

Can an attorney settle a dispute without the client's consent?

By Ivor Heyman

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A recent case handed down by Keightley J in the South Gauteng High Court has reignited the debate about when an attorney can settle or compromise a claim on behalf of a client without the client's specific consent. In **Minister of Police v Kunene and Others** [2020] 1 All SA 451 (GJ), the plaintiff sued the Minister of Police (the Minister) for damages arising out of an unlawful assault on the plaintiff by members of the South African Police Service (SAPS). The quantum of the claim was high (in excess of R34 million) because the alleged assault on the plaintiff involved a police shooting that rendered him a paraplegic.

The Minister was at all times represented by the State Attorney, Johannesburg. It was common cause that a member of the office of the State Attorney, assisted by counsel, consented to the merits on behalf of the Minister (the merits concession became the first order), and also made a tender for the amount claimed (the quantum concession became the second order).

The Minister subsequently brought a rescission application on the basis that, in settling the case on the merits, the State Attorney acted without the consent of the Minister and contrary to the directions of the SAPS Legal Service Department to defend the action. Accordingly, the Minister contended that the State Attorney did not have authority, as the agent for the Minister, to concede the merits and the quantum orders, and that these orders should be set aside.

In coming to the conclusion that the orders had to be set aside, Keightley J summarized the legal position regarding the authority of an attorney to settle a claim on behalf of her client as follows: "Attorneys generally do not have implied authority to settle or compromise a claim without the consent of the client. However the instruction to an attorney to sue or defend a claim may include the implied authority, provided the attorney acts in good faith." It is submitted that this statement regarding an attorney's implied authority to settle a case is confusing because the good faith of the attorney can never answer the question whether he had a mandate to settle a case.

To answer the mandate question, a court would need to examine our existing jurisprudence on whether the attorney was given actual authority, tacit authority, or implied authority to settle the case.

ACTUAL AUTHORITY TO SETTLE A CLAIM

Actual authority arises where an attorney is given express authority to do something. One instance of express authority is where a client signs a power of attorney or a mandate e.g. to sue a defendant. In this instance, our law is clear that a client is not bound by the actions of his legal representative – attorney or counsel – where such representative has exceeded the mandate given to him and he has achieved an object not intended by his principal. **Ras v Liquor Licensing Board, Area No 11, Kimberley** 1966 (2) SA 232 (C).

TACIT AUTHORITY TO SETTLE A CLAIM

In some cases, an attorney's mandate may be formulated so widely that it includes a tacit authority to settle the claim. A situation like this could arise where an attorney is given a mandate to "take all steps necessary to bring a claim to finality". Faced with a question about the attorney's authority to settle the claim in such a case, the court might find that the mandate included a tacit term to settle the case. Situations where a tacit term to settle a case would be found to exist are exceptional because most clients instruct their attorneys to sue for the full amount, and only consider settlements when/if they actually arise. **Goosen v Van Zyl** 1980 (1) SA 706 (O).

IMPLIED AUTHORITY TO SETTLE A CLAIM

In some cases, a court will imply the authority to settle the claim into the mandate. This could arise where the court considers that the ability to settle the claim was necessary to enable the attorney to perform his legal obligations to the client. An example of this could arise where a client is forced to go away on business travel and cannot attend the trial. If the client authorizes the attorney to proceed with the trial in her absence, the court might find that an implied term existed for the attorney to take whatever steps were necessary, including settling the claim, even if the client was not available to approve the settlement negotiations. Here again, situations like this would be exceptional because of the prejudice to the client if the settlement is subsequently found to be unacceptable to the client. **Bikitsha v Eastern Cape Development Board & Another** 1988 (3) SA 522 (E).

APPARENT AUTHORITY TO SETTLE A CLAIM

In the **Kunene** case, Keightley J found that there was an additional basis upon which an attorney could compromise a claim without a client's consent. Relying on the Constitutional Court case of **Makate v Vodacom (Pty) Ltd** 2016 (4) SA 121 (CC), she stated that in certain cases a principal (client) might create an appearance that the agent (attorney) had the power to act on the principal's behalf even if such authority was not actually granted by the principal. This apparent authority, the learned Judge concluded, can be used to hold a client to a settlement or compromise even in circumstances where the attorney acted contrary to the direct instructions of the client. **Kunene** [paragraph 41].

It is submitted that this conclusion is incorrect because it sweeps away our entire jurisprudence dealing with the question of whether an attorney had actual, tacit or implied authority to settle a claim. In other words, if apparent authority is a valid basis to settle a claim, a court seized with this question need no longer examine whether the attorney had any type of authority to settle that claim. According to Keightley J, as long as the client "created the impression that its agent had authority to reach agreement on behalf of the principal ... justice demands that the principal must be held liable in terms of the agreement." **Kunene** [paragraph 40].

In **Makate** [paragraph 51], the Constitutional Court held that, to establish apparent authority, the following would need to be proven:

- 1) A representation by words or conduct of the principal that the agent had the authority to act as he did.
- 2) The representation must be in a form that an outsider would reasonably be expected to rely on it.
- 3) There must be actual reliance by the outsider on the misrepresentation.
- 4) The reliance needs to be reasonable.
- 5) The outsider needs to have suffered actual prejudice.

Even with the help of the guidelines provided by **Makate**, one runs into difficulties applying the doctrine of apparent authority to the question of whether the attorney had a mandate to settle a case. The reason is that, under South African law, before an attorney can settle a dispute, a special mandate is required. In the words of Mullins J in **Bikitsha v Eastern Cape Development Board** cited above, “for acts of great prejudice an attorney needs a special mandate.” Since the nature of a settlement is that it involves a compromise, it would be hard to imagine a settlement that does not involve some form of prejudice to the client. Therefore in the absence of actual, tacit, or implied authority to settle the claim, the attorney would need to seek an additional mandate over and above his general mandate to sue on behalf of the client.

CLOSING THOUGHTS

Perhaps the greatest difficulty with Keightley J’s application of the apparent authority doctrine laid out in **Makate** to an attorney’s mandate is that it fails the common sense test. The basis of our jurisprudence on attorney mandates is that, owing to the potential or actual prejudice involved in obtaining a settlement, a special mandate is required before settling a matter. If an attorney could simply act in good faith to settle a claim on the premise that he had a general mandate to sue on behalf of the client, this would open up a floodgate of lawsuits by dissatisfied clients claiming that their attorneys had settled their cases without authority. Therefore, despite the finding in **Kunene**, and in the absence of exceptional circumstances described above, an attorney would be assuming an unwarranted risk by settling a matter without a special settlement mandate from the client. The settlement mandate could be provided orally by the client when a settlement opportunity arises, but a much more robust approach is to include the authority to settle in the general mandate that an attorney asks a client to sign.

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