



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1009/2021

In the matter between:

MINISTER OF POLICE

APPELLANT

and

PIERRE CHRISTO VAN DER WATT

FIRST

RESPONDENT

THE SHERIFF, PRETORIA CENTRAL

SECOND

RESPONDENT

Neutral citation: *Minister of Police v Van der Watt and Another* (1009/2021) [2022] ZASCA 114 (21 July 2022)

Coram: PETSE DP and PLASKET and MOTHLE JJA and TSOKA and SALIE-HLOPHE AJJA

Heard: 19 May 2022

Delivered: 21 July 2022

Summary: Judgments and orders – compromise agreements made orders of court – State Attorney conceding merits and quantum against the Minister of Police against express instructions – State Attorney’s ostensible authority – rescission – rescission in terms of the Uniform Rule 42(1)(a) – grounds of rescission of agreements

under common law are only fraud and just error or just cause – compromise agreements not tainted by fraud and just error – no illegality found.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Kubushi, Molopa-Sethosa and Janse van Niewenhuizen JJ concurring, sitting as court of appeal):

- 1 The appeal is dismissed with costs, including the costs of two counsel.
 - 2 The Registrar of this Court is directed to send a copy of this Judgment to the Minister of Justice and Correctional Services and the Legal Practice Council and draw their attention of paras 30 and 31 of the judgment.
-

JUDGMENT

Tsoka AJA (Petse DP and Plasket and Mothle JJA and Salie-Hlophe AJA concurring):

[1] This appeal concerns an unsuccessful application for the rescission of two consent court orders granted on 22 October 2015 and 10 February 2017¹ by the Gauteng Division of the High Court pursuant to two settlement agreements concluded by the State Attorney on behalf of the appellant, the Minister of Police (the Minister), and the first respondent's legal representatives.

[2] The first respondent is Mr Pierre Christo Van der Watt (Mr Van der Watt) and the second respondent is the Sheriff: Pretoria Central. Although the second respondent is cited in this matter as a party, it played no role both in the court below and in this Court. The Sheriff was cited merely as a party who had executed the warrant of execution pursuant to the two orders referred to above.

[3] The facts foundational to the appeal are in the main common cause. They are as

¹ The first order was granted by Ledwaba DJP and Louw J granted the second order.

follows. At about 20h00 on 3 March 2013, the police were summoned by Ms Elmarie Van der Watt (Ms Van der Watt) to attend a domestic complaint at Mr Van der Watt's residence as the latter was assaulting and threatening to kill the former, his wife. Mr Van der Watt's actions traumatised their children who, on arrival of the police, were crying. Ms Van der Watt reported to the police that her husband was using steroids.

[4] Undeterred by the presence of the police, Mr Van der Watt who was holding a bottle of alcohol, charged towards the police while hurling insults at them and threatening to kill his wife. Mr Van der Watt not only threatened to kill his wife in the presence of the police, but also verbally abused the police including using the offensive 'K . . . word'.

[5] The traumatised Ms Van der Watt requested the police to accompany her to fetch her clothing in order to leave her husband. While still in the house, Mr Van der Watt assaulted the police with the result that the police were forced to handcuff him to bring the situation under control. While going downstairs with the handcuffs Mr Van der Watt stumbled as he was still wrestling with the police and rolled downstairs. He sustained injuries. He was then arrested and taken to the police cells. Later, he was taken to hospital for medical treatment while still under police guard.

[6] Warrant Officer Du Toit laid criminal charges against Mr Van der Watt for assault and resisting arrest. The latter did not, however, lay criminal charges against the police for the injuries sustained in the incident. As Ms Van der Watt was financially depended on her husband, she did not press charges against him. This resulted in the public prosecutor declining to prosecute Mr Van der Watt as the former formed an opinion that there were no prospects of conviction. The charges against Mr Van der Watt were withdrawn. He was then released from custody.

[7] Subsequent to his release from detention on 17 March 2013, Mr Van der Watt instituted an action for damages against the Minister for unlawful arrest, detention and assault. The Minister defended the action and was represented by Ms Nangomoso

Qongqo of the State Attorney's office who, on 13 February 2015, wrote a letter to the Minister advising the Minister that 'we are of the opinion that we have a case to fight for'. On the same date, the Minister was advised that Mr Mduduzi Thabethe had been briefed as counsel and that from then on, he would be handling the matter on behalf of the Minister.

[8] After the close of the pleadings, the action was enrolled for trial on 22 October 2015. All the Minister's witnesses who were to testify in resisting Mr van der Watt's claims, were present in court. On the day of the trial, Ms Qongqo telephoned Colonel Mahube, the police officer responsible for litigation in the South African Police Service in the North West Province, for a mandate to settle the issue of liability. Colonel Mahube refused to give Ms Qongqo the requested mandate as the latter had previously advised that the police had a good case against Mr Van der Watt's action.

[9] Notwithstanding the expressed mandate to resist liability, Ms Qongqo and Mr Thabethe proceeded to settle the issue of liability on the basis that the Minister would be liable for 50% of Mr Van der Watt's proven damages. A settlement agreement between the parties was then concluded whereafter Ledwaba DJP was approached to make the settlement agreement an order of court. On 6 May 2016, surprised by the turn of events, the Minister, through Colonel O R Sebusho, instructed the State Attorney to apply for rescission of the order made by Ledwaba DJP on 22 October 2015. At the same time, the Minister requested Ms Qongqo to hand over the matter to a different attorney in the State Attorney's offices as the police were dissatisfied with the manner in which the matter was handled by Ms Qongqo. Ms Qongqo, however, insisted that she had instructions to concede liability. Nevertheless, she handed over the file to her superior, Mr Isaac Chowe, for the file to be given to Ms Mokgale in the State Attorney's offices.

[10] On 31 May 2016 Ms Qongqo advised Colonel Sebusho that Ms Mokgale had indicated that she was in no position to take over the matter. In the meantime, the issue of quantum was enrolled for trial before Louw J. As the parties had settled the issue of

quantum, on 10 February 2017, Louw J made the settlement agreement an order of court. Prior to the issue of quantum having been settled and the settlement agreement made an order of court, on 9 January 2017, Mr Van der Watt amended the particulars of claim by increasing the amount of damages claimed in respect of the head of damages relating to the assault.

[11] On 10 May 2017, the Minister launched an application in terms of rule 42(1) of the Uniform Rules of Court for the rescission of the two consent orders concerned, on the basis that such orders were erroneously sought or granted as contemplated in rule 42(1). In the alternative, it was asserted that the two court orders were granted as a result of *iustus error*.

[12] The application served before Van der Westhuizen AJ. After hearing argument, the court dismissed the application with costs.

[13] Aggrieved by the dismissal of the application, the Minister launched an application for leave to appeal the order made. On 25 September 2018, the court dismissed the application for leave to appeal with costs. In due course, the Minister petitioned this Court for leave to appeal. On 30 May 2018, this Court granted leave to appeal to the full court of the Gauteng Division of the High Court. The appeal served before Kubushi, Molopa-Sethosa and Janse van Nieuwenhuizen JJ. Again, the Minister was unsuccessful as the full court dismissed the appeal with costs. The Minister again launched a petition to this Court for special leave to appeal the order of the full court. On 31 August 2021, this Court granted the Minister special leave to appeal the order of the full court. This is the appeal now before us.

[14] The focus of the appeal is the alleged lack of authority of the State Attorney to conclude the two impugned settlement agreements on behalf of the Minister. The Minister contended that as Ms Qongqo and Mr Thabethe lacked the requisite authority to conclude the two settlements agreements, which were later made orders of the court, the settlement agreements were void and unenforceable and therefore fell to be

rescinded because, in terms of rule 42(1)(a) of the Uniform Rules, they were erroneously sought or granted.

[15] Rule 42(1), in relevant part, provides:

‘(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) . . .

(c) . . .’

[16] The remedy sought by the Minister in seeking to rescind or vary the two court orders concerned in terms of rule 42(1)(a), is not available to him. On a proper reading, rule 42(1)(a) is available only to a party in whose absence the order sought to be rescinded was either erroneously sought or erroneously granted. Here it is common cause that the Minister was legally represented by the State Attorney and counsel when the impugned orders were granted by Ledwaba DJP and Louw J. Thus, on this basis alone, the appeal falls to be dismissed.

[17] The real issue in this appeal is whether the State Attorney and counsel had apparent (or ostensible) authority to conclude the settlement agreements that resulted in the two court orders being made. In the present matter, it is undisputed that when the two court orders were made, the State Attorney and counsel, on behalf of the Minister, had no actual authority to compromise the claim against their principal. On the contrary, all indications are that Ms Qongqo and Mr Thabethe acted contrary to the Minister's express instructions to resist the claim which were conveyed to them in unequivocal terms by Colonel Mahube.

[18] In *Makate v Vodacom (Pty) Ltd*² the Constitutional Court explained the concept of apparent authority as follows:

² *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) para 65.

‘ . . . The concept of apparent authority as it appears from the statement by Lord Denning, was introduced into law for purposes of achieving justice in circumstances where a principal had created an impression that its agent has 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. . . ’

[19] In this case, the Minister created the impression that the State Attorney and counsel who represented him at the material times had authority to act on his behalf. Mr Van der Watt and his counsel were under the impression that the State Attorney and her counsel had authority to conclude the settlement agreements on behalf of the Minister. It is undisputed that Mr Van der Watt and his counsel were unaware that the State Attorney and her counsel had no actual authority, nor has there been any suggestion that Mr Van der Watt and his counsel committed fraud to induce the Minister's legal representatives to conclude the impugned compromise agreements. Indeed, before us counsel for the Minister expressly disavowed any reliance on fraud or any kind of improper conduct on the part of Mr Van der Watt or his legal representatives. Accordingly, the interests of justice dictated that the Minister should be held liable in terms of the settlement agreements.

[20] In *MEC for Economic Affairs, Environment & Tourism: Eastern Cape v Kruizenga and Another*³ this Court, dealing with the apparent authority of a legal representative to bind a client at a pre-trial conference convened in terms of rule 37 of the Uniform Rules, reasoned that:

‘ . . . 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

³ *MEC for Economic Affairs, Environment & Tourism: Eastern Cape v Kruizenga and Another* [2010] ZASCA 58; 2010 (4) SA 122 (SCA) ; [2010] 4 All SA 23 (SCA) para 20.

authority' has the necessary authority to do what attorney's usually do at a rule 37 conference – they make admissions, concessions and often agree on compromises and settlements. In the respondents' eyes the State Attorney quite clearly had apparent authority.'

[21] In *Moraitis Investments (Pty) Ltd and Others v Montic Diary (Pty) Ltd and Others*⁴ (*Moraitis*) this Court pointed out that the proper enquiry is, however, not to start with the settlement agreement concluded but to start with the court order made. The court reasoned that, as long as the court order exist, it cannot be disregarded. It remains valid and extant until set aside.

[22] In *Eke v Parsons*⁵, the Constitutional Court described the effect of court orders thus:

'The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the *lis* between the parties; the *lis* becomes *res judicata* (literally, "a matter judged"). It changes the terms of a settlement agreement to an enforceable court order. . .'

And that :

' . . . Generally, litigation preceding enforcement will relate to non-compliance with the settlement order, and not the merits of the original underlying dispute. That means the court will have been spared the need to determine that dispute, which – depending on the nature of the litigation – might have entailed many days of contested hearing.'

[23] In the present matter, the *lis* between the parties, namely the merits and quantum of the action, as a result of the two court orders, became *res judicata*. That is the end of the enquiry as the *lis* between the parties is no longer alive. It being common cause that the two court orders were not obtained as a result of fraud on the part of Mr Van der Watt or his legal representatives, the court orders concerned are thus valid and enforceable. The full court can thus not be faulted for dismissing the Minister's appeal

⁴ *Moraitis Investments (Pty) Ltd and Others v Montic Diary (Pty) Ltd and Others* [2017] ZASCA 54; [2017] 3 All SA 485 (SCA); 2017 (5) SA 508 (SCA) para 10.

⁵ *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) paras 31 and 32.

on the basis that the application for rescission of the court orders were not erroneously sought or granted.

[24] The Minister had a second arrow in his bow. Both in the court of first instance and the full court, the Minister argued that as the settlement agreements were concluded in the absence of authority, the resultant court orders are invalid and thus ought to have been set aside. The foundation for this argument was the principle of *iustus error*.

[25] The Minister's reliance on the principle of *iustus error*, is ill founded. As pointed out in *Moraitis*, this principle can be relied upon only if the legal consequences of valid settlement agreements are to be avoided but not where a party, such as the Minister, contends that, in the absence of actual authority, there were no settlement agreements.

[26] In this Court, as in the full court, the Minister contended that as the two impugned court orders are inconsistent with the principle of legality, the foundational basis of the rule of law, they fell to be rescinded. The contention is based on the fact that, firstly, once the first court order was made, Mr Van der Watt impermissibly augmented his cause of action, and secondly, on the authority of *Kunene and Others v Minister of Police (Kunene)*,⁶ a decision of this Court, the two court orders ought to be rescinded.

[27] In my view, the Minister's contentions are devoid of merit. The facts in *Kunene* are materially distinguishable from the facts in the present matter. In *Kunene* it was not merely an augmentation of the pleaded cause of action, but rather the introduction of a new cause of action. In the present matter no new cause of action was introduced. What Mr Van der Watt did was merely to increase the quantum of damages sought under various heads. In contrast, in *Kunene*, after the granting of the court order, a new cause of action for assault was introduced after the court had granted an order in relation to the issue of liability. As a result, this Court found that this should have

⁶ *Kunene and Others v Minister of Police* (260/2020) [2021] ZASCA 76.

aroused suspicions that the State Attorney and counsel had no authority to bind the Minister.

[28] In *Kunene*, the relevant court order was rescinded based on the fact that it was a product of a myriad of fraudulent activities by both the State Attorney and her counsel. As already mentioned, in the present matter there is no suggestion of fraud on the part of the State Attorney and her counsel.

[29] It is apt to restate what this Court said in *Kunene*.⁷ It said:

'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.'

[30] Before making the order, it is unfortunately necessary to address one disturbing issue that emerges from the record. A perusal of the record reveal that Ms Qongqo, the State Attorney that was assigned to represent the Minister and Mr Thabethe, counsel who was briefed in the matter, concluded compromise agreements with the respondent's legal representatives in breach of express instructions from Colonel Mahube, representing the Minister, to resist the respondent's claim. On the date on which the trial was supposed to commence the Minister had all his witnesses in attendance in court ready to testify on his behalf. Instead, the matter did not go on trial but was settled, so it would appear from the record, against the Minister's express instructions to contest the claim.

[31] How it came about that the Minister's explicit instructions were not carried out and, in fact, defied is not clear from the record. Be that as it may, this is a matter that warrants investigation both by the Minister of Justice and Correctional Services on the one hand and the Legal Practice Council on the other with a view to establish where things went wrong. And in particular whether any disciplinary action needs to be taken

⁷ *Kunene and Others v Minister of Police* (260/2020) [2021] ZASCA 76 (10 June 2021) para 47.

against Ms Qongqo and Mr Thabethe or both. Thus, it behoves this Court to direct that a copy of this judgment should be brought to the attention of the Minister of Justice and Correctional Services and the Legal Practice Council for a thorough investigation.

[32] The conclusion reached is that the full court did not misdirect itself in dismissing the appeal before it. The Minister's present appeal must thus fail.

[33] In the result, the following order is issued:

- 1 The appeal is dismissed with costs, including the costs of two counsel.
- 2 The Registrar of this Court is directed to send a copy of this Judgment to the Minister of Justice and Correctional Services and the Legal Practice Council and draw their attention of paras 30 and 31 of the judgment.

M TSOKA
ACTING JUDGE OF APPEAL

Appearances:

For the appellants:

DT Skosana SC (with S Mbhalati)

Instructed by:

S Ngomane Inc, Pretoria

Phatshoane Henney Attorneys, Bloemfontein

For the respondent:

AB Rossouw SC (with J C Van Eeden)

Instructed by:

Gildenhuis Malatji Inc., Pretoria

Pieter Skein Attorneys, Bloemfontein