IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2012/22469

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between –

THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH AND SOCIAL DEVELOPMENT OF THE GAUTENG PROVINCIAL GOVERNMENT APPLICANT

And

MATHEBULA, AGREEMENT on behalf of N S M 1ST RESPONDENT
LEKABE, KGOSI GUSTAV 2ND RESPONDENT
PHOKOWANE, KHUDUGA 3RD RESPONDENT
THE MINISTER FOR THE DEPARTMENT OF JUSTICE & CONSTITUTIONAL DEVELOPMENT 4TH RESPONDENT
THE SHERIFF FOR THE DISTRICT OF JOHANNESBURG CENTRAL 5TH RESPONDENT

JUDGMENT

BORUCHOWITZ J:

[1] This is an application for the rescission of an order granted by Victor J, ostensibly by agreement between the parties, on 26 August 2015 in terms of which the applicant was directed to pay an amount of R22 786 293.58 in respect of delictual damages to the first respondent in her representative capacity on behalf of her minor child, N s M.

[2] The applicant is the Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government. Five respondents have been cited, namely Mrs A Mathebula, the first respondent, who is cited in her aforementioned representative capacity; the second respondent, Mr Kgosi Gustav Lekabe, a State Attorney in Johannesburg, who is alleged to be at the centre of the issue forming the subject of the application; the third respondent, Mr Khuduga Phokwane, a senior assistant state attorney who is responsible for the matter in the office of the State Attorney, Johannesburg. The fourth respondent is the Minister of Justice & Constitutional Development, cited in his official capacity as nominal respondent responsible for the actions of the second and third respondents respectively; and the fifth respondent is the Sheriff of the District of Johannesburg. The application was opposed by the first to fourth respondents, who were represented by both senior and junior counsel. An order for costs on the attorney and client scale is sought against those respondents who have opposed the application.

[3] The circumstances giving rise to the application are largely common cause and can be briefly stated.

[4] On 30 July 2012, the first respondent issued summons against the applicant claiming damages on behalf of N in an amount of R4 982 625, alleging that as a result of negligence on the part of the applicant's employees at the Thembisa Hospital she sustained severe brain damage, cerebral palsy, mental retardation and epilepsy. The applicant disavowed liability on the ground that N's condition was a result of negligence on the part of the first respondent who had failed to obtain any anti-natal treatment until October 2010, when she was about eight months' pregnant.

[5] The question of merits and quantum was separated. On 1 August 2014, Francis J, delivered judgment on the issue of liability, in which the applicant was held to be 100% liable for the first respondent's proven damages. After delivery of the judgment the first respondent amended her particulars of claim so as to increase the quantum of damages to R42 047 182.70.

[6] The quantification of the first respondent's claim was set down for hearing on 20 August 2015. As the matter was of long duration involving some thirty-six experts, it was stood down for hearing until 24 August 2015. As there were no judges immediately available the matter was again stood down until 25 August 2015. On that day, the parties utilised the time available to actively engage in settlement discussions, and the trial stood down further until 26 August 2015. During these discussions the first respondent made a number of concessions resulting in a reduction of the total amount claimed to R22 786 293.58. In the afternoon of 25 August 2015, the first respondent's junior counsel was contacted telephonically by the applicant's counsel and requested to prepare a draft order on the basis discussed and agreed at Court. This was duly done and a copy of the proposed draft order was forwarded to the applicant's counsel and the third respondent by email.

[7] The agreed draft was made an order of court in the chambers of Victor J on the morning of 26 August 2015.

[8] The applicant alleges that the second respondent settled the quantum of damages contrary to the instructions of officials of the Department of Health, and that by consenting to the draft order the second respondent and applicant's counsel

acted contrary to their instructions and the interests of the applicant. The third respondent, who dealt with the matter on behalf of the applicant throughout the trial, seemingly also acted contrary to the instructions of the applicant.

[9] What went on between the legal representatives of the applicant and the officials of the Department during the period 24 to 26 August 2015 is extensively dealt with in the affidavits filed by the applicant and the second to fourth respondents.

[10] Essentially, what emerges from these affidavits is the following. On 24 August 2015, counsel for the applicant prepared a settlement memorandum (Annexure LKG2 to the second to fourth respondents' answering affidavit) in which he recommended a settlement amount of R22 828 293.58. The applicant alleges that it was made known by officials of the Department to the second and third respondents that the settlement figure was unacceptable. In their view, the available actuarial reports indicated that there was a difference of R11- to R12 million which would be awarded to the first respondent in respect of future medical expenses to which she might not be entitled.

[11] The applicant contends that on 26 August 2015 two officials of the Department, Tsoka and Nkwayana, acting on the instructions of the chief director for legal service, attended at Court and specifically instructed the second respondent and applicant's counsel to obtain a postponement in order to acquire an amended actuarial report and if that was refused, to argue the question of quantum. When the applicant's legal team attended at the Victor J's chambers Tsoka and Nkwayana were under the impression that the matter would be stood down as they were awaiting a revised

actuarial report. But when counsel returned they were informed that the proposed settlement amount had been made an order of court, contrary to their instructions.

[12] The second respondent disputes the applicant's allegations. He contends that he forwarded the settlement memorandum to the applicant for consideration but no instructions were forthcoming. He then contacted the Director-General in the office of the Premier for assistance but waited in vain for instructions. The second respondent formed the view that none of the officials of the applicant was prepared to take responsibility for the matter. Consequently, he had no alternative but to protect the applicant's interests by entering into the settlement agreement which he considered to be reasonable. He claims that in concluding the settlement he acted in his capacity as the State Attorney, relying on the provisions of s 3 of the State Attorneys' Act, 56 of 1957 (the Act), and that his mandate as the State Attorney included the authority to settle and compromise the first respondent's claim.

[13] The first respondent states that at all material times throughout the trial her legal representatives believed that the second and/or third respondents acted for and on behalf of the applicant and with the latter's express or tacit authority. It was never intimated to the first respondent's legal representatives by either applicant's counsel, the second or third respondents or the officials of the Department who were present at court that the applicant's instructions were to stand the matter down in order to obtain an amended actuarial report or to argue the question of quantum. At no stage did the first respondent's legal representatives speak to the two officials who were at court. They at all times laboured under the impression that the second and third respondents had the authority to settle the first respondent's claim.

[14] The first respondent contends further that if it be found that the second and third respondents were not so authorised, then the appointment of the second respondent to act as the applicant's legal representatives constituted a representation which induced the first respondent's legal representatives to believe that they were in fact authorised to settle the matter. Accordingly, the applicant is estopped from denying that the second and third respondents had authority to represent the applicant and to conclude the settlement agreement in the terms that they did. Reliance in this regard was placed on the decision in *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and another* 2010 (4) SA 122 (SCA) at paras 16-21.

[15] The applicant seeks to rescind the court order granted on the basis of Rule 42 and on common-law grounds. The only basis upon which the application can be considered is the common law. The applicant does not on the facts pleaded bring itself within the parameters of Rule 42.

[16] Rule 42 provides as follows:

> **"**(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) an order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment as the result of a mistake common to the parties.

(2) Any party desiring any relief under this rule shall make application Therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.**"**

[17] In terms of Rule 42, a court may only rescind an order or judgment where the following jurisdictional facts are established: (a) The order is erroneously sought or granted in the absence of a party; (b) There is an ambiguity or patent error or omission in the order; and (c) The order is the result of a mistake common to the parties. None of these jurisdictional facts has been established.

[18] A judgment or order may be set aside at common law on any of the grounds on which *restitutio in integrum* would be granted such as fraud, *justus error* or some other just cause (*iusta causa*).

[19] It is settled law that a judgment entered into by consent may be set aside where there is an absence of a valid agreement to support the judgment. A consent judgment depends for its existence upon the validity of the underlying agreement. Such judgment may be assailed when it is shown that through fraud, error or some other cause true consent between the parties was vitiated. This principle was

emphasized in *MEC for Economic Affairs, Environment and Tourism v Kruizenga and another* 2008 (6) SA 264 (Ck)[1] para [37], where the following was stated by Van Zyl J:

> **"…** In the *Childerley* case De Villiers Judge President stated obiter, with reference to a passage in Voet and an earlier decision in *De Vos v Calitz and De Villiers* that, except for fraud, 'judgments by consent may be set aside under certain circumstances on the ground of *justus error'*. It is doubtful in *De Vos* the court recognised that any order or judgment made by consent may, generally speaking, be set aside upon any ground which would invalidate an agreement between the parties, and that a mistake of fact may provide a ground for relieving a litigant from a judgment entered into by the attorney's consent. In *Gollach & Gomperts v Universal Mills & Produce Co* the court similarly stated that a consent judgment could be set aside on grounds that would justify rescission of the agreement to consent to judgment. The principle to be extracted from this, and the statement of Voet quoted in para [36] above, is twofold: The first is that a consent judgment is founded on contract, and like any other contract, defects such as fraud and error would entitle an innocent party to avoid the agreement because his consensus, though real, was improperly obtained. For this reasons, cases where a party to a consent judgment seeks to resile therefrom on the ground that consensus was induced by error, must be approached along the same lines and judged according to the same principles as cases where a party may resile from an agreement on the ground of *justus error*. Secondly, and flowing from this, is that the absence of a valid agreement between the parties to support the judgment, is capable at law of constituting lawful ground or reason (*iusta causa*) which justifies an order of restitution in respect of the judgment.**"**

[1]This matter was confirmed on appeal in *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and another* 2010 (4) SA 122 (SCA) referred to in para 14 of this judgment.

[20] In *Gollach & Gomperts v Universal Mills & Produce Co (Pty) Ltd and others* 1978 (1) SA 914 (A) (at 922H-923A) which is referred to in the above extract from *Kruizenga* the court emphasized that *justus error* was a sufficient ground for the setting aside of a consent judgment, provided that such error vitiated the true consent and did not merely relate to motive or to the merits of a dispute which it was the very purpose of the parties to compromise.

[21] It has also been held that the absence of authority on the part of an attorney to settle or compromise a claim has also been held to be a sufficient ground to entitle a client to *restitutio in integrum* (see *De Vos v Calitz and De Villiers* 1916 CPD 465, also referred to in the above passage in *Kruizenga*).

[22] The central issue to be decided in the present case is whether the State Attorney had actual or apparent authority to conclude the agreement of settlement that underlay the court order granted on 26 August 2015.

[23] As mentioned above, it is the second respondent's contention that s 3 of the Act confers on the State Attorney the unfettered discretion and authority to act on behalf of the applicant in its best interests and includes the authority to enter into settlement agreements on behalf of the applicant.

[24] Counsel for the applicant rightly submitted that the State Attorney could have no authority to settle or compromise a claim where he is acting against the express instructions of the client. Section 3(1) of the Act provides that the function of the office of the State Attorney and of its branches is the performance in any court of such work on behalf of the Government of the Republic as is by law, practice or custom performed by attorneys, notaries and conveyancers. Section 4 deals with

the rights, privileges and duties of an attorney, notary or conveyancer lawfully performing the functions described in s 3(1) and provides that they include any of the rights, privileges and duties possessed by or imposed on an attorney practising in the High Court where such functions are performed.

[25] Attorneys generally do not have authority to settle or compromise a claim without the consent of the client. However, the instruction to an attorney to sue or defend a claim may include the implied authority to do so, provided the attorney acts in good faith. A court may set aside a settlement or compromise that does not have the client's authority where, objectively viewed, it appears that the agreement is unjust and not in the client's best interests. In *Kruizenga* the Supreme Court of Appeal in *Kruizenga* held (in para 11) that the office of the State Attorney, by virtue of its statutory authority as a representative of the Government, has a broader discretion to bind the Government to an agreement than that ordinarily possessed by private practitioners, though it is not clear just how broad the ambit of this authority is.

[26] In the present case it is unnecessary to decide whether the State Attorney was in fact authorised to conclude the settlement agreement; and.nor is it necessary to decide whether the applicant is to be estopped from denying the authority of the State Attorney to conclude the settlement. If the State Attorney exceeded his actual authority or acted contrary to the express instructions of the applicant, the latter may nevertheless be contractually bound to the settlement on the basis of the State Attorney's apparent or ostensible authority.

[27] In *Makate v Vodacom (Pty) Limited* [2016] ZACC 13, the Constitutional Court highlighted the jurisprudential differences between apparent authority and agency by estoppel. The court referred to the following dictum of Lord Denning MR in *Hely-Hutchinson v Brayhead Limited and another* [1968] 1 QB 549 (CA).

> "Actual authority may be express or implied. It is express when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office. Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it. *Ostensible or apparent authority is the authority of an agent as it appears to others.* It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the 'holding-out'. Thus, if he orders goods worth £1,000 and signs himself 'Managing Director for and on behalf of the company,' the company is bound to the other party who does not know of the £500 limitation, see *British Thomson-Houston Co Ltd v Federated*

> *European Bank Ltd*, which was quoted for this purpose by Pearson LJ in *Freeman & Lockyer*. Even if the other party happens himself to be a director of the company, nevertheless the company may be bound by the ostensible authority. Suppose the managing director orders £1,000 worth of goods from a new director who has just joined the company and does not know of the £500 limitation, not having studied the minute book, the company may yet be bound. Lord Simonds in *Morris v Kanssen*, envisaged that sort of case, which was considered by Roskill J in the present case."

[28] The Constitutional Court emphasized, with reference to the above dictum of Lord Denning that apparent authority is the agent's authority as it appears to others. 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 (*Makate* paragraph 65).

[29] The appointment of someone to a position of authority and with all the trappings pertaining to the post is a factor that is not to be underestimated in considering whether there is apparent or ostensible authority (see *NBS Bank Limited v Cape Produce* 2002 (1) SA 396 (SCA) at para 25; and *Glofinco v Absa Bank Limited t/a United Bank* 2002 (6) SA 470 (SCA) para 14; see also the judgment of the Supreme Court of Appeal in *Kruizenga* paragraph 20).

[30] Based on the aforegoing, it is my conclusion that by appointing the State Attorney to represent it in resisting the first respondent's claim, the applicant represented that the State Attorney had the authority to settle the claim. There was

no intimation to the first respondent's legal representatives that the settlement reached was against the express instructions of the applicant and for that reason they must reasonably have believed that the State Attorney and counsel had the requisite authority to settle the claim. The applicant is accordingly bound to the settlement agreement on the basis of the State Attorney's apparent authority.

[31] It follows that the agreement of settlement which underlay the court order granted by Victor J on 26 August 2015 was validly concluded and the applicant cannot obtain a rescission of the court order.

[32] What remains to be determined is the question of costs. There is sufficient justification to order the applicant to pay the first respondent's costs on the scale as between attorney and client. The applicant has acted unreasonably in the manner in which the proceedings have been conducted. The applicant was aware on 26 August 2015 that it was obligated in terms of the court order to pay an amount of R22 786 293.58. Yet it took no steps to rescind the judgment until the Sheriff of Court arrived at its doorsteps to execute on the order, that is, some forty-seven days after the order had been granted. The first respondent has had to incur substantial costs including the appointment of senior and junior counsel in order to resist the application for rescission.

[33] Given the enormity of the claim and complexity of the issues raised, it was a wise and reasonable precaution for the first respondent to employ the services of two counsel. Justice dictates that the first respondent be fully compensated in respect of all of the costs incurred by her in order to resist the application (see, in this regard, *In re Alluvial Creek Limited* 1929 CPD 532).

[34] Different considerations apply to the costs payable by the applicant *vis-à-vis* the second to fourth respondents. There is an irreconcilable factual dispute between the applicant and the second and third respondents in regard to the question as to whether the settlement agreement was entered into contrary to the express instructions of the applicant; if that were indeed the case, the second respondent would have had no authority to settle or compromise the claim. In the light of this material factual dispute, it would be inappropriate to direct that one or other of the applicant or second and third respondents pay the wasted costs.

[35] Both the applicant and the fourth respondent are Organs of State. In *Uthukela District Municipality and others v President of the Republic of South Africa and others* 2003 (1) SA 678 CC, the Constitutional Court emphatically stated that Organs of State have a constitutional duty to foster cooperative government as provided for in Chapter 3 of the Constitution. This entails that they must avoid legal proceedings against one another and, where possible, disputes should be resolved at a political level rather than through adversarial litigation. It is not understood why the fourth respondent was joined as a party to the application. Clearly, the applicant launched the present application without making any effort to settle the dispute by means of the mechanisms and procedures provided for in Chapter 3 of the Constitution and breached its constitutional duty.

[36] The second, third and fourth respondents, who have briefed two counsel, have asked that the applicant be ordered to pay their costs, including the costs occasioned by the employment of two counsel. The difficulty that I have with this

request is twofold: First, it is unclear whether the second and third respondents acted contrary to the express instructions of the applicant in settling the matter. If they did, this would be a sufficient reason to deprive them of their costs. Secondly, the applicant and the second to fourth respondents are essentially Organs of State and the litigation is at the expense of the public purse from which they derive their funding (see, in this regard, *Minister of Police and others v Premier of the Western Cape and others* 2014 (1) SA 1 CC, para 64). Having regard to these considerations, I am of the view that the applicant and the second to fourth respondents should each pay their own costs.

[37] In the result, the following order is made.

(1) The application is dismissed with costs.

(2) The applicant is to pay the first respondent's costs on the attorney and client scale, which are to include the costs consequent upon the employment of two counsel.

/(3) Each of **...**

(3) Each of the applicant, the second, third and fourth respondents is to pay its own costs.

_____

BORUCHOWITZ J
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

DATE OF HEARING	:	27 April 2016
DATE OF JUDGMENT	:	04 July 2016
ON BEHALF OF THE APPLICANT	:	ADVOCATE N MANAKA
INSTRUCTED BY	:	NGCEBETSHA MADLANGA ATTORNEYS Ref: JSN/RP/ar/MATHEBULA
ON BEHALF OF THE 1ST RESPONDENT	:	ADV N VAN DER WALT SC with Adv M COETZER
INSTRUCTED BY	:	WIM KRYNAUW ATTORNEYS Ref: J Coetzer/MEC0006/DC
ON BEHALF OF THE 2ND, 3RD AND 4TH RESPONDENTS	:	ADVOCATE D NTSEBEZA SC with Adv A MOFOKENG
INSTRUCTED BY	:	THE STATE ATTORNEY, JOHANNESBURG Ref: V Dhulam/6358/12/P50/jm