IN THE SUPREME COURT OF TRANSKEI

CASE NO: 2367/88

NANCY NTOMBIZONKE XATULA — APPLICANT/PLAINTIFF

vs

MINISTER OF POLICE — RESPONDENT/DEFENDANT

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JUDGMENT

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WHITE J : Leoneda Ncediseni Xatula was shot and killed by a member of the Transkeian Police Force on the 10th July, 1988. Plaintiff (Applicant) is claiming for loss of support due to his death in her capacity as his mother, and the grandmother of his daughter.

When the case was initially set down for hearing during August, 1992, settlement negotiations took place between Mr Jika, an attorney on the staff of the Government Attorney, Umtata, acting for the Defendant (Respondent), and attorneys Stofile and Sangoni of Sangoni Incorportated, who represent Plaintiff. The outcome of these negotiations became the subject of an in limine point being argued in this Court. The trial court (Mall,J) found that the parties had settled the matter, but the Appeal Court reversed his finding and found that there had not been a settlement. The trial consequently proceeded and evidence was heard during March, 1994. It was then postponed for the further hearing of evidence during the period 29th August, 1994 to 16th September, 1994. As a further dispute concerning settlement arose on the 29th August, 1994, evidence could not be led and instead the Plaintiff thereafter brought the present application in which she seeks the following order:

"1. That this Honourable Court declare that Applicant and

Respondent have settled the question of Respondent's liability and that only the question of quantum remains to be determined;

2. That Respondent pay the costs of this application and any wasted costs occasioned by the matter not being proceeded with on 29 August 1994 to 16 September 1994;

3. That this Honourable Court grant such further and/or alternative relief as it may deem appropriate."

Counsel for the Plaintiff, Mr Skweyiya, has submitted that Jika settled the issue of liability on behalf of Defendant. It is indeed common cause that Jika entered into settlement negotiations with attorneys Stofile and Sangoni during the week of the 22nd to the 26th August, 1994, and that he wrote various letters in this respect to them and to the Registrar of this Court. In these letters he stated that he had been "mandated by the National and the Provincial Ministers of Police to settle the matter out of Court"; that the Defendant "conceded the merits herein", and that the only remaining issue for decision was that of quantum. In support of these contentions, Jika furnished the said attorneys with a letter addressed to him on the 23rd August, 1994, by Mr Khalimashe, the Senior Legal Adviser of the Premier of the Province of the Eastern Cape, in which Khalimashe states that "certain representations have caused both the National and Provincial Ministers responsible for Police matters to grant and give instructions as your client to settle this matter." He also supplied them with a copy of a letter addressed by the Minister of Safety and Security to Dr Mphele, the M.E.C. for Safety and Security, Bisho, on the 24th August, 1994 (hereinafter referred to as the letter from the Minister), which reads as follows:

"I refer to your request for authority to have the civil case brought by the dependants of the late Leo Xatula settled out of court.

You are hereby authorised to inform the legal representatives of the Transkei Police to settle the matter if reasonable

terms can be agreed upon."

Counsel for the Defendant, Mr Penzhorn, has submitted that no settlement was concluded as Jika had no authority to settle the matter and, alternatively, that even if he did have such authority, he failed to comply with the terms of the mandate stipulated in the letter from the Minister. To consider these submissions by Mr Penzhorn it is necessary to refer to the events which preceded the aforesaid settlement negotiations.

Despite the Transkeian Police Force believing that they had good prospects of success in the case, Jika attempted to settle same during 1992 and again during January, 1993. Because the police believed that he was not acting in their interests, and in fact attempting to settle the matter behind their backs, they requested the Government Attorney, Mr Mgudlwa, to remove Jika from the case. This was done soon after February, 1993. His removal failed to restrain Jika from interfering in the matter and during September, 1993, he again attempted to settle the case. This attempt led the police to write a letter to the Director-General of the Department of Justice complaining about Jika's interference and requesting that he be removed from all cases to which the police were a party. It is manifest that after September, 1993, Jika had no mandate in respect of this case and that the Government Attorney, Mr Mgudlwa, was in charge of the case. In correspondence Jika admits that he was removed from the case. It would appear that even Mgudlwa's authority ceased on the 2nd September, 1994, as notice was filed on that day that the State Attorney had withdrawn as the attorney-of-record for the Defendant, and that the attorneys firm Clayton Mkhululi Manxiwa & Company had been instructed to appear for the Defendant.

It seems that Jika could simply not accept that he had been removed from the case and that he no longer had any authority in the matter. During August, 1994 he made several telephonic representations to the aforesaid Khalimashe and on the 26th August, 1994, he wrote a lengthy memorandum to the "Minister of Police, Eastern Cape Region". This was followed by a lengthy memorandum to the "Minister of Police National Government" on the 8th September, 1994. In neither of these memoranda does he mention

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that the police believe they have a good case, or that he no longer acts for Defendant. To the contrary, he states that the Defendant has no prospects of success, and recommends that the case be settled. Khalimashe conveyed these viewpoints to Mr Gastrow, an adviser of the Minister of Safety and Security, whom he then advised to settle the case. Acting on this advice the Minister wrote the aforesaid letter to Dr Mphele in which he authorised settlement of the case if reasonable terms could be agreed upon. Jika then commenced settlement negotiations with Stofile and Sangoni, as is set out above.

As Mr Penzhorn was about to lead further evidence for the Defendant on the 29th August, 1994, Mr Madlanga, Junior Counsel for the Plaintiff - Mr Skweyiya had not been briefed for that day - informed him that the case had been settled and showed him the letter from the Minister. Mr Penzhorn then contacted Mr Gastrow and informed him that, inter alia, the police never wanted to settle the case, that they insisted on the case proceeding, that they believed they had good prospects of success, and that Jika had no authority in the matter. The Minister then sent a letter by fax to the Government Attorney in which he stated that in view of the further information which had come to his knowledge, the case should proceed. When the letter was received both Counsel agreed that the matter could not proceed and that it should be postponed to enable the Plaintiff to bring this application.

On the abovementioned facts it is abundantly clear that during August, 1994, Jika had no authority whatsoever to act on behalf of Defendant in this matter. Not only had his mandate to act as an attorney for the Defendant in the case been withdrawn during February, 1993, but the mandate of the Government Attorney had also been withdrawn. Jika was fully aware of these facts. The letter addressed by Khalimashe to the "State Attorney" on the 23rd August, 1994, does not in my opinion confer any mandate on Jika. Although that letter does state "Attention: Mr T.I. Jika", it is addressed to the State Attorney, his superior, and does not confer a mandate on him. Furthermore, the authority conveyed in that letter is so tainted by the fraudulent non-disclosure of the true facts, that it is manifestly voidable at the instance of the Defendant. The Court must therefore agree with Mr Penzhorn's first submission that as Jika had no mandate to act, the purported settlement

cannot stand. Mr Skweyiya has submitted that legal representatives have wide powers, which include the right to settle cases on behalf of their clients, and has in this respect referred to Matthews and Another v Munster (1886 - 90) A.E.R. 251 CA. That principle does, unfortunately, not assist the Plaintiff as Jika was not at the time the legal representative of the Defendant, and had no authority to act on her behalf.

There is also merit in Mr Penzhorn's second submission, namely, that if Jika did have a mandate, he failed to act within the scope and ambit of that mandate. In terms of the Minister's letter authority was granted "to settle the matter if reasonable terms can be agreed upon". Jika simply conceded liability before any terms had been considered and thereby manifestly exceeded the authority of the mandate. Attorneys Stofile and Sangoni were furnished with a copy of the Minister's letter and they cannot consequently plead ignorance of the terms of the mandate. The settlement is therefore also voidable on the grounds that the mandate was exceeded.

The Court is consequently satisfied that the so-called settlement must be set aside and that the application must fail.

I turn now to the question of costs. It is clear that the cause of this application and the trial not proceeding from the 29th August to the 16th September, 1994, was the unwarranted interference and misrepresentations made by Jika. Although he is not a member of the police force, he is an employee of the Government and I see no reason why the Government, in the broad sense, should not be held liable for the wasted costs occasioned by his acts. Mr Skweyiya has submitted that the Court should declare the wasted costs to include the period from the 29th August to the 16th September, 1994. I can find no reason or authority for making such an order. It would, in my opinion, be dangerous for this Court to make such and order without any evidence of the nature and extent of the costs involved, or the facts which could affect the extent of such costs.

The Court makes the following order:

1. The application is dismissed.

2. The Respondent shall pay the costs of this application, on the party and party scale, which shall include the costs of two Counsel.

3. The Respondent shall pay the wasted costs, on the party and party scale, occasioned by the trial being postponed on the 29th August, 1994, which shall include the costs of two Counsel;

4. The wasted costs referred to in paragraph 3 of this order shall include all those costs which the Taxing Master sees fit to allow arising out of Applicant having briefed two Counsel for the hearing for the period 29th August to 16th September, 1994.

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JUDGE OF THE SUPREME COURT

Heard on the 23rd May, 1995.
Delivered on the 29th May, 1995

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| Counsel for the Applicant | : | T.L. Skweyiya SC and M.R. Madlanga |
| Attorneys for The Applicant | : | Sangoni Incorporated |
| Counsel for the Respondent | : | G.H. Penzhorn SC and H.H.T. Woker |
| Attorneys for The Respondent | : | Clayton Mkhululi Manxiwa & Co. |