

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Herero Royal Red Flag Association vs Herero Red Flag Association Council of the Municipality of Windhoek The Registrar of Deeds Dr Weder, Kaut & Hoveka Incorporated	Plaintiff 1 st Defendant 2 nd Defendant 3 rd Defendant 4 th Defendant	Case No: HC-MD-CIV-ACT-OTH-2018/00081 Division of Court: High Court (Main Division) Heard on: 28 March 2023
Heard before: Honourable Lady Justice Claasen, J	Delivered on: 19 April 2023	
Neutral citation: <i>Herero Royal Red Flag Association v Herero Red Flag Association</i> (HC-MD-CIV-ACT-OTH-2018/00081) [2023] NAHCMD 205 (19 April 2023)		
Order: <ol style="list-style-type: none">1. The late filing of the applicant's heads of argument is condoned.2. There is no order as to costs in relation to the condonation application.3. The applicant's application to re-open the case is dismissed with costs.4. The costs are consequent upon the employment of one instructing counsel and one instructed counsel and subject to the provisions of Rule 32(11).5. The matter is postponed to 10 May 2023 at 8h30 for a status hearing.6. The parties shall file a joint status report no later than 05 May 2023 regarding additional supplementary closing submissions before the judgment, orally or in written format.		
Reasons for order:		

CLAASEN J:

Background

[1] This is an application for leave to re-open the case for the first defendant to argue absolution from the instance. The application is opposed by the plaintiff. I will refer to the parties as they are in convention.

[2] It is necessary to give a brief background of the history that precedes this application. The trial proceedings in the matter were completed during 2019. There was no separation of issues and all the issues were argued whereafter, this court disposed of the matter by upholding a special plea of lack of *locus standi*. The plaintiff successfully appealed against that finding and the matter was referred back to this court for a judgment on the merits. Having noted that, this court invited the parties for additional written closing submissions, if they are so inclined, before preparing a judgment. Counsel for the first defendant then gave an indication of its intention to apply for a re-opening of its case, which application is currently before this court.

[3] In support of its application, the first defendant filed an affidavit by a certain General Obetz and a Director of the Herero Royal Red Flag Association, Mr Bernhard Kandjii. He deposed that the need arises for the first defendant to re-open its case in order to bring an application for absolution from the instance, as that was not done during the trial. He deposed that the application is done bona fide, that it is in the interest of justice for the first defendant to be granted leave to re-open the case and that it will practically assist the court in determining the matter. Counsel for the plaintiff, Mr Tjiteere filed a confirmatory affidavit.

[4] The plaintiff set out its opposition in an answering affidavit by Mr Ebsob Kaapama who was duly authorized by the members of the Association to depose to any necessary papers in the litigation of this case. That was as a result of the untimely death of Mr Kamburona who had been designated to do so in the original case. Counsel for the plaintiff, Ms Nambinga also filed a

confirmatory affidavit.

[5] Mr Kaapama holds a different view to the first defendant, namely that there is no need to argue or bring an application for absolution. He explained that the matter had been dealt with in its entirety during the trial and that the first defendant at the time did not find it necessary to bring an application for absolution from the instance after the plaintiff's evidence. The first defendant informed the court in clear language that it closes its case without calling any witnesses. He furthermore declared that he is concerned that the real intention of the first defendant is to lead evidence on its defense, in the event that the court does not grant the absolution from the instance. That, he declares, is unconscionable and should not be allowed.

Condonation

[6] The applicant filed its heads of arguments for this application a day late, but that was condoned by this court.

Summary of Arguments

[7] Counsel for the first defendant submitted that at the time of the trial, it was fit to close the case of the first defendant without further ado, but now, after the Supreme Court referred it back to be dealt with on the merits, first defendants deem it appropriate to argue on absolution from the instance. In accordance to what is contained in the heads of argument, he impressed on the court that the intention is not to call witnesses, but merely deal with absolution from the instance. He concedes that it will protract the proceedings, but that it is necessary for a complete record. His view is that it is not sufficient for the first defendant to merely argue on the merits, without arguments on absolution. His view is that the plaintiff will not suffer prejudice which cannot be cured by a costs order and that the court can give directions regarding the further conduct of the matter.

[8] Counsel for the plaintiff's stance is that if the court grants the application to reopen the case and dismisses the absolution, the natural consequence is that the first defendant can then present its case by calling witnesses. Counsel argued that such a situation should not be allowed. Counsel also argued that the first defendant has not made out a case as the founding affidavit makes no factual allegations why the witnesses were not called and why the court should now reopen the case. She articulated that the plaintiff would be inclined to argue before

judgment, but that arguments on absolution are not necessary and it will only waste the court's time. She stated that the Supreme Court's finding that this matter be determined on the merits, does not add or detract anything to the application to reopen the case. She submitted that first defendant must stand or fall on its decision to close its case without any witnesses at the time.

Legal considerations

[9] The legal criteria for applications to reopen a case has been elucidated by in *Soltech CC v Swakopmund Super Spar*¹ as follows:

(a) As a general rule, a party who has closed his or her 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 strong case will have to be made out therefor;

(d) The party seeking to reopen must show that proper diligence was used to procedure the evidence for the trial;

(e) The party must show that the evidence was not available before the closing of his or her case, or could not reasonably have been obtained; or, if it was indeed available, he or she should advance an acceptable explanation why it was not adduced before the closing of the case.

(f) If that party is taken by surprise during the trial and for that reason did not endeavour to obtain evidence or lead available evidence, he or she may be granted leave to reopen his case;

(g) The proposed evidence must be material;

(h) It is not required 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 or her inability to recall a witness;

(k) A case may be reopened at any stage before judgment; and

(l) Delay is an important consideration but it is not necessarily fatal to the application to reopen.'

[10] The authors, Herstein and van Winsen², referred to the judgment of *Du Plessis v Ackermann*³ wherein the court distinguished between cases in which the application is made to lead further evidence: (a) where only one party has closed; (b) where both parties have closed;

¹ *Soltech CC v Swakopmund Super Spar* (I 160/2015) [2017] NAHCMD 115 (18 April 2017).

² Herstein and van Winsen *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th ed p 906 para XIII.

³ *Du Plessis v Ackermann* 1932 O.D.P.A 139.

and (c) where argument has been concluded. It was stated that, where both parties have closed their cases, the possibility of unfair disadvantage is increased but the court, in its discretion, may sanction the admission according to the circumstances.

Conclusion

[11] I return to the instant case, where the first defendant at the time of trial, after the evidence of the plaintiff, elected to close its case. The first defendant did so without calling the defense witnesses who had filed witness statements. It did not apply for absolution from the instance at the time.

[12] Now, after having had some time to consider its position, the first defendant contends that it merely wants the case to be re-opened for the sake of presenting arguments on absolution from the instance. If that is indeed just for arguments to be made, this court is hard pressed to see the need to reopen the case, as additional arguments before 'final judgment' can serve the same purpose. Such arguments can still poke holes in the plaintiff's case. When asked about this, counsel for the first defendant did not provide a satisfactory rationale for wanting an opportunity merely to make arguments on absolution from the instance.

[13] In *Nick's Fishmonger Holdings (Pty) Ltd and Another v Fish Diner in Bryanston CC and Others* 2009 (5) SA 629 (W)⁴ it was held that:

'The court ought to allow it where the evidence was omitted inadvertently, but would not do so where the party, having had the opportunity at his disposal, deliberately elected not to put it before the court because he was of the opinion that it was not necessary.'

[14] The case before court strike me as one where there is no inadvertent omission. In the original trial, the first defendant need not have closed its case, it simply could have applied for absolution from the instance. However, that was not done. The first defendant had all the options available at the time, but made a deliberate decision to go the final step of closing its case without calling any witnesses. Evidence was available, as witness statements had been filed by the first defendant.

⁴ *Nick's Fishmonger Holdings (Pty) Ltd and Another v Fish Diner in Bryanston CC and Others* 2009 (5) SA 629 (W).

[15] I am in agreement with counsel for the plaintiff insofar as, there are inevitable consequences that flow from a reopening of a case. In this instance, should the case be reopened for the applicant to apply for absolution from the instance and if that application is dismissed, the natural consequence is that first defendant will get another opportunity to present its case. That in turn may prompt plaintiff to want to deal with issues that may arise as a result thereof, with disastrous consequences for the finalization of the matter.

[15] Even if I am wrong and first defendant does not want another bite at the cherry, I have earlier expressed that first defendant can still get an opportunity now for additional closing arguments before the court embarks on a judgment on the merits, without having to re-open the case if that is material to them. There is no need to have arguments twice which ultimately, will serve the same purpose, namely to sway the court that the plaintiff has not proven its case.

[16] In response to a question by the court as to what prejudice it will cause for the applicant if the court does not grant the application, counsel for the first defendant stated that it will deprive the first defendant from putting its best case forward. That hardly makes for a convincing justification of prejudice.

[17] Consequently, I find that the first defendant has not made out a case for this court to re-open the case and the application is therefore dismissed with costs.

[18] In the result I make the following orders:

1. The late filing of the applicant's heads of argument is condoned.
2. There is no order as to costs in relation to the condonation application.
3. The applicant's application to re-open the case is dismissed with costs.
4. The costs are consequent upon the employment of one instructing counsel and one instructed counsel and subject to the provisions of Rule 32(11).
5. The matter is postponed to 10 May 2023 at 8h30 for a status hearing.
6. The parties shall file a joint status report no later than 05 May 2023 regarding additional supplementary closing submissions before the judgment, orally or in written format.

	Note to the parties:

C CLAASEN Judge	Not applicable
Counsel:	
Plaintiff:	Defendant:
Ms Nambinga Palyeenime Incorporated Attorneys Windhoek	Mr Tjiteere Dr Weder Kauta & Hoveka Inc. Windhoek