CASE NO.: SA 2/2007

REPORTABLE

IN THE SUPREME COURT OF NAMIBIA

In the matter between

BELETE WORKU **APPELLANT**

And

EQUITY AVIATION (PTY) LTD **RESPONDENT**

Coram: Shivute, CJ, Chomba, AJA *et* Silungwe, AJA.

Heard on: 05/11/2007

Delivered on: 07/07/2009

APPEAL JUDGMENT

CHOMBA, AJA:

[1] The main point of law which this appeal judgment will address and determine revolves around the scope of the mandate which a legal practitioner is vested with when his or her client, who is a party to litigation, instructs him or her to negotiate a settlement with the other party. Incidental to that main point of law, is the issue whether in this case the appellant did give his legal counsel, Mr. Strydom, a mandate to conclude a settlement agreement which would have the effect of the appellant foregoing his right to institute a court action or actions against the respondent for unfair dismissal.

Additionally, there was a bone of contention on whether it is competent for a court, which is seized of a proceeding commenced by notice of motion, to prioritize an informally lodged application over the one with which it is so seized. However, before tackling all these issues, it is necessary to start with an introduction which will set the scenario from which this appeal derived its genesis. The introduction will also serve as a basis reflective of matters which are common cause between the parties to this appeal.

Introduction

[2] At the time when the proceedings in this case were instituted, the respondent company bore the name Servisair Namibia (Pty) Ltd. However at the time this court was hearing the appeal we were informed that its name had changed to Equity Aviation (Pty) Ltd. I shall, therefore henceforth refer to the respondent as “Equity Aviation” or simply as “Equity”, alternatively as “the respondent”.

[3] The appellant, Mr. Belete Worku (Mr. Worku), formerly worked for Equity Aviation on a contract of three years. During September, 2001, while the contract still had 25 months to run, Mr. Worku’s service was abruptly terminated, thereby precipitating lodgment by him against Equity Aviation

of a labour complaint in the District Labour Court. The cause of action in the complaint he laid was unfair dismissal. After being served with the relevant notification of the institution of the suit, Equity did not file a notice to defend. Instead an officer or officers from its management went and consulted a lawyer, who advised that the dismissal was indeed procedurally unfair and therefore that Equity had no leg to stand on in defence against the action taken against it. Unfortunately for Equity, it was by then too late to take any procedural step to avoid the immediate consequence of its failure to file a notice to defend. This was because Mr. Worku had at that stage already obtained a default judgment against it in the sum of N$660,000. That amount was supposedly a representation of the package to which Mr. Worku was entitled as remuneration which he would have received had he served the uncompleted remainder of his contract.

[4] In the understanding of the respondent, Mr. Worku had obtained that quantum of damages through subterfuge, since, according to the respondent, he had materially misrepresented the facts of his claim. Moreover, Equity had not anticipated a default judgment sounding in liquidated damages because, to its knowledge, the complaint as lodged sought a substantive relief of reinstatement; damages were claimed only in the alternative. In the premises, the respondent filed an application for rescission or variation of the default judgment. Mr. Worku in turn filed notice of his intent to oppose that application. It would appear that contemporaneously with the filing of the application for rescission or variation, Equity Aviation engaged Mr. Worku in negotiations for an *ex curiae* settlement of the dispute between them. Apparently, the negotiations were fruitless because, pursuant to the application it had filed as already stated, in due course Equity Aviation curiously obtained an order from a court of cognate jurisdiction. The order was in

the following terms:

> "(i) that judgment or order by my learned colleague on 11 February is hereby varied with the following orders.

(ii) that in terms of section 46(1)(a)(iii) the applicant is ordered to reinstate the respondent (i.e. Worku) in the position in which he would have been had he not been dismissed, with immediate effect.
(iii) that in terms of section 46(1)(a)(iii) to pay the respondent an amount which would have been paid had he not been so dismissed.

(iv) that such an amount including all benefits and allowances must be paid to him from 1st December 2001 until date of reinstatement.

(v) that should any disciplinary hearing or action (be) taken against the respondent; it must be chaired and conducted by an independent and unbiased person agreed by both parties."

[5] Regrettably, the revised order was inexplicit and, therefore, was differently interpreted by Equity Aviation and Mr. Worku. In the result Equity Aviation promptly paid to Mr. Worku a sum of N$36,000 which, according to it, represented Mr. Worku's loss of income, benefits and allowances in terms of the above mentioned order. On the other hand, Mr. Worku's calculation based on the same order, was that the

compensation due to him amounted to N$246,391.78. Having deducted the N$36,000 which he had accepted from Equity Aviation, he caused a warrant of execution to issue for a sum of N$210,391.78, plus N$162.00 costs. Apparently on account of legal advice from his own legal representatives, Mr. Worku later obtained a replacement warrant in the amount of N$140,092.61.

[6] Subsequently, on the strength of the replacement warrant of execution, Mr. Worku obtained an attachment order against some of Equity's goods. Having effected the attachment, he was poised to sell the goods in execution of his judgment when, in order to forestall the sale, Equity provided a bank guarantee in the amount of N$240,295.52 and Mr. Worku was informed accordingly. In the meantime, Equity filed yet another application, this time in the Labour Court and sought an order declaring the warrant of execution a nullity (the main application). Mr. Worku in turn filed a

notice to oppose this latter application, but unfortunately for him, his counsel, Mr. Strydom, did not timeously file an affidavit in support of his notice of intent to oppose.

[7] At that stage Mr. Worku was forced to, and did, file an application for condonation for the late filling of the affidavit aforementioned. Before the return day when the condonation application was to be heard, yet more settlement negotiations – about which more is to be narrated under a different caption – which form the springboard from which this appeal emanated, were undertaken between Mr. Heathcote, acting for Equity, and Mr. Strydom, ostensibly acting for his client, Mr. Worku. Suffice it to state that those negotiations are reputed to have produced the disputed settlement agreement.

[8] On the set down date when the main application was to be heard together with Mr. Worku's condonation application,

the parties appeared before Acting Justice Usiku, sitting as President of the Labour Court. The application for condonation was formally presented, and then, informally from the Bar, Equity's counsel submitted to the court that the matter had been settled, but apparently that was disputed by the other side. The order which the learned Acting Judge made pursuant to Mr. Worku's application was to the effect that condonation was granted *for the late filing of heads of arguments.* (Emphasis is mine). As if that anomaly was not bad enough, she also made another order referring the question of settlement to oral evidence. By that order also the main application was stayed.

[9] I pause here to comment that the reference by Acting Judge Usiku to condonation for late filing of heads of arguments was, without a doubt, erroneous. The main application before her, I must stress, was for the warrant of execution to be declared null and void, and then there was

Mr. Worku's application for condonation for the late filing of the aforementioned affidavit. Since there were no papers before her concerning heads of argument, the condonation she granted will be dealt with in this judgment as condonation for the late filing of Mr. Worku's affidavit. I must further emphasize that the informal submission about a settlement agreement having been concluded would appear to have been accepted by the Acting Judge without much ado, despite the informal manner in which it was presented.

The Settlement Agreement Issue

[10] Arising from the order referring the question of the settlement agreement to oral evidence, the parties appeared on February 8, 2005 before Maritz, P, as he then was. Ms. Engelbrecht appeared for Equity, while Mr. Worku appeared in person. Right at the outset, the President of the Court could not contain his concern over the nature of the proceedings before him. He first observed that the notice of

hearing before him showed that *viva voce* evidence was to be heard on the question whether a settlement had been concluded. He, however, reminded the parties that when they appeared before Usiku, AJ, on a previous occasion the matters which fell for consideration by her were firstly the application for declaring the warrant of execution null and void and secondly the application by Mr. Worku for condonation for his late filing of an affidavit in opposition to Equity's application for the declaratory aforementioned. He noted that Usiku, AJ granted Mr. Worku's application, and, therefore, wondered whether the condonation question was not *res judicata.*

[11] When Ms. Engelbrecht conceded that the question of condonation was indeed *res judicata*, the President queried the purpose of the proceedings before him that day. Ms. Engelbrecht informed the Court that the condonation application was opposed on the ground that a settlement

agreement had been concluded between the parties. She further informed the court that the proceedings before the President that day were to be the sequel of the referral order of Usiku, AJ. It is apposite to record here that Mr. Worku, contrariwise to Ms. Engelbrecht's contention, informed the Court that what was to be considered that day was the main application in the light of the fact that condonation was granted for the late filing of his affidavit.

[12] A lengthy debate took place concerning the nature of proceedings to be undertaken that day, and in due course the President made a ruling stating that what he ought to do was to deal with the difficulty in a pragmatic fashion. He decided to do so because he discerned that both sides were anxious to proceed with the matter, though for different reasons. He nonetheless noted that even though he was going to implement the oral evidence referral order, there was no formal application before him to support that course.

[13) The issue whether or not a settlement was struck and whether or not Mr. Strydom had a mandate from Mr. Worku to conclude such settlement were the most thorny at the hearing of this appeal, as they were also in the Court *a quo.* The learned President of that Court, after hearing a plethora of evidence from both sides, came to positive conclusions on both scores, namely that a settlement agreement was indeed concluded and that in achieving that result Mr. Strydom had a mandate from Mr. Worku, his client. In amplifying that conclusion, the learned President held that Mr. Strydom had implied or ostensible and even actual authority from, Mr. Worku. I shall, therefore, now move on and review the evidential facts relevant to the issues in dispute, but, in doing so, I shall restrict the review so as to highlight the critical aspects which bear on the first two issues as identified above.

[14] From the evidence already reviewed we have seen that

Equity's application for rescission or variation of the default judgment was the subject of consideration by the District Labour Court differently constituted. That latten court ordered, as I have already shown, among other things, the immediate reinstatement of Mr. Worku, but added the rider that if he was to face disciplinary proceedings after reinstatement, then those proceedings were to be chaired and conducted by an independent and unbiased person the choice of whom should be agreed to by both parties concerned. Contrary to the court's said order, Mr. Worku was, after reinstatement, dismissed a second time in October or November, 2002, without following the procedural requirements. This gave rise to the possibility that Mr. Worku might file yet another complaint of unfair dismissal. Meanwhile, the application for the annulment of the warrant of execution, which was the main application, was still pending and was slated to be heard on June 16, 2003, a Monday, in the Labour Court.

[15] According to Mr. Heathcote's evidence given in the Court presided over by Maritz, P, (the Court *a quo*) early during the week preceding the Monday, 16 June, 2003, Mr. Heathcote suggested to Mr. Strydom that the labour disputes between their respective clients be settled. Mr. Heathcote further suggested that a text of the settlement to be concluded should be drawn up and subsequently be presented to the Court on the Monday so that it could be made a Court order. Mr. Heathcote's evidence-in-chief of how the settlement was achieved was recorded as follows, as he was being led in examination-in-chief by Ms. Engelbrecht:

> "I said (to Mr. Strydom), 'Can we settle this matter? Is there any possibility? And I suggested to him, and he said, 'Of course, we can try and settle it again.' And I suggested to him because of what happened previously with the bribing charges, and the like, I said to him, 'What I suggest we do is you go to your client, you get a mandate to settle.'"

Ms Engelbrecht: “Just go slowly. ---- And at that stage I also asked him again, I said that during October 2002, Mr. Worku’s services were terminated again in terms of a provision in his contract and I asked Mr. Strydom whether Mr. Worku is also of the intention to issue a District Labour Court complaint in relation to that other dismissal?

Ms Engelbrecht: “So that was the second dismissal ---- The second dismissal.”

[16] Mr. Heathcote went on:

“And I also said, I also explained to him at that stage there was a continuing investigation, those were my instructions, at the client’s office as far as or what they called, a forensic investigation, as far as possible irregularities committed by Mr. Worku and I said, ‘If we settle then we must throw everything into the pot’, and that would then include the main application, secondly, the intended Labour Court complaint that Mr. Worku was going to institute in the Labour Court ...(intervention). For the second dismissal and also that we, the parties part properly and we also will then not put in the whole issue of this forensic investigation and being, knowing the history, I said to Mr. Strydom, ‘Now, what I suggest you do is, you go back to your attorney and get a mandate and give an amount on that basis.’”

[17] Later, Mr. Heathcote went on:

> "...During the afternoon of, I can't remember the exact day, but it was in the week preceding the 16th of June, I went, I was again in Mr. Strydom's office and he said, 'Well, we can settle the matter on all, including the main application, the intended Labour Court complaint in respect of the second termination and thirdly also the forensic investigation, continuing forensic investigation and they would accept seventy-two thousand Namibian Dollars (N$72,000-00.)' I then said to him, 'Well, I don't want to biggle (sic) (Here it would appear that the evidence transcriber was unsure of the word Mr. Heathcote used, but I think the word used was 'bicker', then Mr. Heathcote continued) if that is the offer, I will most probably, knowing the history and all the pain and suffering at that stage on behalf of the client, I will most probably advise my client to accept the offer because by that time, My Lord, we've had various other discussions on previous occasions and every time it happened that as soon as it is settled then for some or other reason Mr. Worku wants more..."

[18] Much later in his continued evidence-in-chief Mr. Heathcote stated the following:

> "....I walked across to his (Mr. Strydom's) chambers and I said to him 'Albert, we have accepted the offer, you draft the settlement agreement according to your mandate and we then, we regard the matter as settled'. Mr. Strydom at that stage was, I must say, quite relieved that the matter was settled and while we we're in his

> chambers, we discussed, went again over the fact that everything must now be settled and he, at the right hand corner of his brief of a yellow brief, I think that of PF Koep and Company, then stipped down or in short, made hand written notes as to the settlement. I was quite satisfied and said to him that it is now settled, that on Monday we will just make it a Court Order, and that was the end of the matter as far as I was concerned..."

[19] Mr. Strydom also gave evidence, but although he was presumably the appellant's own witness, the trial judge allowed Mr. Worku to cross-examine him even though he was not declared a hostile witness. His evidence on the critical issue concerning the settlement, as he was being questioned by Mr. Worku, is recorded as hereunder:

> "Mr. Worku: Thank you Sir. Now would you kindly inform the Court whether Mr. Mueller told you how my case was? Was it a good case or is it a legal case, was it anything? ---- It was a good case...
>
> Mr. Worku: No he told you the case is good? ----Yes

Now did you tell me anything about my case, whether it's good or bad?---- I told you that you had a very solid case on the basis that no disciplinary procedures were followed and on the basis in which way you informed me how your dismissal took place, I told you that in law you had a sound case...

In other words before we went to court, you were offered through Mr. Kopplinger a settlement offer? ---- That is correct...

Can you remember Sir how much it was? ---- I can recall that the amount that they offered eventually, I think, I stand to be corrected, that it was somewhere in the vicinity of one hundred and three (N$103,000) or one hundred and seven thousand (N$107,000) that they offered and you were only prepared to accept on hundred and fifteen (N$115.000) and therefore the parties could not reach a settlement."

[20] Answering further questions asked by Mr. Worku regarding how the negotiations proceeded, Mr. Strydom testified as follows:

"Well there was an amount that you were initially prepared to settle. I believe it was a hundred and eight thousand (N$108,000) and then later on you changed that amount I think up to hundred and fifteen (N$115,000) or something like that and they were only prepared to come up I think to hundred and eight (N$108,000) or hundred and ten (N$110,000) and because of that fact that you were not willing to reduce your offer, no settlement came into place.

[21] Mr. Strydom was asked by Mr. Worku to recount some of the events which took place on or about 9th June during the week preceding the court appearance of 16 June, 2003. The following is what he testified:

> "We then discussed with you the problem that we anticipated we would encounter concerning the Application and then we made certain suggestions to you concerning a possible settlement. Eventually you agreed that we start discussions concerning settlement with the other side and then we embarked upon that. I then went to Advocate Heathcote on my own and had a discussion with him on the possibility of a settlement.

[22] Another piece of Mr. Strydom's evidence worth reproducing touches directly on the reputed giving of a mandate to settle. It was given in answer to a question which followed a previous answer Mr. Strydom gave to the effect that he, Mr. Strydom, had talked to Mr. Worku before going to discuss the settlement with Advocate Heathcote, viz:

> "Mr. Worku: When was that? ---- That was already that

evening, Monday evening.

Mr. Worku: What did you inform Mr. Mueller about that settlement? ---- I informed both Mr. Mueller and yourself that afternoon. When we had discussions and our consultations, we then decided. You gave us a figure upon which you would be satisfied to settle. That figure was seventy-two thousand Namibian Dollars (N$75,000.00) (sic)"

[23] Then the following was narrated by Mr. Strydom about some of the happenings of the following day, Tuesday, 10th June:

> "To return to Tuesday, it was never put to me at any stage during our discussions that he (i.e. Mr. Worku) was unwilling to accept that amount. Mr. President he gave me the instructions, upon his instruction I drafted the Deed of Settlement." (Underlining is mine)

[24] Mr. Strydom made an important statement when he appeared before Damaseb, P, on Monday, June 16, 2003. He made it from the Bar when seeking the leave of the Court to withdraw as Mr. Worku's counsel. That date was otherwise the occasion when the reputed settlement

agreement would have been presented to the court with a view of having it recorded as a consent order. Regrettably the relationship of lawyer and client between Mr. Strydom and Mr. Worku had by then already ruptured. I reproduce the statement hereunder on account of the important bearing it has on these proceedings. In giving an account of the events which led to the estrangement between him and his client, the following was part of his statement –

> "Mr. Strydom: Yes Mr. President. President this is a highly unfortunate position that I find myself in. I may just mention for the record Mr. President that when counsel and I discussed the terms of the settlement that was on a Monday evening. I understood him to be and to mean that such settlement would entail all claims. However at that point I still had to go back to my client in order to discuss it with him. That happened the next day. During our discussions there I have to concede that I did not convey the terms of the settlement to such an extent that he understood it to be, to incorporate all claims.
>
> President: That is not (indistinct)
>
> Mr. Strydom: The result of that was that I subsequently drafted the deed of settlement and was again alerted to the fact that it should incorporate all

claims. I then the day thereafter, that was on the Wednesday, went back to my client, pointed out to him the particular clause that was now part of the settlement and indicated to him that this encompassed all future claims. He was then not amenable to accept that term of settlement, whereas the parties then started negotiations afresh in order to incorporate the second possible claim that he wanted to institute. What then resolved was a mandate was given and further matters then ensued between both Mr. Kopplinger and Mr. Mueller of which I was not a part of that happened on Friday. In all frankness to my client and the court and my learned friend and I also indicated that to him, I am of the view that at the time when I conveyed the settlement, that was the Tuesday, it could have been that my client misconstrued it to mean only that part of the claim that relate to this present application. In order to void (*sic)* any ambiguities to that effect I then again the day thereafter spoke to him about the full effect of this settlement and what the terms contained therein entail. It was on that point that he then withdrew from the settlement to the extent that he wasn't willing to accept the 72,000 any more, he wanted more money on account of the fact that, to also deal with the second issue, namely the issue that he wanted to institute a further claim against the applicant. I cannot take it any further than that in so far as that misunderstanding is there I apologise for that but I cannot in all fairness, there is no way that I can, well it could have been construed as a mistake in the sense that I should have been more frank and open to my client the time when I discussed the terms with him." (Emphasis is mine).

[25] Adverting to the prolonged questioning which Mr. Strydom had to endure from Mr. Worku, the following question and answer relate pertinently to the issue of what mandate, if any, Mr. Worku gave to Mr. Strydom:

Mr. Worku: "Did you have a mandate for that from me? ---- As far as I can recall we had a mandate concerning the amount. We did not have a mandate concerning the settlement of all claims." (Emphasis added).

[26] The preceding excerpts are not intended to cover all that Mr Heathcote or even Mr. Strydom testified in the Court below. Both of them, and especially Mr. Strydom, gave very extensive evidence. Indeed there were other witnesses as well who gave *viva voce* evidence. However the two from whose evidence I have made quotations were more or less the *dramatis personae* in this case. Moreover, it is worth noting that the Court *a quo* gave Mr. Worku a rare leeway which enabled him to ask Mr. Strydom roving, critical and often quite intemperate questions, a great number of them bordering on cross-examination. That unfriendly confrontation was not surprising because by then the lawyer/client relationship between the two had gone awry, and there was no love lost between them.

The Lawyer and Client Relationship

[27] 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 imposed by him or her upon the agent's apparent authority. Thus in *Salisbury Bottling Co. (Pty) Ltd. v Arista Bakery (Pty) Ltd* 1973 (3) SA 132 (R, AD) the respondent company was carrying on a business at Rosarum Store, Beatrice, on the strength of a general dealer's licence. A man named Wilhelm was the

manager of the business. For quite a period of time the appellant was supplying goods to the respondent and in doing so was interacting with Wilhelm. It was not disputed that on 3rd June, 1972 the appellant supplied some goods to the respondent in the same manner as it had always done, but the cheque which was handed to the appellant in payment for the goods on that occasion was subsequently dishonoured. The appellant thereafter sued the respondent claiming the price of goods sold and delivered to the respondent. The respondent's defence to the appellant's claim was that the goods were not delivered to the respondent. What had happened was that on or before 30th April, 1972, unbeknown to the appellant, the proprietor of the respondent company had sold that company's business to Wilhelm, the manager. Despite the sale, however, business at Rosarum Store, Beatrice, appeared to be conducted precisely in the same manner as before, and still on the same general dealer's

licence. There was no indication to the outside world that the business of the respondent had changed hands. After taking into account the full facts of the case, Macdonald, ACJ, had this to say in holding the respondent liable for the price claimed (see at page 134E – 135A):

> "Mr. Wilhelm was the duly appointed agent of the respondent company to conduct the respondent company's business at Beatrice. That being so, a presumption of fact arises that after 30th April he continued to be the agent of the respondent company. It is clear in the circumstances which I have outlined that such a presumption of fact would arise, and I need only refer on this aspect to Phipson on *Evidence*, 11th ed., at para 291 – 'States of mind, persons or things, at a given time may in some cases be proved by showing their previous or subsequent existence in the same state, there being a probability that certain conditions and relationships continue. The *presumption of continuance,* which is one of fact and not of law, will, however, weaken with remoteness of time, and only prevails till the contrary is shown, or a different presumption arises from the nature of the case...

The presumption of continuance, which undoubtedly arose from the facts which I have outlined, gave rise to a duty on the part of the respondent company to notify persons who had previously dealt with Rosarum Store, Beatrice, that from 30th April, 1972, that business, contrary to all the indications, would not continue as before to be conducted on behalf of the respondent company. As I have indicated, no such notification was given, and in the absence of notification the appellant was entitled to assume, in view of the very short period of time which elapsed between 30th April and 3rd June, 1972, that no change in the pre-existing relationship between Mr. Wilhelm and the respondent company

had taken place."

[28] The principle in the *Salisbury Bottling Co. (Pty) Ltd* case, *supra,* can, *prima facie,* apply to the present case. This is because it is common cause that since the inception of the proceedings *in casu* in the District Labour Court in February, 2002, Mr. Strydom had conduct of this case on behalf of the appellant. That continued to be the position up to 2003 when the matter was moved from the District Labour Court to the Labour Court at the time when Equity's application for the rescission or variation of the default judgment was launched. In fact the relationship of lawyer and client between the two endured up to the week just before Damaseb, P, was due to deal with yet another stage in the proceedings on June 16, 2003. It stands to reason that the presumption of continuance applied in the *Salisbury Bottling* case would, at face value, appear to fit into our case as well, subject to the necessary notification being given to Equity's lawyers of the

termination of Mr. Strydom's authority. However, I shall later on consider to what extent, if any at all, this principle applies to the facts of our case

[29] Yet another principle is applicable to the type of agency which subsists between lawyer and client, and that was referred to by Friedman, J, in *Dlamini v Minister of Law and Order and Another* 1986 (4) SA 342 (D & CLD) where he is reported to have said at 346I – 347A 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". (The underlining is mine)

In the course of delivering his judgment Friedman, J, quoted with approval the following dictum from Lord Esher in

Matthews and Another v Munster (1887) 20 QB 141 (CA) (1886 -90) All ER Rep. 251:

> "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." (The underlining is again mine)

[30] On the basis of the three cases cited in the preceding paragraphs, the resultant questions I have to consider and answer are the following, viz: (a) Did Mr. Worku give his counsel authority to settle the pending case of his dispute with his former employer, Equity? (b) If he did give such authority, did he later terminate it? (c) If he did terminate it, did he bring that fact to the attention of Equity's lawyers? (d) Was there any cause that might have justified Mr. Strydom to withdraw his legal services from his client at a much earlier stage? And (e) Can it be said *in casu* that what Mr. Strydom did in furtherance of his said authority was done *bona fide* in the interests of his client?

Whether Authority to Settle was Given

[31] Mr. Worku, as I have already shown, did retain Advocate Strydom to institute proceedings for unfair dismissal against Equity Aviation and at that stage there is no evidence to

suggest that the instructions given were anything other than proper instructions. At that stage the pending dispute related only to the unfair dismissal of September, 2001. Therefore, on the basis of the *ratio decidendi* in *Dlamini v Minister of Law and Order and Another***,** *supra*, the authority given at that stage also embraced the settlement of that dispute. At that time the second dismissal had not occurred and therefore cannot be said to have been included in the authority as initially given. The prevailing controversy, which the Court *a quo* set out to, and did, on the other hand resolve is basically whether the authority given was inclusive of settlement of the possible dispute emanating from the second dismissal.

[32] The issue of including the second dismissal was broached by Mr. Heathcote, according to Mr. Heathcote's own evidence. To quote him again, he testified saying, "I said to him (meaning Mr. Strydom), 'Can we settle this matter? Is

there any possibility?' And I suggested to him, and he said, 'Of course, we can try and settle it again.' Then later on still relating to that same meeting with Mr. Strydom, Mr. Heathcote said, 'And I also said, I also explained to him again, I said that during October 2002 Mr. Worku's services were terminated again in terms of a provision in his contract and I asked Mr. Strydom whether Mr. Worku is also of the intention to issue a District Labour Court complaint in relation to the other dismissal.' At that stage Ms Engelbrecht asked whether that October 2002 dismissal was the second dismissal and Mr. Heathcote agreed. Then he continued his evidence, adding, 'And I also said, I explained to him at that stage there was a continuing investigation, those were my instructions, at the client's office as far as or what they called, a forensic investigation as far as possible irregularities committed by Mr. Worku and I said 'If we settle then we must put everything in the pot,' and that would then include the main application, secondly, the intended Labour court complaint that Mr. Worku

was going to institute in the Labour Court for the second dismissal...'"

[33] Since the issue of an all-inclusive settlement was not raised by Mr. Worku, the resultant subsidiary question that arises is whether Mr. Worku did specifically give authority to his counsel to settle that one as well. In order to answer that question, we have to advert to other evidence on record.

[34] I have already recorded that after Mr. Heathcote's suggestion about the all-inclusive settlement, he also made two other suggestions, namely that Mr. Strydom should go to his client to obtain a mandate and that he should also go to his instructing attorney, Mr. Mueller, and obtain a similar mandate. Some time later when Mr. Heathcote again went to Mr. Strydom's office as a follow up to the request that Mr.

Strydom should seek a mandate, Mr. Strydom told him, “Well, we can settle the matter on all, including the main application, the intended Labour Court complaint in respect of the second termination and thirdly also the forensic investigation, continuing forensic investigation and they would accept seventy-two thousand Namibian Dollars.”

[35] We have already referred to Mr. Strydom’s evidence in relation to his recapitulation of the events of Monday, June 9, 2003. In that evidence he says Mr. Mueller and he explained to Mr. Worku the problems they anticipated on June 16 at court. At the end of the discussions he said Mr. Worku agreed that they, evidently meaning Mr. Worku’s legal team, could start discussions concerning the settlement with the other side.

[36] Furthermore in the course of questioning Mr. Strydom, Mr. Worku referred to the draft settlement agreement. The setting was on Wednesday in Mr. Strydom's chambers and the discussion, attended by Mr. Mueller also, was a continuation from Monday, June 9, 2003. The specific point being discussed was how the settlement concerning the N$72,000.00 came about. In answer to that question Mr. Strydom testified – "Mr. President, he (meaning Mr. Worku) gave the instruction; upon his instruction I drafted the Deed of Settlement." Then Mr. Worku asked a follow up question. The dialogue went as follows:

> "And who initiated it, Sir? ---- Mr. President, we advised Mr. Worku already on the Monday that he should settle.

So you initiated that? ---- We initiated, we advised Mr. Worku concerning the settlement, yes.

> So you initiated? ---- That is why we called him to come to our office so that we can discuss it.
>
> But I never gave you the mandate for that initiation? ---- You never gave us a mandate on the Monday concerning, to initiate the settlement but you gave us already on Monday to settle for seventy-two thousand dollars. Mr.

President I apologise."

[37] Then the following further dialogue is recorded later in the course of Mr. Strydom's evidence regarding the draft settlement agreement:

> "Mr. Worku: Okay Sir, now after I read the paper, I asked you Sir, "Adv. Strydom, for which case is this", I asked you and what was your answer? ---- Mr. President, I then informed Mr. Worku again it concerns this case and all future claims that you intend to prosecute."

[38] Later, still on the same matter regarding the draft, another dialogue went as hereunder:

> "Then I asked you which claim is this including seventy-two thousand (N$72,000.00). ---- Yes, that is correct. Mr. President, what happened was not that he asked him that, I alerted his attention to that clause, to inform him he must bear in mind it does not only relate to this case Mr. Worku, it refers to all claims, all future claims. It's

in that form it was coached." (sic)

[39] Finally on the same point, I reproduce the following dialogue between the same two, which seems to crown it all:

> "Mr. Worku: So after I read this and I read the bottom which says, 'This agreement constitutes a full and final settlement of any claims that could have or did arise out of the working relationship between the parties', the last paragraph for me contradicted with the section 442/01 (sic) and then I asked, for which one? Of course it is written up there. I said, why then did this agreement constitutes a final settlement, I asked you. Then you said, no Adv. Heathcote and Mr. Kopplinger say they will not sign the settlement agreement unless that phrase is included. Is it true or it's not true? ---- The way in which you asked it to me, that is not true Mr. President, but what is true is that during our discussions it was very clear that the Applicant (meaning Equity Aviation) would not sign any settlement unless it included all claims. That I confirmed and that is why I alerted Mr. Worku to that section contained in the Deed." (The underlining is mine).

[40] The overall impression one gets from the foregoing extracts of the evidence, is that it becomes clear that the all-inclusive clause was not only the brain child of Equity Aviation through its counsel, Mr. Heathcote, but it was made a take-it-or-leave-it condition. One also gathers the impression that Mr. Strydom did not bring that condition to the attention of Mr. Worku until the eleventh hour, nor did he seek his client's mandate as specifically requested by Mr. Heathcote. It is equally evident that the clause came to Mr. Worku as a matter of surprise, and he did not hesitate to reject it outright.

[41] The main prop on the strength of which the reputed settlement could firmly stand was the evidence of Mr. Strydom. However, in my respectful opinion, the pieces of his evidence which I have quoted in this judgment give a dim view of his standing as a witness. It shows inconsistency on his part. In one breath he claimed to have obtained his

client's authority to conclude a settlement which embodied the all-inclusive clause, particularly in regard to the possible claim relating to the second dismissal. In another he conceded that the clause was included because Equity would not sign a settlement agreement without it. Then he testified that he received instructions from his client to draw up the settlement agreement, only to contradict that in his statement from the Bar. In that statement he stated that on Tuesday when he met with his client, he did not inform him about the requirement to include the said controversial clause, but that that notwithstanding, he went ahead and drew up the settlement agreement, which he showed the client only on the Wednesday. At one time he asserted that it was on Monday that his client gave him the mandate to settle, but later he testified that on that Monday his client gave a mandate only as regards the amount of N$72,000.00, but that no mandate to settle all claims was given on that day.

[42] It is trite that an appellate court should not lightly interfere with a trial court's evaluation as to credibility of witnesses. This is because a trial judge has an opportunity which an appellate court rarely enjoys, namely to hear and observe witnesses as they testify. As such the trial judge has a better opportunity to assess the worth of their evidence. However, where the appellate court, upon a careful scrutiny of the evidence on record, is of the view that the trial judge has quite clearly not made proper use of his privilege of observation and as a result has misdirected himself or herself in evaluating such evidence and that that misdirection has led to a wrong decision, then the appellate court is entitled to interfere and make its own evaluation of that evidence. In *S v Francis* 1991 (1) SACR 198 (A) Smalberger, JA, affirmed this principle when he stated at 204E:

> "Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in

> exceptional cases that this court will be entitled to interfere with a trial judge's evaluation of oral testimony. (*S v Robinson and Others* 1968 (1) SA 666 at 675 G – H)."

[43] I have no doubt in my mind that the learned President in the present case failed to correctly evaluate the evidence of Mr. Strydom. I am of the view that the misdirection arising therefrom led to his wrong conclusion of pitching Mr. Strydom's credibility to a degree which was not merited. In other words, if the learned President had paid due attention to the inconsistencies which I have highlighted in Mr. Strydom's evidence, he would not have found that Mr. Strydom did receive the necessary mandate to enable him conclude a settlement agreement relating to the second dismissal.

[44] In referring to Mr. Strydom's statement made from the Bar, I have justified doing so for the reason that the statement

has an important bearing on the proceedings in this case. I am fully conscious of the fact that statement was not evidence; it was made from the Bar. However, Court-bound legal counsel, whether operating from the private sector or from the public service, are as duty-bound as a presiding judicial officer is to promote the cause of justice. That is why legal practitioners, as a class, are called officers of the court, and as such, whatever they submit to the Bench – other than legal argument – carries the character of material which should be in tandem with the duty to administer justice. Accordingly, a presiding judicial officer before whom such a statement is made is, for professional and ethical reasons, obliged to accord the statement so much weight as may influence his decision. It is in that light that I felt that I should juxtapose the statement with his evidence in order to assess their congruence.

[45] The learned President in the Court below did not lose sight of the complication which the statement made in contradistinction with Mr. Strydom's evidence, as is illustrated by the following text from his judgment:

> "I am somewhat troubled by Mr. Strydom's remarks in court prior to his withdrawal on 16 June, 2003. He conceded on that occasion that he had not conveyed the terms of the settlement 'to such an extent that the (respondent) understood it to incorporate all claims' and that he should have been more frank and open when he had discussed the terms of the agreement with him. I find those remarks difficult to reconcile with his evidence that he had told the respondent that he and the applicant should get out of one another's hair and that they should make a 'clean break'. Given the respondent's denial, it might well be that Mr. Strydom subjectively felt at the time he gave the explanation that he could have done even more than he had – hence the concession."

In my considered opinion the learned President underplayed the seriousness of that statement. I say so because despite that statement, he highly rated Mr. Strydom's credibility. I disagree with him.

[46] My consequential determination regarding the question I posed in (a) of paragraph [30] *ante* is, therefore, that in so far as the authority to settle the dispute relevant to the unfair dismissal of September, 2001 was concerned, that was undoubtedly given by virtue of the fact that Mr. Worku retained Mr. Strydom as his counsel in the action commenced in the District Labour Court. I come to that conclusion pursuant to the principle enunciated in *Dlamini v Minister of Law and Order and Another***,** *supra.* In fact there is no dispute about the mandate to settle in that respect; except that Mr. Worku was not happy with the amount offered to him, but that is a side issue which can, if necessary, be dealt with separately. The issue *in casu* is whether Mr. Strydom had a mandate to conclude a settlement agreement entailing the inclusion of the second dismissal in a full and final settlement. For the preceding reasons, I am inclined to accept the contention of Mr. Boesak that Mr. Strydom was not given such mandate.

[47] In the light of the conclusion I have arrived at, it is academic for me to discuss the question of a principal's duty to give notice regarding the subsequent termination or

limitation of his agent's mandate. The principle in *Salisbury Bottling (Pty) Ltd*, *supra,* regarding the giving of such notice is applicable when there has been a mandate initially given and later the mandate is removed or restricted. Then the principal is required to notify the world at large of such termination or restriction. It must follow that where no mandate existed, the idea of giving a notice is otiose. Moreover, the evidence of both Mr. Strydom and Mr. Heathcote shows that Mr. Worku was a fickle person who repeatedly resiled from his commitments. As for Mr. Heathcote, at one time in the course of proceedings in this case he suffered the embarrassment of Mr. Worku laying charges with the police alleging that Mr. Heathcote had bribed his, Mr. Worku's, lawyers. Both Mr. Strydom and Mr. Heathcote are seasoned legal practitioners. In the event, after their experience of Mr. Worku being that type of person, the least I would have expected of them was to insist that if they were to get any mandate from Mr. Worku, that mandate

should be in writing.

[48] It is astonishing that despite Mr. Worku's fickle character as evidenced by his repetitive failure to honour his commitments, Mr. Strydom did not, at a much earlier stage, decide to withdraw his legal services from him. The wise counsel given by Lord Esher in *Matthews and Another v Munster*, *supra,* is that when a client informs his counsel that he does not like the terms upon which counsel has agreed to conclude a settlement on behalf of his client, counsel ought to say to the client, "then I will no longer act for you." Had Mr. Strydom acted in accordance with that sagacious counsel his agency relationship with Mr. Worku might have terminated before the regrettable circumstances recorded in this judgment.

[49] Because my conclusion is that Mr. Strydom did not have a mandate in regard to his client's second dismissal, I deem it equally unnecessary to discuss the question of *bona fides* in relation to the conduct of an agent while executing his or her

mandate. This means that the only important issue remaining and which I need concern myself with in this judgment is the issue of the appropriateness of the deviation from the main application to the issue of the existence or non-existence of the settlement agreement.

[50] Rule 6(1) of the Labour Court Rules made pursuant to section 22 of the Labour Act, No. 6 of 1992, provides that every application "shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief." In fact on two previous occasions the respondent's legal representatives made applications in compliance with that rule of procedure. That was when they applied for the rescission or variation of the default judgment and, secondly, when they applied for the annulment of the warrant of execution. There was no earthly reason why in respect of the very important issue of the settlement agreement they decided to make an informal and irregular oral application even though all the indications of opposition to that application must, in the circumstances of this case, have been apparent and expected. My feeling is that Usiku, AJ, ought to have outrightly rejected that abnormal application on the ground of failure to comply with procedural rules.

[51] There was then an application by the appellant for condonation for the late filing of the power of attorney, the

notice of appeal and of the record of appeal. Because of the important point of law the appeal raised, I would, and do hereby, grant the combined application in retrospect. Nothing more needs to be said about that.

[52] The respondent raised a point *in limine* whereby a complaint was laid that the record of appeal was incomplete because a substantial portion of exhibits were not included and that some of the exhibits included in the record were incorrectly marked. That was a genuine complaint. However, this appeal was extremely well presented on paper as well as in oral submissions by both sides. To this end, the court wishes to commend both Mr. Boesak, on behalf of the appellant, and Ms. Schimming-Chase, for the respondent, for the industry they put into the preparation of their heads of argument, and in their oral submissions which they presented lucidly and with commendable verve. This court

did not, by virtue of the said deficiencies in the record of appeal, find itself inhibited in comprehending the issues which cried for determination. At the end of the day, therefore, I do not consider that the administration of justice has been prejudiced.

[53] After all has been said and done, the inevitable decision I have come to is that this appeal must be, and it is allowed. In consequence, I make the following order:

1. The appeal is allowed.

2. The finding by the Court *a quo* that the main application had been settled between the appellant and the respondent is set aside and the following finding is substituted therefor:

> "There has been no settlement of the main application involving the parties."

3. This matter is remitted to the Labour Court for the hearing and determination of the main application.

4. The respondent is ordered to pay the appellant's costs of the appeal, such costs to include the costs of one instructing and one instructed counsel.

_____
CHOMBA, AJA

I concur.

_____
SHIVUTE, CJ

I also concur.

_____
SILUNGWE, AJA

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