REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2845/2012

In the matter between:

IMBERT NGAJOZIKWE TJIHERO	**FIRST PLAINTIFF**
JACQUELINE GETRUD TJIHERO	**SECOND PLAINTIFF**

And

UAZUVA BEN KAUARI	**FIRST DEFENDANT**
LYDIA NINGIREE KAUARI	**SECOND DEFENDANT**

Neutral citation: *Tjihero v Kauari* (I 2845-2012) [2016] NAHCMD 187 (29 June 2016)

Coram: PARKER AJ
Heard: **17 June 2016**
Delivered: **29 June 2016**

Flynote: Evidence – Cross-examination – Cross examination of witness where written witness statements are served in terms of the rules of court – Court held that written witness statement not admitted in terms of the rules of court does not constitute witness's evidence in-chief in terms of the rules of court – Such witness statement not part of the record – Court held further that procedure for admitting witness statement in terms of the rules of court, rule 93(4), conduces to aspects of the rule of law as buttressed by art 12 of the Namibian Constitution – Consequently, to allow cross-examiner to cross-examine witness on an unadmitted written witness

statement will be an affront to the rule of law and the Namibian Constitution – Cross-examiner cannot, and should not therefore be allowed to, cross-examine a witness on such unadmitted written witness statement without none – Procedure for making such written statement part of the record is to apply it to have it admitted as an exhibit through the witness..

Summary: Evidence – Cross-examination – Court held that written witness statement not admitted in terms of the rules of court does not constitute witness's in-chief evidence in terms of the rules of court – Such witness statement not part of the record – Court held further that procedure for admitting witness statement in terms of the rules of court, rule 93(4), conduces to aspects of the rule of law as buttressed by art 12 of the Namibian Constitution – Consequently, to allow cross-examiner to cross-examine witness on an unadmitted written witness statement will be an affront to the rule of law and the Namibian Constitution – Cross-examiner cannot, and should not, therefore be allowed to, cross-examine a witness on such unadmitted written witness statement without none – Procedure for making such written statement part of the record is to apply it have admitted as an exhibit through the witness – Defence witness is served witness statement but before taking to the witness box replaced the first witness statement with a second witness statement – Second witness statement was admitted as constituting witness's in-chief evidence in terms of the rules of court – Plaintiff counsel dashed into cross-examining the defence witness on the first witness statement which was not part of the record – Court ruled that cross-examiner could not cross-examine the witness on the inadmissible written witness statement which did not constitute the witness's evidence in-chief in terms of the rules – Procedure for making such previous witness statement part of the record is to apply to have it admitted as an exhibit through the witness.

ORDER

The court ruled that Mr Narib cannot, and should not, cross-examine Erastus on his first witness statement: he can only cross-examine Erastus on his second witness statement; thus, upholding the defence objection.

JUDGMENT

PARKER AJ:

[1] The instant proceeding arose in this manner. During cross-examination of defence witness Mr Erastus Kauri, Mr Narib, counsel for plaintiffs and the cross-examiner, sought to cross-examine Erastus on a witness statement of his that had been served on plaintiffs in terms of rule 92(1) of the rules of high court but which had been replaced by a second witness statement. Defence counsel Mr Van Vuuren objected to the cross-examination on that earlier witness statement of Erastus's.

[2] The court ruled that Mr Narib cannot, and should not, cross-examine Erastus on his first witness statement: he can only cross-examine Erastus on his second witness statement; thus, upholding the defence objection.

[3] By agreement between them – and which the court endorsed – both counsel proposed to argue the issue fully because of its important bearing on the further conduct of the present trial and other trials before the court. The question to be determined is simply this: Whether Erastus may be cross-examined on his first witness statement.

[4] The brief facts at play here are as follows. Erastus served, as I have said previously, his witness statement in compliance with rule 93(1). Before in-chief-examination commenced, Erastus submitted a second witness statement. It seems to me that no objection was taken against Erastus replacing the first witness statement with a second witness statement. Be that as it may, and that being the case, Erastus's second witness statement was admitted and was drawn through the procedural mill provided by rule 93(4) by the court.

[5] On these incontrovertible facts, I make the following findings of law against the backdrop of the rules of court. It was the second witness statement that, on oath,

was read into the record. It was on the second witness statement that the court admonished Erastus that the oath he had taken required him 'to tell the truth, the whole truth and nothing but the truth'. It was the second statement Erastus confirmed under oath and which constituted Erastus's examination-in-chief-evidence. It is in respect of the information in the second statement that Erastus confirmed he bore personal knowledge**.** It was in respect of the second statement that the court admonished Erastus that because of the oath he had taken he was to understand that once the statement was read into the record that statement was his evidence given under oath in the proceedings and that if anything in it was not true and he was aware of such fact, he might be liable for perjury. It was as respects the second witness statement that Erastus signified his understanding of the admonition. It was in respect of the second witness statement that Erastus was admonished that if anything in the second witness statement was not true or inaccurate he bore a duty to tell the court and state the true or correct facts. It was in respect of the second statement that Erastus was admonished and about which Erastus signified his comprehension. *A priori*, *the only statement that constitutes and stands for Erastus's in-chief-evidence and which forms part of the record of these proceedings* is indubitably Erastus's second witness statement, within the meaning of subrule (2), read with subrule (4), of rule 93. (*Italicized and underlined for emphasis)* There cannot be any serious argument contrariwise, in my opinion.

[6] The following key aspects of rules 92 and 93, read – as they perforce should – within the contextual framework of the overriding objectives of the rules of court (rule 1(3)) are important in the consideration of the interlocutory matter. Witness statements are aimed at truncating the usually long and laborious hours of adducing in-chief-evidence during trials. The serving of a witness statement is not only mandatory, it is also, as Mr Van Vuuren submitted, compulsory, to the extent that if X's witness statement is not served within the time limit specified by the court, X may not be called to give oral evidence unless the court, on good cause shown, permits X to give oral evidence (rule 93(5)). This is an indication that the whole practice of witness statement is designed to promote the overriding objectives of the rules, and it is mandatory and compulsory. That is why if X failed to comply with rule 92(5), X may be barred from testifying at the trial as a witness, unless the court is satisfied

that cogent and convincing reasons have been placed before it for the court to permit X to give oral evidence.

[7] It follows reasonably that where X has complied with the rules in the making and serving of X's witness statement, X's witness statement *alone* – and I emphasize 'alone' – constitutes X's oral evidence which X intends to adduce during the trial in relation to any issues of fact to be decided at the trial (rule 92(1)). Furthermore, when X's witness statement is admitted into the record in terms of rule 92(4), that statement is X's evidence given under oath or affirmation in the proceedings (rule 92(4)). In that event, X's witness statement stands for X's oral examination of evidence-in-chief as I have held. And, need I say; there can be only a single and not a multiplicity of a witness's witness statement constituting his evidence-in-chief, as there can be only a single oral examination-in-chief-evidence at any one moment in time in the proceedings. And in terms of the rules of court, such evidence must be contained in a written witness statement, as aforesaid more than once. It follows that any other statement that witness X might have made earlier and which is not admitted in terms of rule 92(4) is not X's *'evidence given under oath or affirmation in the proceedings*' in terms of the rules. (Underlined and italicized for emphasis)

[8] It is not aleatory; neither is it insignificant that the rule maker has provided in rule 93(4) for admonition of a witness who has complied with the serving of witness statement, rendering such witness statement, which has been confirmed on oath or by affirmation and admitted, as that witness's evidence-in-chief. The procedure in rule 93(4) conduces to aspects of rule of law as buttressed by art 12 of the Namibian Constitution on fair trial. It admonishes the witness that because his or her witness statement constitutes and stands for his evidence-in-chief he or she is given the opportunity to point out anything in the statement that is not true or that is inaccurate, and that he or she bears a duty to inform the court in that regard, and he or she is given another opportunity to then state on oath the true or correct facts. If a statement has not gone through the procedural mill prescribed by rule 93(4), and therefore not part of the record, it would be monumentally unjust and unfair to subject a witness who had not served that statement to cross-examination on matters in that witness statement without more and, *a fortiori*, subject such witness to

any sanction allowed by law for any proved untruths and inaccuracies in that statement which he or she has not sworn to or affirmed and which does not form part of the record of the proceedings, as I have found *ad nauseam***.** Any such approach will be an affront to the rule of law and the court's sense of fairness and justice which art 12 of the Namibian Constitution promotes.

[9] Keeping these factual findings and findings of law in my mental spectacle, I proceed to consider the principles of law applicable. In this regard I accept Mr Narib's submission that, as provided by s 42 of the Civil Proceedings Evidence Act 25 of 1965 -

'Cases not otherwise provided for. – The law of evidence including the law relating to the competency, compellability, examination and cross-examination of witnesses which was in force in respect of civil proceedings on the thirteenth day of May, 1961, shall apply in any case not provided for by this Act or any other law.'

[10] I accept also Mr Narib's contention about previous inconsistent statements, in support of which counsel referred the court to extracts from DT Zeffert and AP Paizes, *The South African Law of Evidence*, 2nd ed (2009), in particular section 4 on p 914 where the following passage appears under the title 'Previous inconsistent statements':

'4. Previous inconsistent statements

We have seen that one of the ways in which the credit of a witness may be impeached is by asking him whether he has previously made a statement which differs from what he is saying in court and what was said, there, as regards the weight to be attached to a contradiction applies here too. This has already been considered in connection with the discrediting of a party's own witness. Slightly different rules regulate the use of such statements in attacking the credit of witnesses for the opposing side.

The general subject of impeachment of credit is governed by the rules in force on 30 May 1961, which were those of English law.'

[11] It is therefore authorities in English law, that is, the English common law, that I now direct the enquiry.

[12] Having applied the foregoing considerations on the interpretation and application of rules 91, 92 and 93, read with rule 1(3), of the rules of court to the facts of the case and having taken into account the intertextuality of those provisions, I come to the following inexorable conclusions. Any contrary argument will surely be fallacious and self-serving.

[13] Cross-examination is directed to (1) the credibility of the witness, say X, (2) the facts to which X has deposed to in X's evidence-in-chief, including the cross-examiner's version of them, and (3) the facts to which X has not deposed but to which the cross-examiner thinks X is able to depose (see *Halsbury's Laws of England*, 4th ed, para 278) ('the *Halsbury's* principle'). But the *Halsbury's* principle is subject to an important limitation. It is that a party may be prevented from cross-examining X as to facts which that party's own witnesses have not dealt with in their evidence. (*R v Rice* [1963] 1 QB 857 (Court of Appeal) ('the *R v Rice* limitation') I signalize the point that the *R v Rice* limitation has a crucial and direct bearing on the issue at hand.

[14] As respects previous inconsistent statements which undoubtedly is part of our law and which Mr Narib is so much enamoured with; the general rule is that statements made by a witness Y at another time, whether on oath or otherwise, as is the situation in the instant proceeding regarding Erastus's first witness statement, are no evidence as to the truth thereof. They are ammunition – and only that – in a challenge of the truth of the evidence Y has given at the trial. They can be used only to demolish the credibility of Y or to reduce the weight to be attached to Y's evidence at the trial. To do this – and this is crucial, and this is what Mr Narib in his vigorous submission on previous inconsistent statement overlooks – it is necessary for the trial court to have before it formally the previous statement, so that the trial court can compare it with the evidence given by Y in court in the trial and assess for itself the seriousness of any alleged discrepancies.

[15] In this regard, the proper procedure, which Mr Narib disregards, to have Y's previous statement formally before the court is this. Counsel should first direct Y's mind to the occasion when the previous statement was made and ask Y whether on

that occasion Y made such and such statement. If Y agrees that he did make the previous statement, either in question and answer form or in the form of a narrative, the statement is then in the record. If Y denies that he made the statement attributed to him, counsel must then either read verbatim into the record the relevant portion of the previous statement or put the whole previous statement to Y and apply to have it introduced through Y as an exhibit. (See *Simon Miyoba v The People* (1977) ZR 218 (Supreme Court) at 219 (40) – 220 (35), per Baron DCJ.)

[16] In my opinion this general rule and the proper procedure set out above become even more apropos and are even of greater application and force if regard is had to the practice and purpose of witness statement in the rules of court, which I have discussed previously.

[17] Thus, considering the rules of court regarding witness statement, in the instant case, the more satisfactory practice would be for counsel to have applied to have Erastus's first statement introduced through Erastus as an exhibit. Counsel would then be in a position to deal with any matter in that statement, including any alleged discrepancies between Erastus's evidence given in the trial and his previous statement. The law says so.

[18] During the trial, Mr Narib overlooked the procedure described previously and dashed straight into cross-examining Erastus on Erastus's first witness statement which is not part of the record. Counsel appeared to have laboured under the view that since defence counsel Mr Van Vuuren was allowed to examine witnesses on certain documents not in the bundle, he, Mr Narib, was entitled to cross-examine Erastus on Erastus's first statement, without more. With the greatest deference to Mr Narib, Mr Narib shoots at his own foot. Indeed, that is all the point about the procedure described previously. The documents Mr Narib refers to were first admitted as exhibits and so formed part of the record; and in that event, Mr Van Vuuren was entitled to examine witnesses on them.

[19] It follows reasonably that because Erastus's first statement has not been admitted as part of his evidence and part of the record of the proceedings, the court is not in a position to determine whether the narratives in which Mr Narib wished to

cross-examine Erastus are matters which the plaintiff's witnesses have dealt with in their evidence in order to take advantage of the *Halsbury's* principle. As matters stand, the plaintiffs are caught within the force of the *R v Rice* limitation. Furthermore, by overlooking the procedure set out previously, this court does not have before it formally Erastus's first statement, 'so that it can be compared with his evidence given in court and assess for itself the seriousness of any alleged discrepancies'. (See *Miyoba*, loc. cit.)

[20] Based on these reasons, I feel no doubt – none at all – about the correctness of the ruling I made as set out in para [2] above.

[21] The preponderance of the foregoing reasons and conclusions thereanent are unaffected by Mr Van Vuuren's submission that after this court made the ruling referred to previously, this court become *functus officio* and therefore this court cannot revisit that ruling and Mr Narib's submission that this court is entitled to revisit a ruling on admissibility of evidence made in the course of proceedings. In sum, the ruling set out in para [2] stands, as I hold.

C Parker

Acting Judge

APPEARANCES

PLAINTIFFS:	G Narib Instructed by Sisa Namandje & Co. Inc., Windhoek
DEFENDANTS:	A Van Vuuren Instructed by Grobler & Co., Windhoek