

## REPUBLIC OF NAMIBIA

NOT REPORTABLE



## HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

## JUDGMENT

In the matter between:

Case no: I 3826/2011

**GENERAL FRANCOIS OLENGA****RESPONDENT/PLAINTIFF**

And

**ERWIN SPRANGER****APPLICANT/DEFENDANT**

*Neutral citation: Olenga v Spranger (I 3826/2011) [2015] NAHCMD 87 (15 April 2015)*

**CORAM: MASUKU, AJ****Heard: 1 April 2015****Delivered: 15 April 2015**

**Flynote:** This is an application for payment of costs for management conferences attended by the defendant as a result of the plaintiff's failure to comply with the court's management order. The court held that the management hearings were as a result of

the plaintiff not complying with a court order and there is no reason why the plaintiff should not be ordered to pay costs of the same on the ordinary scale.

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## JUDGMENT

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**MASUKU, AJ.,**

[1] This is an interlocutory application for an order calling upon the plaintiff/respondent, above to pay costs attendant upon case management hearings held on 21 May and 21 November 2014, respectively. The relief sought is couched in the following terms<sup>1</sup>:

1. 'That the plaintiff be ordered to pay the wasted costs of the Court Connected Mediation held on 21 November 2014.
2. That the Plaintiff be ordered to pay the wasted costs in respect of the wasted costs of the Case Management Hearing held on 21 May 2013 and 20 June 2013.
3. That the Plaintiff be ordered to pay the costs of this application.'

I must, however, hasten to mention at this nascent stage that the costs claimed under prayer 1 above are no longer in contention and reference to them is not made in this judgment.

[2] The application is effectively not opposed as no opposing affidavit was filed by the plaintiff/respondent. This is so notwithstanding that a notice to oppose the application had been filed by the plaintiff/respondent<sup>2</sup>.

[3] I propose to set the matter in proper perspective by first outlining the facts giving rise to the application as can be gleaned from the papers filed of record. For present purposes, I propose to refer to the parties as they appear in the main proceedings. I

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<sup>1</sup> See Notice of Motion dated 15 December 2014.

<sup>2</sup> See Notice dated 23 January 2015..

shall, for ease of reference, refer to the plaintiff/respondent as the plaintiff and to the defendant/applicant as the defendant.

[4] The plaintiff sued out a summons from the office of the Registrar of the High Court<sup>3</sup>, claiming an amount of US\$ 850,000.00, interest thereon and costs. The amount is allegedly owing on account of an oral agreement between the parties in terms of which certain amounts were to be kept by the defendant in trust but which the defendant allegedly did not pay over when required. The claim, it must be said is defended by the defendant. I need not traverse the averrals contained in the pleadings for present purposes.

[5] The matter was, at some stage referred to court connected mediation. On 21 November 2014, the parties were due to appear before a mediator at SADC Tribunal Building, Advocate A.W. Corbett. It is a matter of record that the defendant and his legal representative attended the hearing but the plaintiff defaulted. At paragraph 4 of the present application, the defendant deposes that after the failure to attend the said hearing, the plaintiff filed an application for condonation and tendered costs occasioned by his failure to attend the mediation. It is the costs associated with that hearing that the defendant claims in these proceedings. Is he entitled to them, particularly in view of the plaintiff's tender to pay same?

[6] It is well to record that in terms of the mediation referral order dated 30 September 2014, both parties were ordered to attend the mediation conference at the SADC Tribunal on 21 November 2014 and the parties were further ordered to be personally present thereat. That the plaintiff did not attend as ordered, is not just plain from the uncontested defendant's affidavit, but it is also confirmed by the report of the Mediator, Advocate Corbett. The report is dated 24 November 2014 and indicates at paragraph 2, 'The plaintiff did not attend the mediation, apparently because he had taken ill. No documentary proof was furnished in regard to his illness or unavailability to

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<sup>3</sup> See particulars of Claim dated 9 December 2011.

attend the mediation.’ As a result of the plaintiff’s non-appearance, the mediator recorded that a settlement agreement could not be concluded in the matter.

[7] In view of the affidavit filed of record and which I must emphasise once again, is not controverted, the defendant attended the arbitration hearing and for that purpose it is claimed, he travelled from Swakopmund and incurred costs in so doing. The defendant states further that had the plaintiff indicated any difficulties he encountered in attending the hearing, the defendant would not have made the journey. In this regard, it is clear that no information was furnished to the defendant and the plaintiff behaved as if all was normal, causing manifold inconveniences to both the arbitrator and to the defendant.

[8] In an answering affidavit dated 26 November 2014, dealing with an unrelated matter but one which touches on the events in issue, the plaintiff admitted that he failed to attend the mediation and subsequent trial. At paragraph 16 of same, he acknowledged that the defendant incurred costs of travelling from Swakopmund and ought to be compensated therefor in costs. He states earlier at paragraph 4 of the same affidavit that his attorneys of record did not have instructions at the relevant time to make a tender for wasted costs.

[9] From the foregoing, two things are clear. First, that the application for payment of the wasted costs is not opposed as no opposing affidavits have been filed as indicated earlier. Furthermore, from the contents of the immediately preceding paragraph, it is an ineluctable fact that the plaintiff acknowledged on oath that the defendant was entitled to wasted costs of the days in issue and actually tendered same under oath. He has not and cannot be allowed to approbate and reprobate at the same time. He has continually sung this song, as it were, with one voice, namely, the defendant is entitled to be granted the costs which were incurred as a result of the plaintiff’s failure to attend hearings ordered by the court. He claims that he was unwell but for present purposes, he is not denying his liability to pay same.

[10] The issue of whether the plaintiff was liable to pay the costs served before court, particularly on 21 May and 21 June 2014 on which days the court stood the determination of these. On these days, the court ordered<sup>4</sup> the plaintiff among other things to comply with certain management orders it had issued. It is clear in my view that the costs for the management hearings as stated above, resulted from the plaintiff's non-appearance as earlier stated. For instance, in the order dated 21 May 2013, the court postponed the matter to 23 July 2013 'to afford the plaintiff a further opportunity to comply with the case management order issued on 5 March 2013'. The court further ordered the 'wasted costs of today's hearing are to stand over for determination'. A similar situation occurred on 21 June 2013 where the court postponed the matter to 24 September 2013 to enable the plaintiff to again comply with the case management order issued on 5 March 2013. The determination of the costs for the hearing that day were again stood over.

[11] It therefore becomes clear to me that the costs for the management conferences for both days resulted from the plaintiff's failure to comply with the management order issued on 5 March 2013. It would appear that the court, in fairness to the plaintiff, bent over backwards, on two occasions to enable the plaintiff to comply with the said order. What cannot be gainsaid is that the defendant incurred costs for appearing on both dates when the plaintiff had failed to comply with the court order dated 5 March as aforesaid. In the premises, I am of the view that there is no reason in law, logic or common sense why the plaintiff should not be ordered to bear costs for both these days as both postponements were granted as a direct result of him not complying with a court order.

[12] The learned author A.C. Cilliers<sup>5</sup>, states that the purpose of an award of costs is the following:

'. . . costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either

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<sup>4</sup> See annexures 'D1' and 'D2' to the Notice of Application.

<sup>5</sup> Law of Costs, Lexis Nexis, 1997 at page 1-4.

to initiate or defend litigation as the case may be. Owing to the necessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based.'

It will be clear that the quotation above refers principally to the award of costs at the end of the litigation but it is my considered view that the principles enunciated above also apply to matters such as the present, where the defendant, in this case has been put out of pocket and has had to attend management hearings which had to be postponed as a result of the plaintiff not adhering to court orders.

[13] In the premises, I am of the view that the defendant has been put out of pocket in attending the management hearings which were postponed to enable compliance with the court order by the plaintiff. The defendant has eminently made out a case for the plaintiff to bear the costs of the management hearings dated 21 May and 20 June 2013. He has had to make application for the grant of the above orders and he is in my view entitled to cost of this application as well. Both sets of costs are ordered to be granted on the ordinary scale as no application has been made for the grant of same on a punitive scale.

[14] The foregoing constitute the reasons why on 1 April 2015, I granted the order in terms of prayers 2 and 3 of the Notice of Motion dated 15 December 2014.

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TS Masuku, AJ

APPEARANCES

RESPONDENT/PLAINTIFF: P Swanepoel  
Instructed by Phillip Swanepoel Legal Practitioners

APPLICANT/DEFENDANT: Non appearance