

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA
RULING
PRACTICE DIRECTION 61



MAIN DIVISION, WINDHOEK

Case Title: R K INVESTMENT CC FIRST PLAINTIFF/APPLICANT CEDRICK KAMWII SECOND PLAINTIFF/APPLICANT and UNION TILES WINDHOEK (PTY) LTD FIRST DEFENDANT/RESPONDENT MALLS TILES SECOND DEFENDANT/RESPONDENT	Case No: HC-MD-CIV-ACT-CON-2019/04266
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE PARKER, ACTING	Date of hearing: 6 FEBRUARY 2024
	Delivered on: 13 MARCH 2024
Neutral citation: <i>R K Investment CC v Union Tiles Windhoek (Pty) Ltd</i> (HC-MD-CIV-ACT-CON-2019/04266) [2024] NAHCMD 110 (13 March 2024)	
IT IS ORDERED THAT: 1. The application is dismissed. 2. There is no order as to costs. 3. The application is finalised and removed from the roll.	

4. Counsel or the parties (if unrepresented) must attend a status hearing at **08h30** on **20 March 2024** for the court to consider the further conduct of the action.

Following below are the reasons for the above order:

PARKER AJ:

[1] Before this court is an application brought on notice of motion whereby the applicants (first and second plaintiffs) seek an order in the following terms:

- ‘1. A declaratory that the dispute between applicants and 1st Respondent has become settled.
2. A order compelling the 1st Defendant to sign the settlement agreement already signed by the Applicants on the 6th June 2023, a copy of the settlement (agreement) is attached to the Founding Affidavit as annexure “RK4”.
3. An order in terms of which the settlement agreement shall be made an order of Court.
4. Costs of suit, only if opposed.
5. Further and/or alternative relief as this Honourable Court deems fit.’

[2] The respondents (first and second defendants) have moved to reject the application, and are represented by Mr Mouton. Mr Bangamwabo represents the applicants (plaintiffs). It is important to note at the threshold that the burden of the court is essentially to determine whether an agreement to settle the parties’ dispute was concluded by the parties.

[3] I shall not garnish this judgment with the background information respecting the matter. That was done in the judgment, dated 28 August 2023.

[4] First and foremost, in our law there are two fundamental grounds upon which a person **X** can prove the existence of a contract, namely, ‘consensus’ and ‘reasonable reliance’. As to the first ground, **X** must establish that there has been an actual meeting of minds of the parties, that is, **X** and **Y** were *ad idem* (ie consensus *ad idem*). If that was established, the validity of the contract is put to bed, not to be awoken. If, however, there was not an actual meeting of minds,

that is, X and Y were never *ad idem*, the question to answer is whether X or Y by his or her words or conduct led the other party into the reasonable belief that consensus was reached; that is 'reasonable reliance'.¹

[5] The second relevant basic principle is this. An 'oral agreement made seriously and deliberately with the intention that a lawful obligation should be established and has a grounded reason which is not immoral or forbidden' is valid and enforceable.² The third relevant basic principle is that the onus of establishing that a contract exists rests squarely on the party who alleges the existence of the contract. He or she may establish the existence of the contract on the ground of consensus *ad idem* or on the ground of reasonable reliance. That is not all. That party must also prove the terms of the contract. Generally, the opposing party bears no burden to prove that no contract exists.³

[6] The plaintiffs admit that no agreement was reached during lunch time on 5 June 2023. That fact is crucial. However, all the terms and conditions of a settlement agreement were discussed and negotiated subsequently by the parties through a teleconference facility the same day (ie 5 June 2023). The defendants deny that any agreement was reached because there were outstanding material matters that stood un agreed upon, namely, the appointment of a contractor to carry out the works involved and such contractor's quotation regarding installation and/or fitting of the titles in question.

[7] In their replying papers, the applicants disputed the respondents' answer, with the following amplification: The initial draft settlement agreement (Annexure 'RK2') did not contain a provision on the issue of a contractor. The draft as revised by the respondents and sent to the applicants (Annexure 'RK2'), too, did not contain a provision on the issue of a contractor and yet the respondents did not include the issue in the revised settlement agreement that they drafted.

[8] The applicants' reply does not counter the respondents' averment that that material issue was still alive during the teleconference negotiations and was not resolved, and so there could not have been an agreement during the teleconference.

¹ *Geomar Consult CC v China Harbour Engineering Company Ltd Namibia* [2021] NAHCMD 455 (5 October 2021) para 4.

² *Geomar Consult CC* footnote 1 loc. cit., *Palastus v Palastus* [2015] NAHCNLD 29 (8 July 2015).

³ *Geomar Consult CC* footnote 1 loc. cit.

[9] Consequently, I find and hold that no oral settlement agreement was reached by the parties, because neither consensus nor reasonable reliance is established.⁴ But that is not the end of the matter, as I now demonstrate.

[10] In their replying papers, the applicants aver the following: An initial settlement agreement drafted by the applicants (Annexure 'RK2') was sent to the respondents for their consideration. The initial draft was prepared by the respondents and sent to the applicants. The applicants did not have any problem with the revised draft settlement agreement, and so the second applicant signed it. It was the submission of Mr Bangamwabo that the revised draft amounted to a counter offer, and since the counter offer was accepted by the applicants, an agreement was reached, binding the parties.

[11] Based on a general principle, Mr Bangamwabo's submission is correct. But the general principle is subject to an important qualification. The counter offer should be unconditional. Barry JP Stated in *Hayter v Ford*:

'There was no unconditional offer on the part of the plaintiff which the defendant could, by accepting, bind the plaintiff.'⁵

[12] In their answering affidavit, the deponent thereof, Mr Neves, stated that the respondent's legal practitioners in the person of Mr Kotze (a candidate legal practitioner) informed Mr Bangamwabo (the deponent of the founding affidavit) that Mr Neves, the legal representative of the respondents, needed to approve the settlement agreement after discussions with the clients and after having received the 'go ahead' to sign the settlement agreement. Mr Kotze filed a confirmatory affidavit to that effect.

[13] In their replying papers, the respondents reply thus: 'Mr Francois Kotze clearly stated (to Mr Bangamwabo) that Mr Neves would sign the revised settlement agreement at (the) court on the morning of 6th June 2023.' In my view, the statement attributed to Mr Kotze cannot by any legal imagination be said to be an unequivocal and inexorable statement that Mr Neves shall sign the settlement agreement by hook or by crook without further negotiations by the parties and without further consideration by the respondents.

⁴ Loc. cit.

⁵ *Hayter v Ford* (1895) 10 EDC 61 at 69.

[14] The statement must be understood in the context in which and the circumstances under which it was made. Mr Bangamwabo had phoned to speak to Mr Neves but Mr Neves was not in his chambers, and so Mr Bangamwabo spoke to Mr Kotze who in the first place had sent the revised settlement agreement to him on behalf of Mr Neves.

[15] I have considered the history of the instant matter where the parties are unrelentingly at each other's throat and where the parties have taken intractable and unyielding positions in the dispute. Having done that, I find it inexplicable that one would rush to the conclusion that the parties have reached a settlement agreement based on the lone and naked statement by a third party who was not involved in the negotiations. I am referring to Mr Kotze.

[16] There is no satisfactory and sufficient evidence before the court tending to explain why Mr Bangamwabo could not have waited until he got hold of Mr Neves. Mind you, Mr Kotze did not inform Mr Bangamwabo that Mr Neves had left with him information about the signing of the settlement agreement with instructions that it be communicated to Mr Bangamwabo. In those circumstances, the proper and reasonable course to take was for Mr Bangamwabo to have conferred with Mr Neves about what he made of Mr Kotze's information. Such a course was reasonably required and necessary, considering – I repeat – the insalubrious relationship between the parties and the rigid and obstinate attitudes of the parties that have bedevilled the proceedings in the instant matter. The fact that action was instituted as long ago as 2019 and no end is in sight speak volumes negatively. Mr Bangamwabo should have acted with caution and circumspection.

[17] With the foregoing analysis and conclusion in my mind's eye, I find that the counter offer made by the respondents through the revised settlement agreement (Annexure 'RK4') was conditional. Consequently, I hold that the counter offer was made without *animus contrahendi*.⁶ Therefore, the counter offer could not bind the respondent.⁷

[18] Consequently, I find that the applicants have failed to prove the existence of a settlement agreement on the basis of consensus or reasonable reliance.⁸

⁶ *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.

⁷ *Hayter v Ford* footnote 3 loc. cit.

⁸ *Geomar Consult CC v China Harbour Engineering Company Ltd Namibia* footnote 1 loc. cit.

[19] *Erongo Regional Council and Others v Wlotzkasbaken Home Owners Association and Another*⁹ is of no assistance on the point under consideration. There, the respondents (applicants in the High Court) had approached the court to enforce a valid agreement that had already been made an order of court. Similarly, *A N v P N*¹⁰, referred to the court by Mr Bangamwabo, is distinguishable on the facts. There, a valid agreement had been reached during a court-connected mediation. Therefore, the authority there is of no application in the instant matter, as Mr Mouton submitted.

[20] The applicants have prayed for a declaratory order in para 1 of the notice of motion. The mandatory relief sought in para 2 and the order sought in para 3 of the notice of motion may be granted only if the court granted the declaratory order.

[21] The power of the court to grant declaratory orders is found in s 16 of the High Court Act 16 of 1990, and it provides that the court has the power -

‘(d) ... in its *discretion*, and at the instance of any interested person, to enquire into and determine any *existing, future or contingent* right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.’

[My emphasis]

[22] Thus, s 16 of Act 16 of 1990 contains the power by which the court may grant a declaratory order and the requirements which the applicant must satisfy in order to succeed. The important element in this section is that the power of the court is limited to a question concerning a right. The crucial element in s 16 of Act 16 of 1990 is that the exercise of the court’s power is limited to the question concerning a right – existing, future or contingent – which the applicant claims.¹¹

[23] Additionally, it is trite that a declaration is a discretionary order that ought to be granted with care, caution and judicially, having regard to all the circumstances of the case at hand. It will not be granted, for instance, where the relief claimed would be unlawful or inequitable for the court to grant.¹²

⁹ *Erongo Regional Council and Others v Wlotzkasbaken Home Owners Association and Others*.

¹⁰ *A N v P N* [2017] NAHCMD 275 (27 September 2017).

¹¹ *Kennedy v Minister of Safety and Security* 2020 (3) NR 731 para 18.

¹² *Ibid* para 19.

[24] I have found that no oral settlement agreement was concluded by the parties and the revised settlement agreement cannot bind the respondents. Having so found, I conclude that the applicants have not proved any right that could be protected by a declaratory order in terms of s 16(d) of the High Court Act 16 of 1990.

[25] It would, therefore, be unlawful and inequitable for the court to grant the declaratory order sought. It follows as a matter of course and inordinately, as intimated previously, that the court cannot grant the relief sought in paras 2 and 3 of the notice of motion.

[26] It remains the matter of costs. Considering the unyielding attitudes and rigid positions of the parties, I do not think a teleconference was the most prudent way to go to reach a settlement agreement. None of the parties themselves deposed to the founding affidavit and the replying affidavit and the answering affidavit. Was it not proper and efficacious that the parties who participated in the meetings called to discuss and negotiate a settlement agreement should be the ones to have deposed to those affidavits.

[27] It matters tuppence that Mr Neves doubles as a legal representative of the respondents and a director of the first respondent. The axiom that the lawyer who represents himself or herself cheats his or her client is as true today in Namibia as it was in Seventeenth Century England. The court has not heard them, and that complicated matters, leading to a protracted and a never ending proceeding.

[28] Consequently, I do not think I should order any costs in an application, though complex, that does not take us to the conclusion of the action. The granting of a favourable costs order could be a brake on the parties' desire to bring the action to its conclusion.

Judge's signature:	Note to the parties:
	Not applicable.

Counsel:	
PLAINTIFFS	DEFENDANT(S)
F BANGAMWABO of FB Law Chambers, Windhoek	C J MOUTON Instructed by Neves Legal Practitioners, Windhoek