THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 898/2020

In the matter between:

OPPRESSED A C S A MINORITY 1 (PTY) LTD
(Formerly known as African Harvest Strategic Investments (Pty) Ltd) **FIRST APPELLANT**

UP-FRONT INVESTMENTS 65 (PTY) LTD **SECOND APPELLANT**

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA **FIRST RESPONDENT**

MINISTER OF TRANSPORT **SECOND RESPONDENT**

AIRPORTS COMPANY OF SOUTH AFRICA SOC LTD **THIRD RESPONDENT**

PYBUS THIRTY-FOUR (PTY) LTD **FOURTH RESPONDENT**

AIRPORTS MANAGEMENT SHARE INCENTIVE SCHEME COMPANY (PTY) LTD **FIFTH RESPONDENT**

LEXSHELL 342 INVESTMENT HOLDINGS (PTY) LTD **SIXTH RESPONDENT**

TELLE INVESTMENTS (PTY) LTD **SEVENTH RESPONDENT**

ADR INTERNATIONAL AIRPORTS SOUTH AFRICA (PTY) LTD **EIGHTH RESPONDENT**

G10 INVESTMENTS (PTY) LTD **NINTH RESPONDENT**

MINISTER OF FINANCE **TENTH RESPONDENT**

Neutral citation: *Oppressed A C S A Minority 1 (Pty) Ltd and Another v Government of the Republic of South Africa and Others* (case no 898/2020) [2022] ZASCA 50 (11 April 2022)

Coram: DAMBUZA, MAKGOKA, SCHIPPERS, PLASKET and GORVEN JJA

Heard: 24 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 11 April 2022.

Summary: Civil Procedure – rescission of judgment – no distinction in approach to rescission of consent orders and other judgments – the starting point is the court order rather than the underlying agreement – lack of authority to conclude settlement agreement and consequent consent court order – good cause for rescission established.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Yacoob J sitting as court of first instance):

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

JUDGMENT

Dambuza JA (Makgoka, Schippers, Plasket and Gorven JJA concurring)

Introduction

[1] This appeal is against an order granted by the Gauteng Division of the High Court, Johannesburg (high court, Yacoob J), in terms of which a consent order made by the same court, per Matojane J, was rescinded. The appeal is with the leave of the high court.

Background

[2] The two appellants, Oppressed ACSA Minority 1 (Pty) Ltd (formerly known as African Harvest Strategic Investments (Pty) Ltd) and Up-Front Investments 65 (Pty) Ltd, are part of a 4.21%[1] minority shareholder component in Airports Company of South Africa (ACSA), the third respondent in this appeal. ACSA is a statutory entity established by the first respondent, the Government of

[1] ACSA was formed by the Government in 1993 to operate the nine main South African airports. In 1998 it was partially privatised when 25.4% of its shareholding was sold to private sector shareholders. By 2015 the Government held 74.6% shares and the balance was held as follows: ADR International Airports South Africa (Pty) Ltd (a wholly owned subsidiary of the Public Investment Corporation (PIC) SOC Limited) held 20%, a staff share incentive scheme (constituted by Amsis and Lexshell 342 Investment Holdings (Pty) Ltd) held 1.19%, Minority Shareholders held 4.21% (formerly African Harvest Strategic Investments (Pty) Ltd) - 1.40% shares, G10 Investments (Pty) Ltd – 1.21% shares, Upfront Investments 65 (Pty) Ltd – 0.40% shares, Pybus Thirty Four (Pty) Ltd – 0.40% shares, and Telle Investments (Pty) Ltd – 0.80% shares).

the Republic of South Africa (the Government), in terms of the Airports Company Act 44 of 1993 (Airports Act). The appellants acquired their share in 1998 at a price of R172 million. The Government, holds 74.6% of the shares. The second respondent (Minister of Transport) is the designated Government representative on the ACSA Board.

[3] On 29 July 2015 the appellants brought an application in the high court under s 163 of the Companies Act 71 of 2008 (Companies Act), seeking an order directing ACSA to acquire their 1.8% stake in ACSA at fair value.[2] The application was a culmination of a longstanding dissatisfaction on the part of the appellants with the business direction adopted by ACSA, subsequent to the appellants' acquisition of their shares. It was not in dispute that subsequent to the appellants' acquisition of their shares, ACSA had deviated from undertakings it had made when the appellants acquired their shares. Instead of pursuing a public offering (IPO) as promised and listing on the Johannesburg Stock Exchange (JSE), ACSA adopted business practices that prioritized its economic developmental role. In addition, the Government retained its shares in ACSA instead of divesting of them as the appellants had been led to believe it would.

[4] In the s 163 application the appellants contended that ACSA's deviation from the promised commercial route resulted in their return on capital being limited to the cost of their capital. At some stage ACSA also stopped declaring dividends, leaving the appellants burdened with the debt they had assumed in order to buy the shares, with no escape avenue.

[2] In terms of s 163(1)*(a)* of this Act a shareholder or director of a company may apply to a court for relief if any act or omission by the company, or related person, has had a result that is oppressive, or unfairly prejudicial to, or that unfairly disregards the interests of the applicant. The same relief is available under s 163(1)*(b)* [where] the business of the company, or a related person, is being or has been . . . conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant; or (under s 163(1)*(c)* [where] the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised [in a manner] that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant.

[5] While admitting that during June 1998 it had considered a public offering of its shares as recorded in its prospectus, ACSA maintained that it could not be held responsible for the appellants' debts. It contended that there was never a time limit for effecting the IPO, and that, in any event, the appellants had rejected an offer to buy their shares at R12.87 per share. They never proved that the offer was unreasonable and they never showed mala fides or unlawfulness in ACSA's developmental role. Instead, they were only prepared to sell their shares at R26.51 each, the value as per ACSA's interim accounts for the six-month period ending on 30 September 2014, so it was asserted.

[6] ACSA insisted that its Board of Directors had acted within its rights and mandate in determining its business direction. And the appellants had not shown any oppressive or prejudicial conduct on the part of ACSA and the Minister. Therefore the appellants had not proved an entitlement to a relief based on s 163 of the Companies Act.

[7] ACSA, the Minister of Finance and the Government (State parties) contended that the appellants did not specify when and by whom the decisions not to list and not to pay dividends were taken, and whether they were executive or administrative decisions. They pleaded that in acquiring the shares from the appellants, ACSA would have to comply with the provisions of s 217 of the Constitution and other procurement requirements prescribed in terms of the Constitution. Furthermore, an order sought by the appellants, that an internationally recognised expert be appointed to value their shares, would be offensive to the provisions of the Public Finance Management Act 1 of 1999 (PFMA) and the Regulations promulgated thereunder.[3]

[3] The specific sections of the PFMA which, it was alleged, would be contravened if the s 163 application were to be granted, are set out in the paragraphs that follow.

[8] A few days before the date of the hearing of the s 163 application, discussions were held between the appellants and ACSA's representatives. These resulted in a settlement agreement being concluded on 31 July 2017, the day before the hearing. On the day of the hearing, 1 August 2017, the high court, per Matojane J, granted a consent order based on the settlement agreement. In the relevant part the order read as follows:

'NOW THEREFORE the parties agree to settle the dispute between them as set out hereunder.

1. The first respondent ("ACSA"):

1.1 is directed to purchase the shares of the applicants in ACSA;

1.2 is to take transfer thereof against payment to the applicants of a purchase consideration in an amount to be determined by the referee referred to in paragraph 4 below;

1.3 purchase [sic] the applicants' shares as a share buy-back out of ACSA's retained income.

2. The value of the applicants' shares in ACSA will be as at the date of this order.

3. In order to determine the value of the applicants' shares in ACSA, the court refers this issue to a referee as contemplated in terms of section 38 of the Superior Courts Act, No 10 of 2013 ("Superior Courts Act").

4. The applicants and first respondent will appoint the referee within 14 days from date of this order such referee to be:

4.1 an internationally recognised, independent merchant banker doing business in South Africa with experience in the valuation of infrastructure businesses shall be appointed by agreement between the parties (or failing such agreement by the chairperson for the time being of the Banking Association of South Africa);

. . .

8. The referee's costs shall be borne equally by the applicants on the one part, and ACSA, on the other part.'

[9] The consent order was partially implemented. A referee was appointed pursuant to the court order and a valuation was concluded on 26 February 2018. ACSA, however, disputed the valuation and launched proceedings in the high court to challenge it. On 17 July 2018, whilst the ACSA challenge to the valuation was pending, and almost a year after the consent order was granted, the

Government launched an application in the high court seeking rescission of the consent order and, in the alternative, leave to appeal against that order.

[10] The application for rescission of the consent order was brought in terms of both rule 42(1) of the Uniform Rules of Court (the rules) and under common law. It was contended that the consent order was erroneously granted as it was not competent for the court to grant an order which bolstered an illegality. The illegality was said to be the conclusion of a settlement agreement in breach of ss 3 and 4 of the Airports Act,[4] and the provisions of paragraphs 9.5 and 9.6 of ACSA's Memorandum of Incorporation (MOI).[5] The Government contended that the Minister of Transport never gave approval to the share buy-back. Furthermore, although the Government was the majority shareholder in ACSA, it had not been party to the settlement agreement, yet it found itself bound thereby whilst it could not discharge its obligations to protect public funds.

[11] In addition, so contended the Government, the settlement agreement was concluded in breach of ss 54(2)*(c)* and 66 of the PFMA. Section 54(2)*(c)* of the PFMA imposes an obligation on accounting authorities of public entities intending to acquire or dispose of a 'significant shareholding' in the company to inform National Treasury of the impending transaction and to submit particulars

[4] Section 3 of that Act provides:
'(1) The State shall be the holder of the shares in the company; (2) The said shares shall only be sold or otherwise disposed of with the approval, by resolution, of Parliament; (3) The rights attached to the shares of which the State is the holder shall be exercised by the Shareholding Minister on behalf of the State; (4) The State President shall designate a Minister as the Shareholding Minister.'
Section 4 provides that:
'the objects of the company are the acquisition, establishment, development, provision, maintenance, management, control or operation of any airport, any part of any airport or any facility or service at any airport normally related to the functioning of, an airport.'

[5] The relevant provisions of the MOI provide that:
'9.5 In addition to any prescribed obligations which the Shareholders may agree to and notwithstanding any provisions of this MOI, no Securities in the Company held by any other Holder, other than the Minister, shall be transferred to any party without the consent of the Minister.
9.6 Where the Minister consents to the sale or disposal or transfer of securities in the manner contemplated in clause 9.5 above, the Minister shall be entitled , at his or her discretion, to stipulate any conditions which shall apply to the granting of the consent.'

relevant to the transaction to 'their executive authorities'.[6] The Goverment maintained that the share buy-back transaction fell within the ambit of this section, yet no report to National Treasury was made prior to the conclusion of the agreement. The appellants retorted that there was no evidence that the share buy-back amounted to a disposal of a significant shareholding in ACSA.

[12] Section 66 sets out restrictions on borrowing money, the issuing of guarantees, indemnities and securities by public institutions to which the PFMA is applicable.[7] The contention by the Government was that in terms of the consent order, ACSA had to buy the shares back at some undetermined time in the future.

[13] Another reason why it was contended that the consent order was an illegality was that it was granted in the absence of a solvency and liquidity test that is required under ss 46 and 48 of the Companies Act. There was no resolution by the ACSA Board of Directors acknowledging that it was satisfied that the solvency and liquidity requirements had been complied with. Sections 46(1)*(a)* and *(b)* of the Companies Act regulate the making of distributions by companies. In terms thereof distributions may only be made pursuant to an existing legal obligation or on authorisation by the board. Further, distributions may only be

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[6] Section 54(2) provides:
'Before a public entity concludes any of the following transactions, the accounting authority for the public entity must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction:
. . .
(c) acquisition or disposal of a significant shareholding in a company. . .'.

[7] Section 66, in relevant part, provides:
'(1) An institution to which this Act applies may not borrow money or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that institution or the Revenue Fund to any future financial commitment, unless such borrowing, guarantee, indemnity, security or other transaction -
(a) is authorised by this Act; and
(b) in the case of public entities, is also authorised by other legislation not in conflict with this Act;
. . .
(3) Public entities may only through the following persons borrow money, or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that public entity to any future financial commitment:
(a) A public entity listed in Schedule 2: The accounting authority for that Schedule 2 public entity. . .'.

made when it reasonably appears that the company will satisfy a solvency and liquidity test immediately after completion of the proposed distribution.

[14] The high court found that the requirements of rule 42 had not been met. It rejected the Government's argument that the absence of authority for the conclusion of the settlement agreement by ACSA constituted justus error. Instead, the court accepted a submission by the Government that the court order fell to be rescinded on just and equitable grounds by exercise of the court's remedial powers under s 172(1)*(b)* of the Constitution, because the settlement agreement and the consent order contravened the provisions of s 66 of the PFMA and were therefore unlawful.

[15] Although ACSA had filed a notice to abide to the decision of the high court in the application for rescission of judgment, it filed an explanatory affidavit and also made written and oral submissions, essentially supporting the application for rescission. It also opposed the appellants' application for leave to appeal, and again filed Heads of Argument, and made oral submissions opposing the appeal. To a large extent the submissions made on behalf of the State parties in opposing the appeal overlapped.

[16] On appeal the appellants asserted that the Government lacked standing to bring the rescission application because the consent order was only granted against ACSA. It was submitted on the appellants' behalf that the Government had no legal interest in the share buy-back transaction as it could not be held liable for the payment of the price of the shares. Furthermore, the unlawfulness or illegality of the court order was not a proper basis for rescission of the consent order and it was not competent to rescind a court order under s 172(1)*(b)* read with s 173 of the Constitution. Instead, it was submitted, the Government should have brought an application for the review of the decision to conclude the

settlement agreement. The appellants also contended that the high court erred in concluding that the settlement agreement was never authorised by the ACSA Board.

[17] The Government persisted in its argument that because the settlement agreement was not in compliance with the law, a proper basis for rescission of the consent order had been established. It insisted in its contention that rescission was permissible on the common law ground of justus error because ACSA's legal representatives and officials had no authority to conclude the settlement agreement. It highlighted that both this Court and the Constitutional Court have emphasised that courts cannot perpetuate an illegality, and they have a responsibility to scrutinise settlement agreements for legal compliance. The violation of the provisions of the Companies Act and PFMA remained part of the Government's case on appeal.

[18] The appellants took issue with ACSA's participation in the appeal. They maintained that it was not open to ACSA, having withdrawn from active participation in the case and having undertaken to accept whatever outcome the court might give, to enter the fray on appeal as an 'antagonist'. Their stance was that the Government and ACSA should not be afforded audience in the appeal. It is therefore necessary to determine first the standing of these parties in this appeal.

Government standing

[19] The enquiry is whether the Government has a direct and substantial interest in the valuation and the share buy-back ordered by the high court. It is trite that a party to litigation must have an actual and current interest in the subject matter and the outcome of the litigation.[8]

[8] *Four Wheel Drive CC v Leshni Rattan NO* [2018] ZASCA 124; 2019 (3) SA 451 (SCA) para 7.

[20] As discussed, the Government is the major shareholder in ACSA. In the founding affidavit deposed to by Mr Alun Frost on behalf of the appellants in the s 163 application,[9] it was pleaded that the Minister of Transport was designated by the President as the Government shareholder representative in ACSA. The Government was instrumental in the establishment of ACSA and, by and large, remains the force behind ACSA's business policy. It is the custodian of the public's interest in ACSA. It therefore has the requisite direct and substantial interest in ACSA. It must have been for these reasons that it was cited as a respondent by the appellants in the s 163 application.

[21] For the same reasons the Government had a responsibility to participate in the conclusion of the settlement agreement. The fact that on 1 August 2018 it inexplicably abdicated its responsibility and formed the view (as communicated by its counsel at the time) that it was not affected by the contents of the agreement did not divest it of its legal interest.[10] That legal interest still obtains in this appeal.

ACSA standing

[22] The appellants' objection to ACSA's participation in this appeal must also fail. It is true that, having elected to abide by the order of the high court in the application for rescission of the consent order, ACSA was barred, under the doctrine of peremption, from mounting an appeal against the consent order.[11] One would therefore not have expected ACSA to present emphatic opposing submissions as it did in opposition to the appeal. Curiously, in its explanatory affidavit ACSA offered no explanation for its partial compliance with the consent order over the period of almost a year following the granting thereof. Be that as

[9] The application for the share buy–back under s 163(2) of the Companies Act.
[10] When the parties moved for an order that the settlement agreement be made an order of court, counsel for the government confirmed to Matojane J that as government's legal team, they had consulted extensively with '[their] clients' with regard to the terms of the settlement agreement. He further confirmed that the 'clients' were also in attendance in court on the day.
[11] *Hlatshwayo v Mare & Deas* 1912 AD 242 at 247.

it may, the doctrine of peremption is not absolute. Sometimes the interests of justice will be served by the court electing not to enforce peremption.[12] And when confronted with the possible operation of the doctrine, the approach is to consider whether any overriding policy considerations militate against the enforcement of the doctrine.[13]

[23] Given the centrality of ACSA to the issues that had to be determined in this appeal, its rather active participation was more likely to be beneficial to the proceedings, even if to a limited extent, in giving insight into the issues relevant for determination of the appeal. Furthermore, there had been no objection to the affidavit and comprehensive Heads of Arguments filed on its behalf in the high court in the rescission application and in its opposition to the application for leave to appeal. For these reasons, this Court exercised its discretion in favour of granting audience to ACSA in the appeal.

The appeal

[24] At common law a final judgment may be set aside for fraud, justus error (in exceptional circumstances) and justa causa. The Government's insistence that it was entitled to have the judgment rescinded based on justus error is misplaced. A party may escape liability under a contract where it can be shown that the denier laboured under a mistake. That was not the case made out by the Government in this case. The Government was not party to the settlement agreement. On the other hand, the Government could have the consent order rescinded on just cause. The inquiry requires that a good and sufficient cause be shown in accordance with the principles applicable to rescission under rule 31(2)*(b)* of the rules.[14] The relevant factors include the reasonableness of the explanation of the

[12] *Booi v Amathole District Municipality and Others* (CCT 119 of 2020) [2021] ZACC 36; 2022 (3) BCLR 265 (CC) at para 31.
[13] *Booi* para 29.
[14] D E Van Loggerenberg et al *Erasmus: Superior Court Practice* 2 ed (2015) at B1–308.

circumstances in which the consent judgment was given, and the bona fides of the application, including the bona fides of the defence on the merits of the case. The court has a wide discretion in evaluating 'good cause' in order to ensure that justice is done.[15]

[25] It is not necessary to discuss in great detail each of the plethora of statutory and other alleged infringements raised by the Government and ACSA in relation to the conclusion of the settlement agreement and the granting of the consent order. The arguments based on ss 54(2)*(c)* and 66(1) of the PFMA and s 163 of the Companies Act may immediately be discounted. As it was submitted on behalf of the appellants, the evidence did not show that their shares amounted to a 'significant shareholding' in ACSA. In addition, it is relevant that the high court ordered that the buy-back would be financed from ACSA's retained income.

[26] Consequently, the argument by the respondents that the order authorised the buy-back at some indeterminate time in the future was not persuasive. If the buy-back price as determined in the referee's evaluation could not be paid out of the retained income, the buy-back could not be implemented in terms of the court order. Furthermore the need to satisfy the requirements of s 163 of the Companies Act was superseded by the settlement agreement (subject, of course, to its validity in other respects). The settlement would have been pointless if the requirements of s 163 still had to be met.

[27] However, although the Government did not explain its counsel's submissions in court in relation to the settlement agreement, its arguments on lack of authority for the conclusion of the settlement agreement and the consent order were more persuasive in support of a bona fide defence justifying rescission of

[15] Ibid fn 14 at B1- 204.

the judgment. In *Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others*,[16] this Court highlighted that in determining whether a consent order falls to be rescinded the correct starting point is the order itself rather than the underlying settlement agreement. Where the basis of the attack on the judgment is lack of authority to conclude the underlying agreement (as it is in this case), the principle that comes into play is that no agreement came into existence.[17] Essentially, this is the respondents' argument in this case.

[28] The crux of the Government's submission was that ACSA's officials and representatives lacked the authority to conclude the settlement agreement. It was not in dispute that until the ACSA Board passed the necessary resolution, neither the settlement agreement nor the consent order would be lawful. It was also not in dispute that the Minister's approval was necessary for the buy-back agreement to be valid.

[29] A recounting of the uncontested background to the conclusion of the settlement agreement is necessary for consideration of the consent issue. Until the few days preceding the date of hearing of the s 163 application, ACSA and the appellants were destined for a full hearing on 1 August 2017 on all the issues raised in that application. On 27 and 28 July 2017 pre-hearing discussions commenced between the parties' legal representatives.[18] On 27 July 2017, proposed terms for a possible settlement were presented to the ACSA Board by its lawyers. The Board resolved that more time was required to consider the proposal and to consult the Minister before making 'any commitment'. That was the last word from the ACSA Board on possible settlement.

[16] *Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others* [2017] ZASCA 54; [2017] 3 All SA 485 (SCA); 2017 (5) SA 508 (SCA) at para 10.
[17] Ibid fn 16 para 17.
[18] Between ACSA, the Minorities and the Government.

[30] On 31 July 2017 a further meeting to discuss the possibility of a settlement was held between the legal representatives of the respective parties. Also in attendance at that meeting were ACSA's Chief Executive Officer, the Head of its Legal Department, its Company Secretary, Mr. Frost (for the appellants) and various other persons. On that day a proposed draft order was exchanged and discussed between the legal representatives and the parties' representatives.[19] By the end of the meeting it appeared that everyone in attendance at the meeting was satisfied that a court order based on a proposed settlement agreement would be sought on the following day. Matojane J, the judge to whom the matter had been allocated, was advised accordingly in preparation for the next day. The settlement agreement was signed by the legal representatives of ACSA and the appellants.

[31] The next morning, however, ACSA's legal representatives advised the court that they had been instructed to seek a postponement of the application. When the request for a postponement was refused, ACSA's senior counsel withdrew from the proceedings, leaving only junior counsel to continue with the matter. Thereafter, submissions were made on some contentious portions of the settlement agreement. Ultimately a consensus was reached on all the terms of the consent order. Counsel for the Government indicated that the Government had not been party to the discussions which led to the settlement agreement, but had been given a copy thereof which was duly considered by the relevant Government functionaries. He expressed the view that the Government was 'not affected' by the terms of the agreement. The consent order was then granted in that context.

[32] From these facts, it was clearly established that the ACSA Board never passed a resolution adopting the settlement agreement. The factual finding by the high court to this effect cannot be faulted. The Minister also never consented to

[19] The contested issues were the inclusion of a reference to s 163 of the Companies Act 2008 in the preamble of the proposed order and a reference to oppressive conduct in relation to the contemplated valuation exercise.

the settlement agreement. Much was made by the appellants of ACSA's conduct in compliance with the court order. They highlighted ACSA's active participation in the steps taken to implement the court order over the seven months following the granting thereof. It was submitted that even if no resolution was ever taken by the Board on the agreement, ACSA, through its conduct, ratified the settlement agreement and was estopped from relying on lack of authority. As proof thereof, in the answering affidavit, Mr Frost referred to correspondence between himself and ACSA's secretary relating to the appointment of the referee who was to do the valuation as provided in the consent order. He also highlighted that copies of the correspondence were sent to the Chairman of the ACSA Board together with the Chief Executive Officer (CEO) and Acting Chief Financial Officer (CFO), and that the latter signed the referee's terms of engagement, where after ACSA paid the R650 000.00 which was its share of the referee's fees.

[33] However, as correctly submitted on behalf of the Minister, compliance with the authorisation requirements was a fundamental necessity for consent to an order in the terms proposed in the settlement agreement. Neither ACSA's legal representatives nor its Board Chairman, CEO or CFO, either individually or together had the authority to give such consent. And the unauthorised agreement could not be legitimised through a court order.[20] The submissions on behalf of the appellants that they were entitled to rely on some authority, 'whether actual or ostensible', by ACSA's 'representatives' and legal representatives who consented to the order, was unsustainable. There could be no basis for ostensible authority, when, on the day of the hearing of the s 163 application, ACSA's legal representatives said that they had been instructed to seek a postponement.

[20] *Eke v Parsons* [2015] ZACC 30, 2016 (3) SA 37 (CC), 2015 (11) BCLR 1319 (CC); *Valor IT v Premier, North West Province and Others* [2020] ZASCA 62, [2020] 3 All SA 397 (SCA), 2021 (1) SA 42 (SCA); *Road Traffic Management Corporation v Waymark Infotech (Pty) Limited* [2019] ZACC 12, 2019 (6) BCLR 749 (CC), 2019 (5) SA 29 CC.

[34] Similarly, the reference to a special resolution adopted by ACSA's shareholders at its 22nd Annual General Meeting in 2015 authorising the buy-back of ACSA's shares did not assist the appellants. Neither could the argument that the Minister of Transport was represented at the negotiations and the court proceedings that culminated in the consent order on 1 August 2017. The 2015 resolution preceded the s 163 application. The only relevant resolution adopted by ACSA's Board in relation to the pending application was the one passed on 27 July 2017 in which the Board resolved that it needed more time to consider the settlement proposal. That resolution set out clearly that the Board's attitude was that it was not amenable to settlement on those terms at that time and it directed that the Minister's opinion be sought on the matter. The conduct of ACSA's legal representatives in applying for a postponement on the date of the hearing of the main application was consistent with that resolution.

[35] The appellants' ratification argument was equally doomed to fail. ACSA's principal was its board of directors. No conduct by the Chairman of the Board, acting on his own, could constitute ratification. Nor could the conduct by ACSA's CEO or its CFO constitute ratification of the unauthorised agreement. Conduct by these ACSA representatives, whether at the conclusion of the contract or subsequent thereto, was irrelevant to the determination of validity of settlement agreement and the consent order.

[36] There was also no proper basis to support the estoppel argument. No conduct on the part of the ACSA's Board could be understood to invest its legal representatives, Chairman, the CEO or the CFO with authority to consent to the agreement. There was no evidence that the share buy-back was a matter that normally fell within the scope of those representatives. In any event it was not the appellants' case that they were led to believe that the necessary resolution had been passed by the Board.

[37] The appeal is dismissed with costs, including the costs of two counsel.

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N DAMBUZA
JUDGE OF APPEAL

Appearances:

For appellants:	J Gauntlett SC with N Luthuli
Instructed by:	Falcon & Hume Inc, Sandton
	Webbers, Bloemfontein
For 1st and 2nd respondents:	G Marcus SC with A Hassim SC
Instructed by:	State Attorney, Johannesburg
	State Attorney, Bloemfontein
For 3rd respondent:	S Budlender SC with P Ngcongo
Instructed by:	Edward Nathan Sonnenbergs Inc, Sandton
	Honey Attorneys, Bloemfontein