



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT ON APPLICATION TO RECALL PLAINTIFF'S WITNESS AND TO CALL
FURTHER EVIDENCE**

I 160/2015

In the matter between:

SWAKOPMUND SUPERSPAR

APPLICANT/DEFENDANT

and

SOLTEC CC

RESPONDENT/DEFENDANT

*Neutral citation: Soltec CC v Swakopmund Super Spar (I 160/2015) [2017] NAHCMD
115 (18 April 2017)*

CORAM: MASUKU J

Heard: 15 March 2017

Delivered: 18 April 2017

Flynote: **LAW OF EVIDENCE** – Application for the re-opening of party's case and the recall of a witness – considerations taken into account in making the decision –

cross-examination, its objects and the need to put one's case fully to the opposition. **LEGAL ETHICS** – the inadvisability of legal practitioners deposing to affidavits in matters in which they appear – and that if necessary, this must be unusual and for compelling reasons that are disclosed - lawyers to use temperate language in affidavits and submissions filed in court

Summary: The applicant was sued by the respondent for payment of N\$ 104 000 from an oral agreement for supply of material and services. The respondent called its only witness and during his evidence, it applied for an amendment of its particulars of claim by adding an alternative claim based on tacit terms. This application was not opposed and was accordingly granted by the court.

The respondent thereafter closed its case and the applicant unsuccessfully applied for absolution from the instance. When the matter was due to resume and the applicant to open its case, it applied for an order recalling the respondent's witness for purposes of putting certain questions to him and also calling a further witness to impeach the said witness's evidence.

Held – applications for the re-opening of a witness are not readily granted. Furthermore, the court noted that the application was unusual for the reason that it also sought to have the respondent's case re-opened and that compelling reasons for such course must be advanced in order to enable the court to exercise its discretion in favour of an applicant.

Held – that the applicant had taken an inordinately long time to file the application and failed to advance cogent reasons in the affidavits why the court should grant its application.

Held further – that the applicant was not taken by surprise as alleged, by the evidence belatedly sought to be impeached and that the applicant had not used due diligence to bring the evidence to light as it had always been available to be led. *Held further* that

the issue sought to be introduced should have been introduced in the cross-examination of the respondent's witness.

Held – that the application should be refused also for the reason that the applicant was seeking to belatedly prop up its case by calling a witness who would 'remove a stone from the shoe' of the applicant's case.

Held further – that it is inadvisable, except for unusual and stated reasons, for a legal practitioner of record to depose to an affidavit in matters of fact. This results in the said practitioner being conflicted between performing the duty to the court and that to the client. This becomes pronounced when the credibility of the said witness becomes challenged, resulting in unpalatable language, in some cases, being used by the said practitioner.

Held – that legal practitioners should ensure that the language used in court, whether in affidavits or submissions must be temperate and should not serve to impugn the dignity of the court and the other side.

The application was dismissed with costs.

ORDER

1. The application for condonation of the late filing of the answering affidavit by the respondent is hereby condoned.
2. There is no order as to costs in relation to the condonation application.
3. The applicant's application to recall the plaintiff's witness and incidental relief is dismissed with costs.
4. Such costs are consequent upon the instruction of one instructing counsel and one instructed counsel and are not subject to the provisions of Rule 32(11).

5. The matter is postponed to 27 April 2017 at 09h00, in chambers, for the setting of dates for continuation of the trial.

JUDGMENT

MASUKU J:

Introduction

[1] The question for determination in this Ruling is crisp. Can a defendant, who is called upon to open its case, following the dismissal of its application for absolution from the instance, successfully apply to have the plaintiff or its witness recalled before the defendant opens its case in its defence?

Appellations

[2] In the main case, the parties are the plaintiff (the respondent in this case) and the defendant (applicant *in casu*). For the sake of consistency, and in order to avoid confusion, I will refer to the parties in this application as they appear above, i.e. the applicant and the respondent, respectively.

Background

[3] The question for determination arises in the following circumstances: The respondent sued the defendant for payment of an amount of N\$ 104,086.82, interest on that amount, together with costs. This claim arose, according to the respondent, as a result of an oral agreement entered into between the parties for the supply and

installation by the respondent of an additional inverter combiner enclosure together with additional safety equipment for its Spar shop in Swakopmund.

[4] The trial commenced and the plaintiff led its sole witness Mr. Heinrich Steuber, who completed his evidence after lengthy cross-examination from Mr. Jones for the applicant. At the end of his evidence, the plaintiff closed its case culminating in the defendant making an application for absolution from the instance. This application, as stated earlier, was dismissed with costs and as the rules provide¹, the defendant was expected to start leading its evidence, particularly because the court had found it had a case to answer by dismissing its application for absolution from the instance.

[5] I must point out for the record that during the evidence of the plaintiff's sole witness, Ms. Campbell, for the respondent, made an oral application, which was not opposed, for the amendment of the respondent's particulars of claim. The effect of the amendment was to add the words 'tacit, in the further alternative' to para 3 of the particulars of claim.

[6] As a result of the amendment, which was granted as it went in unopposed, the said paragraph of the particulars of claim was to then read as follows:

'On or about January 2013 and at Swakopmund, the plaintiff, represented by Heinrich Steuber, and the defendant, represented by Mr. Du Preez, entered into an oral agreement, the material express, alternatively *tacit, in the further alternative* implied terms of the oral agreement were as follows. . .'

The italicized portion represents the nature and extent of the amendment referred to above.

[7] As indicated, instead of the applicant opening its case, it filed an application seeking the following relief:

‘ 1. Condoning, in as far as is necessary –

¹ Rule 99 (4) (b).

- 1.1. Any delay in the launching of this application.
- 1.2. Any delay in the filing of Mr. Du Preez senior's witness statement;
2. Granting the defendant leave to call Mr. Du Preez senior as a witness to testify when the defendant commences with its case.
3. Varying the pre-trial order so as to allow the defendant to file Mr. Du Preez senior's witness statement at a time and upon a date so directed by the managing judge.
4. Extending the time periods agreed to in the pre-trial order as contemplated in Rule 55 of the Rules, so as to allow for the filing of Mr. Du Preez senior's witness statement.
5. Granting the defendant leave to recall Mr. Heinrich Steuber in order to canvass (under cross-examination) Mr. Du Preez senior's proposed testimony (as it appears in his witness statement) with Mr. Steuber.
6. Costs of this application only in the event of it being opposed and that such costs –
 - 6.1 Include the costs of one instructing and one instructed counsel; and
 - 6.2 are not limited to the provisions of Rule 32 (11).'

[8] As earlier intimated, this application is opposed by the respondent. The main question, which may give way to, or dispose of the granting or the refusal of the orders sought, appears to me to be the question of the recall of Mr. Steuber, not by the party that called him as a witness, but at the behest of the applicant. Is such a situation tenable? If this issue is settled either way, it would seem to me, dealing with the other prayers sought will become clearer and easier.

Application to recall a witness

The parties' argument

[9] Applications for the recalling of a witness who has testified and been excused by the court are not unknown to the law. There may be a number circumstances in which the court, on application, may order a witness to be recalled. Mr. Jones started his

argument on a confessional note. He submitted that his application is rather unusual and he could not, despite a diligent search, find authority on all fours with his case.

[10] In his heads of argument, he helpfully referred the court to the learned author L.T.C. Harms,² where the author deals with the general principles applicable to an application to reopen a case in the following manner:

- (a) A party who has closed his case cannot reopen it to lead further evidence;
- (b) The court has a discretion to depart from the rule;
- (c) There is less likelihood of this discretion being exercised the longer the trial progresses and a stronger case will have to be made out therefor;
- (d) The party seeking to reopen must show that proper diligence was used to procure the evidence for the trial;
- (e) The party must show that the evidence was not available before the closing of his case or could not reasonably have been obtained, or if it was indeed available or obtained, he should advance an acceptable explanation why it was not adduced before the closing of the case;
- (f) If that party has been taken by surprise during the trial and for that reason did not endeavour to obtain or lead available evidence, he may be granted leave to reopen his case;
- (g) The proposed evidence must be material;
- (h) It is not required that that, if believed, it would be practically conclusive;
- (i) The evidence must not relate to a collateral issue;
- (j) The court must consider the prejudice to the opposing party, for example his inability to call a witness;
- (k) A case may be reopened at any stage before judgment; and
- (l) Delay is an important consideration, but is not necessarily fatal to an application to reopen a case.

² Service Issue 4-April 2010.

[11] Mr. Jones, in his usually thorough application, helpfully referred the court also to *Coetzee v Union Periodicals Ltd and Others*,³ where the court, in dealing with an application to reopen its case, expressed itself in the following terms:

'In cases where in the conduct of a case, as happened here, the witnesses for the one side are cross-examined on specific points which are going to be made by the other side, and those specific points are not definitely put to the witness, then in that case the court will allow the witness who have given evidence to be recalled in order to deal with the questions which have not been put to them and on which evidence has been led by the other side.'

[12] At p.40, the learned Judge, in *Coetzee*, continued to express himself as follows:

'As I say, it is only in very exceptional cases, where only one of the parties is taken by surprise, that the court will allow any further evidence, or evidence of a rebutting nature to be called. The person on whom the onus rests must discharge it and he cannot, after having closed his case, claim merely because the plaintiff's evidence has shaken his evidence, to be allowed to call rebutting evidence; because if he were allowed to do so finality would never be reached.'

[13] After recounting the parts of the evidence led by the respondent's witness and the issues put to him in cross-examination on the part of the applicant, Mr. Jones took the position that the respondent's witness' evidence contradicted the pleadings and that he had contradicted himself on the question of whom he dealt with between Mr. Du Preez Sr. and Mr. Du Preez Jr., or he dealt with both. It was his case that as a result of the application for an amendment that was not resisted by the applicant, there was a change of front by the respondent and that this resulted in the applicant being taken by surprise. This, Mr. Jones argued, brought this case within the rubric of the *ratio decidendi* in *Coetzee*.

[14] For her part, Ms. Campbell adopted argument which is a horse of a different colour. She argued that the applicant was not taken by surprise at all as it did not object to the amendment. Furthermore, she argued, and quite forcefully too, the applicant had

³ 1931 WLD 37 at 39.

ample opportunity to cross-examine the respondent's witness on the applicant's version during his sojourn in the witness box.

[15] Ms. Campbell, referred the court to *S v Louis*,⁴ where Mr. Justice Silungwe stated the following in regard to the issue in question:

'In *S v Lukas* (*supra*) this Court (per Gibson J, with Mtambanengwe J concurring) quoted the following passage from Hoffman and Zeffert, *The South African Law of Evidence* 4 ed at 461:

"If a party wishes to lead evidence to contradict an opposing witness, he should first cross-examine him upon the facts which he intends to prove in contradiction, so as to give the witness an opportunity for an explanation. Similarly, if the court is to be asked to disbelieve a witness, he should be cross-examined upon the matters which will be alleged make his evidence unworthy of credit.'

[16] The court was further referred to the cases of *Small v Smith*⁵ and *The President of the South African Rugby Football Association v The President of the Republic of South Africa*.⁶ In these cases, the court emphasised the nature and purpose of cross-examination, particularly the duty to put one's case fully to the opposing party's witnesses. I will revert to the principles stated in due course.

[17] In dealing with the issues upon which the respondent's witness is sought to be recalled, Ms. Campbell argued that these were two. First, was who the respondent contracted with when the agreement in question, was concluded. The second, she argued, was with regard to the long-standing relationship testified to by Mr. Steuber, between him and Mr. Du Preez Sr. On the first issue, Ms. Campbell argued that the issue of whom the defendant contracted with was irrelevant to the issue in contention, i.e. the *facta probanda*. I may, for ease of reference, henceforth refer to the Du Preez as Senior and Junior, respectively.

⁴ 2005 NR 527 (HC) 531 – 532.

⁵ 1954 (3) SA 434 (SWA) at 438.

⁶ 2001 (1) SA 1 (CC) at p.36-38 paras [61] to [64].

[18] In this regard, Ms. Campbell contended that questions were put to the Mr. Steuber, namely that it was Mr. Du Preez Jr. that he had dealt with, to which questions the said witness proffered clear answers, namely that though he dealt with Junior, he did at times deal with Senior. It was argued on the respondent's behalf that the answers returned by Mr. Steuber to these questions were final to the extent that the answers proffered may not properly be contradicted by the applicant as the question of who Mr. Steuber dealt with. This, it was contended, was merely collateral to the real enquiry, namely, whether an agreement had been concluded as alleged by the plaintiff.

[19] Regarding the second issue, the argument advanced on the respondent's behalf was that relating to Mr. Steuber testifying that he had a long working relationship with Senior. It was conceded that that issue may admittedly have a bearing in deciding the question whether a tacit term regarding the price i.e. the normal price did in fact exist. In this regard, it was argued that the applicant knew as early as January 2016, when witness' statements were filed of the existence of the issue, regardless of the amendment sought and granted. The issue of the long-standing relationship between Mr. Steuber and Senior was disclosed to the applicant even before the trial commenced and that for that reason, the defendant cannot be heard to complain that it was taken by surprise.

[20] In this regard, the argument further ran, as the issue of the allegation was known before the trial, there was no conceivable reason why Senior was not consulted by the applicant even before the commencement of the trial in January 2016 when Mr. Steuber's witness' statement was submitted. It was contended that the applicant's explanation that Senior was not easily contactable from the farm where he stays, away from Swakopmund is unsupported and is accordingly denied. Furthermore, it was contended that there was no plausible reason advanced why the necessary instructions could not be elicited from Senior from March 2017 when the plaintiff closed its case.

Determination of the issue

[21] What I need to place in proper perspective very early in this unusual matter, is that this application, properly considered, is not merely an application for the recalling of a witness by a party *simpliciter*. In actual fact, it is virtually for the recalling of a witness of the other side, namely, not one the side seeking the recall had previously called. It is actually worse in this case. I say so for the reason that in addition to the first complication I have mentioned immediately above, this application doubles up as the applicant in this case is virtually calling for the re-opening of the other party's case in the process. It is also very unusual that a party can effectively apply for the opposite number to reopen its case.

[22] Normally, that party should concern itself with its case and if any case seeks to be reopened on appropriate grounds, it must be that party's very own case. This is particularly so in civil cases, unlike in criminal cases where the court may, in appropriate cases, call a witness as its own if the interests of justice so demand.⁷ By saying this, I am not suggesting that because of the doubly unusual nature of the case, the court may not exercise its discretion in favour of the applicant at all. I am, however, suggesting that it will take very strong and compelling reasons for the court to exercise its discretion in such a case, particularly in view of the strange elements attendant to the case that I have just mentioned.

[23] With these preliminary thoughts in mind, which place Mr. Jones' client's application on the back-foot from the onset, by virtue of the unusual and unprecedented nature of his application (as Mr. Jones himself readily conceded), I move to apply the principles of law adumbrated in the cases and other authorities referred to earlier. At the end of the consideration of the argument and the applicable law, the court will then make its finding as to whether there is any merit in the application.

[24] I should mention that in answering the main question for determination at this juncture, I shall have regard to the authorities cited above. In particular, I will have regard to the relevant principles set out by the learned author Harms (*supra*),

⁷ S 84 of the Criminal Procedure Act 51 of 1977.

particularly those that I hold find application in this matter. And as stated therein, it must be mentioned that these applications are not granted lightly. This is the premise from which the consideration of the application should depart.

[25] I will start the enquiry by dealing with cross-examination as it appears central to Ms. Campbell's argument. The duty of a cross-examiner, is in my considered view key in this regard. In *Small v Smith (supra)*, Claasen J. stated the following at 438E-F:

'It is, in my opinion elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, other witnesses will contradict him, so as to give him a fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness' evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. Once a witness' evidence on a point in dispute is left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of notice to the contrary that the witness's testimony is accepted as correct.' (Emphasis added). See also *Ndabeni v Nandu*.⁸

[26] In the *SARFU* case (*supra*), the court stipulated the applicable principle as follows:⁹

'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness' attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity whilst in still in the witness-box, of giving an explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling that witness is entitled to assume that the unchallenged witness' testimony is accepted as correct. The rule was enunciated in *Browne v Dunn* (1893) 6 R 67 (HL). The rule in *Browne v Dunn* is not merely of professional practice but "is essential to fair

⁸ (I 343/2013) [2015] NAHCMD 110 (11 May 2015) at [para 23] to [25].

⁹ At para [61] –[64].

play and fair dealing with witnesses". It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisprudence.' (Emphasis added).

[27] The universality of the importance of aptly putting one's case in cross-examination to the other side's witnesses can be exemplified by two further judgments, after which I will summarise the importance of cross-examination and how the principles enunciated in the case referred to in this judgment apply in the instant case. In the Botswana case of *S v Fly*¹⁰ I had occasion to refer to two cases on this subject. The first was *The Prosecutor v Jean Paul Akayesu*,¹¹ where the Chamber (court), stated the applicable law as follows about the need to put one's case to the opposing witnesses:

'If, and this is the second point, the Defence must lay the foundations for that challenge and put the challenge to the witness during cross-examination. This is both a matter of practicality and principle. The practical matter is this: if the Defence does not put to a witness the allegation that he is lying because he wishes to take the accused's property, then this may elicit a convincing admission or rebuttal. The witness may break down and reveal, by his words or demeanour, that he has indeed been lying for that purpose; alternatively he may offer a convincing rebuttal for example, pointing out that the accused has no property which the witness could appropriate. Either way, the matter might be resolved. To never put the crucial question to the witness is to deprive the Chamber of such a possible resolution. As a matter of principle, it is only fair to a witness, whom the Defence accuse of lying, to give him or her an opportunity to hear that allegation and to respond to it. This is the rule in common law, but is also simply a matter of justice and fairness to victims and witnesses, principles recognised in all legal systems throughout the world.' (Emphasis added).

[28] In the High Court of Swaziland, Hannah C.J. (later a Judge of this Court), stated the following in the celebrated case of *R v Dominic Mngomezulu And Others*¹² regarding the importance of putting one's case to the opposing party's witnesses:

¹⁰ (CTHFT-000057-07) [2008] BWHC 464 (21 October 2009).

¹¹ Case No. 1 CTRT-96-4-T at p. 35 (A judgment of the United Nations Tribunal into the Genocide in Rwanda).

¹² Cri. Case No. 94/90 at p. 17.

'It is, I think, clear from the foregoing that failure by counsel to cross-examine on important aspects of a prosecution's testimony may place the defence at risk of adverse comments being made and adverse inferences being drawn. If he does not challenge a particular item of evidence, then an inference may be made that at the time of the cross-examination his instructions were that the unchallenged item was not disputed by the accused. And if the accused subsequently goes into the witness box and denies the evidence in question, the Court may infer that he has changed his story in the intervening period of time. It is also important that counsel should put the defence case accurately. If he does not, and the accused subsequently gives evidence at variance with what was put, the Court may again infer that there has been a change in the accused's story.'

[29] I must preface my remarks by saying that the fact that some of the cases referred to above are criminal cases is of no moment as the principle holds true even in civil cases. What is made plain in this regard from the foregoing authorities, is that it is imperative that the party called upon to cross-examine the opposing party's witness must put its case fully to the witness or witnesses as the case may be. This is because once the said witnesses have been excused, the likelihood of the court recalling or allowing them to be recalled is very minimal. In this regard, a party has to ensure that its case is fully canvassed in all its material aspects, leaving nothing to chance because once the witness has been excused, the witness will not ordinarily be called to deal with issues which come as an afterthought to the cross-examiner. As a result, the court is entitled to reach its verdict on the evidence led and to draw inferences, if any, from that evidence and no more.

[30] The learned author H. Daniels¹³ deals with the objects of cross-examination and quotes Harris who states as follows:

'It should be borne in mind that the objects of cross-examination are three, the first is positive, and the other two negative. They are: to obtain evidence favourable to the your client, to weaken evidence that has been given against your client, and finally, if nothing of value which

¹³ Morris Technique in Litigation, 4th edition, Juta & Co. 1993 at p.179

is favourable can be obtained, to weaken or destroy the evidence by attacking the credibility of the witness.'

[31] Later on the same page, the learned author quotes Wrottesley, who in turn quotes Cox, who says:

'In resolving whether or not to cross-examine a witness, it is necessary to remember that there can be three objects in cross-examination. It is designed to either destroy or weaken the force of the evidence the witness has already given against you, or to elicit something in your favour which he has not stated, or to discredit him by showing to the jury, from his past history or present demeanour, that he is unworthy of belief. Never should you enter upon a cross-examination without having a clear purpose to pursue one or all of these objects. If you have not such, keep your seat.'

The author, after considering relevant authorities, including the two above, concludes that there are two principal purposes of cross-examination, namely, 'get what you can; destroy everything else.' The question is, did Mr. Jones do this? If he did, is he entitled to a second bite to the same cherry?

[32] In this case, Mr. Jones attributes the need to call the witness to the amendment and claims that the defence was taken by surprise within the meaning contemplated in the *Coetzee* case. I am of the view that the principle enunciated in that case is not applicable to this case at all. I say so for the following reasons: Firstly, Mr. Jones, after the amendment was not opposed by him, did not seek a postponement or an adjournment of the matter in order to deal with the evidence wrought by the amendment, which he could clearly have done. He was entitled to even take instructions in relation to the amendment, a course he, in his wisdom, can be safely assumed he found unnecessary.

[33] To the extent necessary, he had every right to take instructions on the implications of the amendment. He cannot be heard to complain now that the decision not to take instructions then and to reconfigure the case, or to recalibrate it, if

necessary, has returned to boomerang in his face. He decided to proceed and cross-examined the witness without considering whether the amendment could affect the nature and line of cross-examination. Not only that – he did not object when the respondent ultimately closed its case and more importantly, he made application for absolution from the instance thereafter.

[34] The ruling on absolution, which was not in the applicant's favour, was delivered in June 2016 and the applicant, did nothing after the dismissal of its application to try and re-open the closed case within a reasonable time thereafter. It was only six months later, when the case was due to resume and the defendant due to open its defence that this application was moved. It cannot be that the defendant was taken by surprise in this regard, due consideration given to what I have stated immediately above. It was aware of the nature and the effect of the evidence led against it but took an unreasonably long time to move the application and this, in my view works against the applicant in this case.

[35] Furthermore, the court in the *Coetzee* case stated that a party who belatedly realizes that the nature of evidence is detrimental to its case, cannot be properly regarded as having been taken by surprise when the effect is that the nature of the evidence led and belatedly sought to be impeached, has shaken that party's case to the core. That, in my view, is where the defendant finds itself. One cannot suddenly be surprised when the event allegedly giving rise to the alleged surprise took place 7 or 8 months earlier, i.e. from the leading of evidence that is being sought to be impeached. In that event, as the learned Judge pointed out in *Coetzee*, cases may never be finalized and this imperative compels me to refuse the application.

[36] This leads me to another point. I referred to the provisions of s. 186 of the C.P.A. earlier in this judgment. I had occasion in Swaziland, to consider the implications of an equivalent section of the Criminal Procedure and Evidence Act, i.e. s. 199.¹⁴ This was in *R v Vusi Virus Dlamini*.¹⁵ In terms of that section, the court was entitled, at any stage, to

¹⁴ Act No. 67 of 1938.

¹⁵ Cri. Trial No. 375/09.

subpoena any person as a witness or examine any person in attendance though not subpoenaed as a witness, or may recall or re-examine the said person. In terms of s. 199 (2), the court 'shall subpoena and examine or recall and re-examine any person of his evidence appears to it just and essential to the just decision of the case.'

[37] In that case, the prosecution called all its witnesses, save one who was afflicted by a serious type of tuberculosis. The prosecution, because of her illness, decided not to call her and closed its case knowing of her existence and the nature of the evidence she could have led. She was allegedly an eye-witness to a murder, of which the accused had been indicted. At the close of the entire case, after the accused had finalized his evidence, the court, with the concurrence of Counsel on both sides, embarked upon an *inspectio in loco*, a decision influenced by the disparate narration in evidence of various points central to the scene where the offence was allegedly committed.

[38] After the inspection, the prosecution made an application to have the said witness called in terms of s. 199 (2), alleging that the calling of the witness was essential to just and equitable decision of the case. After reviewing a number of authorities and writings on this section, the court refused to call the said witness and held that the reason why the witness was sought to be called at this stage was to try and salvage what was the sinking ship, as it were, of the prosecution's case. The court refused to lend its powers to recall a witness to be used by a party prop up its crumbling case.

[39] The court, in particular, referred to the writings of the learned authors Lansdown and Campbell,¹⁶ where the following is recorded:

'In general, the power extended to the Court by section 167 and 168 should be exercised cautiously and sparingly, for the Court should not go out of its way to build up a case which the prosecutor neglected to establish, or to undertake the function of rebutting a defence.'

¹⁶ South African Criminal Law and Procedure, Vol II, Juta & Co. 1982 at p.529.

The court further referred to the case of *R v Hepworth*¹⁷ where similar sentiments were expressed by Curlewis JA.

[40] More significantly, the court also referred to *R v Kubeka*,¹⁸ where the court stated the following remarks that I regard as trenchant and in parts relevant to the instant case:

‘The section which I have read imposes upon him (i.e. the Judge) the duty to intervene in the case and of calling the evidence himself if he considers that it is essential for the just decision of the case to call that evidence. This is an onerous duty and one which a Judge does not lightly assume, and in considering whether he should use his discretion under the first part of the section, or whether it is essential to the just decision of the case to call a witness, the Judge will consider various factors.

Where the case on both sides has been closed it may be very dangerous to call a further witness. . . Even where a witness has not been in Court, if there is a danger that the witness may be coached, that the witness may come knowing what is wanted of him, to supply a missing link in the case or support a weak point, in such a case the Judge would be very reluctant and very slow to call a witness; for two reasons: . . . I may summarise the kind of danger to which I refer by quoting a remark made by a Judge in a different context, namely in a civil case, where he said you ought not to allow a party to re-open a case and to call a witness where the witness knows “where the shoe pinches”. The same remark would apply here – a witness should not be called if he knows “where the shoe pinches.”’

[41] In the judgment, I likened the calling of the witness to a situation where a person is wearing a shoe that has a stone in it, which renders walking a difficult affair. I therefor likened the calling of the witness as one whose mission is to remove the discomfort in walking by ‘removing the stone from the shoe’, in order to restore normalcy in walking.

[42] Turning to the instant case, although the circumstances may not be quite the same, I am of the view that the principle enunciated nonetheless applies. The defendant accepted the amendment and proceeded to cross-examine Mr. Steuber, who, after the

¹⁷ 1928 AD 265

¹⁸ 1953 (3) SA 691 (TPD) 691.

finalization of the cross-examination, was then excused and the case was closed. As indicated, the re-calling or re-opening of the case did not occur at this stage. The defendant moved for absolution from the instance, indicating that it was content with the case it had put to the plaintiff. This position persisted for some time even after the dismissal of the application for absolution from the instance.

[43] When the reality of opening its case dawned on the defendant, it suddenly woke up to the reality that certain important aspects were not put to the plaintiff and thus seeks, not only to recall the Mr. Steuber, but in effect, to have the respondent's case re-opened. This, in my view is done by the applicant pursuant to the realisation that there is a stone in its shoe, namely that certain aspects of its version were not put to the plaintiff. It becomes clear that this is a knee-jerk reaction on the part of the defendant, designed to try and prop up a case it did not put at the relevant time. I am of the view that whatever discomfort may eventuate as a result of the applicant not putting its entire case during the plaintiff's sojourn in the witness box, must return to haunt it.

[44] If this application was to be allowed, and the applicant was allowed to remove the discomfort in its shoe caused by the stone, that would herald disastrous consequences to the finalization of the trial. I say so because the respondent may, on its own part, be called upon to call further witnesses to challenge the issue now being sought to be introduced by the applicant. This may, by the same token, cause the applicant, besides the witness it intends calling, have to apply to call a further witness or witnesses to challenge the evidence that the respondent would be impelled to call by the granting of the application call. Cases would not be finalized if this type of litigation strategy was to be allowed.

[45] This must be particularly viewed from the backdrop of the overriding principles of judicial case management, which *inter alia* call for the early disposal of cases by placing benchmarks in that regard. There must, in any event, be finality to litigation and this is a paramount consideration, that causes the underpinnings of the application to pale into

insignificance regard had to the delay and the unpropitious time at which the application has been moved, not to mention the deleterious implications thereof on finality.

[46] I cannot also close my eyes to the reasons proffered by Mr. Steuber, who is the respondent's member. He has deposed on oath that he is on the cusp of retiring from the business and he wants to put this case behind him once and for all. It is his evidence that the trajectory that the case has assumed as a result of the application under consideration, causes him lots of anxiety and sleepless nights. More time will be lost as a result of the application being granted and I agree with him.

[47] I am also of the considered view that besides what I consider an egregious delay in the circumstances, no proper explanation has been advanced by the applicant. Why the applicant could not have contacted its witness as soon as the amendment was made is not clear and in any event, and this is a matter I turn to later, the real reasons advanced are not proffered by the applicant's proposed witness or official.

[48] I am in full agreement with Ms. Campbell, that the issue of who represented the applicant during the conclusion of the contract is not relevant to the *facta probanda*. The main issue, is whether the agreement alleged by the applicant was entered into. To that extent, I am of the view that the first issue in respect of which the case is sought to be re-opened is merely collateral to issues specifically identified in the pre-trial order as crying out for determination during the trial. It is therefor not one of such materiality as to point inexorably in the direction of the need to re-open the respondent's case.

[49] I accordingly hold that the irrelevance of the issue to the real questions for determination, renders it unworthy of the trouble associated with re-opening the respondent's case. I say this in addition to the other reasons I have given for refusing the application.

[50] Regarding the evidence of Senior, I am in agreement with Ms. Campbell's submission that such evidence is material to the determination of the tacit term

regarding the price. The issue of the alleged long-standing relationship between Mr. Steuber and Senior, was known to the applicant from January 2016 when the statements were filed. There is no reasonable explanation proffered as to why such evidence was not procured at the opportune time. Furthermore, no reasonable or convincing explanation is proffered as to why such evidence was not sought to be procured soon after the amendment was sought and granted.

[51] It must be appreciated that in such matters, the decision whether or not to grant an indulgence is dependent in many cases by the nature of the reasons proffered and the level of disclosure and good faith displayed. The more egregious the delay, the more compelling and convincing must be the reasons. Where the reasons advanced are limping or unconvincing, the likelihood of the court coming to the applicant's assistance become slim and become like a mirage in the desert.

[52] A party that fails to properly apply its mind to all the nuanced legal questions and factual issues that need to be determined in its case cannot be allowed to be lackadaisical in its approach and expect that at the mere raising of a finger, the court will, without more, be persuaded to take as drastic a step as re-opening an already closed case.

[53] More is required in this regard, if the early disposal of cases, enshrined in the overriding principles of judicial case management will not be reduced and deteriorate to a mere shibboleth. In this regard, it must also be considered that there is no allegation that the evidence sought to be introduced was previously unavailable. It also does not appear to me that proper and due diligence was employed in procuring such evidence at the appropriate time. All the foregoing persuade me to hold that there is no merit to the application to re-open the plaintiff's case by recalling the respondent's only witness at this juncture.

Applicant's affidavits filed in support of the application

[54] There is one matter of procedure and ethics that I am in duty bound to address and Ms. Campbell requested the court to comment on this, an invitation I could not, in good conscience, for the reasons which follow, decline. There is an insidious and pervasive practice that appears to holding some practitioners in this court by its ensnaring tentacles. This is the ubiquitous practice in this jurisdiction and in terms of which legal practitioners wantonly file affidavits in respect of matters in which they appear. In many cases, this is totally needless and not unusually, has certain unintended consequences, and which cause degeneration of proceedings and more often than not, poison and cause a toxic atmosphere in which the matters are heard and determined to prevail.

[55] In a recent judgment, the learned Angula D.J.P., commented adversely about this practice in *The Prosecutor-General v Kennedy*.¹⁹ In decrying this practice, the learned Deputy Judge President remarked as follows:

'I feel obliged to make an observation here that this practice by legal practitioners of filing affidavits on behalf of a client should be discouraged and desisted from. It should be only resorted to in exceptional cases, for instance where the party to the proceedings is for compelling reasons unable to depose to an affidavit. Such reasons must be disclosed in the affidavit deposed to by the legal practitioner. In the instant matter no explanation has been given as to why the first respondent could not depose to the affidavit. An affidavit contains evidence. In the event of disputes of facts on affidavits arise which cannot be resolved by the approach to resolve dispute (*sic*) in motion proceedings commonly referred to as the *Plascon Evans* rule and the matter has to be referred to oral evidence, in such event the legal practitioner will have to become a witness. Such a scenario would be undesirable. It is further undesirable for a legal practitioner to align or associate him or herself with her client's cause. It is for those reasons that it is undesirable for legal practitioners to depose to an affidavit on behalf of a client dealing with factual issues. A legal practitioner cannot astride two horses at the same time, namely be a witness and also a legal practitioner subject to ethical rules of conduct.'

¹⁹ (POCA 02/2015) NAHCMD 26 (06 February 2017)

[56] This case is no exception. Ms. Wylie deposed to an affidavit running into some 77 paragraphs, which affidavit the applicant's official ought to have deposed to. The latter was confined, in the circumstances, to file a paragraph affidavit when the information deposed to is within his knowledge and he was present in court during the proceedings. No reasons are proffered as to why Ms. Wylie had to depose to the affidavit when the proper person to do, as far as the information available, suggests, was present.

[57] Whether she was authorized by the applicant, a legal *persona*, to do so, is unclear and is an issue I will not pursue. More importantly though, the matters to which she deposed, are matters of fact which are, on the facts, purely and exclusively within the knowledge of applicant's officials. They are certainly not ones that the legal practitioner would personally know or be expected to know. In actual fact, the matters to which she deposed can properly be regarded as hearsay because she has no personal knowledge of them and it is in my view highly debatable whether the applicant's officers in any one of the Du Preez, would be able to cure same by filing a confirmatory affidavit. I say no more of that issue either.

[58] In the instant case, the practice has further unpalatable results. If the *bona fides* of the deponent is called into question, particularly as they may not be personally privy to the actual factual matrix involved, the matter then acquires an unsavoury flavour, which may tempt the legal practitioner to be excused from the normal application of the rules applicable to witnesses, including that they are lying. They will, for this purpose, wish to draw the 'immunity' of being officers of the court, when they have divested themselves of the protection that special position grants them by taking a weapon so to speak and going into the battle field to use their weapons.

[59] The inevitable result is that the legal practitioner becomes affronted when his or her credibility and probity is being questioned and this leads to the contents of the affidavits degenerating to a verbal sparring exercise, sometimes interspersed with words and phrases that should ordinarily have no place in affidavits, particularly where

an officer of the court is involved. The legal practitioner then descends into the arena and gets caught, as it were, in the dust of the conflict, losing in the process, the independence, objectivity and detachedness their special office requires.

[60] Further the legal practitioner will take personal offence to some of the attacks, which may otherwise be condign and in some cases expected in respect of ordinary witnesses. Unbecoming language often becomes a constant companion, if it does not take centre stage, prompting, in appropriate cases, applications for striking out what may be regarded as scandalous or vexatious matter, needlessly creating an interlocutory application, which will inevitably run up costs for the client. This must be avoided at all costs.

[61] In this case, when the propriety of Ms. Wylie filing the affidavit, as pointed out earlier, she assumed a defensive posture and stated:²⁰

'I deny that it is either improper or inappropriate for myself to depose to the affidavits supporting this application. I am, after all, the instructing attorney who has dealt with this matter from its inception and as such I am fully acquainted with all the facts and proceedings pertaining to the conduct of this matter.'

[62] As will be seen from what I have stated earlier, the position adopted by Ms. Wylie is untenable and raises a conflict between her duty to represent her client and her duty to be an officer of the court. The fact that Counsel has been briefed to represent the applicant in this case does not make her deposing to an affidavit proper.

[63] I am not to be understood as laying down an inflexible rule, being the law of the Medes and the Persians in this regard. There are certain instances where it is comely and proper for a legal practitioner to file affidavits e.g. where there has been a failure on the part of the said legal practitioner to comply with certain court orders or directives and to which the client is understandably not privy. These must, however, be few and

²⁰ Para 17.2 of the Replying Affidavit.

far between. Legal practitioners should stop forthwith filing affidavits as a matter of course. By so doing, they are not only doing themselves a serious disfavor, but they are not helping their clients at all, plunging them, in some cases, unnecessarily into mini interlocutory skirmishes, which will cost time and money, if not permanent scars on the legal practitioners themselves, because the written word has some permanency attaching to it.

[64] In this case, there are certain portions of the applicant's affidavits filed by the applicant's legal practitioner that acquired the unsavoury flavour, tending to pit legal practitioners against each other as it were, leaving the clients in the terraces, watching probably with glee as their legal representatives exchanging verbal blows and tear into each other.

[65] As an example, Ms. Wylie carries an assault on the respondent's legal practitioners, as well, the very concern of matters degenerating and becoming personal I have dealt with earlier. I will quote only a few examples of her choice words in the line of assault. At para 17.4 of her replying affidavit, she says the following of Mr. Steuber and particularly of her legal representatives:

'In the light of Steuber being a layperson, it is clear that he continues to be poorly advised.'

Para 18:11:

'Surely Sreuber (*sic*) cannot claim to be prejudiced by the admission of evidence that might impeach him, it seems that once again he is poorly advised.'

Para 19.2:

'The plaintiff's pleadings are poorly drafted and unfortunately as a result they are misleading, as is clear from this application.'

In para 24.2, obviously guns blazing, and raining fire, mist and brimstone, Ms. Wylie continues in her offensive and says:

'I deny that I have in any manner or form attempted to "down play" the import of the application. By simply calling a "spade" a "spade", I have not "down played" the import of the application'.

[66] Because of Ms. Wylie unfortunately but avoidably becoming personally involved in this matter, it is clear that her ethical duty to her opponent, of being courteous, went swiftly out through the window, an eventuality that would have been avoided if the correct party had deposed to the affidavit.

[67] In this regard, I can do no better than quote the words of admonition that fell from the lips of Tebbutt J.A. in *Mawelela v M B Association of Money Lenders and Another*²¹ regarding the language that must be used in court papers, be it affidavits or submissions:

'Appellant had, so Mr. Zwane submitted, proceeded "recklessly" in the court a quo, that his application was "ineptly prepared", "patently sloppy" and showed "gross tardiness" on his part. In one of his submissions, Mr. Zwane said that for the Court to believe the appellant on the question of service of the summons, would be "asking the Court to believe a hell of a lot indeed". The use by an officer of the Court of any sort of language contained in the last sentence is clearly improper and offensive. It is incompatible with the dignity of the Court and is discourteous not only to the Court but to the opposing litigant. Many of counsel's other submissions are couched in intemperate language which is not only unnecessary but which the Court does not expect from counsel. Arguments can be forcefully advanced without resorting to the use of language such as that used by Mr. Zwane in his submissions'. (Emphasis added).

[68] In this regard, Counsel should be astute to eschew language that is intemperate and offensive to the court or the other side. This applies not only to submissions,

²¹ (43/1999) [1999] SZSC 23 (03 December 1999) at p.12.

whether written or oral but it applies with equal force to the contents of affidavits as well. Degenerate language has no place in court and legal practitioners who are the purveyors of such unbecoming language must be pulled by the court on hot coals as it were so that they learn the lesson that such language is unacceptable and will not be countenanced by the court for any reason nor under any circumstance.

[69] In rounding off on this issue, I find it appropriate to refer in a general sense to the learned author H. Daniels (*supra*), at p. 47, where he deals with evidence by legal representatives in the following manner at para 3.6:

‘It has been stated in a number of cases since early in the present century that it is most undesirable for an attorney or counsel who is acting for a party in the litigation to give evidence as a witness. The legal practitioner is not disqualified but, particularly where issues of credibility are involved, he should not put himself in the position, perhaps, of having to argue that his own evidence should be accepted. As De Villers JP remarked in *Hendricks v Davidoff*: “This city is full of advocates and attorneys.” These sentiments, no doubt, will be shared by practitioners in all the cities of South Africa. It matters not that, as in the same case, the legal practitioner turns out to be “a very important, and . . . successful witness”. What would have been said had he not been so successful? After all, the legal practitioner takes on sufficient responsibility when he handles the case in his professional capacity and no reason can be suggested why he should take the added burden of becoming an acceptable witness. Indeed it is not too much to suggest that there may be a conflict between the practitioner’s duty to testify fearlessly without regard to the effect of his evidence and his interest (and duty) in trying to win the case for his client. In the *Elgin Engineering* case referred to, Wessels J, as he then was, dealt with this question in the following way:

“I must digress at this stage to remark that in circumstances where his credibility may be in issue it would appear to be undesirable for an attorney who is to be an important witness in any matter, to act as the attorney of record. The fact that the witness is the attorney of record for one of the litigants does of course not affect his competence as a witness in any way. It is important that an attorney should at all times retain his independence in relation to his client and the litigation which is being conducted. If he is to give important evidence in the case in circumstances where his credibility may be called into question, his independence as a professional adviser to his client may, in my opinion, be affected.”

[70] I need not say anymore on this issue, save to say that the sentiments expressed above coincide with those dealt with in this matter, notwithstanding that those in the instant matter deal with the general inadvisability of legal practitioners filing affidavits willy-nilly in matters in which they appear. It appears from the foregoing exposition that what is sauce for the goose must be sauce for the gander as well.

Application for condonation

[71] The respondent also filed an application for condonation of the late filing of its answering affidavit. It is common cause that the respondent delayed in filing same by one day. The application was not opposed by the applicant and from my reading of the affidavit filed in support of the application, a reasonable explanation has been tendered and the applicant has not suffered any prejudice as a result of the late filing. It was for these reasons that I granted the application as prayed.

Conclusion

[72] I am of the considered view, in the circumstances, that all things considered, and particularly the debilitating consequences the granting of the application will have in particular on this case, I am of the considered opinion that the applicant's application is liable to be dismissed as I hereby do.

[73] I take this opportunity to thank most profoundly, Counsel on both sides for the assistance they both rendered to the court in dealing with what is an unusual matter, charting on unfamiliar territory. That Mr. Jones was on the receiving end of the stick as far as the result is concerned, is no reflection on his endeavour, and for which I cannot in good conscience fault him.

Costs

[74] I have considered the unusual nature of the application and the extensive research that needed to be done to assist the court in this matter and I am of the view that for that reason the costs otherwise prescribed by Rule 32(11) should not apply. I also consider in this regard, the lateness of the application and the deleterious consequences it has had on the early finalization of the case as warranting a departure from Rule 32(11).

Order

[75] In the premises, and for the foregoing reasons, I accordingly issue the following order:

1. The application for condonation of the late filing of the answering affidavit by the respondent is hereby condoned.
2. There is no order as to costs in relation to the condonation application.
3. The applicant's application to recall the plaintiff's witness and incidental relief is dismissed with costs.
4. Such costs are consequent upon the instruction of one instructing counsel and one instructed counsel and are not subject to the provisions of Rule 32(11).
5. The matter is postponed to 27 April 2017 at 09h00, in chambers, for the setting of dates for continuation of the trial.

T.S. Masuku
Judge

APPEARANCES:

PLAINTIFF: Y Campbell

Instructed by: Behrens & Pfeiffer

DEFENDANT: JP Jones

Instructed by: Ellis Shilengudwa Inc.