

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1823/2016

In the matter between:

**WOKER FREIGHT SERVICES (PROPRIETARY) LIMITED**      **PLAINTIFF**

and

**TRANSWIDE FREIGHT CC**      **FIRST DEFENDANT**  
**EDEN INTERNATIONAL IMPORT AND EXPORT CC**      **SECOND DEFENDANT**  
**NAMIBIA BUNKER SERVICES (PROPRIETARY) LIMITED**      **THIRD DEFENDANT**

**Neutral citation:**    *Worker Freight Services (Pty) Limited v Transwide Freight CC* (I 1823/2016) [2018] NAHCMD 384 (29 November 2018)

**Coram:**      Unengu, AJ  
**Heard:**      2 October 2018  
**Delivered:**    29 November 2018

**Flynote:** Civil Practice – Oral agreement enforcement – Parties and matter referred to mediation during case management proceedings – Mediator conducting mediation similar to arbitration proceedings – Process not in accordance with the Rules of Court – Court held – Mediator defied Rules of court and failed to state in the report whether the mediation was successful or unsuccessful. Further, court refused to declare that the oral agreement was concluded by the parties – furthermore, the court refused to order the power of attorney to be stamped with a revenue stamp to validate same – Claim dismissed after special was upheld.

**Summary:** The matter and the parties to the suit were referred to mediation by the case managing judge in terms of rule 38 read with the provisions of rule 39 of the High Court Rules. During the mediation, however, the mediator appointed by the court to mediate in the dispute, conducted the mediation similar to arbitration proceedings by allowing the mediation proceedings to continue in absence of a representative of a party to mediation and declaring the third defendant not liable and excused it from the proceedings. That power the mediator does not have. His duty was only to assist the parties to resolve their dispute not to act as if he were their legal representative. That being the case, the court *held* that the mediator defied rules and practice directives regulating mediation proceedings. *Held* further that due to the non-compliance with the rules, the report filed by the mediator caused confusion because it did not state whether the mediation was successful or not successful. As a result, therefore, court *held* that no oral agreement was concluded by the parties and dismissed the claim with costs.

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## ORDER

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The special plea raised by the first defendant is upheld and the claim dismissed with costs.

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## JUDGMENT

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UNENGU AJ:

### Background

[1] In this matter, the plaintiff has issued combined summons against the first, second and third defendant seeking enforcement of an alleged oral agreement ostensibly concluded between it and the defendants during the mediation proceedings before a court connected mediator. Even though, the second defendant and third defendant are cited as parties to the matter, it appears though that the first defendant is the only party against whom the plaintiff is seeking an order in the terms of an order pleaded in paragraph 6 of the particulars of claim as being binding, an order directing the defendant(s) to comply with the terms of the said agreement and costs of suit against the first defendant and any such other defendants electing to defend the action.

[2] The first defendant is the only defendant who refused to sign the alleged agreement contained in the mediation report and annexure to the particulars of claim of this matter as annexure "B". The second defendant co-signed the mediator's report together with the plaintiff's representative, meanwhile the third defendant was found not to be liable to pay the plaintiff any more by the mediator and was excused from the mediation proceedings.

[3] As already pointed out before, the cause of the dispute is the refusal of the first defendant to agree with the terms of an alleged oral agreement mirrored in annexure "B" to the mediator's report. The second defendant agreed and signed annexure "B" with the plaintiff while the third defendant was excused from attending the mediation proceedings by the mediator. Apparently the third defendant was not implicated during the preliminary negotiations between the parties.

[4] In its plea, the first defendant raised a point *in limine* in the terms here below:

## The pleadings

1.3 Annexure B to the particulars of claim was presided by the Mediator, duly appointed by the Honorable High Court, after the matter was referred to Court Connected Mediation in terms of the rules of the High Court.

1.4 In terms of rule 39(5) of the Rules of the High Court of Namibia;

(5) Only a person with full settlement authority **must** attend a settlement conference convened by the parties within a time limit as directed by the managing judge or the court, but this sub rule does not apply where the Government is a party or where the managing judge or the court issue a contrary order.

1.5 Rule 39(6) states that; For purposes of sub rule (5) a party that is –

(6)(b) a juristic person, **must** be represented by a person duly authorized in writing by that juristic person, **other than the legal practitioner of record;**

1.6 The court did not issue a contrary order as per rule 39(5).

1.7 Consequently, the mediation proceedings so constituted in contravention of the very rules of the court could never produce binding consequences for the first defendant who was not duly represented in such proceedings and who did not sign the alleged agreement which the plaintiff (and the remaining parties thereto) wish to enforce against the first defendant.

1.8. The alleged agreement is therefore a nullity, and incapable of forming nor sustaining a cause of action. No legal consequences could arise therefrom.

1.9. In these premises the first defendant prays that the special plea be upheld and the plaintiff's claim be dismissed.'

[5] On the merits, the first defendant, amongst others pleaded that Mr Murorua could not in law represent the first defendant, therefore, the mediator was not supposed to allow him to represent the first defendant in the absence of Mr Moodley. Furthermore, that because of the nature and creation of mediation proceedings and mediation itself which occurred in the temporally heated litigation process, the parties to such proceedings could not be forced to sign agreements they do not agree with.

[6] Further, it is common cause that the matter went through all judicial case management processes and the pre-trial conference took place on 24 May 2017 when the pre-trial report was adopted and made an order of court. It is necessary to quote from the pre-trial order all issues of fact and of law the parties wanted to be resolved during the trial.

*Pre-trial order*

[7] However, I will concentrate on issues relevant to the resolution of the dispute at hand only. I shall leave out issues relevant to the main case.

Issues of fact to be resolved during the trial

- 1.1 Whether Mr Murorua, the first defendant's legal practitioner, could be allowed to represent the first defendant at the mediation proceedings in the absence of the representative of the first defendant.
- 1.2 Whether the mediation proceedings were properly constituted.
- 1.3 Whether Mr Murorua was duly authorised to represent the first defendant at the mediation proceedings and whether Mr Murorua has full settlement authority to represent the first defendant for all intents and purposes.
- 1.4 Whether Mr Murorua agreed to the alleged terms of settlement.
- 1.5 Whether Mr Murorua's refusal to sign the written settlement agreement was on account of disputing the terms or for other reasons and the other reasons, if so.
- 1.6 Whether the presence of the representative of the first defendant (Mr Pooven Moodley) at the start of the mediation proceedings (which continued over a period of 2 non-consecutive days), constitutes compliance with rule 39(6) as

read with rule 39(5) notwithstanding that the representative of first defendant subsequently became absent from the proceedings.

- 1.7 Whether the first defendant waived its right to be represented by its representative (Mr Moodley) during the second (continued) session of the mediation proceedings on 24 August 2015.
- 1.8 Whether the parties, including the mediator, waived compliance with rule 39(6)(a) as read with 39(5) when they all agreed, firstly, that the representative of the first defendant could be excused from the mediation proceedings on 24 August 2015 and secondly, that the mediation proceedings could proceed in his absence.
- 1.9 Whether on 24 August 2015 and at Windhoek, the plaintiff and first, second and third defendant concluded an oral agreement (subsequently recorded in writing, comprising annexure "B" hereto), the relevant material express, alternatively tacit, alternatively implied (and invisible) terms of which included the following (the plaintiff, first, second and third defendant in the following sub-paragraphs being referred to as at in the presently stayed High Court proceedings pleaded above).

[8] I will also quote issues of law to be resolved during the trial as per the pre-trial order.

'2. All issues of law to be resolved during trial:

2.1 Whether the provisions of Rule 39(5) and 39(7), are a legal bar for plaintiff's reliance on the alleged settlement arising out of the court connected mediation in light of the fact that the representative of the first defendant became absent during the mediation proceedings and at the time that the terms of the settlement agreement were discussed.

2.2 Whether the requirement in terms of rule 39(6)(b) as read with practice direction 19(2), implies/allows or can be interpreted to imply/allow that the representative of a juristic person other than the legal practitioner of record, need not be present throughout mediation proceedings in order to the requirement of rule 39(b) as

read with rule 39(5) to be fulfilled, provided that said representative is present at the start of mediation proceedings.

2.3 If it is found that Mr Murorua in fact agreed to the settlement terms on behalf of first defendant, whether the settlement agreement is binding on the first defendant.'

[9] Issues of facts not in dispute are listed in paragraph 3 of the pre-trial order which I do not intend to reproduce in the judgment because the list is lengthy.

### Evidence

[10] The plaintiff was represented by Mr Van Vuuren and the first defendant by Mr Ntinda. Mr Van Vuuren called two witnesses to testify for the plaintiff. They were Messrs Christiaan Henrich Woker and Marthinus Hermanus Mans while Mr Pooven Moodley is the only witness who testified for the first defendant. All three witnesses read into record prepared written statements which formed their evidence-in-chief.

[11] In his evidence Mr Woker said that Mr Moodley, the representative of the first defendant Transwide Freight CC asked the mediator to be excused at the commencement of the second session of the mediation due to ill health. According to Mr Woker, Mr Pooven Moodley in the presence of all present at the mediation confirmed that Mr Murorua was duly authorised with settlement authority to represent Transwide Freight CC.

[12] This evidence was corroborated by the testimony Mr Mans. However, they contradicted each other when Mr Woker testified that the mediator undertook to record in writing the terms of the agreement while Mr Mans testified that the mediator recorded (in writing) the terms of the verbal agreement contained in annexure "B" to the particulars of claim at the conclusion of the mediation.

[13] Mr Woker further testified that it was not easy for them to follow how the agreement between the second and the first defendant was set out because there were still some outstanding issues to be dealt with between the second and first defendant with regards to legal discussions about prescription of the matter. Mr Woker further testified that the mediator, Mr Oosthuizen made some notes of the

discussions which he summarised and presented to the parties to confirm and asked each of them whether what was summarised by him was what they have agreed.

[14] Furthermore, it is Mr Woker's testimony that the second defendant abandoned its claim for contribution against the third defendant, Banker Services (Pty) Ltd on certain terms and the third defendant was thereafter excused from further attending the mediation proceedings. The reason why the third defendant was excused from taking part in the mediation by the mediator and on what legal basis it was done, is not clear. In my view, it was the duty of the managing judge to discharge the claim against the third defendant and excused it from litigation following the terms and conditions of the settlement agreement concluded by the parties, if there was any settlement agreement filed. In the present matter, there was none filed.

[15] Furthermore, Mr Woker testified that the parties adjourned from time to time and deliberated separately from each other to reach agreement. Surely, the first defendant was denied this right due to the fact that only Mr Murorua, its legal practitioner was present as Mr Moodley was not present. It is also common cause that Mr Moodley was not aware about the terms and conditions of the alleged oral agreement concluded, therefore, was unable to testify about the oral agreement.

[16] Mr Woker further testified that many of the settlement figures or amounts were suggested to the parties by Mr Oosthuizen in order to reach an agreement. According to him the mediator made proposals to the parties and advised them on whether they would be prepared to cut their claims by half or waive the interest. Mr Woker testified in detail what transpired in settlement negotiations which is in my view contrary to the principles of settlement negotiations prohibiting disclosure of such negotiations on the basis of privilege. No evidence waiving that right was placed before court.

[17] Written settlement proposals exchanged between the parties<sup>1</sup> and anything discussed during a settlement conference are without prejudice, therefore, may not be used by any party in the proceedings to which the letters and the conference relate or any other proceedings. (See also Registrar's Notes issued in terms of P D 65 p 11 para 7)

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<sup>1</sup> Rule 39(9) of the High Court Rules.



[18] The mediator is a neutral facilitator who will assist the parties to reach their own settlement and will not make decisions about right or wrong or dictate to parties what they should do as it happened in this mediation. He or she must not act as a legal practitioner to offer or provide legal advice as parties are represented by their own legal practitioners in the mediation settlement negotiations. (See Registrar's notes above)

[19] As pointed out above, the parties and the matter were referred to mediation by a managing judge<sup>2</sup> who determined the terms of reference within which the mediator was expected to operate and the parties to fulfil their obligations referred to in rule 39. Instead, the mediator converted the mediation proceedings into arbitration proceedings making final decisions by excusing the third defendant from taking part in the mediation proceedings – thereby defying, not only the provisions of Rules 38 and 39, but also a court order which referred the parties and the matter to the alternative dispute resolution procedure.

[20] It is a right of a party to withdraw from mediation after he or she has discussed such decision in the presence of the other parties and the mediator.

[21] I am not wrong, therefore, to conclude from the evidence presented before me in the trial that the mediator converted the mediation into arbitration proceedings. That is more clearer from his decisions to excuse Mr Moodley from the proceedings and proceeded with mediation in his absence. The correct procedure was to postpone the proceedings to a date when Mr Moodley was able again to attend.

[22] It has been argued and contended on behalf of the plaintiff by Mr Van Vuuren that Mr Moodley asked self to be excused from mediation, therefore, waived his right to be present. I disagree. Mr Moodley did not convey to the mediator in absolute terms or otherwise that he was waiving or abandoning his right to represent his company in the mediation process.

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<sup>2</sup> Rule 38.

[23] In *Grobberlaar & Another v Municipality of Walvis Bay*<sup>3</sup> Maritz, AJ (as he then was) said the following when dealing with the defence of waiver:

‘To succeed in such a defence the respondents had to allege and prove that when the alleged waiver took place the first applicant had full knowledge of the right which he decided to abandon; that the first applicant either expressly or by necessary implication abandoned that right and he conveyed his discussion to that effect to the first respondent. See *Netlon and Another v Pacnet (Pty) Ltd*<sup>4</sup> at 873; *Hepner v Roodepoort – Maraisburg Town Council* (Supra); *Traub v Barclays National Bank Ltd 1938 (3) SA 619 (A)* at 634.’

[24] The factual presumption is that a person is not likely deemed to have waived his or her right; the onus is on the plaintiff to prove on a balance of probabilities the first defendant’s alleged waiver<sup>5</sup>. The plaintiff, with the evidence presented, failed to prove the waiver by Mr Moodley to represent his company.

[25] That being the case, I reject the allegation that Mr Moodley waived his right to represent his company during the second session of the mediation.

[26] The second reason why I am of the view that the mediation proceedings were converted into arbitration proceedings is that he took a final decision to find that the third defendant was not liable to the second defendant’s claim and excused it from further taking part in mediation because there was no evidence implicating the third defendant.

[27] As the mediator, his function was to assist all parties referred to him by the court to find a solution to their dispute; thereafter to report to the managing judge the outcome of the mediation by indicating successful or that the mediation had failed<sup>6</sup> - not to adjudicate the matter and make a finding as to whether or not a party is liable and discharge it from the proceedings.

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<sup>3</sup> 1997 NR 259 (HC).

<sup>4</sup> 1977 (3) SA 840 (A).

<sup>5</sup> *Hepner v Rooderort-Marienburg Town Council* 1962 (4)(SA) 772; *Borstlap v Spangenburg en Andere* 1974 (3) SA 695 (A).

<sup>6</sup> Rule 38(5).

[28] In that regard, it is my view, that nothing but a fragrant disregard of the rules of this court and the practice directives has occurred, thereby causing a confusion with regard to the end result of the mediation.

[29] I agree with the principles of law set out in paragraph 1 of the plaintiff's written submissions under the heading introduction and background. There are no qualms about the correctness of the law stated therein. However, in this matter, the main issues to be resolved first are those issues contained in paragraphs 1.2, 1.5 and 1.6 of the pre-trial order namely whether the mediation proceedings were properly constituted; whether the presence of the representative of the first defendant (Mr Moodley) at the start of the mediation proceedings, constituted compliance with rule 39(6) as read with rule 39(5) notwithstanding that the representative of the first defendant subsequently became absent from the proceedings. Furthermore, whether the first defendant waived its right to be represented by its representative (Mr Moodley) during the second (continued) session of the mediation proceedings on 24 August 2015 and whether the parties concluded a verbal agreement between them.

[30] The answer to the questions above is in the negative. The reasons for that have already been stated above in the judgment. The mediation proceedings were never properly constituted without Mr Moodley in attendance and the absence of the third defendant. Without these two parties, the remaining parties could not constitute a proper mediation proceedings to conclude a valid oral agreement. As pointed out above, the alleged oral agreement was concluded by the plaintiff and the second defendant alone in the mediation proceedings conducted by the mediator contrary to the reference order of the managing judge and the rules 38 and 39.

[31] Further, the plaintiff in its written heads of argument submits, amongst others, that the Rules constitute subordinate legislation as the Judge-President cannot make rules that change the common law; limit existing rights including rights created by agreements between parties; create and impose an excessive burden upon persons affected by the rules; limit the substantive law applicable to agency and have a retrospective effect. I agree.

[32] But being subordinate legislation does not mean Rules of court should not be observed by the litigants. In *Indigo Sky Gem (Pty) Ltd v Johnston*<sup>7</sup>, Gibson, J struck a matter from the roll because heads of argument were not filed by counsel timeously and said:

‘The crux of the matter is that there appears to have been a flagrant breach of the Rules of court. Given that course of conduct, my attitude is that the court can only ignore such attitude at its own peril and to own prejudice in the running and administration of the court’s business. Thus my view is that such failure cannot be overlooked in the circumstances of this case because to do that would encourage laxity in the preparation of the court pleadings. If rules are only to be followed when a legal practitioner sees it fit to do so, then the Rules may well be torn up.’

[33] Similarly, before the Indigo matter above, Levy;J in the matter of *Swanepoel v Marais and Others*<sup>8</sup> with reference to other cases, has the following to say about a failure to observe the Rules of Court:

‘The Rules of Court are an important element in the machinery of justice. Failure to observe such Rules can lead not only to the inconvenience of other litigants whose cases are delayed thereby. It is essential for the proper application of the law that the Rules of Court, which have been designed for that purpose, be complied. Practice and procedure in the courts can be completely dislocated by non-compliance.’

[34] Therefore, the Rules of Court, subordinate legislation they may be, are an important element in the machinery of justice, designed for the purpose of the application of the law which can only be ignored by the court at its peril and its own prejudice in the running and administration of the court’s business, which is why the mediator by not following the provisions of rules 38 an 39 completely dislocated the practice and procedure for mediation proceedings.

[35] Consequently, and applying the principles of law above to the facts of this matter, it is my view that the special plea and the defence raised against the validity of the mediation proceedings and its constitution, should succeed with costs.

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<sup>7</sup> 1997 NR 239 (HC).

<sup>8</sup> 1992 NR 1.

[36] The court, during oral submissions by counsel for the plaintiff, *mero motu* raised the validity of the power of attorney which authorized Mr Murorua to represent the first defendant and its representative in the mediation because it did not bear a revenue stamp as required by the Stamp Duties Act<sup>9</sup>

[37] As a result, I requested both counsel to also address me on why such power of attorney document should not be regarded as invalid, therefore, not admissible evidence for purpose of the present proceedings.

[38] Both counsel obliged and filed supplementary written heads of argument for consideration by the court. It is apparent from the supplementary written heads of both counsel and the authorities cited therein that counsel are in agreement that the document may be allowed to be used as evidence only with the permission of the court, subject to the payment of any penalty incurred in respect of such document under section 9(1) of the Act, and to have the document duly stamped before it may be admitted to be produced or given in evidence or made available. However, before the court had granted such permission, the document not stamped, like the one in issue, is invalid and such document should not have been made available for whatever purpose. It is peremptory that unstamped power of attorney document must not be made available for any purpose including as evidence in a civil trial unless permission is sought and obtained from the court to validate it.

[39] Section 12 of the Stamp Duty Act<sup>10</sup> provides as follows:

'Save as is otherwise provided in any law, no instrument which is required to be stamped under this Act shall be made available for any purpose whatsoever, unless it is duly stamped, and in particular shall not be produced or given in evidence or be made available in any court of law, except –

- (a) in criminal proceedings; or
- (b) in any proceedings by or on behalf of the State for the recovery of any duty on the instrument or of any penalty alleged to have been incurred under this Act in respect of such instrument:

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<sup>9</sup> Act 15 of 1993 Schedule 1 para 14.

<sup>10</sup> Stamp Duties Act, 1993 (Act 15 of 1993).

Provided that the court before which any such instrument is so produced, given or made available may permit or direct that, subject to the payment of any penalty incurred in respect of such instrument under section 9(1), the instrument be stamped in accordance with the provisions of this Act and upon the instrument being duly stamped may admit it to be produced or given in evidence or made available.' (emphasis added)

[40] Similarly, s 7 of the Act provides for who should be liable to stamp the document (power attorney). In this matter, the person who executed the power of attorney, namely the first defendant<sup>11</sup>. However, the first defendant did not produce the power of attorney to court but the plaintiff.

[41] The circumstances of this matter, in my view, does not justify an order from this court to have the power of attorney document stamped with penalties paid by either the first defendant or the plaintiff. It will serve no purpose because the court upheld the point *in limine* or the special plea raised by the first defendant.

[42] Even if I am wrong in upholding the special plea, I still hold the view that the plaintiff on merits failed to prove on a balance of probability that an oral agreement was concluded and by whom during the mediation proceedings. That conclusion is vindicated by the mediator's report which did not indicate that the mediation proceedings were successful as parties orally settled the matter. In addition, the versions of the plaintiff's witnesses, Messrs Woker and Mans on the issue of whether an oral agreement was concluded are at variance. One said that the mediator made notes of the terms and conditions of the oral agreement while the other testified that the mediator undertook to record the terms of the agreement in writing. Mr Mans in para 7 of his witness statement states that at the close of the second session the parties present at the mediation concluded a verbal agreement of settlement of which terms were recorded in writing by the mediator. Two different versions from parties to the alleged oral agreement. Both versions cannot be probably the truth of what happened in the mediation.

[43] Consequently and for reasons re-iterated above in the judgment, I make the following order:

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<sup>11</sup> S 7(1)(m).

The special plea raised by the first defendant is upheld and the claim dismissed with costs.

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E P UNENGU  
Acting Judge

## APPEARANCES

APPLICANT: A Van Vuuren  
instructed by Francois Erasmus and Partners, Windhoek

DEFENDANT 1: M Ntinda  
of Sisa Namandje & Co Inc., Windhoek

DEFENDANT 2: K Klazen  
of Ellis Shilengudwa Inc., Windhoek

DEFENDANT 3: A Delpport  
of Delpport Attorneys, Windhoek