REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 10804/2019

[1] REPORTABLE: YES / NO
[2] OF INTEREST TO OTHER JUDGES: YES / NO
[3] REVISED.

16.4.19
Date:

WHG VAN DER LINDE

In the matter between:

Yogindra Das Sigaban — Applicant

and

City of Johannesburg — Respondent

J U D G M E N T

Van der Linde, J:

[1] The applicant applies to rescind a judgment under Rule 42(1)(a) on the basis that it was granted erroneously. He does not contend that it was erroneously granted in his absence, as the rule expressly envisages; he was legally represented throughout. The rule provides:

"(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby; ...".

[2] The application is brought in recess by way of urgency. The court order involved was made by this Court on 10 January 2019, by agreement, and it incorporated an agreement of settlement. The agreement of settlement was concluded, at least ostensibly, between the parties pursuant to interdict proceedings instituted in this Court by the Respondent against the Applicant under case number 21704/18 in which it (the Respondent), *inter alia*, sought to interdict the Applicant from operating his business on his property which is zoned for residential use and removing the equipment, materials and any other movable goods utilised for the conducting of the business contrary to the zoning of his property.

[3] The Applicant did not dispute that his property is zoned for residential use and that he is operating a business thereon in the interdict application and still does not do so in this application. He contends that he was not aware that he was not allowed to conduct business thereon and the only time he became aware that he was not supposed to do so was when the Respondent brought it to his attention.

[4] The applicant then instructed his attorney to seek relief from the court so that he had more time to move to new premises. He contends that it was only during 24 March 2019 and in the process of launching this application and whilst in consultation with his present legal representatives, that the contents the settlement agreement came to his attention with the result an order rescinding and setting it aside was sought and in the alternative an order for the extension of time until 31 August 2019 to develop the alternative property.

[5] The essence of the settlement agreement was that the applicant would cease conducting the business at the stated address by 29 March 2019. The applicant has not done so, and hence this urgent application.

[6] Mr Dewrance, SC who appeared with Mr Carelse for the respondent did not take the point of urgency, and since I heard both parties on the merits, and given the outcome of my decision on the merits, there is no point in striking the matter from the roll for lack of urgency.

[7] The applicant's case is that the agreement of settlement that had been made an order of court was not mandated by him. That agreement was signed not by him but by his attorney, but he disputes that his attorney had authority to enter into the settlement agreement on his behalf.

[8] The facts are that it is common cause that in the lead-up to the settlement agreement being made an order of court in the interdict application, the parties in fact concluded a settlement, one which was indeed signed by the applicant's attorney on his behalf, but one which he had at least initialled at the foot of the pages. Both written instruments, that is the initial settlement agreement and the later settlement agreement that was made an order of court ("the first settlement agreement" and "the second settlement agreement"), make provision on the last page for signature only by the parties' attorneys and not by the parties themselves.

[9] However, when the respondent's attorney sent the first settlement agreement to the applicant's attorney, the covering email requested that the "*client*" sign the settlement agreement; that is why the applicant initialled the first settlement agreement, but still the applicant's attorney signed the first settlement agreement because, as I have said, provision is made at the end of the agreements for the parties' attorneys to sign the agreement and not the parties themselves.

[10] What happened was that when the presiding judge in the unopposed motion court was moved to make the first settlement agreement an order of court, the presiding judge

apparently had difficulties with the settlement agreement, as a result of which the matter was stood down. Thereafter a correspondence exchange between the parties' attorneys ensued, and this led to an email whereby the respondent's attorney wrote to the applicant's attorney, enclosing the second settlement agreement, and requesting that the second settlement agreement be signed, without saying expressly by whom.

[11] In the event the second settlement agreement (which accompanied that email) was signed by the applicant's attorney but not initialled by the applicant; and the applicant now says, as noted, that his attorney had no authority to sign it.

[12] There are two differences only between the first settlement agreement (which the applicant initialled and his attorney signed), and the second settlement agreement (which the applicant did not initial but which his attorney signed (the second agreement). They are that the first settlement agreement contained a final clause to the following effect:

"8. Further and/or alternative relief."

And the second difference is that the second settlement agreement had within it a non-variation clause whereby variations to the settlement agreement would only be effective if they were reduced to writing and signed by the parties, referred to in argument as a *Shifren*-clause.[1]

[13] In argument for the applicant Mr Ram, SC submitted that the concern of the applicant was not so much the introduction of the *Shifren*-clause. He accepted that any amendment to the settlement agreement would in any event require consensus between the parties.

[14] However, Mr Ram submitted that throughout it was the applicant's understanding that the words *"further and/or alternative relief"* in the first settlement agreement meant that if he

[1] After *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A).

wished, the applicant could get an extension of time beyond 29 March 2019 within which to relocate his business from the current premises.

[15] The answering affidavit on behalf of the respondent makes the point that the respondent laboured under the *bona fide* and reasonable belief that the applicant's attorney was properly mandated to sign the second settlement agreement on behalf of the applicant; and the respondent therefor raises an estoppel against the applicant.

[16] The first issue that comes to mind is whether the applicant's assertion that he always thought that *"further and/or alternative relief"* means that he could get an extension in respect of the time by which to relocate, is credible. It seems to me that the answer is that whether or not it is credible does not really matter, because if the first agreement, the one that he had initialled, was made an order of court, he would not find any accommodation – were he to go to court – for his argument that he was entitled to an extension of time to relocate on the basis of a *"further and/or alternative relief"* clause. Such an order simply does not provide that entitlement.

[17] But as I see it the more principled answer to the issue raised by the applicant is that of the authority of an attorney who acts for a party in litigation. In this regard the respondent relied on the judgment of Chachalia, JA in *MEC for Economic Affairs, Environment and Tourism v Kruizenga*, [2010] 4 All SA 23 (SCA) where the learned judge said the following at para [20] (my emphasis):

"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 respondent's 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. 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. That party is entitled to assume, as the respondents did, that the authority who is attending the conference clothed with an 'aura of authority' has the necessary authority to do what attorneys usually do at a Rule 37 conference – they make admissions, concessions and often agree on compromises and settlements. In the respondents' eyes, the state attorney quite clearly had apparent authority."

[18] In this case the email exchange that led to the conclusion of the first settlement agreement did exact that "*the client*" must sign the settlement agreement, despite the fact that it made provision for only the attorney to sign it on behalf of the client. But I cannot believe that the respondent's attorney could justifiably question the authority of the applicant's attorney on behalf of the applicant to conclude the second settlement agreement, especially in the light of the fact that the changes from the first to the second agreement were so ostensibly immaterial; and in the latter instance, without the covering email this time specifying that *the client* (as opposed to the attorney) was required to sign the settlement agreement.

[19] Take the application of the settlement *Shifren*-clause in the settlement: The settlement agreement was intended to become an order of court. On the authority of *Eke v Parsons*, 2015 (11) BCLR 1319 (CC), a settlement agreement which is made an order of court, has the effect that it is an order like any other. Such an order cannot be amended without the intercession of the court itself. But in any event, as Mr Ram conceded during argument, in my view fairly, even absent a *Shifren*-clause it was not open to the applicant unilaterally to decide on an extension of the date by which he had to relocate. On any basis, consensus was essential.

[20] That brings one to the deletion of the "*further and/or alternative relief*" clause. Many judges do not make orders which include such a clause and, with respect, rightly so. It is meaningless. And, as already pointed out, whether one dismisses the applicant's argument

on the basis of lack of credibility, or on the basis that it has no substance in law, matters not: when the respondent's attorney asserts that he believed that the applicant's attorney had a mandate to conclude the second settlement agreement - having regard to the fact that the applicant himself had already initialled the first settlement agreement, and having regard to the relatively insignificant changes to that first settlement agreement, that is a credible and reasonable stance.

[21] In my view it follows that as a matter of law the applicant's attorney had apparent authority when concluding the settlement agreement which in the event was made an order of court.

[22] In the result I make the following order:

The application is dismissed with costs including the costs consequent upon the employment of two counsel.

WHG van der Linde
Judge, High Court
Johannesburg

Date argued: Thursday 11 April 2019
Date judgment: Tuesday 16 April 2019

For the applicant:	Adv R Ram, SC
Instructed by:	Mayet Vittee Inc Applicant's Attorneys 3rd Floor, 165 West Street Sandton 2196 Tel: 079 581 1009 / 083 605 9219 Fax: 086 617 0493 Email: info@mvattorneys.co.za mmayet@mvattorneys.co.za mvittee@mvattorneys.co.za Ref: MV0076
For the respondent: With him:	Adv Dewrance, SC Adv C Carelse
Instructed by:	Derrocks Inc Attorneys Respondent's Attorneys 200 Columbine Avenue

Mondeor
Johannesburg
Tel: (011) 838 8103 / 8113
Fax: (011) 834 4969
Email: vernol@derrocks.co.za
Ref: VKD/COJ Y Sigaban