THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 799/2016

In the matter between:

MORAITIS INVESTMENTS (PTY) LTD	**FIRST APPELLANT**
APOSTOLOS MORAITIS NO	
(as trustee of the Moraitis Trust)	**SECOND APPELLANT**
ANTHANASIOS MORAITIS NO	
(as trustee of the Moraitis Trust)	**THIRD APPELLANT**
CHRISTOS MORAITIS NO	
(as trustee of the Moraitis Trust)	**FOURTH APPELLANT**
APOSTOLOS MORAITIS	**FIFTH APPELLANT**

and

MONTIC DAIRY (PTY) LTD	**FIRST RESPONDENT**
MONTIC TRANSPORT (PTY) LTD	**SECOND RESPONDENT**
EMONTIC INVESTMENTS (PTY) LTD	**THIRD RESPONDENT**
MONTIC ASSETS (PTY) LTD	**FOURTH RESPONDENT**
HUNTERS PROPERTIES (PTY) LTD	**FIFTH RESPONDENT**
TROPICA FOODS (PTY) LTD	**SIXTH RESPONDENT**
TROPICA INVESTMENTS (PTY) LTD	**SEVENTH RESPONDENT**
KARL KEBERT NO	
(as trustee of the Karl Kebert Trust)	**EIGHTH RESPONDENT**
MICHAEL SEGAL NO	

(as trustee of the Karl Kebert Trust) NINTH RESPONDENT

SOLLY GROSS NO

(as trustee of the Karl Kebert Trust) TENTH RESPONDENT

APOSTOLOS MORAITIS NO

(as trustee of the Karl Kebert Trust) ELEVENTH RESPONDENT

KARL KEBERT NO

(as executor of the late Julie Lamer) TWELFTH RESPONDENT

KARL KEBERT THIRTEENTH RESPONDENT

THE SHERIFF,

JOHANNESBURG FOURTEENTH RESPONDENT

Neutral citation: *Moraitis Investments (Pty) Ltd v Montic Dairy (Pty) Ltd* (799/2016) [2017] ZASCA 54 (18 May 2017)

Coram: LEACH, TSHIQI, WALLIS and SALDULKER JJA and FOURIE AJA

Heard: 8 May 2017

Delivered: 18 May 2017

Summary: Settlement agreement – order of court – grounds for rescinding order – lack of authority to conclude settlement agreement – failure to prove lack of authority – ss 75, 112 and 115 of the Companies Act 71 of 2008 – principle of unanimous assent

ORDER

On appeal from: Gauteng Division, Johannesburg of the High Court (Matojane J, Hawyes AJ concurring, Moshidi J dissenting):
The appeal is dismissed with costs.

JUDGMENT

Wallis JA (Leach, Tshiqi and Saldulker JJA and Fourie AJA concurring)

[1] An agreement of settlement, especially one made an order of court, is usually a sign that the hostilities between the litigants have ended. In this case it led to a new front being opened in the conflict between the parties. The fresh bone of contention was the authority to conclude the settlement agreement. The appellants contended that the fifth appellant, Mr Apostolos Moraitis (Mr Moraitis), was not authorised to conclude the settlement agreement by either the first appellant, Moraitis Investments (Pty) Ltd (Moraitis Investments), or the Moraitis Trust. The trust is represented in the present litigation by Mr Moraitis and his two brothers, the trustees of the trust and in that capacity the second to fourth appellants. They accordingly brought proceedings against all the other parties to the settlement agreement seeking to have it, and the order making it an order of court, set aside. The application succeeded at first instance, but an appeal to the full court of the Gauteng Division, Johannesburg of the High Court (Matojane J, with Hawyes AJ concurring and Moshidi J dissenting) overturned that decision and dismissed the application. This further appeal is with the special leave of this court.

The background

[2] The principal actors in this drama were Mr Moraitis and the thirteenth respondent, Mr Karl Kebert. For many years they were engaged in business together. The main business was a dairy business conducted through a company, Montic Dairy (Pty) Ltd (Montic), the first respondent. Other companies were formed to hold properties and engage in other activities related to the dairy business. These are the second to sixth respondents. As is customary, Mr Moraitis and Mr Kebert held their respective interests indirectly. In Mr Moraitis' case, the vehicle was the Moraitis Trust of which he and his daughters were the capital beneficiaries. The Moraitis Trust was the sole shareholder of Moraitis Investments, which held a 20 percent stake in each of the first, second, fourth, fifth and sixth respondents and a 25 per cent stake in the third respondent.

[3] Mr Kebert held his interests in the companies through the Karl Kebert Trust (the Kebert Trust),[1] which is represented in this appeal by the eighth to eleventh respondents. The Kebert Trust owned 100 per cent of the shares in Tropica Investments (Pty) Limited (Tropica Investments) the seventh respondent, which in turn was the owner of the balance of the shares in the first, second, third, fourth, fifth and sixth respondents.

[4] In 2006 Mr Moraitis and Mr Kebert fell out. Litigation ensued before what was then the North Gauteng High Court. Moraitis Investments and the Moraitis Trust sought the liquidation of the six companies in which Moraitis Investments held shares, alternatively an

[1] In some places in the papers this is referred to as the Karl Kebert Family Trust but it is unnecessary to resolve this discrepancy.

order that the shares owned by Moraitis Investments be purchased by the respondents. They alleged that winding up the companies would be just and equitable, or that a purchase order would put an end to the deadlock between Mr Moraitis and Mr Kebert. On 19 October 2007, Sapire AJ made an order, pursuant to an agreement between the parties to that litigation, that Tropica Investments and the Kebert Trust, to which he referred compendiously as the Kebert Group, would purchase the shares owned by Moraitis Investments in the various companies. The parties agreed, and Sapire AJ ordered, that an independent third party, acting as a valuer, would determine the purchase price of the shares and loan accounts. Ernst & Young Advisory Services Limited (Ernst & Young) was appointed to undertake the valuation. Its valuation, which would have involved the payment of a little over R5 million to Moraitis Investments, satisfied no-one. The companies whose shares were to be valued, together with Tropica Investments and the Kebert Trust, commenced proceedings to set aside the valuation and have a far lower valuation substituted for it. Moraitis Investments and the Moraitis Trust opposed those proceedings and it was suggested that in truth there had been an under-valuation.

[5] While these latter proceedings were ongoing, Mr Kebert, in his capacity as the executor in his late mother's estate, commenced an action in the then South Gauteng High Court against Mr Moraitis personally. He sought payment of a substantial sum in respect of the purchase price of his late mother's interest in the company owning the Exotica Hotel on the island of Zakynthos. He alleged that his mother and Mr Moraitis had jointly developed the hotel, which was being run by the latter's children, and that prior to her death she had agreed to transfer her interest to Mr Moraitis for €500 000. The overall picture is of litigious hostilities

extending over a broad front involving all of the parties to the present proceedings and being conducted simultaneously in the Pretoria and Johannesburg courts.

[6] When the dispute regarding the hotel was set down for hearing the parties engaged in intensive negotiation, instigated by Mr Moraitis' attorney, leading to the drafting and signature of the settlement agreement. The agreement recorded that it was in settlement of case number 2009/52206, being the litigation over the hotel, and also of the two cases in the North Gauteng High Court, namely case number 41065/2006 (the liquidation application) and case number 23631/2010 (the valuation dispute). It reflected all of the parties to the current litigation as parties to the settlement, but there were only two signatories, namely Mr Moraitis and Mr Kebert. Each signed on behalf of all the various entities falling on their own side of the fence. Of importance for present purposes is that Mr Moraitis signed on behalf of Moraitis Investments and the Moraitis Trust. Both he and Mr Kebert warranted that they were duly authorised to sign on behalf of the trusts and companies whom they purported to represent. The settlement agreement was then made an order of court by Mojapelo DJP.

[7] The settlement provided for the shares held by Moraitis Investments in the first to sixth respondents to be transferred to Mr Kebert or his nominee against payment to Mr Moraitis of R600 000. On behalf of his mother's estate and himself Mr Kebert abandoned any claims in relation to the hotel. The agreement was partially implemented in the sense that a payment of R600 000 due to Mr Moraitis was made. Problems surfaced when transfer was demanded of the shares held by Moraitis Investments in the six companies.

[8] On 30 September 2013 the present proceedings were launched in the South Gauteng High Court[2] with a view to having both the settlement agreement and the order of court set aside. The principal contention in regard to the invalidity of the settlement agreement was that Mr Moraitis had not been authorised by the Moraitis Trust and Moraitis Investments to conclude it on their behalves and that it was therefore invalid and unenforceable against them. The relevant allegations were made by Mr Moraitis on behalf of both Moraitis Investments and the Moraitis Trust, without a trace of embarrassment or an explanation of the basis on which he had originally warranted his authority to act on their behalves. Alternative arguments that he advanced were that the agreement involved the disposal of the whole of the business of Moraitis Investments and that he and Mr Kebert had personal interests in the transaction. As such he invoked ss 75, 112 and 115 of the Companies Act 71 of 2008 (the Companies Act) to contend that the agreement was unlawful and void. In regard to the order making the agreement an order of court, he contended that once it was shown that the agreement was invalid or unenforceable for any of these reasons the court order fell to be set aside.

The law

[9] The focus of the original judgment by Windell J and those delivered in the full court fell on the issue of Mr Moraitis' authority to execute the settlement agreement on behalf of the Moraitis Trust and Moraitis Investments. That was not surprising, because the application and the argument was premised on the proposition that by virtue of the claimed lack of authority the settlement agreement itself was void and

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[2] This was a misnomer as by then the court had become the Gauteng, Johannesburg Division of the High Court.

unenforceable. Building on that it was contended that it followed *a fortiori* that the consent order had to be set aside. The points raised in terms of the Companies Act were hardly addressed.

[10] In my view that was not the correct starting point for the enquiry, because it ignored the existence of the order making the agreement an order of court. Whilst terse the order was clear. It read:

'The Agreement of Settlement signed and dated 05 September 2013 is made an order of court.'

For so long as that order stood it could not be disregarded. The fact that it was a consent order is neither here nor there. Such an order has exactly the same standing and qualities as any other court order. It is *res judicata* as between the parties in regard to the matters covered thereby.[3] The Constitutional Court has repeatedly said that court orders may not be ignored. To do so is inconsistent with s 165(5) of the Constitution, which provides that an order issued by a court binds all people to whom it applies.[4] The necessary starting point in this case was therefore whether the grounds advanced by the applicants justified the rescission of the consent judgment. If they did not then it had to stand and questions of the enforceability of the settlement agreement became academic.

[11] The heads of argument did not address the grounds for the rescission of a judgment in any detail, so the parties were afforded an

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[3] *Eke v Parsons* 2016 (3) SA 37 (CC) paras 29-31; *Provincial Government North West and Another v Tsoga Developers CC and Others* [2016] ZACC 9; 2016 (5) BCLR 687 (CC) para 47.

[4] *Department of Transport and Others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC) paras 177-183. There is a narrow exception where a court makes an order that is on its face beyond its powers, as with the order to appoint a specific individual as a provisional liquidator that was in issue in *Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA). That order was invalid as the power to appoint a provisional liquidator was exclusively vested in the Master and accordingly the Master could not be held to be in contempt by declining to make the appointment. See *Tasima* para 197 and *Provincial Government North West v Tsoga Developers CC and Others* [2016] ZACC 9; 2016 (5) BCLR 687 (CC) para 50.

opportunity to deliver supplementary heads. Those delivered on behalf of the appellants were dismissive of the court's concerns in this regard, describing them as not germane to the appeal, beyond raising the possibility that Mr Moraitis may have perpetrated a fraud. This was a surprising contention, coming as it did, from counsel representing him. It is unusual for a lawyer to charge their client with fraud. In this case the even more surprising implication was that in bringing the application Mr Moraitis was seeking to rely on his own fraud. The supplementary heads delivered on behalf of the respondents submitted that absence of authority did not fall within the narrow grounds that our courts recognise as justifying the setting aside of an order of court.

[12] The issue is far more nuanced than the arguments suggest. The approach differs depending on whether the judgment is a default judgment or one given in the course of contested proceedings. In the former case it may be rescinded in terms of either rule 31(2)(*b*) or rule 42 of the Uniform Rules, or under the common law on good cause shown.[5] In contested proceedings the test is more stringent.[6] A judgment can be rescinded at the instance of an innocent party if it was induced by fraud on the part of the successful litigant, or fraud to which the successful litigant was party.[7] As the cases show, it is only where the fraud – usually in the form of perjured evidence or concealed documents – can be brought home to the successful party that *restitutio in integrum* is granted and the judgment is set aside. The mere fact that a wrong judgment has been given on the basis of perjured evidence is not a sufficient basis for setting aside the judgment. That is a clear indication that once a judgment

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[5] *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A).
[6] Ibid at 1041B-E.
[7] *Makings v Makings* 1958 (1) SA 338 (A); *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 166G-J.

has been given it is not lightly set aside, and De Villiers JA said as much in *Schierhout*.[8]

[13] Apart from fraud the only other basis recognised in our case law as empowering a court to set aside its own order is *justus* error.[9] In *Childerley*, where this was discussed in detail, De Villiers JP said that 'non-fraudulent misrepresentation is not a ground for setting aside a judgment' and that its only relevance might be to explain how an alleged error came about. Although a non-fraudulent misrepresentation, if material, might provide a ground for avoiding a contract,[10] it does not provide a ground for rescission of a judgment. The scope for error as a ground for vitiating a contract is narrow and the position is the same in regard to setting aside a court order.[11] Cases of *justus* error were said to be 'relatively rare and exceptional'.[12] *Childerley* was considered and discussed by this court in *De Wet*[13] without any suggestion that the principles it laid down were incorrect.

[14] The same issue arose indirectly before this court in *Gollach and Gomperts*.[14] I say indirectly because the case was not concerned with a judgment, but with the avoidance of an agreement of compromise (a *transactio*) on the basis of non-disclosure. The judgment repays careful consideration. The general principles were stated as follows:[15]

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[8] *Schierhout v Minister of Justice* 1927 AD 94 at 98.
[9] *Childerley Estate Stores v Standard Bank of South Africa Ltd* 1924 OPD 163 (*Childerley*).
[10] GB Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) para 7.1, p 315-6.
[11] *Childerley* at 165 and 168.
[12] *Childerley* at 166.
[13] *De Wet* fn 5 ante.
[14] *Gollach & Gomperts (1967)(Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) at 922F-H (*Gollach and Gomperts*).
[15] *Gollach and Gomperts* at 922B-E.

'A *transactio*, whether extra-judicial or embodied in an order of Court,[16] has the effect of *res judicata*. …It is obvious that, like any other contract (and like any order of Court), a *transactio* may be set aside on the ground that it was fraudulently obtained. There is authority to the effect that it may also be set aside on the ground of mistake, where the error is *justus*.'

The judgment then referred to *Childerley* and the refusal to accept that a judgment could be set aside on the grounds of *justus* error induced by a non-fraudulent misrepresentation. It continued as follows:

'The matter then before the Court was an action to set aside a judgment delivered in a defended case. Concerning judgments entered by consent, the learned JUDGE-PRESIDENT accepted that they could, "under certain circumstances", be set aside "on the ground of just error". It appears to me that a *transactio* is most closely equivalent to a consent judgment. *Such a judgment could be successfully attacked on the very grounds which would justify rescission of the agreement to consent to judgment.* I am not aware of any reason why *justus error* should not be a good ground for setting aside such a consent judgment, and therefore also an agreement of compromise, provided that such error vitiated 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.' (Emphasis added.)

[15] The appellants seized upon the passage highlighted in the above quotation to contend that it provided authority for the broad proposition that any ground justifying the avoidance of a contract would also provide grounds for setting aside a consent judgment granted pursuant to an agreement of compromise. In my view that inverts what Miller JA was saying, by reading that sentence without regard to what preceded it. Miller JA had dealt with the grounds on which a court could set aside a judgment, and identified fraud and, in limited circumstances, *justus* error

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[16] An extra-judicial *transactio* is an agreement of compromise between the parties that is not made an order of court. It is said to have the effect of *res judicata* because, like a judgment, it finally disposes of the disputes that are the subject of the compromise. They may not be resuscitated, in the same way as a court order precludes the parties from resuscitating their dispute.

as providing such grounds. He then drew an analogy between a consent judgment and a *transactio* and said that the grounds upon which a judgment could be attacked were the very grounds justifying rescission of the agreement to consent to judgment. As he had just dealt in detail with the grounds for setting aside a consent judgment, it can hardly be thought that he was intending to say that there were other unspecified grounds, or that any grounds existing at common law for avoiding an agreement would also provide a basis for rescinding a consent judgment granted pursuant to that agreement. That would have involved over-ruling what had been said in *Childerley* in the passage he had cited without criticism. His judgment cannot be taken to say anything more than that fraud and *justus* error, where sufficient to set aside a judgment, would also be sufficient to set aside a compromise that gave rise to that judgment.

[16] Counsel for the respondents, Mr Symon SC, very properly drew our attention to the judgment of Van Zyl J in *Kruisenga*,[17] where he said that:

'The principle is that when a judgment is not passed on the merits of a dispute … but rather derives its existence from an agreement, its continued existence is subject to the validity of the agreement.'

There are two difficulties with this statement. First, the distinction it draws, between judgments 'not passed on the merits of a dispute' and other judgments, lacks any foundation in our jurisprudence. There is no difference in law between an order granted in the case of a default judgment; an order pursuant to a settlement prior to the conclusion of opposed proceedings; or the order in a judgment pronounced at the end of a trial or opposed application. As the Constitutional Court has said it is an

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[17] *MEC for Economic Affairs, Environment and Tourism v Kruisenga and Another* 2008 (6) SA 264 (Ck) para 53 (*Kruisenga*).

order 'like any other'.[18] Second, the proposition is over-broad and inconsistent with the authorities discussed above. Were it correct a material, but non-fraudulent, misrepresentation justifying rescission of the agreement of compromise would also justify the rescission of the judgment granted pursuant to that compromise, but that is not the case. Its defect lies in approaching the question from the direction of the agreement instead of from the direction of the judgment. The latter is the correct approach, because the judgment operates as *res judicata* and precludes a claim based on the agreement.[19] Unless and until the judgment has been set aside, there can be no question of attacking the compromise agreement. It follows that the necessary starting point for the enquiry must be whether there are grounds upon which to seek rescission of the court order. Only then can there be any issue regarding the rescission of the compromise.

[17] Insofar as the appellants rely upon the provisions of ss 75, 112 and 115 of the Companies Act they must therefore bring their case within the scope of the principles set out above. In regard to their contentions based on Mr Moraitis' alleged lack of authority to conclude the settlement agreement on behalf of Moraitis Investments and the Moraitis Trust another principle comes into play. This is that the court can only grant a consent judgment if the parties to the litigation consented to the court granting it. If they did not do so, but the court is misled into thinking that they did, the judgment must be set aside.[20] This is something different from avoiding a contract on the grounds of fraud, duress, misrepresentation or the like. In those cases the injured party has an

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[18] *Eke v Parsons* supra fn 3, para 29.
[19] *Eke v Parsons* and *Tsoga Developers CC* supra, fn 3.
[20] *Kruisenga*, supra, para 54.

election to abide by the agreement. When one is concerned with an absence of authority to conclude the agreement in the first place, that is not a matter of avoiding the agreement, but of advancing a contention that no agreement came into existence.

[18] There are several cases that make this point, but I need only refer to two. In *De Vos v Calitz and De Villiers*[21] Ms de Vos was sued in the magistrates' court. She was urged by her legal adviser to settle, but was adamant that she would not do so. Her attorney, after a conversation with her brother, whom he bona fide believed was authorised to give instructions on her behalf, accepted a settlement proffered by the other side that provided for judgment to be granted against Ms De Vos by consent. Before the magistrate could be approached, Ms de Vos learned of the agreement and repudiated it on the grounds of her attorney's lack of authority. Although this was conveyed to the magistrate, judgment was nonetheless entered against her. The judgment was set aside on appeal, on the grounds of the attorney's lack of authority, but the court made it clear that it could have been rescinded on the same grounds.

[19] The other case, *Washaya v Washaya*,[22] also involved a legal practitioner agreeing to a consent order without any authority from his client to do so. The legal practitioner said that he had settled the case on his own initiative in the belief that his client would thereafter ratify what he had done. After referring to earlier decisions, commencing with *De Vos*, the court held that the order had to be rescinded, saying that:

'To my mind that ends the matter. … It is clear, in terms of these precedents, common sense and justice that once a Court is not satisfied that a party consented to judgment

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[21] *De Vos v Calitz and De Villiers* 1916 CPD 465.
[22] *Washaya v Washaya* 1990 (4) SA 41 (ZH) at 45E-G.

then that party is entitled to *restitutio in integrum*. Put differently, had the Court granting the judgment been aware that the party had not consented it would not have acceded to the request that it enter judgment. The judgment must therefore be set aside.'

[20] A gloss has subsequently been placed upon this proposition that, while lack of authority is the preponderant factor, on its own it may not suffice unless there is a reasonable explanation for the circumstances in which the consent judgment came to be entered.[23] There is merit in this because the court is being asked to set aside its decision in circumstances where it is *functus officio*. However, in the light of my conclusion on the facts it is unnecessary to express a final view on this. The case can be disposed of in relation to Mr Moraitis' authority to represent the Moraitis Trust and Moraitis Investments on the basis that the central proposition that a court may not grant an order making a settlement agreement an order of court, unless the parties to the agreement consent thereto, is correct.[24]

Authority

[21] The appellants' primary case was that Mr Moraitis had no authority to enter into the compromise on behalf of Moraitis Investments and the Moraitis Trust and no authority to agree to that compromise agreement being made an order of court. Counsel for the appellants correctly accepted that the onus rested on his clients to establish the lack of authority on which they relied. He rested his argument principally on a

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[23] *Georgias and Another v Standard Chartered Finance Zimbabwe Ltd* 2000 (1) SA 126 (ZS) at 132B-D; *Ntlabezo and Others v MEC for Education, Culture and Sport, Eastern Cape* 2001 (2) SA 1073 (Tk H) at 1081B-E.

[24] The judgment on appeal in *Kruisenga*, whilst not directly in point, is consistent with this conclusion. *MEC for Economic Afffairs, Environment and Tourism, Eastern Cape v Kruizenga an Another* [2010] ZASCA 58; 2010 (4) SA 122 (SCA) para 7.

lack of authority to represent the Moraitis Trust and, accordingly, I will deal with that first and with the position of Moraitis Investments thereafter.

[22] In the founding affidavit Mr Moraitis canvassed the terms of the trust deed under which the Moraitis Trust was constituted. The trust was established in 1997 and the original trustees were Mr Moraitis and his brothers. Clause 6.1 prohibited the conclusion of any agreement or transaction to which a trustee or their spouse was a party, or in which they had an interest, unless there was at least one disinterested trustee in office and that trustee, or the majority of disinterested trustees, voted in favour of entering into the transaction or agreement. The trustees were authorised to conduct their business as they thought fit (Clause 6.3.2) and were entitled to delegate any of their powers to committees consisting of one or more trustees (Clause 6.5).

[23] The legal principles on which the appellants rely are trite. Unless the trust deed otherwise provides the trustees must act jointly. They may however authorise a third party, including one of their number, to act on their behalf and conclude agreements that bind the trust.[25] In reliance on those principles Mr Moraitis dealt with the issue of authority, so far as it concerned the Moraitis Trust, in the following terms:

'At the time that I signed the settlement agreement, neither the third nor the fourth applicants in their capacities as the trustees of the Moraitis Trust, had authorised me to conclude the settlement agreement on their behalf, in their capacities as trustees of the Moraitis Trust. Nor had we had a meeting of trustees to discuss settlement of all the pending litigation by any one trustee on behalf of the Trust. …

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[25] *Nieuwoudt and Another v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) paras 20 and 23; *Thorpe and Others v Trittenwein and Another* 2007 (2) SA 172 (SCA) para 9.

I am advised that in order for the settlement agreement to be valid and enforceable as against the Moraitis Trust, it was necessary for all three trustees to sign the settlement agreement jointly, in their capacity as trustees, alternatively it was necessary for the third and fourth applicants to have authorised me to conclude the agreement on behalf of the trustees representing the Trust.'

The third and fourth appellants deposed to brief confirmatory affidavits, saying only that they had read the affidavit of Mr Moraitis and each of them confirmed 'the contents thereof applicable to me, and to me in my capacity as trustee of the Moraitis Trust and to the Moraitis Trust'.

[24] In the heads of argument it was submitted that this was not disputed. That submission was incorrect. In his answering affidavit, Mr Kebert drew attention to the warranty contained in the settlement agreement, which stated that:

'Moraitis warrants that he is authorised to enter into this settlement agreement on behalf of his Trust (as Trustee) and Moraitis Investments (Pty) Ltd and that Moraitis Investments (Pty) Ltd and his Trust have authorised Moraitis to enter into this settlement agreement on their behalf.'

He said that Mr Moraitis should be held to this warranty and that 'his denial of authority (such as it is) must be rejected'. Earlier he said that the assertion that Mr Moraitis was not authorised to represent the Moraitis Trust was 'false and unsubstantiated and should be rejected'. In the light of that unequivocal statement it is hard to see on what basis it could be contended that it was undisputed that Mr Moraitis lacked authority to represent the Moraitis Trust. The real question was whether there was a bona fide dispute about his authority. If there were, in the absence of a reference to oral evidence, which was not sought, the appellants would have failed to discharge the onus. This was because the application of the *Plascon-Evans* rule meant that the case had to be determined on the version of the respondents.

[25] The respondents were not party to the internal workings of the Moraitis Trust. In order to avoid the conclusion that Mr Kebert's denials were bare denials that could be disregarded they had to make their case in the third category of a dispute of facts referred to in the well-known passage from the *Room Hire* case,[26] namely where the respondent has no direct knowledge of the facts stated by the applicant, but denies them and gives evidence to show that the version of the applicant is untruthful or unreliable. And in that situation less evidence will suffice to raise a dispute of fact.[27] That is what Mr Kebert set out to do.

[26] Mr Kebert explained in his original answering affidavit that the Moraitis Trust was a vehicle created by Mr Moraitis to hold the shares in Moraitis Investments and that Mr Moraitis was the governing mind behind the trust and decided all matters on its behalf. He said that throughout their lengthy business association Mr Moraitis had never required the permission of the remaining trustees in regard to any business decision. All of these allegations attracted bare denials from Mr Moraitis in his replying affidavit, who brushed them off by saying that he had already dealt with them. He had not done so and as statements of fact they stood unrebutted.

[27] Mr Kebert went further in a supplementary answering affidavit by providing information regarding the manner in which Mr Moraitis dealt with the various cases in which they were involved. Starting with the liquidation application, he pointed out that the attorney representing

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[26] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163.
[27] *Gericke v Sack* 1978 (1) SA 821 (A) at 827D-G.

Moratis Investments and the Moraitis Trust was a Mr Ioullanou. He was also the attorney representing those entities in the litigation concerning the valuation by Ernst & Young, and Mr Moraitis in the litigation over the hotel. As such he had presumably been responsible for preparing affidavits and was involved in the settlement negotiations and the drafting of the settlement agreement, including the warranty of authority.

[28] Turning to the founding affidavit in the liquidation proceedings, Mr Moraitis deposed to it in his capacity as a director of Moraitis Investments and as a trustee of the Moraitis Trust. He attached resolutions to this effect executed on the same day as the affidavit was sworn, and reflecting decisions by Moraitis Investments and the Moraitis Trust taken in Johannesburg. Both resolutions were signed by Mr Moraitis. Accepting, as we must, that these statements by Mr Moraitis correctly reflected his authority, there needed to be an explanation of the manner in which that authority was conferred upon him. There was none.

[29] On the merits, in the founding affidavit in the liquidation application, Mr Moraitis explained the background to his business relationship with Mr Kebert and the nature of that relationship. He described it as being akin to a partnership. Its business was conducted 'as a group'. Their relationship extended beyond a commercial one to one as friends. The emphasis throughout was that the businesses were in truth those of Mr Moraitis and Mr Kebert and the companies and trusts merely vehicles through which they were pursuing their own interests. The manner in which they were conducted indicated to any observer that Mr Moraitis and Mr Kebert had been vested with the relevant authority to represent the trusts and companies in business dealings. Although Mr

Moraitis delivered a supplementary replying affidavit in regard to this material he did not deal with the substance of the factual allegations.

[30] The liquidation proceedings eventually came before Sapire AJ and the parties agreed on an order in terms of which the interest of Moraitis Investments in the various companies would be purchased by either Tropica or the Kebert Trust. This was the alternative relief that had been sought in the application. Far from disavowing this settlement and the resultant order by Sapire AJ, the appellants all wish to pursue it, because the relief they seek in these proceedings would revive the litigation over the Ernst & Young valuation and the implementation of Sapire AJ's order. Accordingly the conclusion of the settlement and the agreement to have it made an order of court were authorised by the Moraitis Trust and Moraitis Investments. They were represented by Mr Moraitis and their attorney was Mr Ioullanou, who were also responsible for the conclusion of the settlement agreement that is in issue here. Yet there is not a jot or tittle of evidence to indicate on what basis the conclusion of the earlier settlement agreement and the consent to Sapire AJ's order was any different from the settlement agreement and order in issue in this case. If the earlier settlement agreement was authorised, valid and binding that must hold true for the latter one, in the absence of evidence showing that the circumstances in which they were concluded were different.

[31] Coming to the circumstances in which the settlement was concluded, the evidence shows that the initiative came from Mr Moraitis' legal representative in the hotel dispute. This was Mr Ioullanou, who was the attorney for both Moraitis Investments and the Moraitis Trust, in the liquidation application and the dispute over the Ernst & Young valuation. He was the person who, on their behalf, concluded the agreement with

Ernst & Young. As the attorney he was aware that the settlement agreement was intended to be comprehensive and cover all the disputes between the parties in all the existing litigation. He must have been aware of the terms of the settlement agreement signed by Mr Moraitis and the warranty of authority that it contained on behalf of his clients. Yet there is no affidavit from him explaining on what basis he permitted his one client, Mr Moraitis, to say that he had authority to represent his other clients, Moraitis Investments and the Moraitis Trust, if that was not in fact true. All that we have is a letter addressed to Mr Moraitis' current attorney saying that his office and counsel did not at any stage contact the third and fourth appellants to discuss the settlement negotiations and settlement agreement. Like the affidavits the letter is a carefully worded statement that avoids dealing with the facts. It is entirely consistent with there being no need for any such discussion, because he was aware that Mr Moraitis was already authorised to enter into settlement negotiations and a settlement agreement on behalf of the Moraitis Trust.

[32] This is a substantial body of evidence that casts doubt on the claim that Mr Moraitis was not authorised by his co-trustees to negotiate a settlement of the disputes in which they and he were embroiled, and to cause the resultant agreement to be made an order of court. It is plain that he was the driving force behind all the litigation and acted on behalf of the Moraitis Trust and Moraitis Investments in instituting, conducting and, in the case of the liquidation application, settling the litigation. He is equally the driving force behind the present litigation. Accepting that his actions in all these matters were duly authorised by his co-trustees the inevitable question is how that authority was conferred in those instances and what difference there was between them and the present one. There is nothing to indicate that there was any difference.

[33] The issue can be summed up in a single stark question. In executing the settlement agreement Mr Moraitis said expressly that he was authorised to represent 'his' trust. In his affidavit he said that he was not so authorised. Why should we believe that he was lying when he signed the settlement agreement, but telling the truth in his affidavit? Counsel was unable to provide an answer to that question. That brings us back to the point at which this analysis commenced, namely that the onus rested on the Moraitis Trust to prove that Mr Moraitis lacked the authority to conclude the settlement agreement on its behalf and to agree to its being made an order of court. In the absence of any attempt to explain the workings of the trust or how issues of authorisation had been dealt with in the past, or any of the matters highlighted by Mr Kebert, that onus was not discharged.

[34] At the risk of being accused of heaping Pelion upon Ossa, there is merit in the criticism that the statements by Mr Moraitis are, in the absence of a full explanation of precisely how the trust operated and how the relevant decisions were taken, assertions of a legal conclusion rather than factual evidence in regard to authority. The question whether a person was authorised to act on behalf of another is ordinarily a question of fact involving the drawing of inferences or conclusions from primary facts in the context of legal principle. Lord Wright said in his speech in *Caswell v Powell Duffryn Associated Collieries Ltd*:[28]

'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish … But if there are no positive proved facts from which

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[28] *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 (HL); ([1939] 3 All ER 722) at 733E – F.

the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.'

The absence of any information concerning the process followed when these different pieces of litigation were instituted and conducted and the extent of the knowledge of the trustees concerning them, as well as the general manner of conducting the business of the trust, leads to the conclusion that there is an absence of facts from which to draw the inference that the claims by Mr Moraitis to have lacked authority in this specific instance are correct.

[35] The situation of Moraitis Investments can be dealt with fairly simply. Authority to represent it could emanate from two sources. There could be a decision by its sole shareholder, the Moraitis Trust, that it should conclude the agreement, or there could be a decision taken by its two directors, Mr Moraitis and Mr Kebert. In order to succeed in establishing its case Moraitis Investments had to prove that neither source of authority was present when the settlement agreement was concluded. It did not discharge that onus on either ground. The same evidence that indicated that Mr Moraitis had authority to represent the Moraitis Trust served to indicate that he had authority to represent the trust in its capacity as sole shareholder of Moraitis Investments in concluding the settlement agreement. In addition he and Mr Kebert were the two directors of Moraitis Investments. The suggestion that, because he did not say, when signing the agreement, that he was doing so in that capacity, Mr Kebert's manifest agreement to the settlement agreement can be disregarded, is without merit. The agreement did not need to be signed by both directors in order to bind the company. It sufficed if it was signed by one of them with the authority of the other. If Mr Moraitis lacked authority Mr Kebert would have known and intervened. The only

inference from his not doing so was that he confirmed that Mr Moraitis had the authority that he warranted he had, to represent Moraitis Investments in concluding the settlement agreement. The objection of lack of authority in this regard must be rejected.

Sections 112 and 115 of the Companies Act

[36] These provisions govern the disposal by a company of the whole or greater part of its assets or the undertaking of the business. The appellants contend that the settlement agreement, involving as it did, the transfer to Mr Kebert of the interests of Moraitis Investments in the first to sixth respondents, fell within the ambit of the sections and accordingly could only be validly effected by way of a special resolution in terms of s 115(2)(*a*) of the Companies Act. As no such resolution was taken they submitted that the transaction was void.

[37] The purpose underpinning the requirements of ss 112 and 115 is to ensure that the interests and views of all shareholders are taken into account before the company disposes of the whole or the greater part of its assets or the undertaking itself. In the case of a special resolution ss 65(9) and (10) stipulate the majority that must be achieved for such a resolution to be passed. Where the company only has a single shareholder these requirements become a mere formality. In those circumstances it seems to me that the principle of unanimous consent can be invoked in answer to the appellants' contention. That principle, long recognised in English company law, from which our courts have received much guidance,[29] was accepted as part of our law relating to companies, under

[29] R C Beuthin 'The Principle of Unanimous Consent' (1974) 91 *SALJ* 2.

both the 1926 and the 1973 Companies Acts.[30] I can see nothing in the current Act to suggest that the principle no longer finds application. The problems that this court identified in *Quadrangle Investments*[31] and those identified by Professor Beuthin in his article on the topic[32] do not arise here to preclude the invocation of the principle.

[38] In the present case the Moraitis Trust was itself a party to the settlement agreement and, for the reasons already given, the appellants have failed to prove that this was not authorised by the trustees. It cannot then be said that it did not, by its own agreement to the settlement, agree to Moraitis Investments becoming a party to the settlement agreement.

Section 75 of the Companies Act

[39] The appellants' contention under this head was that both Mr Moraitis and Mr Kebert had a personal interest in the subject matter of the settlement agreement and that they had not disclosed those interests at a meeting of the board of directors in accordance with s 75(6) of the Companies Act. As I understand the contention it goes further than mere non-disclosure. Section 75(6)(*d*) requires a director who has such a personal interest to withdraw from the meeting and play no role in the deliberations of the board. It seems to follow that the appellants were contending that neither Mr Moraitis nor Mr Kebert could be party to a decision by the board of Moraitis Investments to conclude the settlement agreement and that it could only be authorised by a members' meeting or the court under s 75(10).

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[30] *Sugden and Others v Beaconhurst Dairies (Pty) Ltd and Others* 1962 (3) SA 174 (ECD) at 179H-181A; *Gohlke & Schneider and Another v Westies Minerale (Edms) Bpk and Another* 1970 (2) SA 685 (A) at 693E-694E.
[31] *Quadrangle Investments (Pty) Ltd v Witind Holdings Ltd* 1975 (1) 572 (A).
[32] Fn 29 ante.

[40] The argument must fail for the same reason as the earlier arguments about ss 112 and 115 of the Companies Act. It recognised that the agreement could have been concluded with the authority of the Moraitis Trust and the appellants have failed to prove that the trust did not authorise the conclusion of the settlement agreement.

Rule 42 and the common law

[41] In the heads of argument (although it had not been mentioned in the founding affidavit) there was a suggestion that Rule 42(1) might avail the appellants on the basis that the only parties to the litigation in which the order was made were Mr Moraitis and Mr Kebert in his capacity as the executor of his mother's estate. Accordingly it was suggested that both Moraitis Investments and the Moraitis Trust were absent when the order was made. I do not agree. Once it is accepted that it has not been shown that the Moraitis Trust and Moraitis Investments were not parties to the settlement agreement, they were bound by the provision in clause 15 thereof that they consented and agreed to it being made an order of court. Accordingly, when the agreement was submitted to the judge for that purpose, counsel was acting for all the parties to the settlement agreement. The rule cannot be invoked in those circumstances.

Result

[42] The appeal is dismissed with costs.

M J D WALLIS

JUSTICE OF APPEAL

Appearances

For appellant:	L W De Koning SC
Instructed by:	Mills & Groenewald, Vereeniging; Phatshoane Henney Attorneys, Bloemfontein.
For respondent:	S Symon SC (initial heads of argument by C M Eloff SC)
Instructed by:	Ramsay Webber Inc, Illovo; Lovius Block Attorneys, Bloemfontein.