



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1078/2016

In the matter between:

BANNISTER'S PRINT (PTY) LIMITED

APPELLANT

and

D & A CALENDARS CC

FIRST RESPONDENT

DARRYL ALBERT BANNISTER

SECOND RESPONDENT

Neutral citation: *Bannister's Print v D & A Calendars* (1078/2016) [2018]
ZASCA 17 (15 March 2018)

Coram: Lewis, Leach and Willis JJA and Pillay and Mothle AJJA

Heard: 6 March 2018

Delivered: 15 March 2018

Summary: An agreement of settlement of litigation, forged by a lawyer for one of the parties, cannot be relied on by the other party. It is a nullity.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Mashile, Masipa and Keightley JJ sitting as court of appeal):

The appeal is dismissed with the costs of two counsel.

JUDGMENT

Lewis JA (Leach and Willis JJA and Pillay and Mothle AJJA concurring)

[1] The facts giving rise to the litigation between the parties in this appeal are extraordinary, but not in dispute. Two of the parties are corporate entities each owned by members of the Bannister family. The appellant is Bannister's Print (Pty) Ltd (Print), controlled by Mr Sonny Bannister. The respondents are D & A Calendars CC (Calendars), and Mr Darryl Bannister (Darryl) the son of Sonny Bannister. The members of Calendars are Darryl and his wife. The Bannisters are not on good terms and Print and Calendars have a dispute about various financial claims against each other.

[2] In April 2011, Print instituted action against Calendars and Darryl as second defendant in the South Gauteng High Court for payment of certain amounts, and Calendars in turn raised various claims against Print. Darryl consulted Mr M Strauss, an attorney working for Ian Levitt Attorneys (Levitt), and asked him to represent Calendars and him in the litigation. Strauss delegated the matter to a professional assistant working for Levitt. The professional assistant left the employ of Levitt in 2012.

[3] In June 2012 Levitt hired Mr Marc Lieberthal, who had completed his articles of clerkship, but had not been admitted as an attorney because his previous

employer had refused to sign a certificate of good conduct. Mr Levitt was aware of this, but the firm nonetheless gave the work of conducting the litigation on behalf of Calendars to Lieberthal – something of which Mr Levitt maintained he was ignorant.

[4] Lieberthal advised Darryl in November 2012 that he would be dealing with the matter, and Darryl and his wife consulted Lieberthal in that month. Lieberthal told them that the trial had been set down for hearing in February 2013, but was unlikely to proceed then. Darryl's attempts to contact Lieberthal towards the end of 2012 and at the beginning of 2013 were unsuccessful. He assumed that the trial was not proceeding.

[5] Early in the morning on 5 February 2013, Darryl was phoned by Lieberthal, who asked whether he had received an email allegedly sent by Lieberthal the previous day. Darryl had not in fact received anything. Lieberthal advised that Print's attorney had sent him an agreement in an attempt to settle the litigation, such that claims and counterclaims would be withdrawn. Lieberthal wanted the agreement signed and sent to him immediately, as he needed it in court that morning. Darryl said that Lieberthal sounded frantic. He was astonished that Print was willing to withdraw its claim, but believed Lieberthal.

[6] Later in the day Darryl received an email with the draft settlement agreement attached. He printed it out on yellow scrap paper, and amended it by deleting various provisions that would have left the claims against Calendars and him extant. The effect of the draft, before Darryl amended it, would have been to record that Calendars was indebted to Print in the sum of R846 626 plus interest, and that if it were not paid within 30 days of the date of the agreement, the full sum claimed by Print, some R2 390 707, would become due immediately. Darryl crossed these provisions out, initialed the first to fourth pages with his deletions, and signed the draft on the last page. He sent the amended draft to Lieberthal by fax.

[7] In about March, possibly April, of 2013 Lieberthal phoned Darryl and asked him to send the signed original of the draft agreement to the Levitt offices. Calendars' driver delivered it there. Darryl heard nothing more until 10 May 2013, when the sheriff of the high court arrived at the premises of Calendars with a writ of

execution. He phoned Lieberthal to ask why this had occurred. Lieberthal undertook to investigate, and asked for a copy of the writ.

[8] Darryl managed to obtain a copy of the court order that had given rise to the writ. It transpired that it was in the form of the draft that had been sent to him by Lieberthal in early February, emanating from Print's attorneys, and the amendments made by Darryl were not reflected in the agreement in the court file. It became common cause that Lieberthal had forged Darryl's initials on the document submitted to court, but had used the last page which Darryl had signed. The entire document was thus a fiction created by Lieberthal.

[9] When the action was called at roll call before Mojaelo DJP in the then South Gauteng High Court, Print and Calendars were represented by counsel. They advised the Deputy Judge President that the matter had been settled. But the original of the alleged agreement of settlement was not in the file so the matter stood down until a copy was transmitted by fax to the court building, and was then handed up. The court made the alleged agreement an order of court, provided that it was not uplifted until the original was placed in the court file. The original document that Lieberthal possessed, delivered to him by Calendars, was never placed in the court file. The signed yellow scrap paper draft was found some time after his departure from Levitt, hidden behind a cupboard.

[10] In early July 2013, Calendars and Darryl applied to the South Gauteng High Court for an order declaring the agreement of settlement to have been fraudulently created and void ab initio. Satchwell J granted the application. Darryl deposed to the founding affidavit and Ian Levitt deposed to a supplementary affidavit in support of the application. Levitt made much of his ignorance of the matter, and advised that when he had discovered the way in which Lieberthal had dealt with his clients, he had instituted disciplinary proceedings against Lieberthal, and appointed someone to chair a disciplinary hearing. The details of what happened are not germane to this appeal. Suffice it to say that Lieberthal did not appear at his hearing, and regarded himself as dismissed. He subsequently wrote to Levitt apologizing for his behaviour, which he claimed was the result of a psychiatric disorder. It is not necessary to deal

with the question whether Levitt was to blame for the whole fiasco. A claim against him is not before us.

[11] Print opposed the application for an order that the alleged agreement of settlement was a nullity. It argued that, although the agreement might have been obtained fraudulently, Calendars and Darryl had led it reasonably to believe that Lieberthal had authority to conclude the agreement, and were thus estopped from asserting its invalidity. Sonny Bannister, in his answering affidavit, contended that Calendars and Darryl had authorized Lieberthal to act on their behalf, and that Print was entitled to accept that he was acting on their instructions. Print, he contended, had been detrimentally affected by Lieberthal's conduct.

[12] The legal principle underlying Print's attempt to enforce the 'agreement' is that a party to an agreement of settlement of litigation can be held bound by it on the basis of estoppel, despite the fact that the agreement that was allegedly made an order of court was forged by the legal representative of that party. Satchwell J had not found on the basis of this principle, holding that the agreement was a nullity and that Calendars and Darryl had not agreed to it at all.

[13] Satchwell J held that 'fraud unravels all' and that the agreement did not result from consensus between the parties. She distinguished the application before her from *MEC v Kruizenga* 2010 (4) SA 122 (SCA) where this court had held that where a litigant clothes a legal representative with authority to conduct litigation but exceeds his mandate, the other party may rely on the 'aura of authority' accorded to him or her. She considered that this was not such a case since the agreement was in fact forged. She also refused to grant leave to appeal. This court did grant such leave to a full court (in what is now the Gauteng Local Division of the High Court) and the appeal was dismissed.

[14] The argument advanced before the full court (Masipa, Mashile and Keightley JJ) was that Satchwell J had not taken into account the principles of agency by estoppel. The full court dismissed the appeal on the basis that the elements of estoppel had not been shown. This court, rather surprisingly, gave special leave to appeal to it against the decision of the full court.

[15] The full court also held that *Kruizenga* was distinguishable from the matter on appeal before it. In *Kruizenga* this court held that in order to hold a principal liable on the basis of an agent's apparent authority, the representation that induced reliance on that authority had to be rooted in the words and conduct of the principal – in this case Calendars and Darryl. Cachalia JA said (para 11):

'[I]t would appear that our courts have dealt with questions relating to the *actual* authority of an attorney to transact on a client's behalf in the following manner: attorneys generally do not have implied authority to settle or compromise a claim without the consent of the client. However, the instruction to an attorney to sue or defend a claim may include the implied authority to do so, provided the attorney acts in good faith. And the courts have said that they will set aside a settlement or compromise that does not have the client's authority where, objectively viewed, it appears that the agreement is unjust and not in the client's best interests.'

[16] Dealing with ostensible authority (agency by estoppel), Cachalia JA said (para 20):

'I accept that in this matter, by agreeing to the settlement, the State attorney not only exceeded his actual authority, but did so against the express instructions of his principal. As opprobrious as this conduct was, I cannot see how this has any bearing on the respondents' estoppel defence. The proper approach is to consider whether the conduct of the party who is trying to resile from the agreement has led the other party to reasonably believe that he was binding himself. Viewed in this way it matters not whether the attorney acting for the principal exceeds his actual authority, or does so against the 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 . . . that the attorney who is attending the conference clothed with an "aura of authority" has the necessary authority to do what attorneys usually do at pretrial conferences . . . '.

[17] In this matter, Calendars and Darryl might have given the impression that Lieberthal had the authority to represent them in litigation. But that is not what Print relied on. It relied on a piece of paper purporting to be an agreement of settlement actually signed by the other parties. What in fact they were relying on, however, was a document forged by the person representing the other party. They were not relying on conduct that clothed Lieberthal with an aura of authority. Far from it.

[18] It must be made clear that the statements of the court of first instance and that of the full court on appeal to it, that 'fraud unravels all', cannot be taken at face value. Fraud certainly unravels a contract induced by a party to it. But if a party to an agreement of settlement is misled by the conduct of the other party, in appearing to clothe a legal representative with authority to settle litigation, and the legal representative dishonestly exceeds his mandate or goes against express instructions, as in *Kruizenga*, the effect of the dishonesty does not necessarily unravel an agreement between the parties.

[19] As Cameron J said, in *Absa Bank Ltd v Moore* 2017 (1) SA 255 (CC) para 39, referring to the maxim 'fraud unravels all':

'The maxim is not a flame-thrower, withering all within reach. Fraud unravels all directly within its compass, but only between victim and perpetrator, at the instance of the victim. Whether fraud unravels a contract depends on the victim, not the fraudster or third parties.'

[20] Where a lawyer exceeds his or her mandate, or acts against express instructions, but nonetheless concludes an agreement on behalf of a client, the client may be precluded – estopped – by the other party from denying the lawyer's authority. That is because it is a proper agreement, on which consensus between them has been reached.

[21] That is not what happened in this strange matter. The purported agreement of settlement was a forged document, and cannot give rise to liability on the part of Calendars and Darryl. It bore no resemblance to the agreement that Darryl intended to conclude, embodied in the document with deleted provisions, and which he signed. This conclusion is buttressed by the order of the Deputy Judge President that the agreement should not be uplifted before the original was placed in the court file. The original was not ever placed there because it was hidden behind a cupboard in the Levitt offices. If Print has suffered any loss at the hands of Lieberthal it has other remedies at its disposal.

[22] Calendars and Darryl have asked for the costs of two counsel who were required, they argue, to defend the reputation of Levitt. They also argue that Print

knew it was relying on a forgery, and should not have pursued the second appeal. I agree that the employment of two counsel was necessary in the circumstances.

[23] The appeal is dismissed with the costs of two counsel.

C H Lewis
Judge of Appeal

APPEARANCES

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