

**REPUBLIC OF NAMIBIA**



**IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI**

**CIVIL JUDGMENT**

Case no: I 93/2015

In the matter between:

**JOHANNES NGUTI**

**PLAINTIFF**

and

**HENDRIK MARIUS ANTHONISSEN t/a CUNENE PHARMACY**

**1<sup>ST</sup> DEFENDANT**

**KAYEVROU MBARORO**

**2<sup>ND</sup> DEFENDANT**

**KALISTA NEKONGO**

**3<sup>RD</sup> DEFENDANT**

**Neutral citation:** *Nguti v Anthonissen* (I 93/2015) [2017] NAHCNLD 24 (27 March 2017)

**Coram:** CHEDA J

**Heard:** 17.01; 20.01; 24.01; 25.01.2017

**Delivered:** 27.03. 2017

**Flynote:** A court hearing is a public hearing. In civil cases witnesses are generally allowed to remain in court until they have given evidence or excluded by the court. A party seeking a witnesses' exclusion must apply to court and demonstrate how it will be prejudiced by the witness remaining in court-witness allowed to testify.

**Summary:** In a matter where plaintiff had given evidence and his witness was sitting in court. Defendant objected to the witness being called to give evidence as

he argued that the said witness had been observed nodding and/or shaking his head while plaintiff was testifying. Defendant however, did not demonstrate the existence of prejudice and how it would affect it if the witness was allowed to give evidence.

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### **ORDER**

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1. The application to exclude Mingeli's evidence is dismissed.
2. Mingeli is allowed to testify in this matter.

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### **JUDGMENT**

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CHEDA J:

[1] On the 22 April 2015 plaintiff issued out summons against the three defendants for defamation. The action was defended and has culminated into this trial.

[2] During the trial and after plaintiff had testified, he called his second witness in the person of Johannes Mingeli [hereinafter referred to as "Mingeli"]. Before he gave evidence, Ms. Horn for 1<sup>st</sup> defendant objected to this witness giving evidence on the basis that when plaintiff was giving evidence he was sitting in court and was observed by one Ms. Sonja Malan, [hereinafter referred to as "Malan"] ( candidate attorney) from her law firm who was sitting next to him.

[3] Ms. Horn further submitted that Malan had observed Mingeli giving signals to the plaintiff who was in the witness box at the time. It is, therefore, her argument that these signals resulted in plaintiff changing his testimony. It is because of this incident that Ms. Horn is of the view that this was an irregularity which required the court's intervention.

[4] In that regard she applied that she be allowed to put certain questions to Mingeli before his re-examination by Mr. Aingura. In the interest of justice I granted the application on the understanding that she was not going to question him on the merits, but, on the alleged irregularity he had been part of.

[5] She cross examined him as to the alleged signals he is said to been responding to from Mingeli while he was giving evidence. He however, denied these allegations. The specific allegation was with regards to whether he answered the questions being put to him in a manner that was being indicated to him by Mingeli. The questioning by Ms. Horn took the following format:

“Ms. Horn: Mr. Nguti you testified yesterday that after being asked, is Victor Mingeli one person, you testified he is the same person and then after a few seconds you testified no he is not the same person, is that correct?

Answer: That is correct my Lord.

Ms. Horn: Now Sir we put to you that you changed your answer after receiving a signal from the witness Mingeli Johannes who was sitting in the gallery being a shake of his head and then you proceeded to change your answer to no they are not the same person. What is your comment to that?

Answer: I did not get a signal from Mingeli my Lord.

Ms. Horn: Sir I put it to you that the witness Mingeli Johannes was in court yesterday for the second session after the 11o'clock adjournment. Do you dispute that?

Answer: He was in court my Lord.

Ms. Horn: Now sir I put it to you that as you were testifying and we had a witness to this effect Mr. Mingeli was either nodding his head or shaking his head to answer the questions I have (sic) ask you and you answered your questions accordingly to the signals you received. What (intervention)

Court: Which witness who is going to testify?

Ms. Horn: My Lord that will be the candidate Attorney Ms. Sonja Malan who sat next to the witness.

Court: Okay, she saw him shaking, nodding and shaking his head.

Ms. Horn: That is correct my Lord and the Plaintiff according to the signals changed his answers to my questions during cross-examinations?

- Answer: I was not talking while looking at Mingeli my Lord.
- Ms. Horn: Sir I put it to you that you are not being truthful to this Honourable Court?
- Answer: What I am telling (sic) is the truth my Lord.
- Ms. Horn: And I put it to you that it is on record that you changed an answer specifically at the time that the witness in the gallery saw you shaking or him shaking his head?
- Answer: No my Lord I was not testifying looking at the witness my Lord.”

[6] After Ms. Horn’s questioning of this witness, Mr. Aingura then re-examined his witness and the witness stuck to his testimony.

[7] Ms. Horn in conclusion of her arguments submitted that since Mingeli and Malan were present in court they should be excluded from giving testimony as this would prejudice the defendant’s case. In support of her argument, Ms. Horn referred me to two Botswana Authorities, namely *Mofokeng v Mpolokeng* 2007 (3) BLR 23 HC and *Ramakgathi v Mosidi* 1997 BLR 1084, which I will come to later.

[8] It was further her submission that Mingeli’s signals to the plaintiff resulted in him changing his testimony. She also submitted that there are no case authorities either in Namibia or South Africa relating to the inclusion or exclusion of a witness from sitting in court while evidence is being led. She, however, emphasised that it is an unwritten rule of practice that witnesses who are yet to testify must wait outside the courtroom. This rule of practice was briefly referred to in *Schwikkard, P.H and Van der Merwe, Principles of Evidence, 2005 p 508*.

It appears to me that there is indeed no known direct authority which have decisively dealt with this issue. The nearest to this discussion is found in the Botswana jurisdiction where the courts gave a guideline as to how the courts should approach this question which was indeed novel.

[9] In *S v Bashi Mapogo* CRTF 20-05 [Francistown 13, 14/11 & 19/12/06, a Botswana case (unreported) the court was faced with a similar scenario where in a civil case a witness who had not testified was present in court when the other witness was giving evidence. The court, recognised the fact that there was no legal principle which precluded a witness from sitting in court, but, however, it appeared that it was an unwritten rule of practice that a witness should not be in court while

another witness is giving evidence, however in the event that this happens, he should be allowed to testify and thereafter the issue of his/her credibility should be left with the court to assess.

[10] In the matter under discussion the learned Judge at paragraph 2 expanded his views when he ably stated:

“I took the position that although ideally, a witness is required not to be in court until he or she is called and thereafter accused, where that anomaly eventuates, the said witness should be allowed to testify and the issue of his or her credibility should be left to the court to assess. Where the court, in view of that witness’s demeanour and on a critical assessment of his or her evidence, comes to the conclusion that he or she was influenced, the court may decide on what weight, if any, to attach thereto.”

[11] In the same jurisdiction, the issue stubbornly resurfaced and the court had to again deal with it in, *Lufu v The State* [1998] BLA 562 at 655 G-H where Gaefele J remarked:

“For completeness’ I deem it necessary to state that even where the witness was in court and had heard the evidence, he should be allowed if called upon to give evidence. Thereafter the court will be in a better position to assess his demeanour and should in fact record that fact in the record of the proceedings and evaluate their evidence when it comes to judgment.”

[12] Immediately prior to the decision in the above case, another high court matter found itself falling in for discussion in *Ramakgathi v Mosidi* 1997 BLR 1084 (HC) where Dibotelo J authoritatively stated:

“I am, however, not aware that there is anything fundamentally undesirable in civil proceedings for witnesses to be present in court when evidence is being given by their principal or other witnesses in the proceedings in which the witnesses sitting in court are also going to testify. Whilst it may be undesirable to have plaintiff’s witnesses in court when plaintiff testifies in civil matters i am not aware of any rule of practice that debars the plaintiff’s witnesses from being present in court when the plaintiff gives evidence. The important consideration in my view is whether the defendant has been C prejudiced or embarrassed in his defence by the presence of

the plaintiff's witnesses in court when the plaintiff gave evidence. If the defendant can demonstrate that he has been prejudiced in his defence by the presence of plaintiff's witnesses in court when the plaintiff gave evidence then the appeal court may well come to a conclusion that the miscarriage of justice has occurred and therefore hold that there has been an irregularity of D such as nature as to invalidate the proceedings. It is a well-known and in fact it is an established practice that in civil proceedings a party always holds consultations with his witnesses before they are called to give evidence and that these witnesses would know in advance what testimony a party was going to give. In this case the appellant has not demonstrated that he suffered prejudiced as a result of respondent's witnesses E being present in court when respondent gave evidence." (my emphasis)

[13] This approach seems to have taken root in Botswana as it again became an issue in their later case of *Mofokeng v Mpolokeng* 2007 (3) BLR 23 (HC) where Masuku J embraced and adopted the earlier decision in *Ramokgadi's* case in recognising and accepting that there was no law prohibiting a witness in a civil case to sit-in while the principal is giving evidence although it has become a rule of practice.

[14] From the Botswana authorities, which are not binding, but, however, persuasive the approach of which I adopt, it is clear that in as much as there was no law that prohibited a witness from remaining in court, legal practitioners should ensure that the potential witnesses remain outside court until they are called to testify to avoid a misunderstanding. This in my view should be the approach by our courts.

[15] The fundamentally guaranteed principle of trust by these courts is that evidence should be given in an open court in the presence of the parties and public, this is one of the requirements for a fair trial. Therefore, the principle of an open court is upheld in both civil and criminal proceedings. This principle can only be departed from in special cases and where the court orders otherwise, see *Economic Data Processing (Pty) Ltd v Pentreath* 1984 (2) SA 605 (W). This, however, is the general rule, the exception is that a court has the discretion to order a witness to remain outside the courtroom when called to testify and he thereafter remains in the court room after testifying.

[16] Where a court orders the witness to remain outside, it would be to prevent a witness from being influenced by what other witnesses have said and the reason for preventing him from leaving the courtroom after testifying is to prevent him/her from influencing future witnesses.

[17] However, it should be borne in mind, that the evidence of a witness who was present in court before the time is nevertheless admissible, but, its weight may be affected. In *S v Moletsane* 1962 (2) SA 182, a criminal matter, the court was of the view that the exclusion of a witness is to avoid the next witness from tailoring its evidence to suit that of the previous witness, but, it went further and observed that a party who calls in a witness does so well knowing that it will lend support to its case.

[18] In that case De Villiers JP at 182H-183A remarked:

“It is usual and common practice, especially in criminal cases, also in civil trials, for one of the parties, if not both of them, to ask the presiding judicial officer to order the witnesses to leave the court until after they had given their evidence and the object of this request is to prevent witnesses from hearing the evidence and therefore changing their evidence or trimming their evidence so as to agree with a prior witness and it is true that willy nilly a witness called by a party has some bias in his favour. He is called because he has made a statement which, if true, is favourable to that party’s case, and he becomes to a certain extent, even if in a very minor degree, a partisan. But that is no reason for holding that the evidence given by a witness who was in court when another witness gave evidence is inadmissible and how the evidence of such a witness should be discounted depends on the circumstances of each particular case, and on the standing and the position of the witness who was present when another witness gave evidence. It seems to me that in this case there is very little room for criticism on this ground.”

[19] From the authorities cited above, it seems that the South Africa courts’ approach of which are persuasive in this jurisdiction is that, the admissibility of such evidence entirely depends on the circumstances of the case which can only be assessed after evidence has been heard, see *S v Ntanjana* 1972 (4) SA 635 at 636 C-E.:

“The fact that they had been sitting in court during the hearing might affect the weight of their evidence or it might not – it would depend very much on the circumstances, which could only be assessed after their evidence had been heard. Their evidence was admissible and I know of no authority for the startling proposition put forward by the magistrate, namely that a witness who has been sitting in court is incompetent to give evidence. The fact that these witnesses had been present during the hearing may in the event have been quite immaterial to the acceptability of the evidence they were required to give. The magistrate conducted no enquiry, whatsoever, into the nature of this evidence or whether it had a material bearing on the case. The refusal to allow an accused person to call witnesses without proper enquiry or sufficient reason for such refusal obviously amounts to a failure of justice.” (my emphasis)

[20] While it is a common practice that in civil proceedings witnesses are commonly present throughout the proceedings and are on some occasions excluded by the court, I found no authority germane to this topic albeit little authority that the courts can exclude witnesses or guidance as to how this should be done.

[21] While I am aware that there exists no Namibian authority for the exclusion of a witness in a civil trial, I will, however, endeavour to distil what I have gleaned from Ms. Horn’s submissions and the persuasive Botswana cases. The practice which tends to sway the court in determining this topical issue is that, the court works from the premise that, if a court is sitting in public, no one who wishes to be present during the hearing should be excluded, not even a witness. He/she can only be excluded where a good reason is shown to exist.

[22] It is trite therefore, that the standard of proof in a civil trial is lower than that in a criminal trial. It is on a balance (or preponderance) of probability while in a civil trial it is proof beyond reasonable doubt. It is an imperative consideration to be taken into account when the question of probability or improbability of a happening is to be determined. As there seems that there is no authority on this aspect of law, it is clear that it is a discretion of the court to decide to include or exclude a witness. The only case which comes nearer to giving authority is *Tomlinson v Tomlinson* [1981] 2 FR 136, an American, (Connecticut) appeal court decision by a magistrate court. In that case Sir John Arnold at pages 133-140, stated:



“It seems to me that the right course is this: witnesses should not be under any obligation to leave the court, except where an order is made excluding them; that the proper course for justices to pursue, if an application is made to them, would be to exclude the witnesses, unless they were satisfied that that would not be an appropriate step to take ...”

[23] In that case Sir John Arnold (President of the Family Division) held that although witnesses should not be obliged to leave court unless an order was made excluding them. If an application was made to exclude a witness, the proper course would be to grant the order unless satisfied that, that would not be an appropriate step to take. This, however, does not direct us as to where the power or authority comes from other than from remarks by the courts as it was in English law as stated in *Luckwell v Limata* [2014] EWHC 536 (fam) at para 16 where Holman J stated:

“If a court is, in fact, sitting in public, and if an application is made to exclude a witness or witnesses, then the court may exclude them. But it should only exclude them if the court is satisfied, on the facts and in the circumstances of the particular situation, that it would, for good reasons, be an appropriate step to take.”

[24] Despite my assiduous research and that of counsel there seems to be no direct authority in our jurisdiction other than the foreign authorities referred to above, albeit that some of them are obiter. With the full knowledge of the status and bearing in mind the effect or otherwise of them on our jurisdiction, what I can, however, glean from the above cases is that generally a witness should not be excluded from sitting in court without good cause. Having said this, it is trite that the court has a discretion to exclude a witness for reasons that I will deal with later.

[25] Ms. Horn’s argument has submitted sound and good reasons for such exclusion which can be enumerated as follows:

- a) prevents witnesses from being consciously or unconsciously being informed by the testimony of other witnesses;
- b) prevents the opponents from listening and thereafter tailor-make their testimonies to the disadvantage of the party giving evidence first; and

- c) prevents the other party from allegations of equally making spurious allegations about tailor-making evidence as well.

The court is therefore grateful for a well resembled submissions which were coupled with helpful authorities.

[26] While there are advantages of excluding a witness the downside of this procedure is that, by exclusion the litigant is deprived of effective comments on what other witnesses would have said in their testimonies. Most importantly, witnesses would have noticed important factors which could have arisen in other witnesses' testimonies which their legal practitioners would have missed. This, would therefore, prejudice a litigant.

[27] Having examined the above I am of the view that the starting point is that the court's discretion should be guided by the cardinal rule of the existence or otherwise of prejudice to the party yearning for the exclusion of a witness.

[28] It appears to me that while there is no law which prohibits a witness to sit in court during a hearing, the courts in the exercise of their judicial discretion have, where justice demands, excluded witnesses. This, therefore, has been a common practice which however, is not backed by any cogent authorities in this jurisdiction.

[29] I am, therefore, of the opinion, that there is a need for a guideline for easy implementation of this now frequent practice. As a witness has a right to be present during a trial which is held in public, the party seeking his/her exclusion must make an application which must show good cause why it should be so ordered.

[30] In that application it must clearly and convincingly show the prejudice it is likely to suffer if the witness is present in court. It seems to me that the correct approach which should be adopted in this jurisdiction is that a party seeking the exclusion of a witness must fulfil the following requirements:

- a) It must first demonstrate which aspect of the evidence will materially affect its case, and
- b) show how such evidence prejudices it.

The court will then consider the application taking into consideration the circumstances surrounding the case in order to justify the exclusion of the said witness.

[31] As it is a right of members of the public to sit in court, it stands to reason that applicant must show prejudice in a material manner as the exclusion is in the discretion of the court and clearly not a right.

[32] The court's judicial discretion can only be exercised in applicant's favour if failure to do so will result in a miscarriage of justice. Further, the prejudice should be of such a nature that the proceedings will be invalidated. This, to me is the test which should be adopted. In any case, each case will be determined on its own merits.

[33] Ms. Horn has argued that Malan observed Mingeli nodding and shaking his head which gestures were directed at the witness and these seem to have shepherded the witness to change his testimony.

[34] There are two problems which Ms. Horn is failed to deal with here, firstly, she should have called Malan to testify and be cross-examined by Mr. Aingura, this she omitted to do. Secondly, Ms. Horn should have demonstrated what material prejudice first defendant was going to suffer in the circumstances. The prejudice cannot be proved by reference alone, applicant should do more than crying foul from the gallery. There is need for evidence to be given, which evidence should be tested by the other party.

[35] In my adoption of the above approach I find that applicant has failed to convince the court that there would be prejudice to its case. Applicant has the *onus* to prove on a balance of probabilities that it stands to be materially prejudiced in the circumstances. In *casu* it has failed to convince the court and accordingly Mingeli should proceed to give evidence. However, it is my view that the fact that some concern has been raised and is not excluded, the court with such knowledge should employ the cautionary rule in hearing his testimony.

[36] In the result the following is the order:

1. The application to exclude Mingeli's evidence is dismissed.
2. Mingeli is allowed to testify in this matter.

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M Cheda  
Judge

## APPEARANCES

PLAINTIFF: S. Aingura  
Of Aingura Attorneys, Oshakati

1<sup>ST</sup> DEFENDANT: W. Horn  
Of W Horn Attorneys, Oshakati