IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Reportable

Case No: J486/07

In the matter between:

XOLANI HLONGWANE **Applicant**

And

CISCO SYSTEMS SOUTH AFRICA

(PTY) LIMITED **1st Respondent**

CISCO SYSTEMS INCORPORATED **2nd Respondent**

JUDGMENT

Molahlehi J

Introduction

[1] In the initial motion proceedings filed in terms of s77(3) of the Basic Conditions of Employment Act 75 0f 1997 (the BCEA), the applicant sought a declaratory order declaring the applicant to still be in the respondent's employ and compelling the respondents to accept the tender of his services made on 11 December 2006. The applicant further sought to have the respondents compensate him from 31st October 2006 as if he had remained in the respondents' employ from the date of termination of his contract of employment.

[2] On the 18th April 2008, Cele AJ, as he then was, ordered that the dispute between the parties should be referred to oral evidence and further that the papers which had been filed in the motion proceedings should serve as pleadings.

[3] The issue for determination arising from the pleadings and the evidence presented by the parties is whether or not the employment of the applicant with the respondents was terminated pursuant to the terms of a settlement agreement purportedly concluded between the legal representatives of the parties. The settlement agreement was orally concluded between Stransham-Ford (Ford), the erstwhile counsel of the applicant and Mr Mills (Mills), attorney of the respondents.

[4] The applicant contends that the alleged settlement agreement is not binding on him for the following reasons:

a. He never authorized his erstwhile attorneys to conclude the agreement on his behalf.

b. He did not sign the "Heads of Agreement" which purported to incorporate the essential terms of the agreement.

c. No consensus was reached between the parties regarding a mutually agreeable termination of the contract of employment.

[5] The respondents on the other hand contended that a valid and enforceable oral agreement was concluded with the applicant represented by his erstwhile attorneys. The respondent further contended that the applicant is estopped from denying the authority of his legal representative to conclude the oral agreement.

The "Heads of Argument" was a mere formality intended by the parties, according to the respondents to serve as proof of the terms of the settlement.

The parties

[6] The applicant is a former employee of the first respondent who prior to his dismissal was employed as a business development manager. The first respondent is the subsidiary of the second respondent, registered in terms of the company laws of South Africa and carries its business of supplying network equipment and management for the internet in the world and is based in Johannesburg. The second respondent is a global company listed in the Nasdaq Stock Exchange in the United States of America.

Background facts

[7] During June 2006, the applicant lodged a complaint about misappropriation of the second respondent's funds in South Africa. The complaint was later elevated to Mr De Simone and Mr Mountford, with a threat of litigation and media exposure of the issue complained about. The other details concerning the complaint of the applicant are set out in the judgment of my brother Cele AJ which referred this matter to oral evidence. I do not deem it necessary to repeat those details in this judgment.

[8] It is apparent that the first respondent was not happy with the applicant pursuing his complaint with the second respondent. A meeting was accordingly convened on the 24th July 20006, to discuss the applicant's continued communication with the second respondent.

[9] On the 24th July 2006, the applicant was suspended and thereafter charged with misconduct after failing to heed the warning not to communicate with people outside South Africa. During the same period the applicant made a protected disclosure.

[10] Mr Mills (Mills), the respondent's attorney, was appointed to conduct an investigation into certain allegations made by the applicant. The applicant complained that the charges against him were a form of retaliation against his protected disclosure which he had made to Mr Marenberg (Marenberg) and the disciplinary inquiry would be automatically unfair.

[11] As a result of this conflict that has arisen between the parties a possible mutual separation package was discussed between Mills and the applicant at a meeting which was convened subsequent to the charges against the applicant being proffered. And subsequent to this the two had a further discussion regarding mutual separation. During those discussions the applicant advised that his attorney of record would be in touch with Mills regarding the same.

[12] During September 2006, the attorney of the applicant, Mr Hardie (Hardie) had a discussion with Mills regarding possible settlement of the matter. Mills indicated that the respondent was looking at a settlement of between 6 (six) and 12 (twelve) months' remuneration. It is import, although not directly relevant to the issue in dispute, to note that the investigation and the settlement discussions ran parallel to the preparations for the disciplinary inquiry against the applicant.

[13] On the 11th September 2006, Hardie made an offer of settlement in an amount equivalent to 10 (ten) moths salary, on condition the disciplinary enquiry against the applicant was withdrawn.

[14] It would appear that the applicant was not happy with the advice of Hardie to accept the offer of 10 (ten) months and for this reason approached another attorney- Mr Casasola (Casasola). The applicant was attracted to the radical advice of Casasola who had advised that he could, working with Ford as counsel, secure a settlement of up to R6 million for the applicant and do that as quickly as possible.

[15] In the mean time Mills reverted back to Hardie with an offer of payment equivalent of 7 (seven) moths salary and offered to revert back in as far as the issue of shares were concerned. However, about a week thereafter Casasola contacted Mills and indicated that he was representing the applicant and further that he was keen to have a meeting to discuss a possible settlement of the matter. On the same day that Casasola contacted Mills the applicant wrote a letter Hardie in which he stated the following:

> **"***I Xolani Hlongwane terminate all your services as my legal representative as of today, 27th September 2006.*
>
> *I request that you therefore stop all communication with Cisco Systems and /or any of Cisco Systems representatives.*
>
> *Thank you for all the assistance gave me thus far."*

[16] After the initial contact between Mills and Casasola a meeting involving the legal representatives and the applicant was held on 17th October 2006. At this

meeting Mills tabled again the offer of compensation equivalent to 7 (seven) months salary and promised to revert back as concerning the issue of shares. Mills reverted back to Casasola the following day and confirmed the offer of 7 (seven) months including vested stock options. Casasola undertook to revert back to him shortly after. However, instead of Casasola, Ford reverted back to Mills with a settlement offer of remuneration including both vested and unvested shares. That offer was rejected by the respondent.

[17] The applicant was clearly unhappy with this offer by the respondent. He expressed his frustration and anger in a long letter which was sent to Mills via a covering letter from Ford. The letter deals with both the details relating to the investigation which Mills was to conduct, the history thereof and all the efforts at mutual separation settlement proposals. Towards the end of that very lengthy letter the applicant warns Mills in the following terms:

> ". . . *there will be consequences for your continued and deliberate faltering. Needless to remind you that I have been humiliated, my character defamed in this process, labeled a whistleblower by the media and unjustly accused by Dr Fynn, this has resulted in financial and emotional damages, which we have the to appropriately deal with in a court of law."*

[18] In the same letter prior to issuing the above warning to Mills the applicant places a deadline of the 24th October 2006 for the respondents to do the following:

> "*1. Discontinue procedurally unfair practices*
>
> *2. Desist from using cheap tactical methods of a DC threat*

3. Nullify the suspension and disciplinary hearing

4. Engage with us for a way forward in an honest manner so we can solve the impasse amicably.

[19] Another threat to the respondents is contained in the covering letter of Ford. In that letter Ford inter alia states:

> *" 3 I am further instructed to inform you that Mr Hlongwane has declared his intention to refer Cisco's conduct to the American Justice Department and Securities Exchange Commission as well as Media Investigatory and Regulatory Authorities in England and South Africa."*

[20] The following the day after the above deadline, being the 25th October 2006, Mills sent the notice of the disciplinary hearing which was to be convened on the 27th October 2006 to Casasola. In the afternoon of the same day the applicant sent a fax to Casasola and Ford in preparation of the discussion he was planning to have with Cisco USA. The applicant had planned to inform Cisco USA about the discussion he had with the Department of Trade and Industry which he did following the advice he got from Ford.

[21] At about 20h00, on the same day the applicant sought to contact two of the senior members of Cisco USA. His attempts failed as he only received a massage from the PA indicating that he should expect a response from the office of Mills, the person he was seeking to avoid and sideline in as far this matter was concerned. And 30 (thirty) minutes after the applicant failed to reach the

seniors of Cisco USA, Ford phoned Mills and indicated to him that Cisco would be destroyed unless the applicant was paid $2million.

[22] The same evening and again about 30 minutes after the applicant's call to Cisco USA, Mills contacted Ford and informed him that the respondent will not be extorted. At about 21h33 Ford sent an email to both Casasola and the applicant indicating that Mills has advised that the respondent was not willing to settle at US$2million.

[23] On the 26 October 2006, Mills and Ford had further telephonic discussions regarding the settlement of the dispute. During that telephone discussion a settlement, was according to Mills, reached. The matter was settled, says Mills on the terms confirmed in the letter addressed to him by Ford dated 26 October 2006. The relevant part of that letter reads as follows:

> *"2. I am authorized to indicate that Mr Hlongwane will accept offer of settlement on the terms to this effect:*
>
> *2.1 Payment net of tax eight months optimized ote (sic) earnings plus the value of perquisites normally attributable thereupon.*
>
> *2.2 Receipt of the liquidated value in zar of shares vested up to the signature date.*
>
> *2.3 A contribution to legal fees of ten percent of the above amount which sum will be paid separately into the attorney's trust account*
>
> *2.4 Due assistance with referees and procumbent of future employ.*

3. This document upon signature to serve as heads of agreement in pursuance of 2 above."

[24] Mills testified that it was on the basis of the above letter that the employment contract of the applicant was terminated.

[25] The applicant contends that the termination of his contract of employment with the respondent was invalid. In this respect he challenged the validity of the agreement which his counsel, Ford concluded with the respondent's attorney-Mills. The essence of his challenge is that Ford did not have his instructions to compromise his claim which was more than US$ 2 million.

[26] The applicant further contents that if the agreement was found to have been mandated, it was inchoate because it was not signed by all the parties as provided for in the letter of Ford to Mills. The other point raised by the applicant is that the agreement did not provide for the date of termination of the employment relationship between the parties.

Issues for determination

[27] The issues arising from the pleadings and the evidence presented are mentioned earlier in this judgment. For the purposes of evaluation the issues for determination are further summarised as follows:

a. Did Ford have authority to compromise the applicant's settlement demand by concluding an oral agreement with Mills?

b. If found that Ford was authorised to conclude the agreement on behalf of the applicant, was that agreement inchoate because the settlement letter:

i. did not contain a date for the termination of the employment contract of the applicant.

ii. was not signed by the applicant or Mills.

c. Was a written agreement precedent to a settlement and what were the consequences of the brake down then in then negotiations?

Authority of counsel or attorney to settle on behalf of client:

[28] It is generally accepted in our law that counsel or an attorney has the authority to compromise a client's claim unless the client has instructed otherwise. See ***Hlobo v Multilateral Motor Vehicle Accident Fund 2001 (2) SA 59 (SCA)***

[29] In ***Dlaminin v Minister of Law and Order 1986 (4) SA 342 (D) at 346 I to 347A,*** the court held that

> *"At the outset of the hearing before me, Mr Farlam, who appeared on behalf of the applicant, indicated that the applicant contended that the matter had been settled, that the respondents were bound by the settlement and could not withdraw from the settlement and that accordingly, and if he was correct in this, those matters to which the oral evidence would otherwise relate would become academic, insofar at any rate as the resolution of this particular application is concerned. He therefore asked me to decide in limine whether or not the respondents could withdraw from the settlement, admittedly concluded by counsel briefed on their behalf by the Deputy State Attorney in Durban."* .

The court went further to say:

"*The settlement, which was arrived at, was arrived at by counsel and attorneys purporting to act on behalf of the respondents. 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 or compromise of the litigation on behalf of his client provided he acts bona fide in the interests of his client. This proposition appears to be well entrenched in England. Perhaps the earliest leading case on the subject is the decision of the Court of Appeal in the case of Matthews and Another v Munster (1887) 20 QB 141 (CA) ((1886 - 90) All ER Rep 251). In that case counsel, acting on behalf of the plaintiffs, had settled an action for malicious prosecution on behalf of his clients with counsel for the defendant. The defendant had not been present when the settlement was arrived at and, on coming to Court later, endeavoured to repudiate the settlement. It was held, however, that although the defendant was not present when the settlement was made he had not put an end to the relationship of advocate and client which existed between himself and his counsel, that his counsel had complete authority in the case and that he, the defendant, was bound by the settlement."*

[30] The ***Dlamini'***s case was followed in ***Ivoral Properties (Pty) Ltd v Sheriff, Cape Town AND Others 2005 (6) SA 96 (C)***, where the court in dealing with the issue at hand, in the middle of paragraph [69] of that judgment had the following to say:

"*[69] ...It appears to be self-evident that any attorney's mandate may be so widely formulated that it includes, either expressly or by implication, authority to enter into a settlement agreement on behalf of his client (see Goosen v Van Zyl 1980 (1) SA 706 (O) at 709F). South African courts have followed a well-established approach in English law, namely, that counsel properly instructed to appear on behalf of a litigant has implied authority to conclude a settlement of the litigation on behalf of his or her client, provided that he or she acts bona fide in the interests of the client and not contrary to specific instructions."*

[31] It is clear from the above authorities that in the absence an instruction to the contrary by a client, a counsel or an attorney has implied authority as between himself or herself and the client to compromise the client's claim. The other principle is that counsel or attorney of a client has ostensible authority as between himself or herself and the other party to settle or compromise a client's claim without the need of actual proof of the existence of such authority.

[32] It is apparent from the evidence before this court that there two conflicting versions concerning whether or not the applicant authorised both Casasola and Ford to settle the matter on his behalf. It therefore follows that in resolving that dispute of fact this court is faced with having to resolve it either by weighing the probabilities or assessing the respective party's case on the basis of credibility of their respective witnesses.

[33] The applicant in the presented case was confronted with a number of difficulties in convincing this court that his then attorney and counsel did not have the

authority to compromise his claim of US$2 million against the respondent or could not have settled the matter whilst he was ostensibly busy negotiating with Cisco USA. In this respect it is important to note that the applicant did not call either Ford or Casasola to lead evidence in support of his version. The applicant failed to call as witnesses Casasola and Ford not only in the face of denying their authority to compromise his claim but also in the presence of documentary, including file notes from of them supporting the version of the respondent. This point is made taking into account and accepting that some of the documentation may be hearsay evidence. That documentary evidence was accepted as such and accorded weight they deserved not because they were submitted for the purpose of proving a fact but rather to support the version of the respondent that firstly an oral agreement was concluded and secondly it was concluded with proper authority on the part of the applicant. In this respect it can reasonably be assumed that the applicant did not call his former legal representatives for fear that they would have given a different version to his and in all probabilities supported the version of the respondent.

[34] The most important reason why the applicant ought to have called Ford to testify on his behalf relates to the evidence of Mills that he had a telephone conversation with him (Ford) on the 27th October 2006, wherein the authority to settle was confirmed. It is also important to note that the applicant could not comment when asked to do so regarding the SMS which Ford had sent him on the same day informing him that the respondent had withdrawn the disciplinary enquiry on the basis of the settlement agreement.

[35] In my view, in the circumstance of this case and having regard to the background of how Ford came into the picture, the meeting between the parties, response of Ford on behalf of the applicant to the first offer of settlement made by the respondent and telephone call between Ford and Mills on the 27th October 2006, there is no basis for the respondent to have had any reason to doubt the authority of Ford to settle the matter on behalf of the applicant. This fact taken together with the engagement between Mills on the one hand and the applicant, Ford and Casasola on the other hand, leads to the conclusion that there exist overwhelming probability that there was ostensible authority as between Mills on behalf of the respondent and Ford on behalf of the applicant to compromise their respective clients' claims without actual proof thereof.

[36] Although the applicant contends that Ford or Mills for that matter was aware that he was still negotiating with Cisco USA at the time they concluded the agreement that does not detract from the existence of either ostensible or implied authority. It is not uncommon for the engagement in the negotiations process to take place at various levels and for that to happen concurrently. The principals may for instance whilst retaining and using the services of their negotiating representatives engage each other at a different level for various reasons. The one reason may for instance be with the objective of either unlocking a deadlock or clarifying certain issues that may have developed between their negotiating teams. In the absence of an express or implied indication otherwise, the parties are entitled to assume implied authority on the part of the negotiators of the

other side without having to require proof thereof before concluding a binding agreement.

[37] In the first instance the issue of whether Ford had authority to settle on behalf of the applicant must be understood in the context where the applicant was not an unsophisticated person who lacked knowledge and understanding as to when, why and how the authority of a lawyer can be terminated. He had earlier before instructing Casasola to assist him formerly and in writing withdrew his instruction from Hardie, his present attorney of record. The issue of terminating the mandate with Hardie was that the applicant was not happy with his advice on areas of possible settlement of his matter with the respondent. The applicant's sophistication is also evinced by his understanding of the need for a strategy when engage in negotiations. He knew that a successful negotiated outcome entails a clear strategy, not only how to approach the issues but more important how to build on the dynamics within the role players of the other party to the negotiation process. It seems to me that the applicant was of the view that he could leverage his negotiations power by engaging with Cisco USA and not the respondent or for that matter Mills. It would appear his strategy was to marginalise Mills in the negotiations process.

[38] There is nothing in law nor in practice, as far as I am aware, that says a party can determine the choice of the other party' negotiating representative. In the present instance the respondent had appointed Mills as its attorney and negotiating representative. The applicant had no choice but to engage with respondent through him. The facts before this court even on the version of the applicant

indicate very clearly that negotiations never took place between Cisco USA and the applicant. It is however clear that the applicant sought to have the negotiations elevated to that level and have, as stated earlier, Mills marginalised in the process.

[39] I have earlier indicated that I am confronted in this matter by two conflicting versions. The one version is that an agreement mandated by the applicant was concluded with the respondent, whilst the other hand the version is that that agreement was not authorised by the applicant.

[40] The approach to be adopted in resolving disputes of facts in trial matters was dealt with in the case of ***Stellenbosch Farmers' Winery Group Ltd and Another v Martell ET CIE AND Others 2003 (1) SA 11 (SCA).*** In that case Nienaber JA in dealing with what approach to adopt when faced with two irreconcilable versions had the following to say:

> *". . . The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with*

what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail"

[41] The objective facts and the circumstances of this case militate against the version of the applicant that Casasola and Ford did not have the authority to settle the dispute on his behalf. This analysis must also be understood in the context where under pressing cross examination the applicant conceded that at the time Ford and Casasola had a general mandate to represent him .My understanding of the applicants case is that they did not have the specific

mandate to conclude the agreement because they were aware as indicated earlier that he was busy negotiating with Cisco USA. I earlier found that although the applicant may have wished to have the negotiations happening at that level they never did. Even on the applicant's version the negotiations never took place between him and Cisco USA. There is no doubt that his wish and endeavour was to have the negotiations take place at the level of Cisco USA and they be with Murenberg.

[42] I am thus satisfied on the basis of the evidence before me that the probabilities support the version of the respondent that an oral agreement was concluded with Ford and further that he was authorised to so by the applicant. The version of the applicant that he did not mandate Ford to conclude the agreement on his behalf further stands to fail on the basis of credibility.

[43] The applicant was with due respect to him, profoundly a poor witness to say the least. It would appear he came into the witness stand having considered and strategized as to what his testimony was going to be irrespective of whatever questions are asked to him. His strategy seems to have been that the truth is only what favours his case and would not change his stand irrespective of questions or versions put to him. His strategic approach was to deal with difficult questions or those whose underlying purpose was to seek to undermine his case by way of bringing in some points unrelated to the questions. He was indeed a man loyal to his strategy but at times seems to have failed to understand the difference between strategy and tactics. He is a man not to be trusted with the truth and thus anything in his version that purports to be the truth has to be

evaluated against all probabilities before it can be accepted as such. As I listened and observed his mannerism seating in the witness stand, I wondered whether he seriously believed in his own story. He frequently laughed when questioned during cross examination, something he did not do much of, if at all, during evidence in chief or re-examination.

[44] It was also apparent during cross examination that the applicant evaluated every question put to him with the view to determining the underlying purpose before he could answer. This approach manifested itself more particularly when dealing with questions related to the authority given to Casasola and Ford to conclude an agreement on his behalf.

[45] The question asked to the applicant during cross –examination as to whether he had authorised his legal representatives to explore settlement was the most simplest of all. He seem to have realised in his response that a "yes" or "no" answer would "put him into a corner." He answered as follows: "*They were my representatives."* And when asked further whether in representing him they were entitled to exercise their own discretion, he answered as follows: *"But not to conclude a settlement, not to conclude without my agreement."* The applicant did not however, dispute that in making the settlement offer Ford was exercising a general mandate given to him.

[46] In my view, the applicant was such an unreliable and uncooperative witness that his evidence should be discarded. It is hard to belief that the applicant had no knowledge of the thread which Ford made against Cisco USA. Even if that was the case and it would appear the applicant now seek to distance himself from it,

that was the signal of a risk he was running with Ford who on his version seems to have been on a frolic of his own in handling this matter. There is evidence that he never said and suggested to him that because of his unbecoming conduct his mandate was to be curtailed and he could exercise no discretion without reference to the applicant.

[47] The applicant in some way of seeking to show that after the threat made to Cisco, he lost trust or confidence in Ford to the extend that he had to enlist his brother in the telephone conference he was to have with Cisco USA. It has to be emphasised that if indeed the applicant is to be belief regarding the tactics of Ford why did he not terminated his mandate or at least to have instructed him not to do things without his consent or prior approval. He left Ford as he stated in his testimony with a general mandate and in my view, in all probabilities with discretion to compromise his demand of US$2 million in carrying out that general mandate.

[48] The issue of the mandate to settle the matter for and or behalf of the applicant is made much clearer by the e-mail he referred to during his evidence in chief. The e-mail which was sent to him by Casasola on the 25 October 2006, the relevant parts of which read as follows:

> ***"CISCO SYSTEMS (CISCO) XOLANI HLONGWANE***
>
> 1. *We refer to the terms agreed upon by yourself good the writer and Counsel on 21 October 2006.*
> 2. *We will act in your cause to, inter alia,*
>
> *2.1 Settle the dispute with Cisco*

2.2 Litigate to conclusion

2.3 *Deal with external agencies for your cause. . .”*

[49] The e-mail from Murenberg to Mills dated 26 October 2006 does not retract from the fact that an agreement was concluded. Murenberg’s letter simply enquired from Mills as to what the state of affairs was after Mills told him that an agreement was concluded and later to receive information that suggested otherwise from the applicant. However, what Murenber’s e-mail confirms is that at that stage Mills had already informed the respondent and particular Cisco USA that a settlement had been concluded.

[50] The authority of the applicant’s legal representatives was further confirmed in the letter of 26 October 2006, from Ford to Mills. The letter records as follows:

*“**CISCO SYSTEMS AND XOLANI HLONGWANE***

1. Mr Hlongwane has asked me to convey to you his gratitude for your and Cisco’s recognition of his bona fides in the events surrounding this matter.

2. I am delighted to inform you that I am now authorised to forthwith settle this matter on Mr Hlongwane’s behalf.

3. *To that may I ask that you telephone on receipt hereof to finalise matters.”*

[51] The contents of the above letter are consistent with what Ford further states in his letter to Casasola, dated 7 November 2006. In that letter Ford says the following:

*“**CISCO SYSTEMS AND XOLANI HLONGWANE***

1. *I note that Mr Hlongwane has informed you that he intends instructing another attorney,*
2. *With respect such a move would in my opinion be most problematic at this juncture not least for these reasons.*

    2.1 Mr Hlongwane mandated me to settle his dispute on 26 October 2006 on terms contained in my letter to Mr Mills of Cliffe Dekker.

    2.2 This settlement had Hlongwane's express approval as to its terms which I communicated in your absence and with your approval to messrs Cliffe Dekker in writing.

    2.3 You in turn confirmed these terms to Cliffe Dekker in your letter.

    2.4 They were then meticulously transcribed into an agreement of settlement without derogation except in a sum of additional R88065-11 for accrued leave.

3. *It is therefore my opinion that it is not open to Mr Hlongwane now to purport to resile from the terms expressly agreed.*
4. *In my view this should be communicated explicitly to him forthwith."*

[52] It is further clear from the e-mail that the applicant sent to Casasola on 13 November 2006, that the applicant informed Casasola that his mandate to

represent him was terminated. The action to terminate the mandate was thus after the event; as at that stage the agreement was already concluded.

[53] The other strange thing about the case of the applicant is the period he took before reacting to the wrong which he claims his legal representatives commitment against him. He claims to have become aware of what Ford had done only on 30 October 2006, when he collected his file as from Casasola. This version is also in serious doubt. He initially denied having seen the letter of settlement on 26 October 2006. This is such an important aspect of his case that it would reasonably have been expected that he would have dealt with this issue in his founding affidavit. When questioned about it during cross-examination, he said: *"Yes, I might be wrong by 30th . . "*

[54] The applicant's own version is that as late as the 6 November 2006 he was still using the services of an attorney who is alleged to have concluded an agreement without his authority. He instructed Casasola to inform Mills that he rejects the offer and that he would revert back to him as soon as he has obtained the services of a labour lawyer.

[55] The version of the applicant is further weakened by the file note by Casasola wherein he states that he had a telephone conversation with him and informed him as follows:

"*Advice client that he gave mandate to settle in terms as indicated."*

[56] The attack on the evidence of Mills during cross examination suggested that he ought to have been aware that Ford did not have the mandate to settle on behalf of the applicant. This attack is unsustainable if regard is had to the fact that that

version could only have been challenged and contradicted by presenting the evidence of either Ford of Casasola. The attack on the version of Mills failed to appreciate that the respondent did not have to show actual authority but ostensible authority was enough. It can thus be concluded on the conspectus of the evidence before this court that all the requirements of estoppel have been satisfied in that; (a) representation had been made by words and conduct that Ford and Casasola had authority to represent the applicant, (b) the respondents acted on representation made to them by the applicant, (c) the applicant should reasonably have expected that the respondents as outsider would act on the strength of such representation; (d) the respondents had relied on such a representation in concluding the agreement with Ford and such reliance was in the circumstances reasonable; and (e) the respondent would suffer prejudice if the applicant was at this stage allowed to withdraw his representation. See ***NBS Bank v Cape Products (Pty) Ltd & others 2002 (1) SA 396 (SCA).***

[57] The next issue to consider having concluded that an authorized oral agreement was concluded is whether signature of the letter by all the parties was a condition precedent to the agreement becoming binding. The answer to this question has to be in the negative regard being had to the unchallenged version of Mills in that regard. The version presented by Mills is that after concluding the oral agreement he requested the applicant's legal representatives to put the terms of the settlement in writing as proof of the terms of the settlement. Again the only way that the evidence of Mills could have been contested is if the applicant had called either Ford or Casasola to testify. To the extent that the

letter of Mills to Casasola dated 9th November 2006 may be inconsistent with his version in relation to this issue, I accept the explanation that the contents thereof was an error which occurred when he was trying to reconstruct the events in relation to the oral agreement. In any event the letter does not say that all parties have to sign before the agreement could take effect.

[58] In my view the parties in concluding the oral agreement did not make its coming into effect subject to it being reduced to writing. The discussion about reducing its terms to writing was for the purpose facilitating proof the verbal agreement. See ***Goldblatt v Freementle 1920 AD 123 (AD).*** In other words it was not a term of the oral agreement that it would only come into effect once it was reduced to writing. See ***Shaik & other v Pillay & other 2009 (4) SA 74 (SCA)***.

[59] The other issue for consideration is what would have happened had the negotiations over the formal agreement failed. The answer in my view has to be in the affirmative regard being had to the testimony of Mills. The contention by the applicant that the testimony of Mills was inconsistent with what was pleaded by the respondent has no merit. Thus the totality of the evidence supports the version that had the parties failed to reach agreement on the terms of the agreement the oral agreement would have remained enforceable.

[60] The final issue is whether or not the agreement was incomplete without providing for the date of termination. I again do not agree with the contention of the applicant that the agreement was incomplete without making a provision for the date of the termination.

[61] In my view it is apparent from the facts and the circumstances of this matter that the termination term can be implied into the agreement. The totality of the facts and the circumstances of this case indicate very clearly that the date of the termination of the employment relationship can be implied into the agreement. The very essence of the negotiations, which ended with the oral agreement, was to provide the basis for separation of the relationship between the parties. The separation between the parties occurred when the agreement was concluded and in the circumstances its reasonable in the absence of an express provision to infer that the parties had intended the termination to occur on the 31st October 2006.

[62] In the light of the above discussion I am of the view that the applicant's claim stand to fail. Whilst I note that the applicant is an individual, I see no reason in law and fairness why on the facts and circumstances of this case, the costs should not follow the results.

[63] In the premises the applicant's claim is dismissed with costs.

Molahlehi J

Date of hearing: 29 April 2010

Date of judgment: 16th September 2010

Representation:

For the applicant: Mr. S Hardie of Steven Hardie Attorney

For the respondent: Mr. A T Myburgh

Instructed by: Cliff Dekker Inc.