REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1852/2013

In the matter between:

VALERIE TJIRARE N.O **1ST PLAINTIFF**

VALERIE TJIRARE **2ND PLAINTIFF**

and

INGRID MGOHAGOLEMA **DEFENDANT**

Neutral citation: *Tjirare N.O v Mgohagolema* (I 1852/2013) [2017] NAHCMD 17 (30 January 2017)

Coram: **OOSTHUIZEN J**

Heard: 5 July 2016, 8 July 2016, 27 – 30 September 2016, 1 – 3 November 2016

Delivered: 30 January 2017

Flynote: Claim – validity – offer and acceptance – valid contract – unequivocal offer needs unequivocal acceptance.

Summary: Plaintiffs' claim in two capacities on alleged agreement reached during 2005. First Plaintiff's appointment as executrix came 6 years after death of her husband, the late S. Tjirare. Second Plaintiff's 'claim' on behalf of minor is inadequate if it existed. Plaintiffs' claim premised on alleged agreement which came into existence during 2005 through offer and acceptance. No agreement came into existence as offer was not accepted in its terms and unambiguously.

ORDER

Having heard **Ms Bassingthwaighte**, counsel for the plaintiffs and **Ms Mgohagolema** (defendant in person) –

IT IS ORDERED THAT:

The claim of the first and second plaintiff (although it was not so claimed in the relief), is dismissed with costs.

JUDGMENT

OOSTHUIZEN J:

PLAINTIFFS' PARTICULARS OF CLAIM[1]:

[1] The first plaintiff is Valerie Tjirare N.O. in her capacity as executrix of the Estate Late of Sebastiaan Tjirare and the second plaintiff is Valerie Tjirare in her capacity as

[1] Index, A, p3.

legal guardian of the minor child born to the deceased and herself, namely Millisa Mootseng.[2]

[2] The defendant is Mrs Ingrid Mgohagolema, identified in the plaintiff's particulars as an adult female with full legal capacity.[3]

[3] The action was instituted on the grounds that during the period 2003 to 2004 the defendant allegedly misappropriated from the deceased, the late Sebastiaan Tjirare (hereinafter referred to as the late Tjirare), the amount of N$ 772 510.78. The defendant made a settlement offer to the deceased on 20 May 2005 in the amount of N$ 258 668.78, which settlement offer the first plaintiff allegedly duly accepted.[4]

BACKGROUND:

[4] During 1997, the late Tjirare was involved in a motor vehicle accident. The motor vehicle accident took place in Walvis Bay and the late Tjirare was transferred to Windhoek. As a result of the motor vehicle accident, the late Tjirare became paralyzed from the neck downwards. Defendant assisted the late Tjirare with a claim against the MVAF and thereafter managed the funds on his behalf until 18 October 2004.[5]

DEFENDANT'S REQUEST FOR FURTHER PARTICULARS[6]

[5] Defendant requested to be informed on what facts was it alleged that first plaintiff is the executor in the estate late Sebastiaan Tjirare.

[6] Plaintiffs answered that she was appointed as such on 14 April 2011 and attached her appointment letter as annexure "A" to her reply.[7]

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[2] Index, A, p3, paragraphs 1 and 2.
[3] Index, A, p3, paragraph 3.
[4] Index, A, p3, paragraph 4.
[5] Annexure "C" of Plaintiffs' witness statement, introduced as exhibit.
[6] Index, A, pp 5 to 8.
[7] Index, A, pp 9 and 13.

[7] The late Tjirare passed away on 20 July 2005.[8]

[8] According to the plaintiffs' the estate was reported during July 2010. The estate number is 544/2010.[9]

[9] On questions of defendant pertaining to the basis of plaintiffs' claim the further particulars alleged that the terms of defendant's settlement offer in 2005 was to settle for an amount of N$ 258, 668.78. On a question regarding the basis of the defendant's liability it was said that it is the terms of the settlement offer.[10]

[10] The settlement offer on which plaintiffs' rely is contained in a letter which refers to two previous letters attached to the defendant's letter of 20 May 2005. The two previous letters were not attached to plaintiffs' annexure "E" in her further particulars.

[11] On 13 July 2005 plaintiffs' attorneys wrote to defendant's attorney purporting to accept defendant's offer on condition that deceased's right to claim the remainder of the misappropriated amounts, is not prejudiced.

[12] On 20 July 2005 the defendant's legal practitioners replied to the letter of 13 July 2005, saying:

> 'We discussed the aforesaid letter with our client who instructed us to reply thereto as follows:
>
> Kindly note that the demand contained in your letter is, to say the least preposterous. Our client offered to pay to your client the sum of N$ 258,668.78 in full and final settlement of the claim. Under no circumstances is our client willing to agree to the demand made.'

[8] Index, A, pp 9 and 14.
[9] Index, A, p9.
[10] Index, A, pp 9, 10, 17, 18 and 19. Annexure L to plaintiffs' witness statement is the same letter as the one on p18 of the pleadings. Annexure M to plaintiffs' witness statement is the same letter as the one on pp 19 and 20 of the pleadings.

DISCUSSION

[13] The correspondence above was about the allegation that defendant misappropriated N$ 772,510.78, which defendant said she would settle for N$ 258,668.78.

[14] The letter of 20 July 2005 (emanating from defendant) made it clear that the settlement offer was an offer in full and final settlement of the late Tjirare's claim for N$ 772,510.78. The latter made it clear that under no circumstances the defendant would be willing to pay what she previously offered and be subjected to further litigation for the bigger amount.

[15] During evidence the plaintiffs introduced annexure "H" to her witness statement as an exhibit. Therein the legal practitioner of the late Tjirare, on his instructions, inter alia, said the following (on 25 April 2005) after threatening criminal charges against defendant if she do not pay an amount of N$ 772,510.78, to them, by close of business on 20 May 2005:

> 'Furthermore and needless to say that your without prejudice settlement proposal in the amount of N$ 258,668.78 is to our client unacceptable and therefore rejected.'

[16] Annexure "F", also introduced by plaintiff as an exhibit, from defendant's legal practitioners was indeed "Without Prejudice", dated 6 December 2004 and contains the following:

> 'Kindly note that in an attempt to settle this matter amicably, our client is prepared to pay to your client the amount of N$ 258,668.78 being the amount our client borrowed from your client.'

[17] Annexure "F" was one of the letters referred to in annexure "E" to the further particulars.

[18] It was abundantly clear that the late Tjirare at first rejected the defendants offer (25 April 2005) and thereafter purports to accept (demand) payment of the offer (which was renewed on 20 May 2005) on condition that he could proceed to claim the remainder.

[19] On 5 July 2005 the second plaintiff and the late Tjirare got married.[11]

[20] This matter is exemplary of litigation where the solution lies not in the evidence given orally by the parties, but in the pleadings read with the contemporaneously created documents and writings of the parties or their legal practitioners on their instructions.

[21] From the pleadings and the documentary evidence it is already clear that an offer in settlement was made, rejected, renewed, then demanded with rights reserved to claim a remainder.

[22] Startling however is annexure "N1" discovered by the defendant and included in the annexures to plaintiffs' witness statement. It is dated 13 February 2009. It was put to the defendant under cross examination. It reads –

> 'We have been instructed by the Executor in the Estate to accept your client's offer as full and final settlement in the amount of N$ 258,668.78 in settlement of the Estate's claim against your client.
>
> Your client has never withdrawn that offer.
>
> That is also why we addressed our letter to you dated 25 July 2008 to which we did not even receive the courtesy of a reply.

[11] Annexure "K" to plaintiffs' witness statement, which bears a stamp with the date of 5 June 2005.

> Our client's cause of action is therefore not premised on your client's misappropriation of monies, but rather on the settlement reached.
>
> Needless to say, that your contentions that the debt has prescribed is completely misplaced and we trust therefore that your client is now "persuaded" to effect the payment.
>
> All our client's right remain strictly reserved.
>
> We await to hear from you regarding payment as a matter of urgency.'

[23] Then plaintiffs wait another 3 years and 4 months to institute action.

[24] What is more, first plaintiff was not even the Executrix of the estate late Tjirare when this last letter was written. The estate was only reported at the Master during July 2010 and she appointed as executrix on 14 April 2011.

[25] No agreement between the parties came into being during 2005. Defendant's letter of 20 July 2005, in the context of the previous letters, clarify that point.

APPLICABLE LAW

[26] Acceptance of an offer must be clear and unambiguous and must correspond with the terms of the offer.

[27] Joubert[12] stated that:

> 'The vital characteristic of the acceptance is, however, its coincidence with the offer. There can only be consensus if the offer and acceptance agree with one another in content. Both parties must intend to create the same contract or transaction. From this it follows that there can only be an acceptance if the statement of the offeree is unqualified acceptance of the offer. If the offeree purports to make a conditional acceptance, inserts

[12] Joubert, DJ, *General Principles of the Law of Contract,* 1987, Juta & Co, Ltd: Cape Town, p44.

new terms or leaves old terms out, then there is no complete correspondence between the declarations of the parties and no consensus. There is no such thing as a qualified acceptance. A statement purporting to be a qualified acceptance of the offeree will amount to a counter-offer and by implication a rejection of the offer. The offer will lapse and the counter-offer will be available for acceptance. In rare cases there may be an unqualified acceptance accompanied by a new offer to novate the agreement or to amend it in the way proposed.'

[28] Furthermore, Van Niekerk J quoted in *Seagull's Cry v Council of the Municipality of Swakopmund*[13] the case of *JRM Furniture Holdings v Cowlin*[14] in which the following was stated that:

'The trite rule relevant in this regard is that the acceptance must be absolute, unconditional and identical with the offer. Failing this, there is no consensus and therefore no contract. (*Wessels Law of Contract in South Africa* 2nd ed vol I para 165 et seq.) Willie *Principles of South African Law* 7th ed at 310 states the principles thus:

> "The Person to whom the offer is made can only convert it into a contract by accepting, as they stand, the terms offered; he cannot vary them by omitting or alerting any of the terms or by adding proposals of his own. It follows that if the acceptance is not unconditional but is coupled with some variation or modification of the terms offered no contract is constituted . . .".'[15]

[29] Plaintiffs, in her two capacities pleaded, in her pleadings did not rely explicitly on the fresher "acceptance" of an "open" offer on 13 February 2009. Refer to annexure "N1" to her witness statement. In that letter however the statement was made that defendant never withdrawn the offer to pay the amount of N$ 258,668.78.

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[13] 2009 (2) NR 769 at 780 D.
[14] 1983 (4) SA 541 (W) at 544B.
[15] See also *National Cold Storage, a Division of Matador Enterprise (Pty) Ltd v Namibia Poultry Industries (Pty) Ltd* 2015 (3) NR 844 (HC) pp 850 – 851, para [15] and [16].

[30] The offer however lapsed on 20 July 2005 at the latest, if it did not lapse on 13 July 2005 when the late Tjirare demanded payment of the aforesaid amount, without prejudice to his right to claim the remainder.

PLAINTIFFS' REPLICATION READ WITH THE PARTICULARS OF CLAIM

[31] On 6 March 2014 plaintiffs replicate to the plea and special plea of defendant, by saying that plaintiffs –

(a) instituted action on behalf of a minor and as such prescription only commences one year after the minor reaches majority.

(b) plaintiffs' cause of action is premised on defendant's misappropriation of deceased's money in respect of which claim, prescription was interrupted as the matter became settled on 20 May 2005, but which settlement offer did not become due, owing and payable at the time.

(c) prescription with respect to the settlement agreement only commenced to run when the debt became due, owing and payable, which plaintiffs allege happened on demand.

(d) plaintiffs' alleges that summons constitutes demand and as such plaintiffs' claim has not prescribed.

[32] Plaintiffs' particulars of claim does not disclose a cause of action on behalf of the minor. It is not a cause of action to say that second plaintiff claim on behalf of a minor on the basis of a (lapsed) offer to settle. It is not a cause of action on behalf of a minor if no need is pleaded on behalf of the minor. Crux of the matter is, no settlement agreement between the plaintiffs, in whatever capacity, and defendant came into existence ever.

[33] It is wholly unnecessary even to deal with the prescription issue.

[34] I would venture to say that if there was an offer open to be accepted (despite my findings above), it was never lawfully accepted.

[35] The attempt to accept in February 2009 was highly irregular and misleading. Any attempt to accept on issuing of summons in 2013 was completely unreasonable. Plaintiffs never tried to show that the acceptance pleaded in paragraph 4 of the particulars of claim by first plaintiff (in her capacity as Executrix) was done within a reasonable time.

[36] The particulars of claim and replication are at best fatally incomplete and inadequate.

[37] I found it superfluous to deal with the evidence of the parties, save the brief references to annexures, allowed as exhibits.

[38] Therefore the claim of the first and second plaintiff (although it was not so claimed in the relief), is dismissed with costs.

GH Oosthuizen

Judge

APPEARANCES

PLAINTIFFS:	Ms Bassingthwaighte Of Koep & Partners, Windhoek
DEFENDANT:	Ms Mgohagolema Litigant in person, Windhoek