 7 August 2013 Mr Kunene was shot by members of SAPS near Pick and Pay, along Mabalane Street, Senaoane in Soweto. As a result of the incident, he sustained serious injuries which rendered him a paraplegic. In September 2015, he issued summons against the Minister, claiming damages in the amount of R39 million. The summons was served on the State Attorney's office, Johannesburg. At that time, Mr Kgosi Gustav Lekabe, (Mr Lekabe) the second appellant, was the Head of that office. He allocated the matter to Mr Dovhani Mphephu, (Mr Mphephu) one of the attorneys employed in that office.

[4] In a letter dated 13 October 2015, Mr Mphephu informed SAPS' Legal Division about the action. On 20 October 2015, Colonel Charlene Blackman Britz (Colonel Britz) of SAPS, responded as follows:

'1.4 The South African Police Service accepts full liability for legal costs in this matter. However, should the defence entail the necessity to appoint a correspondent or to brief counsel, please liaise with this office about the nature and tariff of fees of the correspondent/counsel prior to appointing them in order to obtain the written requisite authorization from this Department in terms of Treasury Regulation 12.2.1[1]

1.5 In the interim, proof of quantum, if outstanding, must be obtained from the Plaintiff and forwarded to this office for a decision regarding the fairness and reasonableness of the claim.'

Colonel Britz then requested that SAPS be kept informed, well in advance, of the developments in the matter, including, the dates of consultation and trial dates, and that they be provided with copies of all the pleadings. That, however, never happened. Instead, the Minister's plea (which included a special plea) was drafted and filed by the State Attorney, without consultation with any member of the SAPS.

[1] This is premised on the 'Treasury Regulations, GN R225, *GG* 27388, 15 March 2005' issued in terms of s 76 of the Public Finance Management Act 1 of 1999. (Own footnote added.)

[5] During the days preceding the trial date, Mr Mphephu suggested to Mr Kunene's attorneys that the case was not ready for trial and that it should be postponed; a suggestion that was firmly rejected by the latter. On the morning of 6 February 2017, the matter served before Tsoka ADJP for trial. Mr Lekabe appeared on behalf of the Minister. Mr Kunene's attorneys moved two interlocutory applications, which were opposed by Mr Lekabe. In the first application Mr Kunene sought an order for separation of the merits from the quantum, in terms of Uniform Court Rule 33(4). The second application was for condonation of Mr Kunene's non-compliance with s 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002. Both applications were granted.

[6] The aspect of the amount of damages to be awarded was reserved for a trial date, which was to be agreed upon between the parties. While the matter stood down for allocation to a trial judge (on 6 February 2017), Mr Lekabe did a *volte face.* He approached Mr Kunene's legal representatives and conceded the merits of the case.

[7] When the matter resumed in the afternoon, after 14h00, Mr Kunene's attorney approached Tsoka ADJP, together with an advocate, the third appellant, Mr Hassim Ebrahim Kajee (Mr Kajee), who had in the interim been instructed by Mr Lekabe to appear for the Minister, and advised that the parties had reached agreement on the merits. Tsoka ADJP directed Mr Kajee to record his name on the written agreement, in the place of Mr Lekabe. Thereafter, an order was granted by consent in accordance with the settlement agreement.

[8] In terms of that order, as I have said, the Minister undertook to compensate Mr Kunene for his proved (or agreed) damages arising from the assault perpetrated upon him on 7 August 2013, by members of SAPS'.[2] The matter was thereafter adjourned and set down for trial on 28 February 2018, for the adjudication of the quantum of damages.

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[2] The issue around whether Tsoka ADJP granted the order on 6 or 7 February is cleared by the record which reflects that the proceedings before Tsoka ADJP were on 6, and not 7, February. The date of 7 February was accepted by all as a typo.

[9] By letter dated 14 February 2018, Mr Moshabane Christopher Mafiri (Mr Mafiri), of the State Attorney's Office, who had evidently replaced Mr Mphephu, briefed an advocate, Mr Mthetwa, to provide a legal opinion (to the Minister) on the quantum of Mr Kunene's damages. In the same letter Mr Mafiri stated that 'Adv Kajee will be the leader in this matter'. Mr Kajee thereafter furnished an opinion on the quantum of damages, which was received the day before the trial was due to commence.

[10] On 16 February 2017, Mr Mafiri wrote to SAPS Legal Division, advising that Mr Mphephu was no longer with the office of the State Attorney. Thereafter, on 22 February 2017, Lt Colonel Daluxolo Wycliff Jama (Lt Colonel Jama), the Provincial Commander of SAPS Legal Division, inquired, by e-mail, from the State Attorney's Office as to the outcome of the court hearing of 6 February 2017. In response, Mr Mafiri ignored the substance of the inquiry and merely advised that he was now handling the file.

[11] At some stage, between the granting of the first court order (6 February 2017) and the trial date for the determination of quantum (28 February 2018), Mr Kunene sought to amend his particulars of claim by adding a claim for damages resulting from his unlawful arrest and detention on the same day of his assault by members of SAPS. In a pre-trial minute, dated 15 February 2018, it is recorded that the Minister conceded Mr Kunene's claim for damages for unlawful arrest and detention. Mr Kajee and Mr Mafiri are recorded as having represented the Minister at that pre-trial conference.

[12] When the matter came to trial on quantum before Matojane J, on 28 February 2018, Mr Kajee again represented the Minister, on Mr Lekabe's instructions. Mr Mafiri was also in attendance. The parties' legal representatives concluded a further settlement agreement, without obtaining authority from their client, SAPS or the Minister. Matojane J instructed the parties to prepare a stated case.

[13] In the stated case, apart from setting out the background to Mr Kunene's claim, the parties recorded that 'the Minister had conceded "that [he] was not in a position to dispute the truth and correctness of the factual basis and findings

(opinions) expressed by the experts for whom [the Minister had] no counterparts."' They recorded furthermore, that the Minister had tendered payment of the amount of R34 077 000 as damages. Included in the settlement amount were damages in the amount of R3 500 000 for Mr Kunene's additional claim of unlawful arrest and detention.

[14] Matojane J postponed the matter in order to reflect on the stated case. Only after the adjournment did Mr Lekabe first transmit the opinion, which he had received the previous day from Mr Kajee, to Brigadier Denise Beukes (Brig Beukes). As it turned out, the tender made on behalf of the Minister, in respect of the quantum of damages, had been based on that legal opinion.

[15] On 2 March 2018 Matojane J granted an order in terms of which the Minister was directed to pay R34 million to Mr Kunene for damages which he had suffered as a result of the shooting by the members of SAPS.

[16] On 15 March 2018, Mr Mafiri tersely wrote to Lt Colonel Jama, advising of the proceedings of 28 February 2018 as follows:

'We confirm that this matter was on trial on the 28th February 2018.

The matter proceeded to court and was finalized by way of a stated case as instructed by the head of our office.

Kindly find attached herein the following:

- Stated Case
- Draft Order

We trust you find the above in order.'

In terms of the order, the Minister was to pay the approved amount within 30 days thereof.

[17] On 19 March 2018, Brig Beukes requested an urgent report on the developments in the matter. She did not receive any response. On 23 March 2018, she followed up with another email, requesting the identity of the person who had authorised the concession to the merits of the matter. It appears that there was no response to this request.

[18] It is against this background that the Minister approached the high court seeking that the two orders, granted on the back of the settlements, be rescinded. Essentially, the Minister's case for rescission of the orders was that Mr Lekabe and Mr Kajee never had any authority to concede Mr Kunene's claim and the Minister and the police were never aware of their actions. The Minister highlighted that Mr Lekabe acted irrationally, against express instructions, not bona fide and his conduct and that of Mr Kajee in making the concessions were motivated by corruption.

[19] The latter allegation was founded on certain alleged irregularities in the manner in which Mr Lekabe and Mr Kajee had conducted themselves. Mr Kajee's sudden appearance in court, on behalf of the Minister, on the first day of trial, was surprising, to say the least. He explained it as 'doing a favour', presumably for Mr Lekabe, who had asked him to attend court. It later turned out that he started invoicing the office of the State Attorney in relation to this case two months prior to his appointment. As the high court found, his irregular invoices were paid by the State Attorney, with Mr Lekabe's approval as the only person in that office who held both the authority to appoint counsel and to approve payments. Disturbingly, Mr Lekabe insisted that Mr Kajee was appointed on 15 December 2017, despite the fact that he (Mr Lekabe) had recorded in the register of briefed counsel that he was appointed on 14 February 2018.

[20] Furthermore, the high court considered that the quality of Mr Kajee's work was poor. It had traces of information probably belonging to a document from which he had cut and pasted the advice on quantum, that he had prepared for the Minister. His invoices showed a pattern of inflated charges. He charged for two day's work in respect of perusing each expert report filed in the matter, at R2 500 per hour, with each day seven hours long.

[21] In opposing the application, Mr Kunene's main contention was that the Minister was bound by acts performed by Mr Lekabe, in the exercise of his ostensible authority as the State Attorney, even if it could be found that his conduct was tainted by fraud. It was also submitted on his behalf that the Minister had no bona fide defence to Mr Kunene's claim.

[22] Mr Lekabe denied all the allegations of impropriety made against him. He denied that he attended court on 6 February 2017 and that he concluded the settlement agreement with Mr Kunene's attorneys. He supported the submissions by Mr Kunene's legal representatives that his actions were authorised in terms of s 3 of the State Attorney Act 56 of 1957 (the State Attorney Act). He denied the allegations of an improper or corrupt relationship between himself and Mr Kajee and protested that, on the facts, no fraud was proved. Mr Kajee echoed the same sentiment. Mr Lekabe however, could not dispute the gross impropriety of the concession to additional damages for unlawful arrest and detention.

[23] The high court accepted Mr Kunene's contentions, and that of Mr Mphephu, that it was, in fact, Mr Lekabe who concluded the settlement agreement on 6 February 2017 on the Minister's behalf. The court also found that Mr Lekabe facilitated the unauthorised tender of a payment of R34 million to Mr Kunene. It rejected Mr Lekabe's version that he had attempted to contact Brig Beukes to obtain instructions on the quantum. It found that public interest demanded that the *imprimatur* of the court should not be given to the orders that were tainted by fraud. It rescinded both court orders, and, to mitigate the impact that would result from the matter going to trial, it ordered that the matter be allocated an expedited trial date.

[24] The central issue to be determined in this appeal is whether the high court was correct to rescind and set aside the orders and underlying compromise agreements granted on 6 February 2017 and 2 March 2018 respectively. But first, there is the anterior issue raised by this Court as to whether the order is appealable.

[25] At the hearing of the appeal it was submitted, on behalf of the Minister, that the rescission order was not appealable. Because of the conclusion I have reached on this issue it is unnecessary to consider the matter at length. I may just state that, with the recent developments in our law, an inquiry into the question whether an order of court is final in effect, and whether it disposes of a substantial portion of the relief sought, no longer depends on mere technical

classification thereof. Recently, in *National Director of Public Prosecutions v King*[3] this Court pronounced on the issue as follows:

'[W]hile the classification of the order might at one time have been considered to be determinative of whether it was susceptible to an appeal *the approach that has been taken by the courts in more recent times has been increasingly flexible and pragmatic. It has been directed more to doing what is appropriate in the particular circumstances than to elevating the distinction between orders that are appealable and those that are not to one of principle.*' (Emphasis added.)

[26] In this case, although the effect of the order of the high court is that Mr Kunene still has a full opportunity to present his case at a trial, the matter is appealable because firm findings of fraud were made against the second and third appellants, as the basis for the rescission, and personal costs orders were made against them. So, while orders for rescission of judgment would ordinarily not be appealable, the effect in this case is final. I am therefore in agreement with the submission that the interests of justice permit that an appeal be allowed. The rescission order granted by the high court is therefore appealable.[4]

[27] As to the merits of the appeal, it is trite that a judgment or order may be set aside at common law on any of the traditional grounds on which *restitutio in integrum* would be granted, such as fraud, *justus error* or some other just cause (*iusta causa*). The question is therefore whether, in this case, any one of these grounds exist for the Minister to resile from the compromise agreements concluded.

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[3] *National Director of Public Prosecutions v King* [2010] ZASCA 8; 2010 (2) SACR 146 (SCA); 2010 (7) BCLR 656 (SCA); [2010] 3 All SA 304 (SCA) para 51. See also *Tshwane City v Afriforum and Another [2016] ZACC 19; 2016 (9) BCLR 1133 (CC);* 2016 (6) SA 279 CC para 40.

[4] The test of irreparable harm must take its place alongside other important and relevant considerations that speak to what is in the interests of justice, such as the kind and importance of the constitutional issue raised; whether there are prospects of success; whether the decision, although interlocutory, has a final effect; and whether irreparable harm will result if leave to appeal is not granted. It bears repetition that what is in the interests of justice will depend on a careful evaluation of all the relevant considerations in a particular case. See *Philani-Ma-Afrika and Others v Mailula and Others* [2009] ZASCA 115; 2010 (2) SA 573 (SCA); [2010] 1 All SA 459 (SCA) and *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) para 53.

[28] This Court stated, in *Slabbert v MEC for Health and Social Development of Gauteng Provincial Government*,[5] that '[w]hen a compromise is embodied in an order of court the order brings finality to the *lis* between the parties and it becomes *res judicata*'. And in *Eke v Parsons*,[6] the Constitutional Court cautioned that:

'This in no way means that anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement. For an order to be competent and proper, it must, in the first place "relate directly or indirectly to an issue or *lis* between the parties". Parties contracting outside of the context of litigation may not approach a court and ask that their agreement be made an order of court. . . .' (Footnotes omitted.)

[29] Much reliance was placed, by the appellants, on the judgment of this Court in *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another*;[7] in which it was held that the State Attorney has ostensible authority to bind a client at a pre-trial conference convened in terms of rule 37 of the Uniform Rules, even where the effect of the agreement is to settle an opposing party's claim. Somewhat similar to this case, in *Kruizenga* the dispute related to agreements which the State Attorney had concluded with the respondents at two rule 37 pre-trial conferences, without the consent of the client. The minutes of the first conference showed that the State Attorney had conceded the merits of the plaintiff's claim, with the result that all that remained for determination by the court was the issue of the quantum of damages claimed. An order was granted by the court accordingly. Subsequently the Minister launched an application to rescind that court order and the underlying admissions.

[30] Having considered the relevant principles in AJ Kerr *The Law of Agency*[8], together with a number of judgments of this and other courts, this Court in *Kruizenga* said at para 20:

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[5] *Slabbert v MEC for Health and Social Development of Gauteng Provincial Government* (423/2016) [2016] ZASCA 157 para 7.
[6] *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) para 25.
[7] *MEC for Economic Affairs, Environment and Tourism: Eastern Cape v Kruizenga and Another* [2010] ZASCA 58; 2010 (4) SA 122 (SCA); [2010] 4 All SA 23 (SCA).
[8] A J Kerr *The Law of Agency* 3ed (1991) at 149.

'I accept that, in this matter, by agreeing to the settlement the State Attorney not only exceeded his actual authority, but did so against the express instructions of his principal. As opprobrious as this conduct was, I cannot see how this has any bearing on the respondent's estoppel defence. The proper approach is to consider whether the conduct of the party who is trying to resile from the agreement has led the other party to reasonably believe that he was binding himself. Viewed in this way it matters not whether the attorney acting for the principal exceeds his actual authority, or does so against his client's express instructions. The consequence for the other party, who is unaware of any limitation of authority and has no reasonable basis to question the attorney's authority, is the same. That party is entitled to assume, as the respondents' did, that the attorney who is attending the conference clothed with "an aura of authority" has the necessary authority to do what attorneys do at a rule 37 conference – they make admissions, concessions and often agree on compromises and settlements. In the respondent's eyes the State Attorney quite clearly had apparent authority'. (Footnotes omitted.)

[31] An extraordinary distinguishing factor in this case is the irregular addition of a further cause of action in the form of the claim for unlawful arrest and detention, subsequent to the settlement of the case on the merits, and in respect of which no order of court was obtained. While the high court concluded that there was no evidence connecting Mr Kunene's legal representatives to the fraudulent conduct of Mr Lekabe and Mr Kajee, there is no reasonable basis on which it can be found that they (Mr Kunene's legal representatives) were unaware of the illegality of the bizarre post settlement amendment, to which the State Attorney had agreed.

[32] Mr Kunene's legal representatives must have known that such absurd augmentation of the cause of action after settlement of the merits, which in the order of 6 February 2017, was confined to damages for 'unlawful assault', was impermissible in law. The order of 2 March 2018 however, included damages for 'unlawful arrest and detention' in the amount awarded for general damages. This cause of action was not pleaded, did not 'relate . . . to an issue or *lis* between the parties',[9] and thus could never have been conceded in the merits order of 6 February 2017. On this aspect the question of ostensible authority on the part

[9] *Eke v Parsons* op cit fn 7 para 25.

of the State Attorney does not even arise. The irregularity/illegality in the concession and the consequent compromise tainted both the orders made in relation to the merits and the quantum of Mr Kunene's claim. This factor alone justified rescission of both court orders.

[33] There is no doubt that the judgment of this Court, in *Kruizenga,* remains the correct exposition of the law on the ostensible authority of the State Attorney. However, when Mr Kunene's attorney could not have reasonably thought that the State Attorney had the authority to make the concessions he did, the protection afforded by ostensible authority was not available to him. This however, was not the ground on which the high court's rescission order was based.

Principle of Legality

[34] Part of the Minister's case before the high court was that Mr Lekabe and Mr Kajee's conduct was irrational and 'required judicial overview with reference to the principle of legality'. The high court agreed and was of the view that the powers of the State Attorney were limited by the constitutional principle of the rule of law. It will be recalled that in *Kruizenga*, this Court left open the question whether the broad mandate of the State Attorney may be limited.

[35] After considering the relevant judgments of this Court and the Constitutional Court[10] on ostensible authority, the high court said:

'Applying the above principles to the present case it is immediately apparent that absent particular circumstances pointing to considerations of legality and the rule of law, the Minister would be bound by the State Attorney's concession on the merits and the tender of R34 077 000 on the quantum . . . .'

It considered that the Minister could not be bound by the illegal acts of Mr Lekabe and Mr Kajee (individually or jointly).

[36] The judge reasoned that Mr Lekabe and Mr Kajee had subverted the administration of justice. They had acted contrary to the best interests of their client, the Minister, and had denied him the opportunity to properly defend the

[10] *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) para 48 citing Lord Denning in *Hely-Hutchinson v Brayhead Ltd and Another* [1968] 1 QB 549 (CA).

matter or to settle it on a rational basis. Their conduct was inconsistent with the rule of law and the principle of legality. Consequently, the Minister could not be bound by the compromises concocted by them. This is a case where public interest demanded that the *imprimatur* of the court should not be given to the orders that were made.

[37] On appeal, counsel for the appellants submitted that the issues could be adequately determined on precedent and it was unnecessary to invoke the constitutional principle of legality and that there was no basis on which the principle applied. It was disputed that the State Attorney performed public functions or that it was an organ of state. Even if it was an organ of state, so it was contended, Mr Lekabe was 'not exercising a public power when he conceded liability – he was just doing what attorneys do, whether they represent the State or a private party'. Then it was contended that the 'rule of law, in the context of this case, should have meant nothing more than the application of the *Kruizenga* principles relating to ostensible authority'.

[38] These contentions are however incorrect. The powers and functions of the State Attorney are conferred by statute. Section 3(1) of the the State Attorney Act[11] provides that:

'The functions of the offices of the State Attorney shall be the performance in any court or in any part of the Republic of such work on behalf of the Government of the Republic as is by law, practice or custom performed by attorneys, notaries and conveyancers.

Likewise, s 3(3) reads:

'Unless the Minister of Justice and Constitutional Development otherwise directs, there may also be performed at the offices of State Attorney like functions in or in connection with any matter in which the Government or such an administration as aforesaid, though not a party, is interested or concerned in, or in connection with any matter where, in the opinion of a State Attorney or of any person acting under his or her authority, it is in the public interest that such functions be performed at the said offices.'

[39] Most recently, this Court in *Zuma v Democratic Alliance and Another* [12] dismissed an appeal against the order of a Full Bench in terms of which it

[11] Section 3 amended by s 35 of Act 93 of 1962 and substituted by s 3 of Act 13 of 2014.
[12] *Zuma v Democratic Alliance and Another* (1028/2019) [2021] ZASCA 39 (13 April 2021).

reviewed and set aside a decision by the State Attorney to authorise payment of personal legal costs incurred by the former President of the Republic of South Africa in his criminal prosecution and related matters. That decision was set aside on the basis that the State Attorney had no power to do so under s 3(1) or s 3(3) of the State Attorney Act, and Mr Zuma was ordered to repay the funds received.

[40] Furthermore, the employment of State Attorneys is governed by the provisions of the Public Service Act 104 of 1994. When the impugned orders were granted, Mr Lekabe was in the employment of the Department of Justice and Correctional Services as Head of the State Attorney's Office.

[41] It is thus beyond question that the State Attorney's Office is an institution that exercises public power or performs public functions in terms of legislation. Those powers and functions are sourced in the State Attorney Act. The high court was thus correct to hold that the Office of the State Attorney is an organ of state as defined in s 239 of the Constitution,[13] and that it was bound by rule of law and the principle of legality. The Constitutional Court has said that 'the exercise of public power is always subject to constitutional control and to the rule of law, or . . . more specifically, the legality requirement of our Constitution'.[14]

[42] In *Affordable Medicines Trust and Others v Minister of Health and Others*[15] the Constitutional Court held:

'Our constitutional democracy is founded on, among other values, the "[s]upremacy of the constitution and the rule of law . . .

. . . The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls

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[13] Section 239 of the Constitution, in relevant part, reads:
'**organ of state means** –
(a) . . .
(b) any other functionary or institution –
(i) . . .
(ii) exercising a public power or performing a public function in terms of any legislation,
. . . . '

[14] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343 (CC) para 29.

[15] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) paras 48 and 49.

through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive "are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law." In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.' (Footnotes omitted.)

[43] The principle of legality thus serves to ensure that a public power or function is exercised to achieve the purpose for which it was given in the empowering provision or on the information before the organ of state.[16] And the principle of legality, which is an incident of the rule of law, is a mechanism to ensure that the State, its organs and its officials do not consider themselves to be above the law in the exercise of their functions, but remain subject to it. In the context of the principle of legality, rationality is a 'minimum threshold the requirement applicable to the exercise of all public power by members of the executive and other functionaries',[17] and requires a rational relationship between the exercise of the power or function and the purpose for which it was given.[18]

[44] There can be no dispute that the two court orders granted in favour of Mr Kunene (6 February 2018 and 2 March 2019) were founded on Mr Lekabe's irrational decisions. As the high court correctly held, Mr Lekabe inexplicably refused the proposal by Mr Mphephu, on two occasions, that counsel be appointed to deal with the matter, contrary to the express instruction of SAPS. He was the only person in the State Attorney's Office with the authority to appoint an advocate. Instead of doing so, he made sure that he retained the file, with the result that Mr Mphephu attended a pre-trial meeting without it. Then Mr Lekabe, who had not been handling the file and had not attended the pre-trial meeting, appeared before Tsoka ADJP and initiated the settlement of the case without any authority to do so. Not only that, he unlawfully authorised Mr Kajee to attend court to finalise the compromise agreement on the merits. All of this, contrary to clear and consistent instructions by SAPS as to the Minister's stance on the matter.

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[16] C Hoexter; *Administrative Law in South Africa 2ed* at 357-358.
[17] *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674; 2000 (3) BCLR 241 para 90.
[18] C Hoexter op cit fn 19 at 358.

[45] Mr Lekabe's denial of his involvement in the proceedings of 6 February 2017 was correctly found to be untrue by the high court. The text messages exchanged between Mr Mphephu and one of Mr Lekabe's deputies, Mr Dhulam on the morning of 6 February 2017, to the effect that Mr Lekabe was en route to court put paid to Mr Lekabe's lies.

[46] There was also no credible challenge to the contention that Mr Mphephu had no authority to appoint counsel and to make concessions of the kind made in this case. In fact, Mr Kajee's version that he was requested by Mr Lekabe to attend court on 6 February 2017, disproves Mr Lekabe's assertion that Mr Mphephu tendered the concessions and concluded the settlement agreement. The recordal of Mr Lekabe's name on the court orders also firmly disproved his version. The high court's finding that it was Mr Lekabe rather than Mr Mphephu who represented the Minister in court on that day cannot be faulted. Mr Lekabe's dishonourable attempt to shift the blame to Mr Mphephu for the misrepresentations made to Mr Kunene's attorneys and to court was correctly rejected by the high court.

[47] The high court thus correctly concluded that Mr Lekabe did not act in good faith and was intent on subverting the law and his client's interests. Such fraudulent conduct is inimical to the rule of law and cannot form a legitimate basis for the Minister's liability. No public servant has authority to subvert the constitutional principles on which the very idea of public confidence is founded.

Costs

[48] Mr Lekabe and Mr Kajee were aggrieved by the personal costs order granted on a punitive scale of attorney and client by the high court against them. They made much of the reference by the high court to statements attributed to them in an application brought by the Johannesburg Society of Advocates against Mr Kajee for his disbarment. Therein, Mokgoatlheng and Modiba JJ made uncomplimentary findings against Mr Kajee. The complaint was that the personal costs orders granted by the high court against them in this case resulted from its improper consideration of the remarks made by the two judges.

[49] It is trite that costs are ordinarily granted against a legal representative in exceptional circumstances. In *Stainbank v South African Apartheid Museum at Freedom Park and Another*,[19] the Constitutional Court held:

'Although the courts have the power to award costs from a legal practitioner's own pocket, costs will only be awarded on this basis *where a practitioner has acted inappropriately in a reasonably egregious manner.* However, there does not appear to be a set threshold where an exact standard of conduct will warrant this award of costs. Generally, it remains within judicial discretion. Conduct seen as unreasonable, wilfully disruptive or negligent may constitute conduct that may attract an order of costs *de bonis propriis*.' (Emphasis added.)

[50] The dishonourable conduct by the second and third appellants in this case is described above, and justified the costs orders granted by the high court. That the high court viewed their conduct, comprising of lies and abuse of State funds, as egregious, is clear from its judgment. There is no demonstrable error in the exercise of its discretion.

[51] In the result, the following order issues.

The appeal is dismissed with costs against the second and third appellants; on an attorney and client scale, which include the costs of two counsel where so employed.

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B C MOCUMIE

JUDGE OF APPEAL

[19] *Stainbank v South African Apartheid Museum at Freedom Park and Another* [2011] ZACC 20; 2011 (10) BCLR 1058 (CC) para 52.

Appearances

For 1st Appellant:	J F Mullins SC (with him M Patel and F F Docrat)
Instructed by:	Mafate Inc., Johannesburg
	L & V Attorneys, Bloemfontein
For 2nd Appellant:	V Notshe (with him D Brown)
Instructed by:	Skosana Attorneys, Johannesburg
	Phatsoane Henny Attorneys, Bloemfontein
For 3rd Appellant:	A Manilall
Instructed by:	Manilall Chunder Attorneys, Durban
	Symington De Kok Attorneys, Bloemfontein
For Respondent:	D Joubert SC (with him G Van Rhyn Fouche)
Instructed by:	Geldenhuys Malatji Inc., Johannesburg
	Honey Attorneys, Bloemfontein