THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 169/09

In the matter between:

MEC FOR ECONOMIC AFFAIRS, ENVIRONMENT & TOURISM: EASTERN CAPE — **APPELLANT**

v

KLAAS KRUIZENGA — **FIRST RESPONDENT**
HENQUE 2189 CC t/a WIMRIE BOERDERY — **SECOND RESPONDENT**

Neutral citation: *MEC for Economic Affairs, Environment & Tourism v Kruizenga* (169/2009) [2010] ZASCA 58 (1 April 2010).

Coram: Harms DP; Nugent, Cachalia, Leach JJA et Seriti AJA

Heard: **9 March 2010**

Delivered: **1 April 2010**

Summary: An attorney has ostensible (apparent) authority to bind the client at a pre-trial conference convened in terms of rule 37 of the Uniform Rules even if the effect of the agreement is to settle an opposing party's claim.

ORDER

On appeal from: Eastern Cape High Court (Bhisho) (Van Zyl J sitting as court of first instance).

The following order is made:

'The appeal is dismissed with costs, including the costs of two counsel.'

JUDGMENT

CACHALIA JA (Harms DP, Nugent, Leach JJA and Seriti AJA concurring):

[1] This appeal deals with the question of an attorney's ostensible (apparent) authority to reach agreement at a pre-trial conference convened in terms of rule 37 of the Uniform Rules even if the effect of the agreement is to settle an opposing party's claim. The Eastern Cape High Court, Bhisho (Van Zyl J)[1] held that by instructing the State Attorney to defend the action and to brief counsel to conduct his defence, the appellant represented to the outside world that his legal representatives had 'the usual authority that applies to their office'. And by not informing the respondents that their authority was limited, he 'must reasonably have expected that persons who dealt with his agents would believe that they had the authority to compromise the claims'. So, the court concluded, he was estopped (prohibited) from denying the authority of his legal representatives to agree to the settlement.[2] The learned judge thus held that the appellant was not

[1] *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008 (6) SA 264 (CkHC).
[2] Para 69.

entitled to escape the consequences of the agreement which his legal representatives had made. He also refused the appellant leave to appeal but this court granted the necessary leave.

[2] The dispute forms part of the litigation in a trial action in which the two respondents claim damages from the appellant in his representative capacity arising from an alleged negligent failure of the provincial government's employees to take preventative measures to contain a fire. The fire started on provincial government property under the appellant's control and spread to the respondents' adjoining properties causing extensive damage to their vegetation and infrastructure.

[3] The factual background and chronology of the present dispute is set out in the high court's reported judgment and need not be repeated in detail.[3] In essence the dispute concerns whether the agreements, which the State Attorney reached with the respondents at two rule 37 pre-trial conferences without the appellant's authority, are binding. The minute of the first conference, which was signed by the parties' attorneys some six months later, records that the appellant had conceded 'the merits of the plaintiff's case and the only aspect that remains in dispute between the parties and which remains to be resolved is that of quantum'. The second conference was held, almost 18 months later, after the trial judge, on the morning before the trial commenced, enquired from the parties' legal representatives whether any attempt had been made to settle the dispute over quantum. The matter then stood down for the parties to consider settlement proposals. They met the following day. The minute of this meeting, which was signed by attorneys and counsel for the parties, records the appellant to have admitted liability for some heads of the damages claimed whilst the dispute over the remaining heads would proceed to trial. This minute, which incorporated the earlier agreement, was placed before the judge. The appellant then sought a postponement of the whole case, which the judge refused in the light of the

[3] Paras 1-8.

admissions made. The high court accordingly made an order based on the admitted liability and postponed the hearing concerning the outstanding issues.

[4] Thereafter, with a view to reopening the provincial government's case on the merits, the appellant launched an application to rescind and set aside the court order and to withdraw the admissions his legal representatives had made as recorded in the pre-trial minutes. He grounded his application on an allegation of the existence of a general practice or instruction – but unbeknown to the respondents or their legal representatives – to the effect that the State Attorney needed his or the head of department's express authority to settle or compromise a claim and concomitantly on the State Attorney's failure to obtain his specific authority to concede the merits of the action or to settle certain heads of damage. (There is no suggestion that counsel, who was instructed to appear for the state, was aware that the State Attorney lacked authority and for present purposes only the latter's authority is in issue.) Although there was a factual dispute concerning the existence of the general practice the high court approached the matter on the basis that there was such a practice. And I will likewise do so.

[5] The appellant's application for rescission was brought under the common law and not in terms of Uniform rules 31 or 42. Mr Buchanan, who appears for the appellant, contends that the appointment of attorney and counsel, in itself, does not give rise to a representation that they have full authority, not only to conduct the litigation, but to compromise a claim or to consent to judgment against the client. The law, he submits, requires express – not merely apparent authority – for this purpose. And so he contends, because the State Attorney agreed to compromise the claim in conflict with general practice – and that judgment was granted pursuant thereto – this entitles the appellant to the relief claimed.

[6] It is important to reiterate what was said at the outset – the issue in this matter is whether the appellant may resile from agreements made by his

attorney, without his knowledge, at a rule 37 conference. The judgment does not deal with agreements reached outside of the context of conducting a trial in the normal course of events. The rule was introduced to shorten the length of trials, to facilitate settlements between the parties, narrow the issues and to curb costs.[4] One of the methods the parties use to achieve these objectives is to make admissions concerning the number of issues which the pleadings raise.[5] Admissions of fact made at a rule 37 conference, constitute sufficient proof of those facts.[6] The minutes of a pre-trial conference may be signed either by a party or his or her representative.[7] Rule 37 is thus of critical importance in the litigation process. This is why this court has held that in the absence of any special circumstances a party is not entitled to resile from an agreement deliberately reached at a rule 37 conference.[8] And when, as in this case, the agreements are confirmed by counsel in open court, and are then made a judgment or order of a court, the principle applies with even more force.

[7] It is settled law that a client's instruction to an attorney to sue or to defend a claim does not generally include the authority to settle or compromise a claim or defence without the client's approval.[9] The rule has been applied to a judgment consented to by an attorney without his client's authority[10] and also when the attorney did so in the mistaken belief that his client had authorised him to do so.[11] This principle accords with the rule in the law of agency that where an agent exceeds the express or implied authority in transacting, the principal is not bound by the transaction.[12]

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[4] LTC Harms *Civil Procedure in the Supreme Court* Issue 39 para B37.2.
[5] Rule 37(6)(e).
[6] *Price NO v Allied-JBS Building Society* 1980 (3) SA 874 (A) 882D-H.
[7] Rule 37(6).
[8] *Filta-Matix (Pty) Ltd v Freudenberg & others* 1998 (1) SA 606 (SCA) 614B-D.
[9] Voet 3.3.18; *Ras v Liquor Licensing Board, Area No. 10 Kimberley* 1966 (2) SA 232 (C) 237E-F; *Goosen v Van Zyl* 1980 (1) SA 706 (O) 709F-H; *Bikitsha v Eastern Cape Development Board & another* 1988 (3) SA 522 (E) 527J-528A; 14 *Lawsa* 2 ed para 305.
[10] *Ntlabezo v MEC for Education, Culture and Sport, Eastern Cape* 2001 (2) SA 1073 (TkHC) 1080-1081.
[11] *De Vos v Calitz and De Villiers* 1916 CPD 465.
[12] Francois du Bois et al *Wille's Principles of South African Law* 9 ed (2007) p 998; See J.R Midley *Lawyers' Professional Liability* (1992) p 8, who holds the view that while the courts have

[8] But there appears to be some uncertainty in the way this principle has been applied. Midgley observes that our courts, under the influence of English law, have distinguished between settlements made outside of and those made during the course of litigation – and appear to have accepted that the power to settle a claim is one of the usual and customary powers afforded a legal representative in the latter instance.[13] So, in *Mfaswe v Miller*,[14] an attorney's clerk compromised a claim on the day of the trial before the client had arrived at court. He did so fearing that if the client did not arrive in good time default judgment may be given against him. Thereafter the client sued his attorney for the full amount of the original claim. The court said that the clerk had accepted the compromise 'in the exercise of the discretion vested in an attorney'.[15] And because he had acted in good faith, and was not negligent, the court held that the attorney was not liable to the client in damages. *Alexander v Klitzke*[16] provides an interesting example of an attorney's general authority. The defendant had alleged that his attorney's general authority did not empower him to accept the plaintiff's tender of settlement, but the court disagreed, saying:

'The authority of a power of attorney which is filed by the client, to carry his case to final end and determination, does include authority to make a *bona fide* compromise in the interests of his client, and at any rate, if a client wishes to repudiate such a compromise made on his behalf, then I certainly think that the repudiation should be a timeous one.'[17]

In *Klopper v Van Rensburg*,[18] in an *ex parte* application for a temporary interdict to restrain the sale of usufructuary property, and in answer to a question from the court, counsel stated that if security were given by the respondent for the value of

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sometimes used the terms 'mandatory' and 'agent' interchangeably to describe the attorney-client relationship, the preferable view is that when engaged in litigation on a client's behalf the attorney is acting as an agent and not merely as a mandatory.

[13] J R Midgley 'The Nature and Extent of a Lawyer's Authority' (1994) 111 *SALJ* 415 p 420.

[14] (1901) 18 SC 172.

[15] Above p 175.

[16] 1918 EDL 87.

[17] Above at 88.

[18] 1920 EDL 239.

the property sold, that would meet the case. When the respondent thereafter tendered security, and the applicant rejected it contending that counsel had no authority to agree to a tender of security, the court held that he was bound by his counsel's offer as the latter 'was only doing his plain duty (to) his client. He was making an offer in his client's best interests, and an offer which . . . he had every right to make'.[19]

[9] However, recently, in *Hawkes v Hawkes*[20] the court seemed to adopt a different approach by placing emphasis on whether the agreement concluded was in the client's best interests, rather than on the discretion exercised by the client's legal representative. It held that where an advocate gave an undertaking to the court on behalf of his client without having a mandate to that effect in the attorney's absence and contrary to his client's best interests and also in conflict with his mandate to oppose an interdict sought against his client the client was not bound thereby. This approach resonates with the view adopted in *Bikitsha v Eastern Cape Development Board & another*,[21] where an attorney, before summons had been issued, without having his client's consent, advised his opponent that his client was prepared to waive the 'prescriptive period'. In holding the client not bound by his attorney's waiver, the court noted that 'for acts of great prejudice an attorney needs a special mandate'[22] and '[a] general mandate does not authorise an attorney to act in a manner adverse to his client's interests'.[23]

[10] The courts have also distinguished the ambit of the authority of attorneys in private practice from that accorded to the State Attorney holding that the latter has wider general authority because such authority is derived from statute.[24] It has thus been held that the fact that a senior government official is unaware of

[19] Above p 242.
[20] 2007 (2) SA 100 (SE).
[21] Cited above, n 9.
[22] At 527I-J.
[23] At 528A.
[24] Section 3 of the State Attorney Act 56 of 1957.

and has not expressly approved of a settlement concluded by counsel on the Deputy State Attorney's instructions does not entitle the government to resile from the settlement.[25] *Moult v Minister of Agriculture and Forestry, Transkei*[26] provides a clearer example of the breadth of the State Attorney's authority. The plaintiff sued the government for damages arising out of a motor-vehicle collision – but out of the twelve-month statutory expiry period. The State Attorney, as in *Bikitsha*,[27] had previously waived strict compliance with this requirement. The government alleged that it was not bound by the waiver. Beck CJ, however, distinguished those cases involving private attorneys, such as *Bikitsha*, and held that the waiver 'was of a kind which Government ordinarily leaves to the Government attorney to decide'. He found that the State Attorney's authority derives from 'the particular capacity in which the agent has been employed by the principal and from the usual and customary powers that are found to pertain to such an agent as belonging to a particular category of agents'.[28]

[11] To summarise it would appear that our courts have dealt with questions relating to the *actual* authority of an attorney to transact on a client's behalf in the following manner: Attorneys generally do not have implied 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. And the courts have said that they will 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. The office of the State Attorney, by virtue of its statutory authority as a representative of the government, has a broader discretion to bind

[25] *Dlamini v Minister of Law and Order & another* 1986 (4) SA 342 (D).
[26] 1992 (1) SA 688 (TkGD) 692H-I.
[27] Above para 9.
[28] Above at 692H-I citing Botha J in *Inter-Continental Finance and Leasing Corporation (Pty) Ltd v Stands 56 and 57 Industria Ltd & another* 1979 (3) SA 740 (W) at 748D.

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.[29]

[12] My discussion thus far has been concerned with the limits of an attorney's actual authority to bind a client without the latter's consent. The question arises in this case is whether a client may be estopped from denying the authority of his attorney to settle or compromise a claim.[30]

[13] The issue arose in this court in *Hlobo v Multilateral Motor Vehicle Accidents Fund*.[31] The case concerned a claimant's claim for compensation on behalf of her minor daughter, who had been injured in a motor vehicle accident. A settlement agreement, which had been preceded by months of negotiation during litigation, was concluded by Messrs Lowe and De la Harpe, who respectively acted as attorneys for the claimant and the Fund. De la Harpe submitted proposals for the final form of the agreement to the Fund. As in this case, the proposals were recorded in a rule 37 minute. A letter from the Fund's claims-handler, confirmed its acceptance of the proposals. And acting on this confirmation De La Harpe settled the claim. The Fund then sought to have the agreement set aside on the ground that the agreement concluded between the parties' attorneys had been reached on the strength of a communication from the claims-handler who had no power to authorise the settlement. The court rejected the Fund's defence. In the course of its judgment it said the following:

'What all this shows is that in his dealings with Mr De la Harpe, Mr Lowe would have had no reason to question his (De la Harpe's) authority. He in fact did not do so. From Mr Lowe's point of view De la Harpe had at least ostensible authority to conclude the settlement. All the requirements which must be satisfied before reliance upon ostensible authority can succeed were satisfied. Respondent had appointed Mr De la Harpe as its attorney. It was known to it that he was conducting settlement negotiations on its behalf.

[29] See Generally J R Midgley 'The Nature and Extent of a Lawyer's Authority' (1994) 111 *SALJ* 415.
[30] *Ras v Liquor Licensing Board* (above) n 9 at 238G-H.
[31] 2001 (2) SA 59 (SCA).

It allowed him to do so and in so doing clothed him with apparent authority to settle on its behalf. The appellant, through her attorney, relied upon the apparent existence of authority and compromised the claim on the strength of its existence. Absent any other defence, the settlement is binding upon the respondent. In fact, of course, he had express authority which it is now sought to repudiate.'[32]

[14] The facts in *Hlobo* differ from the present one because there the attorney, De La Harpe, was found to have had actual authority to conclude the agreement – a point which Mr Buchanan pressed in argument in an effort to distinguish it. The passage cited above dealing with De la Harpe's apparent authority in the judgment is, I accept, obiter. But, as I will show below, this does not detract from its persuasive quality. I turn to the present matter.

[15] To establish apparent authority on the provincial government's part, the respondents aver that by appointing the State Attorney to defend the action which necessarily entailed participating in various pre-trial processes, including pre-trial conferences, it represented that he had authority to settle the claims.

[16] It is well-established that to hold a principal liable on the basis of the agent's apparent authority the representation must be rooted in the words or conduct of the principal, and not merely that of his agent.[33] Conduct may be express or inferred from the 'particular capacity in which an agent has been employed by the principal and from the usual and customary powers that are found to pertain to such an agent as belonging to a particular category of agents'.[34] It may also be inferred from the 'aura of authority' associated with a position which a person occupies, at the principal's instance, within an institution.[35]

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[32] *Hlobo* at para 11.
[33] *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* 2002 (1) SA 396 (SCA) 412C-E; *Glofinco v Absa Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA) para 13.
[34] Per Botha J in *Inter-Continental Finance and Leasing Corporation (Pty) Ltd v Stands 56 and 57 Industria Ltd & another* 1979 (3) SA 740 (W) at 748D.
[35] *Glofinco v Absa Bank Ltd* (above) n 34 para 1.

[17] Properly understood the representation from the principal in this case relates only to the appointment of the State Attorney to defend the claim and to instruct counsel in this regard. The further conduct relied on is not that of the principal but of the agent himself and cannot in and of itself bind the principal. The respondents' true case is that by appointing the State Attorney to defend the claim, the appellant represented to them, and they reasonably believed, that the State Attorney had the usual and customary powers associated with the appointment.[36] These included instructing counsel to defend the claim, to draft the plea and to attend all pre-trial procedures, including rule 37 conferences. In other words the appellant represented to the respondents and the outside world that the State Attorney had the authority not only to conduct the trial but also to make concessions at the conferences and to conclude the settlement agreement from which he now wishes to resile.

[18] During argument before us Mr Buchanan did not contend that the State Attorney had no authority to attend the pre-trial conferences. He could hardly have done so because such attendance by an attorney, as I have mentioned earlier, is envisaged in the rule and clearly falls within the usual or customary functions of an attorney in the litigation process. Instead his argument was that the State Attorney's authority was confined to attending the conference and making certain admissions that may, in his judgment, have been necessary. But, as I understand the submission, once he agreed to settle the claim, first by conceding the merits and later by agreeing that his client was liable for certain heads of the damages claimed, he not only exceeded his actual authority but also his usual functions.

[19] Unsurprisingly Mr Buchanan had insurmountable difficulty attempting to defend this assertion. In particular he was not able to draw the line between what the State Attorney had the authority to agree on and what not. To test the

[36] It is not the respondents' case that by appointing the State Attorney they believed that he had any wider or additional powers to an attorney in private practice.

assertion, suppose the attorney agreed on making certain factual admissions without conceding liability in order to curtail the proceedings, which in hindsight proved to have been a mistake. Realising the error he then attempts to withdraw these admissions, but the other side refuses to allow him to do so. And faced with the prospect of continuing the litigation at a disadvantage he agrees to a settlement. It could hardly be asserted that the admissions fell within his usual authority but the settlement, which amounts to a string of admissions, not. To test the assertion further, would the admissions stand if the 'merits' were conceded but not causation? And further, what if causation was conceded but not the quantum of damages? What these intractable difficulties show ineluctably is that it is impossible to draw any line between an attorney's apparent authority to attend and represent his client at a pre-trial conference and his apparent authority to conclude agreements or make concessions there.

[20] 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 respondents' 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.[37] 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.[38] 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 attorney's usually do at a rule 37 conference – they make admissions, concessions and often agree on

[37] *Hlobo* para 12; Cf *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) 471A-D.
[38] Cf *City of Tshwane Metropolitan Municipality v RPM Bricks* 2008 (3) SA 1 SCA para 12.

compromises and settlements. In the respondents' eyes the State Attorney quite clearly had apparent authority.[39]

[21] Mr Buchanan submitted further that to allow the estoppel defence where an attorney exceeds his or her authority could lead to grave injustices and that for policy reasons the estoppel defence should not be allowed in these circumstances. There are two answers to this submission. First, Plewman JA specifically recognized the competence of the defence in the passage quoted above in *Hlobo*, albeit in an obiter dictum. And this court will not lightly depart from a view it has previously expressed, even if only obiter.[40] Secondly, because estoppel is a rule of justice and equity, it is open to a court to disallow the defence on this ground.[41] It was not suggested that it would be either unjust or inequitable to allow the defence in the circumstances of this case. Indeed, the contrary is true. The prejudice to the respondents if the defence is not upheld is evident – even with the appellant's tender to pay the respondents' wasted costs. The respondents and their counsel prepared for trial on the basis of the concessions and on the issues which remained in dispute – not on the merits or on the heads of damages which were agreed upon. Moreover the appellants have after all this time not even established a defence. To allow the appellant to resile from these agreements, made over a period spanning 18 months, would defeat the purpose of rule 37, which encourages settlements, and severely hamper the conduct of civil trials. It would mean practically that attorneys can no longer assume that their colleagues are authorised to make important decisions in the course of litigation without the principal's independent confirmation. This cannot be countenanced.

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[39] Cf A J Kerr *The Law of Agency* 3 ed (1991) p 149.
[40] *Steenkamp v South African Broadcasting Corporation* 2002 (1) SA 625 (SCA) 629F-G.
[41] See generally P J Rabie and J C Sonnekus *The Law of Estoppel in South Africa* 2 ed (2000) ch 7; Lord Denning in *Moorgate Mercantile Co Ltd v Twitchings* [1975] 3 All ER 314 (CA) at 323d-g said: '(Estoppel) . . . is a principle of justice and of equity. It comes to this. When a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.'

[22] In the result I conclude that the high court was correct to hold that the appellant is estopped from denying the authority of the State Attorney to enter into the agreements in question.[42] It follows that the appeal must fail. The order I make is that the appeal is dismissed with costs, including the costs of two counsel.

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JUDGE OF APPEAL

[42] *MEC for Economic Affairs v Kruizenga* (above) n 1 para 69.

APPEARANCES

APPELLANTS:	R G Buchanan SC Instructed by Wesley Pretorius and Associates, East London State Attorney; Bloemfontein
RESPONDENT:	H J van der Linde SC (with him P E Jooste) Instructed by Jordaan & Pretorius Attorneys, Plettenberg Bay Rosendorff Reitz Barry, Bloemfontein