REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO. I 3557/2014

In the matter between:

VLADIMIR MALENKO **APPLICANT/PLAINTIFF**

And

ERNEST ARTHUR COETZEE **RESPONDENT/DEFENDANT**

Neutral citation: *Malenko v Coetzee (I 3557/2013) [2016] NAHCMD 88 (1 April 2016)*

CORAM: MASUKU J

Heard: 16 March 2016

Delivered: 1 April 2016

Flynote: **RULES OF COURT** – Rules 38 (2) in relation to costs of arbitration considered. Rule 32 (9) in relation to interlocutory matters also discussed.

Summary: The applicant filed an application for payment of costs occasioned by the respondent's failure to attend mediation. *Held* – that costs for mediation are to be costs in the cause and are not to be claimed as the matter progresses unless the parties otherwise agree. *Held further* – that the said application being interlocutory in nature, the applicant should in any event have complied with the mandatory provisions of rule 32 (9) and (10) which calls for the attempt to amicably resolve interlocutory proceedings. The application for costs at this stage dismissed with costs.

ORDER

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1. The application for payment of costs for mediation by the applicant at this stage is refused.
2. The costs of this application are ordered to follow the event.

JUDGMENT

MASUKU J.

[1] This is an application by the applicant for the payment of costs allegedly incurred by him as a result of the above-named respondent/defendant failing to attend arbitration meetings called in an attempt to settle this matter in court connected mediation initiatives.

[2] It is important to briefly outline the events that give rise to the issue for determination and I do so presently. The applicant sued the defendant for the payment

of an outstanding balance in the amount of N$ 1 593 000.00, it being alleged that the parties entered into an oral agreement between August 2009 and January 2010 in terms whereof the applicant loaned anD advanced to the respondent the amount of money mentioned immediately above. It is alleged further that notwithstanding demand, the respondent has failed and or neglected to make good the indebtedness.

[3] For his part, the respondent defended the matter resulting in the applicant filing an application for summary judgment which he later withdrew. The matter was referred by this court to court connected mediation by mediation referral order dated 1 June 2015 by Mr. Justice Geier. The applicant contends that two mediation meetings were scheduled by the mediator which the respondent failed to attend. He contends further that he is ordinarily resident in Russia and had to put up travelling and ancillary expenses to enable him to attend the mediation sessions only for the respondent not to attend same. He therefore asks this court to order the respondent to pay same and costs for the application.

[4] The respondent opposes the application on various grounds that I may advert to below. What is not in issue is that the respondent did in fact fail to attend both sessions. The first one, he contends was due to an operation that he underwent. The other, he claims, he was unable to attend due to business commitments that rendered him unable to attend. In respect of this session, he contends that he was in Henties Bay and requested his legal practitioner to reschedule same without success. Lastly, he denies that he flagrantly disregarded court orders to attend the mediation sessions. He states further that his efforts to reschedule the mediation to the following week was spurned by the applicant who was present in the country. He contends that the applicant is in equal guilt in this regard.

[5] I am of the view that it is necessary to cut the matter to the chase and not to apply time and effort to some of the technical issues, some of which may be of moment that the respondent has pertinently raised in his papers and heads of argument. In

particular, the respondent has relied on the provisions of rule 38 (2), of this court's rules, which provide the following:

'The costs of any ADR procedure referred to in subrule (1) are costs in the cause, unless the parties agree otherwise.'

[6] The above provision appears to be couched in peremptory terms and the parties, it would seem to me should respect that position. Another implicit meaning of the said subrule is that if costs should be claimed at any stage and not at the conclusion of the case, then the parties should agree for such costs to be payable before that time. It is clear that in the instant case no reason is advanced as to why costs of the failed application should be claimed at this stage in the face of the above provision.

[7] Although the subrule does not so require in explicit terms, I am of the view that for the court to entertain such an application at this stage, rather than dealing with same in the cause, the applicant for such costs would have to make a special case, citing exceptional circumstances as to why the costs should be applied for at this stage. A reading of the applicant's affidavit is lacking in this regard and appears to treat this application as a normal one notwithstanding the provisions of rule 38 (2).

[8] This leads me to another issue that the respondent has raised, namely the no-compliance by the applicant with the peremptory provisions of rule 32 (9). This provision deals with interlocutory proceedings. The relevant subrule provides the following:

'In relation to any proceedings referred to in this rule, a party wishing to bring such proceedings must, before launching it, seek an amicable resolution thereof with the other party or parties and only after the parties have failed to resolve their dispute may such proceeding be delivered for adjudication by the court.'

[9] It is clear in this case that the above provision was never complied with as there is also no certificate in terms of rule 32 (10). It cannot be seriously argued that the application for costs of mediation claimed in this case are interlocutory in nature and the

rule should have been followed to the letter. In this regard, it is worth pointing out that the said provisions are peremptory in nature – See *Mukata v Appolus*[1] and *Standard Bank Namibia Limited v Gertze*[2]. This subrule, it seems to me, seeks to limit needless litigation and the unnecessary the running up of costs by initiating at times fruitless causes when some agreement may be reached by the parties without the need to approach the court.

[10] The provisions of rule 38 (2) become very pertinent in this regard because they also make reference to the parties having to agree if the costs of mediation are to be claimed in the course of the proceedings and not at the end. It seems to me that these two subrules form a tapestry, requiring parties who seek to claim costs of mediation before the conclusion of the matter to agree to not to have same wait till the conclusion of the entire case. It follows that if they do not agree, as application for the granting of these costs is in the nature of interlocutory proceedings, an amicable resolution must first be explored before the court can be approached. In this regard, it seems to me that the attempts to resolve the issue must be placed before court in terms of rule 32 (10).

[11] Having regard to the points of law raised by the respondent as captured above, I do not find it necessary to deal with the issues raised by the respondent in the merits.

[12] In the premises, it appears that the points of law adverted to above and which were raised by the respondent are good and should result in the application being dismissed. This is not to say that the door is forever closed on the applicant applying for these costs. He should, in compliance with rule 38 (2) do so at the conclusion of the case and not at this juncture, unless there is an agreement in terms of the said subrule.

[13] I therefore issue the following order:

1. The application for payment of costs for mediation by the applicant at this stage is refused.

[1](I 3396/2014) [2015] NAHCMD 54 (12 March 2015).
[2] (I 3614/2013) [2015] NAHCMD 77 (31March 2015).

2. The costs of this application are ordered to follow the event.

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T.S. Masuku

Judge

APPEARANCES

PLAINTIFF/RESPONDENT:	L. Du Pisani
	Du Pisani Legal Practitioners
DEFENDANT/APPLICANT:	Ms Matjila
	Instructed by Isaacks & Associates