REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3935/2010

In the matter between:

NAMBAT & LOGITECH CC **APPLICANT**

and

PARCEL FORCE (PTY) LTD **FIRST RESPONDENT**

ALLIED INVESTMENTS CC **SECOND RESPONDENT**

Neutral citation: *Parcel Force (Pty) Ltd v Nambat & Logitech CC* (I 3935/2010) [2013] NAHCMD 81 (28 March 2013)

CORAM: UEITELE, J

Heard: 26 OCTOBER 2012

Delivered: 28 March 2013

Flynote: Legal practitioner — Rights and duties — Authority of legal practitioner. Legal practitioner and client relationship similar to that of principal and agent. Authority to appear on behalf of litigant implies authority to settle case — Counsel should always act *bona fide* and in client's interest.

Summary:

In the present matter the legal practitioner representing the respondents entered into settlement negotiations on behalf of respondents with the legal practitioner representing the applicant—The legal practitioners representing the parties concluded a settlement agreement and when the matter was called for the case management conference the legal practitioners informed the court that a settlement has been

reached and that that agreement will be made an order of court. When the matter was called for the settlement to be made an order of court the applicant's legal practitioner instead moved an application for order that he parties have concluded a settlement agreement. The respondents' legal practitioner on the other hand indicated that no agreement was reached because the respondents were not aware of the details/conditions attached to the settlement. The matter was then postponed to another date for the court to hear arguments as to whether an agreement was reached or not.

Held -that the lawyer and client relationship is no more than that of principal and agent. As such it is trite that when an agent acts within his apparent or ostensible authority, the principal is bound thereby even if he or she has given private or secret instructions to the agent limiting the authority.

Held further when both Mr Kutzner and Ms. Williams acted as agents (imbued with the necessary authority) for the applicant and respondents respectively when they conducted negotiations to settle the respondents' claims. There is therefore no doubt that Ms. Williams had the necessary mandate to negotiate on behalf of the respondents and to bind them

Held furthermore that Ms. Williams or the respondents did not testify nor did Ms. Williams argue that she was expressly instructed not to effect a settlement. It was found that the contrary was actually the case; she had the full power to settle the matter. Her basis of denying the settlement was that the respondents did not know the additional conditions. Held that the question of whether or not the respondents knew about the additional conditions is irrelevant and immaterial.

ORDER

(a) The agreement reached between the parties on 17 October 2012 on the terms set out in paragraph 8 of the applicant's founding affidavit is confirmed.

(b) The respondents are ordered to pay the costs of this application, such costs to include those consequent upon the employment of two counsels (that is one instructing and one instructed counsel).

JUDGMENT

UEITELE, J

[1] The applicant in this application is Nambat & Logitech CC (who is the defendant in the main action).

[2] The first respondent is Parcel Force (Pty) Ltd (who is the first plaintiff in the main action) and the second respondent is Allied Investments CC (who is the second plaintiff in the main action).

[3] Before I set out the issues which I am called upon to determine in this application, I find it necessary to give a brief background which will set the scenario from which the application was launched.

BACKGROUND:

[4] On 2 December 2010, the first and second plaintiffs (to whom I will refer as the respondents in this judgment), issued summons out of this court, against the defendant (to whom I will refer as the applicant in this judgment), claiming:

4.1 In respect of the first respondent:

(a) Confirmation of the cancellation of the agreement between the parties;

(b) Payment in the amount of N$196 000,0;

(c) Interest *a tempore morae* on the aforesaid amount at a rate of 20% per annum calculated from date of summons to date of final payment;

(d) Costs of suit, to include costs occasioned by the employment of one instructing and one instructed counsel.

4.2 In respect of the second respondent:

(a) Confirmation of the cancellation of the agreement between the parties;

(b) Payment in the amount of N$ 77 000,00;

(c) Interest a tempore morae on the aforesaid amount at a rate of 20% per annum calculated from date of summons to date of final payment;

(d) Costs of suit, to include costs occasioned by the employment of one instructing and one instructed counsel

(e) Further or alternative relief.

[5] The applicant defended the action and after the exchange of pleadings the matter was placed on the case management roll as is envisaged in Rule 37 of this court's rules. The matter was then called on 19 September 2012 for the case management conference, after I considered the parties' joint case management report, I made the following order:

'1. That the matter is postponed to 17 October 2012 @ 8h30 for pre-trial conference;

2. That the matter is set down for trial on 23 - 26 October 2012 @ 10h00;

3. That both parties file their respective discovery affidavits on or before 26 September 2012;

4. That the indexing and pagination of the file must be done on or before 16 October 2012;

5. That witness summaries be filed on or before 9 October 2012.'

[6] On 17 October 2012, when the matter was called for the pre-trial conference, Ms Williams, who appeared for the respondents informed me that the matter has become settled and that the parties will prepare a settlement agreement which the

parties will ask the court to make and order of court when the matter is called for trial on 23 October 2012. Ms. De Jager who appeared for the applicant confirmed what Ms. Williams informed me. I therefore made an order in the following terms:

> ‘The matter is postponed to 23 October 2012 for settlement’.

[7] On 23 October 2012 I was surprised to see a Notice of Motion in terms of which the applicant give notice that it will apply to court on 23 October 2012 at 10h00 for an order that a settlement agreement was reached on 17 October 2012 between the applicant and the respondents. When the matter was called at 10h00 on 23 October 2012 instead of the settlement agreement being handed up to be made an order of Court, Ms. De Jager moved the application as per the Notice of Motion, Ms. William indicated that the respondents intend to oppose the applicant’s application. I accordingly postponed the matter to 26 October 2012 to give the respondents an opportunity to file the notice to oppose and the affidavit in support of the opposition of the applicants’ application.

THE SETTLEMENT AGREEMENT ISSUE

[8] Mr Mark Kutzner the legal practitioner representing the applicant deposed to the affidavit on behalf of applicant in support of the contention that a settlement agreement was reached. I will below set out the basis on which the applicant contends that a settlement agreement was reached and also the basis on which Ms. Williams contends that no settlement agreement was reached.

[9] Mr Kutzner alleges that on 16 October 2012, he (representing the applicant) and Ms Williams (representing the respondents) entered into settlement negotiation in an attempt to settle the respondents’ claims amicable. On the same date (i.e. on 16 October 2012) he received a sms text message reading as follows:

> “My client accepted the offer of 2000 per device. I hope you will be at court tomorrow morning before the pre-trial schedule for 8h30 to allow us to discuss the details.”

‘

[10] Mr Kutzner further alleges that on 17 October 2012 he and Ms. Williams met at court shortly before 8h30 in order to discuss further details pertaining to the settlement (he further alleges that both he and Ms. Williams had the necessary mandates from their clients). During the discussion they (i.e. Mr Kutzner and Ms. Williams) agreed on the following terms:

> “8.1 The devices shall be removed from the respondents’ vehicles by applicant’s representatives in the presence of a representative of respondents;
>
> 8.2 The devices so remove shall then be packed and sealed by applicant’s representatives , in the presence of the respondents and be send to applicant’s supplier in South Africa to be tested whether the devices are in working condition;
>
> 8.3 The transport costs and the risk involved in transporting the devices to applicant’s supplier in South Africa shall be for the applicant’s account;
>
> 8.4 Applicant shall pay the respondents an amount of N$ 2 000.00 per working device returned to applicant, certified to be in working condition by applicant’s supplier in South Africa;
>
> 8.5 The amount of N$ 13 294-26 shall be set-off against the total amount payable by applicant to respondents for the devices returned to applicant and certified to be in working condition.
>
> 8.6 The device in dispute between the parties shall be returned by the respondents to applicant, after being removed by applicant’s representative in the presence of a representative of respondents, without applicant paying respondents an amount of N$ 2000-00 for it as respondents never paid applicant for the aforesaid device;
>
> 8.7 Each party shall pay its own legal costs.”

[11] Ms. Williams admits all the above allegations by Mr. Kutzner. Her basis of denying the conclusion of an agreement is that her clients (i.e. the respondents) accepted an unconditional offer of N$ 2000-00 per device. She says:

> "The further conditions contained in sub-paragraphs (*sic*) 8 was also discussed during the course of my conversation with Mr Kutzner. Although I thought these further conditions were reasonable and gave to understand that I would urge my clients to accept them. I also indicated that for absolute finality to settlement I would have to get my client's final approval. That is why I said in that respect 'my clients will just have to listen to me.' I confirm that at this stage the Respondents had no knowledge of further conditions attached to the settlement proposal. I further confirm that I did inform this Honourable Court at the pre-trial conference that the matter had become settled. In informing the court that the matter had become settled it was based on the unconditional offer which was made on the 16th of October 2012."

[12] In the light of what I have outlined above I am of the view that the issue which I am called upon to decide is whether on the facts before me a settlement agreement was concluded between the applicant and the respondents.

THE LAWYER AND CLIENT RELATIONSHIP

[13] The lawyer and client relationship is no more than that of principal and agent. As such it is trite that when an agent acts within his apparent or ostensible authority, the principal is bound thereby even if he or she has given private or secret instructions to the agent limiting the authority. It is equally trite that the authority of the agent is generally construed in such a way as to include not only the powers expressly conferred upon him or her, but also such powers as are necessarily incidental or ancillary to the performance of his mandate. In order to escape liability it would be necessary for the principal to give notice to those who are likely to interact with the agent, *qua* agent, of the limitations impose by him or her upon the agent's apparent authority[1].

[1]Per Chomba AJA in *Worku v Equity Aviation* (Pty) Ltd 2010 (2) NR 621 (SC) at para [27] page 630

[14] In the South African case of *Dlamini v Minister of Law and Order and Another*[2] Friedman J said the following:

> 'It would seem to be reasonably clear that counsel, who had been properly instructed to appear on behalf of a litigant, has implied authority to conclude a settlement on behalf of his client, provided he acts *bona fide in the interests of his client*.' [Emphasis is mine.]

[15] In the course of delivering his judgment Friedman J quoted with approval the following dictum from Lord Esher in *Matthews and Another v Munster*[3]:

> 'One of the things that must properly belong to management and conduct of the trial must be the assenting to a verdict for a particular amount and upon particular terms. In the present case the amount was £350 and the terms were that all imputations should be withdrawn. It is impossible to say that such an arrangement must be an unreasonable one. Counsel may see that if the case goes to the jury a verdict for a very large amount will be given. If the client is in court and says, 'I will not agree to those terms', his counsel ought to say, 'then I will no longer act for you' and ought to leave him to conduct his own case. If the client allows the negotiation to go on and makes no audible objection the settlement will be binding upon him because he has not withdrawn the authority of his counsel and made that withdrawal known to the other side. But I wish to repeat that although the authority of counsel is unlimited until it is withdrawn, the court retains control over his proceedings. In the present case the client was not present in court at the time the settlement was come to and therefore could not have put and did not put an end to the relationship of advocate and client which existed between him and his counsel, but he comes now and says 'I do not like what my counsel has done for me and I ask the court to set it aside.' There is no symptom of injustice having been done, counsel exercised his judgment to the best of his ability in the matter, and I have no doubt he did what was really best for his client.'

[16] Dlamini's case has been followed by both this Court and the Supreme Court and I therefore have no that the legal principles outlined in that case represents the correct exposition of our law.

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2 1986 (4) SA 342 (D) at 346I – 347A

3 (1887) 20 QB 141 (CA)((1886 – 90) All ER Rep 251

APPLICATION OF THE LEGAL PRINCIPLES TO THE FACTS OF THIS MATTER

[17] In the present matter there is no doubt that both Mr Kutzner and Ms. Williams acted as agents (imbued with the necessary authority) for the applicant and respondents respectively when they conducted negotiations to settle the respondents' claims. There is therefore no doubt that Ms. Williams had the necessary mandate to negotiate on behalf of the respondents and to bind them.

[18] What I understand Ms. Williams to argue is that, when she concluded the agreement with Mr Kutzner her clients' (the respondents) did not know about the additional conditions. Ms. Williams further submits that she indicated to Mr Kutzner that "*I also indicated that for absolute finality to settlement I would have to get my clients final approval*".

[19] I do not regard the above statement as disputing, the fact that she was properly instructed on behalf of the respondents to conclude the settlement agreement which she concluded. I says so for the following reasons when Ms. Williams send the sms indicating that her client had accepted N$ 2 000 per device, she also added that they (Ms. Williams and Mr Kutzner) need to meet to discuss the finer details of the agreement. Secondly, when Ms. Williams informed the Court on the morning of 17 October 2012 that an agreement had been reached between them, it was after the details set out in paragraph 8 of the applicant's founding affidavit had been discussed and agreed upon. I am therefore of the view that Ms. Williams submission that *'In informing the court that the matter had become settled it was based on the unconditional offer which was made on the 16th of October 2012* ' is a veiled attempt to extricate herself from an agreement which she had concluded.

[20] I am further more of the view that Ms. Williams did not seek to argue that when she concluded the settlement on behalf of the respondents, she did not act in a *bona fide* manner in what she believed to be the interests of the respondents. Ms. Williams, in short, did not suggest, and in my view very properly did not suggest, that there was

anything intrinsically unjust in the settlement, assuming that, even if it were unjust, grounds for its repudiation would in law exist.

[21] As I have indicated above Ms. Williams confined her argument to a very narrow point, namely that her clients were not aware of the additional conditions when she settled the matter. She submitted that before the respondents could be bound by the acts it must emerge that counsel had been properly instructed. Ms. Williams is undoubtedly correct in that submission, since counsel not properly instructed obviously would not have the necessary authority to act on behalf of a client and *a fortiori* could not bind the client to a settlement.

[22] The present case has to be decided, of course, simply upon the basis of the probabilities. In the present case Ms. Williams or the respondents did not testify nor did Ms. Williams argue that she was expressly instructed not to effect a settlement. The contrary is actually the case; she had the full power to settle the matter. Her basis of denying the settlement is that the respondents did not know the additional conditions. The question of whether or not the respondents knew about the additional conditions is irrelevant and immaterial.

[23] In the circumstances it seems to me to follow that, the matter was settled on 17 October 2012, the respondents have not demonstrated any basis for either repudiating or resiling from that settlement.

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

(a) The agreement reached between the parties on 17 October 2012 on the terms set out in paragraph 8 of the applicant's founding affidavit is confirmed.

(b) The respondents are ordered to pay the costs of this application, such costs to include those consequent upon the employment of two counsels (that is one instructing and one instructed counsel).

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SFI UEITELE
Judge

APPEARANCES

APPLICANTS:	B DE JAER Instructed by Engling Stritter & Partners
RESPONDENTS:	C WILLIAMS Instructed by ..A Vaaz& Partners