



REPORTABLE

CASE NO: SA 23/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**NAMIBIA MEDIA HOLDINGS (PTY) LTD
FESTUS NAKATANA**

**First Appellant
Second Appellant**

and

**JOHAN LOMBAARD
GOLDEN GAME CC**

**First Respondent
Second Respondent**

Coram: DAMASEB DCJ, SMUTS JA and HOFF JA

Heard: 10 June 2022

Delivered: 8 July 2022

Summary: This appeal concerns the rights and duties of the media in reporting on matters of public interest. The appellants are the editor and owner of the daily newspaper, the *Namibian Sun*. The issue emanates from an article which appeared in the *Namibian Sun* on 24 October 2017 concerning the respondents – that they unlawfully captured and transported elephants; that the elephants in question were kept in horrific and deplorable conditions; and that the respondents were cruel and mean to the elephants. A defamation action against the appellants followed. The appellants

admitted publication of the article and admitted paragraphs 6.1 to 6.4 of the respondents' particulars of claim. Appellants further pleaded that the statements in the article were based on what was said by Dr Malan Lindeque, the Permanent Secretary (now Executive Director) of the Ministry of Environment and Tourism (the Ministry) and its Minister, Mr Pohamba Shifeta, on 23 October 2017 at a public press conference. The appellants also pleaded that the contents of paragraph 6.3 (ie 'That the elephants were being kept for months in containers in horrific and deplorable conditions') constituted a verbatim quotation of what was stated by the Minister at that press conference. The appellant pleaded the defences truth and public benefit, fair comment and reasonable publication. During the trial, appellants filed an application for leave to call two further witnesses (ie Dr Sharpe and Mr Shipindoh). Their witness statements had not been filed. Nor were their names listed as witnesses for the appellants during the course of judicial case management (JCM). Appellants argued that the evidence of these two witness would support their truth and public interest defence.

Relying on rule 1(3) and (4) of the High Court Rules, the decision in *Arangies & another v Unitrans Namibia (Pty) Ltd* 2018 (3) NR 869 (SC) and stressing the fundamental purpose of JCM as being to avoid unnecessary delays in the finalisation of trials, the court *a quo* dismissed the application with a cost order and postponed the matter for the continuation of the trial. At the conclusion of the trial, the court found in favour the respondents on the merits and awarded damages in the sums of N\$70 000 and N\$50 000 respectively. The court *a quo* further found that the appellants had not discharged the onus upon them to establish the truth of the statements contained in the article. Additionally, the court found that, even though the treatment of elephants is a matter of public interest, the appellants had not established the defences of truth and public interest, fair comment and reasonable publication. The appeal is against these orders of the court *a quo*.

On appeal, the appellants' appeal against the court's findings on the merits focussed on the defence of reasonable publication and the award of damages. They argued that if the appeal against the dismissal of the defence of reasonable publication were to succeed, it would not be necessary to refer the matter back for the evidence of two additional witnesses, even if the appeal against that ruling was a good one. Respondents raised a preliminary point against the appeal against the interlocutory order by contending that, as an interlocutory order, it is not appealable except with leave

from the High Court in terms of s 18(3) of the High Court Act 16 of 1990 (the Act) and in the absence of leave to appeal against that order, the appeal should be struck from the roll.

The ruling refusing to call additional witnesses

Held that, rulings in respect of admissibility of evidence and on procedural matters such as permitting or excluding additional witness statements or portions of evidence would not necessarily amount to appealable interlocutory orders and would not be separately appealable even with leave but may be raised as grounds of appeal against the final judgment. The policy reason for restricting appeals in interlocutory matters – reflected in s 18(3) of the Act by requiring leave of the High Court - is the avoidance of piecemeal appellate disposal of issues with unnecessary expense and delays involved, as was spelt out by this court in *Government of the Republic of Namibia v Phillipus* 2018 (2) NR 581 (SC).

Held that, the court below relied heavily upon *Unitrans* in dismissing the application because a delay in the finalisation of the trial would result. The facts in *Unitrans* are however distinguishable from this matter.

Held further that, the court below correctly set out the principles applicable to JCM and especially concerning the avoidance of delays in finalising proceedings. The court however misdirected itself by failing to take into account that Dr Sharpe was subpoenaed by the respondents and the lack of prejudice which would arise if she were to give evidence and also did not take into account the lack of control the applicants had in accessing the reports in question (ie Mr Shipindoh's report only came to appellants' lawyers' attention during the course of the trial) and the bureaucratic difficulties faced by the appellants in attempting to do so.

Held that, this case is unlike most instances which arise where additional witnesses are sought to be called as a consequence of a lack of diligent and timeous preparation by parties and their practitioners, as is required by JCM.

Held that, the court *a quo's* interlocutory ruling and its cost order should be set aside. Even though the appellants were seeking an indulgence, the opposition was unreasonable, given the fact that Dr Sharpe was subpoenaed by them. As an indulgence was sought, fairness dictates that no order as to cost should be made.

Appeal on the merits

After a survey of the developments on the defence of reasonable publication in this court and regard being had to the approach in other jurisdictions (ie the United Kingdom and Canada) where the defence of reasonable publication of facts in the public interest originated from and has developed, this Court finds the following:

Held that, in adopting the defence of reasonable or responsible publication of matters in public interest, the court in *Trustco Group International Ltd v Shikongo* 2010 (2) NR 377 (SC) made it clear, that defamation defences previously available under the common law were inadequate to protect the right to freedom of expression and the media protected under Art 21 of the Constitution. The common law thus needed to be developed, as had happened in other jurisdictions 'to provide greater protection to the media to assure that their important democratic role of providing information to the public is not imperilled by the risk of defamation claims'.

Held that, this court in *Trustco* further observed a considerable convergence in judicial approaches concerning the need to liberalise the law of defamation in recognition of the crucial role of the media in democracies but at the same time acknowledging the need to balance the right of the media with the right to reputation (protected by Art 8 of the Constitution), given the power of the media.

Held that, it was plain from the journalist's evidence that she believed in the truth of the allegations contained in her report as they had been confirmed by or were stated by the Minister and the Permanent Secretary of the Ministry (officials charged with the responsibility of enforcing and implementing the provisions of the Nature Conservation Ordinance 4 of 1975 and protecting Namibia's wildlife and implementing Namibia's obligations under the Convention on International Trade in Endangered Species on Wild

Fauna and Flora (CITES)). At no stage of the trial did the respondents take issue with the accuracy of her report concerning the statements of the Minister and Permanent Secretary.

Held that, the court *a quo* misdirected itself when it found that there was a duty on the journalist to approach the respondents before publishing. As stated by the House of Lords and later the UK Supreme Court in the self-same context in *Flood v Times Newspapers Limited* [2012] UKSC 11, the guidelines governing journalistic practice are to be applied in a practical and flexible manner with due regard to practical realities.

Held that, the journalist has satisfied the test of a reasonable or responsible journalist by accurately reporting on the statements made by the Minister and Dr Lindeque. This defence should have succeeded and the defamation action dismissed with costs.

APPEAL JUDGMENT

SMUTS JA (DAMASEB DCJ and HOFF JA concurring):

[1] This appeal concerns the rights and duties of the media in reporting on matters of public interest.

[2] The appellants are respectively the editor and owner of a daily newspaper, *the Namibian Sun* which is also available on the internet. The respondents are Mr Johan Lombaard, a game farmer and dealer and Golden Game CC, a close corporation which trades in game. Mr Lombaard is the managing member of Golden Game. They succeeded in a defamation action against the appellants concerning an article which appeared in *the Namibian Sun* on 24 October 2017 and were awarded damages in the sums of N\$70 000 and N\$50 000 respectively in the High Court.

The article

[3] The article which is the subject matter of the proceedings reads as follows:

'Court order sought over elephants

The environment ministry had filed an urgent court application to force a game-capturing company to return three elephants that were illegally transported to Mariental.

The Ministry of Environment and Tourism has sought a court order against the owner of a game-capturing company at Mariental to force them to immediately return three elephants to where they were captured. The elephants were illegally transported and are being kept in what the ministry describes as horrific conditions.

Both a criminal case and a civil case have been opened against Johan Lombaard to compel him to return the elephants to Eden Game Farm, a private game farm in the Grootfontein District.

Photos have surfaced of where the elephants have been kept for months in containers on a farm near Mariental. Lombaard and his brother Kobus are co-owners of Golden Game CC. They established the company in 2008 and have more than 20 years' game-capturing experience.

The elephants were kept by Lombaard on farms Geleksberg 82 Mariental and Frauenstein 277 Windhoek.

The three elephants bought by Lombaard form part of a group of five elephants which were earmarked for export to Dubai from Eden Game Farm.

Environment permanent secretary Malan Lindeque said all aspects of the situation were under investigation. According to him the three elephants were sold and captured by Lombaard at Eden Game Farm.

Two other elephants are being held at N/a'an ku sê.

He explained that all five elephants were initially kept at N/a'an ku sê but three of them were then transported to the farm near Mariental. The elephants at N/a'an ku sê have been released into a larger camp.

According to Lindeque, the ministry sought a court against Lombaard to compel him to return the elephants to Eden.

He said the ministry discovered that Lombaard had transported the elephants illegally, without a valid permit, and were keeping them in deplorable conditions.

According to him the ministry is still waiting for the matter to appear on the court roll, which should happen within a week.

Lindeque explained that Lombaard is not registered to capture large wild animals such as elephants. The place where he had kept the elephants was also not approved by the ministry.

Lindeque said the ministry has to approve the transport and the conditions in which animals are kept when they are sold.

“We have given the ultimatum to this person and he has failed to comply. A court order was sought to compel him to take the animals back and this is under way.”

Environment minister Pohamba Shifeta confirmed that Lombaard did not have a permit to transport the elephants from Eden.

He described the situation in which the animals were being kept at Lombaard's farm as horrific.

“First you need to apply for a permit and stipulate where the animals will be kept and whether the animal will be able to survive. We don't encourage that animals should be in captivity and will make this a law.”

Shifeta said at the most 1000 hectares must be available where such animals can be kept.

Shifeta said the ministry had approached the attorney-general and sought an (*sic*) court order.

“This is a very serious case and calls for an urgent application.”

Since these elephants are privately owned, procedures have to be followed.

“Animals have to be treated fairly. We have to look into the issues of how animals are being transported and treated in Namibia.”

Shifeta further said the ministry had not approved the export of the five elephants from Eden to Dubai.

“We have not checked whether the conditions and environment in that country will be conducive for the elephants.

Apart from permission that was given by CITES for the export, the ministry did not give approval. They cannot leave this territory without my signature and permission.”

Shifeta said the reluctance of the ministry to give permission to export the elephants to Dubai was probably why the owner of Eden decided to sell them privately in Namibia.

“This is no joke keeping elephants. When we say they can't be exported to another country because they can't be exported to another country because they are kept in zoos and used in circuses, we cannot put Namibia's name to it.”

Earlier this year *Namibian Sun* reported that Namibia was planning to sell five baby elephants to a zoo in Dubai after a permit was issued to export these elephants to Dubai.

The ministry recently dismissed allegations and reports insinuating that the export of the five elephants from Namibia to a zoo in Dubai did not meet the Convention on International Trade in Endangered Species on Fauna and Flora (CITES) criteria.

The elephants are aged between four and eight years and are owned by Eden Game Farm. Environment minister Pohamba Shifeta at that time told *Namibian Sun* that all CITES regulations had been met.

Lombaard could not be reached for comment yesterday.’

The pleadings

[4] In their particulars of claim, the respondents as plaintiffs complained that the article stated of them:

- '6.1 That the Ministry of Environment and Tourism has sought a court order against the plaintiffs to force them to immediately return three elephants to where they were captured;
- 6.2 That the elephants were illegally transported;
- 6.3 That the elephants were being kept for months in containers in horrific and deplorable conditions;
- 6.4 That both a criminal and civil case have been opened against the first plaintiff.'

[5] They pleaded that the article was defamatory of them by alleging that they had unlawfully captured and transported the elephants, kept them in horrific and deplorable conditions and were cruel and mean to them.

[6] The appellants admitted publication of the article and admitted paragraphs 6.1 to 6.4 of the particulars of claim as set out. In amplification, they pleaded that those statements were based on what was said by Dr Malan Lindeque, the Permanent Secretary (now Executive Director) of the Ministry of Environment and Tourism (the ministry), and its Minister, Mr Pohamba Shifeta, on 23 October 2017 at a public press conference. The appellants also pleaded that the contents of paragraph 6.3 constituted a verbatim quotation of what was stated by the Minister at that press conference.

[7] The appellants further denied that the words complained of were defamatory of the respondents or were intended or understood to have the meanings contended for.

The appellants also relied upon the defences of truth and public interest, fair comment and reasonable publication. They also denied that the respondents sustained damage to their reputations and in the amounts claimed.

[8] The matter proceeded to trial after there had been judicial case management (JCM).

The trial

[9] Mr Lombaard gave evidence for the respondents. The respondents had successfully tendered to supply game, including elephants, to the Dubai Safari Park. To this end, the respondents purchased ten elephants from a certain Mr Hanse of the farm Eden Park in the Grootfontein district. Of these, the respondents intended to supply five elephants to Dubai and sold two elephants to N/a'an ku sê Lodge and Wildlife Sanctuary and intended to keep the remaining three elephants on Mr Lombaard's farm in the Mariental district.

[10] Mr Lombaard testified that the ministry had granted a permit to Mr Hanse to sell 14 elephants, but only six were captured by veterinarians, although not by the specific veterinarian referred to in the permit issued to Super Game Dealers. The six captured elephants were transported by the respondents to N/a'an ku sê where they were kept in a boma.

[11] A week later Mr Lombaard testified that three of these elephants were loaded and transported by the respondents to his farm. He said that Mr Hanse was in possession of a veterinary services permit to move the elephants from the farm Eden to Mr Lombaard's farm.

[12] Within two days of the arrival of the three elephants on Mr Lombaard's farm, they broke out of the constructed boma and were recaptured. They were then placed in what Mr Lombaard termed a temporary enclosure comprising eight shipping containers which, according to him, measured 324 square meters.

[13] Mr Lombaard said that the elephants were 'properly kept' and ate well and drank water and denied that they were kept in containers and stated that their condition did not deteriorate 'in any way whatsoever.'

[14] He said he was approached by a journalist of the *Confidente* weekly newspaper concerning allegations of illegal capture and transportation of the elephants and provided his explanation concerning the existence of permits for their capture and transport. He only became aware of the article published by *Confidente* after it was discovered by the appellants shortly before the trial. He did not take issue with that report which likewise referred to the ministry seeking a court order against him and allegations of capturing, transporting and selling the elephants illegally – which he denied in that report and said he had the requisite permits. The report further attributed the following to him:

'Lombaard admitted to *Confidente* that currently the two elephants in Mariental are being kept in an environment which is not conducive (*sic*). But that is only a temporary measure because the Ministry won't allow me to put them in my camp yet. They had asked me to put an electric fence around the camp but they haven't given me permission to do so.'

[15] Mr Lombaard testified that, after the publication of the appellants' article, his attention was directed to it and he instructed his legal practitioner to take steps against

the appellants. He also said that shortly after the publication of the article, the tender to supply the elephants to Dubai was cancelled. Mr Lombaard tendered inadmissible hearsay evidence concerning statements made to him about the article emanating from sources in Dubai, Libya and the United States of America. This evidence was objected to, but unfortunately would appear to be taken into account by the court below in awarding damages.

[16] Mr Lombaard stressed that the appellants' journalist had not contacted him prior to publication and said that the report contained untrue and incorrect matter concerning him and Golden Game CC. He said the ministry had at no stage sought an interdict against the respondents. He denied that the elephants were illegally transported or were kept in horrific or deplorable conditions.

[17] Mr Lombaard confirmed in cross-examination that, after a letter was sent from his legal practitioner, the appellants offered to publish his side of the story. He declined that offer which was repeated and also rejected during mediation.

[18] The journalist who penned the article, Ms E.S. Smit and her editor, the first appellant as well as Dr Malan Lindeque gave evidence for the appellants.

[19] Ms Smit, a senior journalist with the *Namibian Sun*, stated that she specialised in reporting on matters relating to tourism, the environment and agriculture. Ms Smit received a photograph on social media depicting two elephants in a container in a deplorable condition which was published adjacent to the report. A confidential source informed her that the ministry would seek a court order against the respondents concerning the elephants in question.

[20] On 16 October 2017, Ms Smit approached the ministry's spokesperson, Mr Romeo Muyunda for comment on the photograph. He promised to revert. Ms Smit then set out a detailed enquiry in writing to him, specifying several questions relating to the elephants and their status. On 19 October 2017, Mr Muyunda referred Ms Smit to the Minister who confirmed that he was aware of the photographs but did not say more because of the poor quality of the line when called and referred her to Dr Lindeque, then Permanent Secretary to the ministry. Ms Smit sought a meeting with the latter. In a telephone call, Dr Lindeque said that the ministry was seeking a court order against the respondents concerning the elephants and would also lay criminal charges against the respondents as they did not have the required permits.

[21] Ms Smit subsequently received an invitation to a press conference, scheduled for 23 October 2017. Ms Smit spoke to Dr Lindeque before the start of the press conference and enquired about the elephants. Dr Lindeque informed her that he had not been able to make contact with the ministry's legal officer before the press conference.

[22] During the question and answer portion of the press conference, which was attended by a cross section of media outlets, two other journalists raised the plight of the elephants depicted in the photograph. Both the Minister and Dr Lindeque responded to the questions. Their answers were as set out in the article. They said that the elephants had been transported illegally and were kept in deplorable and horrific conditions. They said that the respondents were not registered to capture and transport the elephants and that the ministry had not approved the conditions where the elephants were kept on Mr Lombaard's farm. Nor had the ministry approved their export to Dubai and that the ministry had demanded that the respondents return the elephants to the

farm Eden and that instructions had been provided to the Attorney-General to seek an urgent court order.

[23] Ms Smit said she made two attempts to reach Mr Lombaard by telephone on the afternoon before the publication, but that his cellular phone was off on both occasions.

[24] After the article appeared and the respondents' lawyer's letter of demand was received, Ms Smit contacted Dr Lindeque concerning the article. He was traveling at the time and returned her call later that day and confirmed that the report was correct.

[25] Ms Smit subsequently approached the ministry concerning the contemplated proceedings against the respondents and was told that the 'matter had been handed over to the Government Attorney' and that further details could not be provided.

[26] It was not disputed during cross-examination that the contents of the article were conveyed during the public press conference by the Minister and Dr Lindeque. Ms Smit said during cross-examination that she had no reason to disbelieve what she was told by the Minister and Permanent Secretary of the ministry during the press conference. Ms Smit stated that the term 'deplorable' was used by the Minister and 'horrific' by Dr Lindeque and that the latter had said that there was an application for a court order.

[27] The second appellant testified that the newspaper's editorial team was briefed by Ms Smit concerning her report on the press conference and that he had decided that the article should be published.

Application to call two further witnesses

[28] After Ms Smit and the second appellant had given their evidence, the appellants brought an application for leave to call two further witnesses, being Mr B. Shipindoh and Dr Janine Sharpe, both employees of the ministry, concerning reports they each produced in respect of the elephants kept on Mr Lombaard's farm.

[29] Witness statements had not been filed in respect of either of them. Nor were their names listed as witnesses for the appellants in the course of JCM.

[30] In support of the application, the first appellant referred to Mr Lombaard's witness statement to the effect that he would subpoena the author of the ministry's veterinarian report who had stated that the elephants were in good condition, were not stressed and kept in proper conditions and that the veterinarian was 'happy with the situation'. The respondents issued a subpoena in respect of Dr Janine Sharpe, but a return of non-service for the subpoena was filed shortly before the trial.

[31] When the appellants' legal representatives met with Dr Lindeque shortly before the trial, they requested a copy of her report from him. He was however by then retired and was only able to forward them a copy of the report on 1 July 2019, the first day of the trial which was set down from 1 to 5 July 2019.

[32] The author of the report, Dr Sharpe, was eventually located by the appellants' erstwhile counsel the next day and she secured permission for the release of two reports she had prepared on 5 and 8 March 2018. In one of these reports, there was reference to Mr Shipindoh, the ministry's game warden for the Mariental area, and a report he had prepared (on the conditions under which the elephants were kept by the respondents).

[33] The evidence of these witnesses was said to be required by the appellants to support their defence of truth and public interest.

[34] Dr Sharpe filed an affidavit as part of this application, confirming her reports and attached a further report dated 18 February 2018 in which she stated that she had travelled to Mariental to assess the condition of the elephants but that Mr Lombaard had refused her and other ministry employees access to his farm and referred them to his lawyer who in turn had said that access to the farm should be sought from him in writing whereupon he would respond. When it was pointed out to him that the Nature Conservation Ordinance 4 of 1975 (the Ordinance) afforded access to any premises, he stated that the issue would be 'sorted out in court'.

[35] Dr Sharpe's report of 5 March 2018 was prepared after access was eventually provided by Mr Lombaard. It was very damning of the condition of the elephants and the conditions in which they were held. Dr Sharpe was able to evaluate the two juvenile elephants kept there in separate enclosures made of steel, rubber matting and corrugated iron roofing. The larger elephant's enclosure had two electrified wire strands running along the inside of the rubber matting wall.

[36] Dr Sharpe pointed out that the enclosure for the young male elephant of about four years old had a corrugated iron roof with many sharp edges and wires sticking out which could cause injury to him. She also pointed out that the roof was low which negatively impacted upon the elephant's ability to cool himself. Dr Sharpe said that she observed that this juvenile elephant was nervous and frequently charged the wall when viewed. That area of the enclosure measured some 164 square metres. The other

elephant was a female of six to eight years of age kept in an area of about 330 square metres. The corrugated iron roof of this enclosure was of an adequate height and she assessed the elephant as slightly nervous and only occasionally charging the walls.

[37] In her recommendation to the Minister dated 8 March 2018, Dr Sharpe pointed out that the animals had been in captivity and in small enclosures for almost a year. Enclosures of those proportions could, she said, be sufficient for short periods of time only, adding:

'However this has not been the case from the beginning. According to photographs and Regional staff accounts, these animals were kept in very poor welfare conditions (kept in containers with no shade, etc.) for an extended period of time. This was completely unacceptable. The enclosures that I inspected yesterday were also clearly modified since regional staff visited on the 1st February 2018. This can be seen when comparing the pictures that were taken then. MET has the authority to revoke any Game dealers licence with sufficient evidence. In my opinion the current enclosure is sufficient for a short period of time, however the previous enclosures were definitely not suitable to house elephants (short or long term). The fact is these animals have been kept in a small enclosure, alone for too long and should be moved into a larger area as soon as possible.'

[38] As highly social and intelligent animals, Dr Sharpe pointed out that extended periods alone without guidance from mature animals and being in confined areas can lead to irreparable social and mental disorders and that extended captivity would mean that they would not be suitable for release back into the wild. Dr Sharpe also stated that the longer those animals 'are kept isolated and in a small enclosure, the worse their social behaviour will become'. This would limit the options for the elephants (and the ministry in taking action) and pointed out that 'the likelihood of euthanising the animals due to behavioural problems will increase'.

[39] By addressing this issue, Dr Sharpe pointed out that she was ‘fulfilling her obligation to prevent cruelty and uphold welfare standards as per her veterinary professional obligation’.

[40] Dr Sharpe recommended that consideration should be given by the ministry to either confiscate or euthanise the elephants through a court order or permitting Mr Lombaard to keep the elephants in a bigger enclosure or sell them to a party aware of their needs. Dr Sharpe recommended immediate steps to improve the welfare and current conditions until their future would be determined, such as addressing the roofing of the one pen to remove sharp edges and adjusting the height, improving air circulation with suitable air vents at the bottom of the enclosure, improving the feed and ensuring that water troughs are cleaned regularly. Dr Sharpe also made recommendations to improve their mental stimulation in their current enclosures.

[41] Mr Shipindoh made a report to the Deputy Director for the Southern Regions in the ministry on 9 May 2017 which set out findings of an investigation made by him in his capacity as warden into the capture, transport and keeping of the elephants. He expressed the view that the further capture of the elephants at N/a’an ku sê and transportation to Mr Lombaard’s farm were without valid permits and illegal. He also questioned the legality of the original capture and transportation of the elephants from the farm Eden. He also stated that the boma on Mr Lombaard’s farm did not meet the necessary requirements for keeping elephants which are specially protected game.

[42] The appellants’ erstwhile legal practitioner, Ms Cagnetta, also made an affidavit in support of the interlocutory application, recounting several attempts from January 2019 to secure the Government Attorney’s permission to consult with Dr Lindeque. The

Government Attorney eventually reverted to say that questions for Dr Lindeque should be submitted to him in writing. This, the appellants' legal practitioners did on 22 February 2019, in which a request was also made for a copy of the veterinary report referred to in Mr Lombaard's witness statement. Unfortunately, no response from the Government Attorney was forthcoming despite several attempts to elicit one. After Ms Cagnetta contacted Dr Lindeque directly on 27 March 2019, a meeting with Dr Lindeque was set up for 1 April 2019 which the Government Attorney also attended. At that meeting Dr Lindeque informed Ms Cagnetta that he was not in possession of the report as he was retired but described it as damning. Various attempts were made to obtain the report from the ministry during June 2019.

[43] On 20 June 2019, Ms Cagnetta noted the subpoena issued to Dr Sharpe at the instance of the respondents requiring Dr Sharpe to produce her report. Following sight of this subpoena *duces tecum* (to produce designated documents), Ms Cagnetta suspended her efforts to secure the report. On 26 June 2019 a return of non-service was filed in respect of the subpoena and was noted by Ms Cagnetta on her return to office on 27 June 2019. Ms Cagnetta then prepared a subpoena for the report to be served upon a certain senior official in the ministry who was however on sick leave on 29 June 2019 and again on 1 July 2019. In the meantime, Ms Cagnetta enlisted the Government Attorney on 28 June 2019 to assist in securing the report. Several further attempts were made by Ms Cagnetta and her assistant to establish the identity of a responsible official upon whom the subpoena could be served. This was all to no avail. Later in the course of 1 July 2019, Ms Cagnetta contacted Dr Lindeque who then had a copy of the report in his possession which he sent via WhatsApp to her.

[44] After several enquiries to the ministry, it was discovered on 2 July 2019 that Dr Sharpe was on sick leave for an extended period following injuries sustained in dealing with a rhino. On 2 July 2019, Ms Cagnetta was able to meet with Dr Sharpe and other officials at the Attorney-General's office and her report together with that of Mr Shipindoh were handed to Ms Cagnetta. Mr Shipindoh had travelled from Mariental later that day in order to be present for the trial.

[45] The application for leave to call them as witnesses was launched on 3 July 2019 and heard on 5 July 2019 in accordance with directions given by the trial judge.

[46] The respondents opposed the application but did not file any answering affidavits to the application, having been afforded an opportunity to do so. They relied upon shortcomings in the application and the efforts to secure the report of Dr Sharpe and complained about a delay which would arise if leave were to be granted for those witnesses to give evidence.

Ruling on the application

[47] The High Court made its ruling on the application on 12 July 2019, dismissing it and provided its reasons for doing so on 19 July 2019. The High Court referred to the objectives of JCM embodied in rule 1(3) and (4) of the High Court Rules and a decision of this court in *Arangies & another v Unitrans Namibia (Pty) Ltd*¹ and stressed the fundamental purpose of JCM as being to avoid unnecessary delays in the finalisation of trials.

¹ *Arangies & another v Unitrans Namibia (Pty) Ltd & another* 2018 (3) NR 869 (SC).

[48] The court pointed out that Mr Lombaard filed his witness statement already on 16 October 2018 where reference was made to the report of a State veterinarian who inspected the elephants and was according to Mr Lombaard satisfied with their condition. The court pointed out that at no stage prior to the commencement of the trial did the appellants raise the report or any difficulty in getting hold of it. The court also referred to the statement in a case management report of April 2018 to the effect that neither party intended to call expert witnesses.

[49] The court referred to an unexplained delay as from 1 April 2019 (when Dr Lindeque referred to the report) until mid-June 2019 when Ms Cagnetta made further efforts to secure a copy of the report, pointing out that no steps were taken to do so during that period.

[50] The court found that the issuing of the respondents' subpoena of Dr Sharpe was of 'no moment' as the respondents did not have the onus in respect of the report and found that the application was brought in reaction to the evidence presented up to that point of the trial. To allow the application would, the court said, cause a delay in concluding the trial, to the prejudice of the respondents and would not be justified in the interest of justice or the objectives of JCM.

[51] The court further found that the appellants sought to introduce 'an expert report' which should have been done earlier and that the respondents would need to have the opportunity to obtain an expert report of their own. The court also pointed out that Dr Sharpe's report was compiled on 5 March 2018, some five months after the article was published and that its value would be limited.

[52] The dismissal of the application was accompanied by a cost order which expressly directed that costs not be restricted to the limitation contained in rule 32(11) of the Rules of the High Court.

[53] The trial was then postponed for the evidence of Dr Lindeque.

Evidence of Dr Lindeque

[54] Counsel for the respondents objected to the references by Dr Lindeque in his witness statements to reports he received from ministry officials on the grounds that they amounted to inadmissible hearsay evidence. The court ruled that Dr Lindeque could give evidence that reports had been received but could make no reference to the contents of those reports which included those of Dr Sharpe and Mr Shipindoh.

[55] Dr Lindeque confirmed that the article constituted a correct reflection of what was said at the press conference. He further accepted that ministry officials may not always be in attendance for all game captures but when it came to dangerous game, such as elephants or rhinos, the ministry attends every game capture to ensure nothing is incorrectly done. It was a condition for the game capture in question (to inform the ministry) and the ministry had not been notified about the capture of the elephants and did not attend. He also testified that the respondents' transportation permit was from (the Directorate of) Veterinary Services in respect of disease control but did not satisfy the ministry's requirements concerning the conditions under which wild animals such as elephants are transported. A permit from the ministry was also required and had not been obtained.

[56] Dr Lindeque also explained that the Government Attorney received instructions from the ministry to proceed for an urgent court order against the respondents but despite several follow-ups, the proceedings were not brought and he was eventually advised in December 2017 that an urgent application could no longer be brought because of the intervening delays.

[57] Dr Lindeque stated that the ministry laid criminal charges against the respondents in respect of offences committed in the capturing and transportation of the elephants in question. After lengthy investigations, the Prosecutor-General instructed the control prosecutor in Windhoek in August 2018 to proceed with charges. Following his retirement, he was not in a position to supply further developments in respect of the criminal proceedings against the respondents.

[58] In cross-examination, he stated that his doctorate was in wildlife management and in particular in the management of elephants. He referred to the large body of knowledge concerning the capturing, care and handling of elephants. He testified that a common practice and protocols were to be adhered to so as to avoid elephants damaging themselves, falling or dying from lack of air supply. He referred to a strict procedure for keeping them in bomas with technical requirements regarding their construction, as well as for feeding, water and shade within a boma.

[59] When asked about the delay in seeking an urgent court order, Dr Lindeque stated that one of the reasons related to attempts made to resolve matters in an amicable manner with the respondents by exploring options for the return of the elephants to the farm Eden without the need for a court order. He referred to commitments given by Mr Lombaard in a meeting to effect significant structural improvements to the place where

the elephants were being kept and that he was working on a 100 hectare camp to release the elephants until a decision was made as to their fate. Dr Lindeque stated that it was on the strength of those commitments that the Minister was advised to follow a particular course of action.

[60] Dr Lindeque also stated that Mr Lombaard had informed the ministry that one of the elephants had died in November 2017, a fact not referred to by Mr Lombaard in his evidence.

High Court judgment on the merits

[61] The court found that the article was defamatory of the respondents in that it attributed illegal activities to the respondents, leading to both a civil and criminal case being opened against them.

[62] The court also found that the reference to the elephants being kept in horrific and deplorable conditions was also defamatory of the respondents.

[63] Turning to the defences raised by the appellants, the court found that they had not discharged the onus upon them to establish the truth of the statements contained in the article. The court rejected Dr Lindeque's evidence that there was an illegal capture because the veterinarian specified by Super Game Dealers CC did not personally capture the elephants. The capture had been effected by other veterinarians on behalf of Super Game Dealers CC. The court appeared to find that this did not amount to a breach of the permit. The court also found that there was not any non-compliance with the transport permits and that the condition contended for by Dr Lindeque merely amounted to remarks contained on the permits.

[64] The court referred to the code of ethics for journalists quoted in *Trustco Group International Ltd v Shikongo*² which it found required journalists to test the accuracy of information from all sources and exercise care to avoid inadvertent error and diligently seek out subjects of news stories to give them the opportunity to respond to allegations of wrongdoing.

[65] The court found that all information presented by Dr Lindeque at the press conference was not accurate in that no urgent application or civil case had been filed and that allegations of illegal capture and transport would not appear to be accurate.

[66] The court found that Ms Smit did nothing to investigate the veracity of the allegations, apart from her two telephone calls to the first respondent.

[67] The court held that there was a duty on Ms Smit to make a genuine and reasonable effort to contact Mr Lombaard and that her two calls in short succession did not amount to a genuine and reasonable effort on her part.

[68] Whilst accepting that the treatment of elephants is a matter of public interest, the court held that the appellants had not established the defences of truth and public interest as well as fair comment.

[69] The court turned to the defence of reasonable publication. It found that Ms Smit, by not seeking out Mr Lombaard to afford him the chance to respond to the allegations,

² *Trustco Group International Ltd v Shikongo & others* 2010 (2) NR 377 (SC).

did not amount to reasonable or responsible journalism and that the appellants had failed to establish the defence of reasonable publication.

[70] As for quantum, the court found that the allegations of illegality relating to the capture and transport of the elephants were 'extremely serious allegations' against the respondent as they 'cut to the heart of the business' they conduct.

[71] The court referred to the inadmissible hearsay evidence given about the alleged consequences of the report upon the respondents and made the damages awards as set out.

The appeal

[72] The appellants' notice of appeal originally filed only contained grounds with reference to quantum of the award. The appellants' legal representatives were subsequently replaced. An amendment was sought to include the merits. It was not opposed and was granted.

[73] The appellants also appealed against the interlocutory order refusing them leave to call the two additional witnesses (Dr Sharpe and Mr Shipindoh) (and for the variation of the pre-trial order as necessary) and seek an order that the matter be referred back to the trial court for their evidence to be heard.

[74] The appellants' appeal against the court's findings on the merits primarily focused on the defence of reasonable publication and the award of damages. Ms Bassingthwaighe, for the appellants, accepted that if the appeal against the dismissal of the defence of reasonable publication were to succeed, it would not be necessary to

refer the matter back for the evidence of two additional witnesses, even if the appeal against that ruling was a good one. In view of the conclusion reached in respect of the defence of reasonable publication, it is not necessary to deal with the interlocutory ruling at any length. Because its dismissal was accompanied by a costs order, it however remains necessary to deal with it, albeit relatively briefly.

Submissions concerning the appeal against the order refusing the appellants leave to call two further witnesses dated 12 July 2019

[75] The respondents raised a preliminary point against the appeal against this order by contending that, as an interlocutory order, it is not appealable except with leave from the High Court in terms of s 18(3) of the High Court Act 16 of 1990 (the Act). Mr P. C. I. Barnard, for the respondents, referred to a recent judgment of this court, *Prime Paradise International Limited v Wilmington Savings Fund Society FSB & others*.³ Counsel pointed out that the ruling of 12 July 2019 refusing leave to call the additional witnesses is an interlocutory order, being incidental to and made during the process of litigation and not finally disposing of the action. In the absence of leave to appeal against that order, counsel contended that the appeal against that ruling should be struck from the roll. Counsel was unable to address anomalies which arise by requiring leave in respect of a ruling of this nature after the finalisation of the trial.

[76] Ms Bassingthwaighe countered that the matter had been finalised and that there was no need for leave to appeal. Counsel also referred to the policy reason for requiring leave to appeal in interlocutory matters to avoid the piecemeal hearing of matters which would not apply.

³ *Prime Paradise International Limited v Wilmington Savings Fund Society FSB & others* (SA 92/2021 and SA 86/2021) [2022] NASC (26 April 2022) para 10.

[77] As was made clear in *Unitrans*,⁴ that rulings in respect of admissibility of evidence and on procedural matters such as permitting or excluding additional witness statements or portions of evidence would not necessarily amount to appealable interlocutory orders and would not be separately appealable even with leave but may be raised as grounds of appeal against the final judgment. The policy reason for restricting appeals in interlocutory matters – reflected in s 18(3) by requiring leave of the High Court - is the avoidance of piecemeal appellate disposal of issues with unnecessary expense and delays involved, as was spelt out by this court in *Government of the Republic of Namibia v Phillipus*.⁵ Given the nature of the ruling and the subsequent finalisation of the matter in the High Court, leave to appeal was not required to raise it on appeal as has been done in this matter.

[78] Ms Bassingthwaighte also submitted that the evidence to be adduced by the two additional witnesses was relevant and crucial to the determination of the issues before court and in particular the conditions in which the respondents kept the elephants. Counsel also pointed out that the issue was limited and related to the truth of the statement that the elephants were kept in deplorable and horrific conditions. It was pointed out that the appellants only became aware of Mr Shipindoh's report when they received his report on 2 July 2019 and managed to consult with him later that day.

[79] Counsel contended that, whilst a delay may arise as a result of calling the additional witnesses, the necessary directives could have been given to ensure that the delay be kept to a minimum. Ms Bassingthwaighte also argued that *Unitrans* was

⁴ Para 5.

⁵ *Government of the Republic of Namibia v Phillipus* 2018 (2) NR 581 (SC) para 11.

distinguishable on the facts. Counsel also submitted that the court did not consider the difficulties faced by the appellants in securing access to ministry witnesses. It was also argued that the objectives of JCM include ensuring that the real issues in dispute are determined and the need to consider fairness meant that the leave for the additional evidence should be heard. Counsel submitted that the matter should be referred back to the trial court so that this evidence could be heard.

[80] Mr Barnard argued that the appellants had failed to investigate the facts prior to publishing and that their legal practitioners thereafter failed to take proper and timeous steps to investigate the truth of the allegations until the matter came to trial. He stressed that the appellants had the burden of proof to establish the defence of truth and public interest. Counsel submitted that the appellants had not raised the issue of the report during case management and were slovenly after it had come to their attention. He also argued that the application for leave to call the witnesses came at a very late stage and 'amounted to a change in tack'. He pointed out that a delay in the trial would be caused by calling the two additional witnesses which would cause inconvenience and prejudice to the respondents and the court.

The ruling refusing leave to call additional witnesses

[81] In the reasons given for the ruling of 12 July 2019 refusing leave to the appellants to call Dr Sharpe and Mr Shipindoh, the court very properly referred to the overall objective of JCM embodied in rule 1(3) and (4) of the High Court Rules in approaching the application.

[82] The High Court rightly stressed the overriding objective of JCM to facilitate the determination of the real issues in dispute justly and speedily, efficiently and cost

effectively as far as practicable by limiting interlocutory proceedings to what was strictly necessary to achieve the fair and timely disposal of matters and ensuring that cases are dealt with expeditiously and fairly.

[83] The court also listed the first four factors in rule 1(4) in sub paragraphs (a) to (d):

'(4) The factors that a court may consider in dealing with the issues arising from the application of the overriding objective include –

(a) the extent to which the parties have complied with any pre-trial requirements or any other mandatory or voluntary pre-trial process;

(b) the extent to which the parties have used reasonable endeavours to resolve the dispute by agreement or to limit the issues in dispute;

(c) the degree of promptness with which the parties have conducted the proceeding, including the degree to which each party has been prompt in undertaking interlocutory steps in relation to the proceeding;

(d) the degree to which any lack of promptness by a party in undertaking the step or proceeding has arisen from circumstances beyond the control of that party.

....'

[84] In addition to these, a further factor in this sub rule [(in sub-paragraph (f))] is salutary in the present proceedings:

'(f) the public importance of the issues in dispute and the desirability of a judicial determination of those issues.'

[85] Rule 17 enjoins the court to give effect to the overriding objective set out in rule 1 when exercising any power given to it under the rules.

[86] Although not expressly stated, the appellants' application was brought under rule 27(3)(a) which provides:

'(3) In order to expedite the determination of the real issues between the parties, the managing judge may, for good cause, at any status hearing, case management conference, pre-trial conference or at the trial –

(a) relax or vary time limits set by these rules, a practice direction, case plan order, case management order or pre-trial order.'

[87] The starting point in determining this issue is the approach of this court in *Unitrans*⁶ which emphasised the duty of the managing judge to ensure that the objectives of JCM are attained, so that a matter is dealt with 'justly and speedily, efficiently and cost effectively as far as practicable . . . to determine the real disputes between the parties, limit interlocutory applications to those necessary to achieve a fair and timely disposal of the matter'.⁷ The court in *Unitrans* stressed that the purpose of 'JCM is to avoid unnecessary delays in the finalisation of trials'.⁸ *Unitrans* also made it clear that laxity in respect of preparation on the part of practitioners may result in the refusal of postponements or other indulgences where this was the result of practitioners not preparing properly. The court further stressed that this did not mean that pre-trial orders could not be altered, emphasising that there would need to be an acceptable explanation for the non-compliance with the rules and the need to do so.

[88] The court below relied heavily upon *Unitrans* in dismissing the application because a delay in the finalisation of the trial would result. The facts in *Unitrans* are

⁶ Para 9.

⁷ Para 9.

⁸ Para 10.

however distinguishable from this matter. In *Unitrans*, the trial had been set down 6 times over a period of three years. On the fifth set down date, the matter was postponed because of the late filing of a witness statement. Leave was sought and granted to file two additional witness statements but a further witness statement was filed and video material was also sought to be introduced. The other party was not even approached to consent to this further indulgence. This court upheld the decision to disallow the further witness statement and the introduction of video material.

[89] The court below also referred to the failure by the appellants and their legal practitioners to investigate the truthfulness of the statements timeously and the failure to take steps to secure a copy of the report by Dr Sharpe after reference to it in Mr Lombaard's witness statement.

[90] In dismissing the reliance placed upon the respondents' subpoena of Dr Sharpe, the court below stated that 'this was of no moment as the plaintiffs had no onus in respect of the report'. This statement however fails to take into account the fact that Dr Sharpe was the respondents' witness as indicated in Mr Lombaard's witness statement and confirmed by the subpoena for her attendance issued at their instance. Once it became clear that the respondents would not be calling Dr Sharpe as a witness following the return of non-service of the subpoena, it was open to the appellants to trace her and call her as their witness. There could be no prejudice at all to the respondents as they had intended to call the same witness to produce her report, as was confirmed in argument by Mr Barnard. The respondents had intended to call her for the very reason the appellants sought to do so – to obtain her testimony on the conditions of the elephants and in which they were kept. The respondents had hoped that her testimony and report would assist them in refuting a reliance upon the truth of the Minister's

damning description of the conditions. The fact that the appellants had the burden to establish the truth of their report (and the respondents did not have the onus to show the report was untrue) is immaterial to the issue. The respondents' stated intention to call Dr Sharpe and their subpoena of her are highly relevant factors in the exercise of the court's discretion, yet were not taken into account.

[91] The court also failed to take into account the difficulties faced by defendants in defamation actions to establish the truth of reports, as acknowledged by this court in *Trustco*.⁹

[92] Whilst some criticism can justifiably be levelled at appellants' efforts to secure a copy of the report in the months preceding the trial (which the court below relied upon for the ruling), the court however failed to take into account the considerable difficulties encountered by the appellants in securing access to Dr Lindeque and other ministry witnesses and the report itself. It was out of the control of the appellants to have reasonable access to the ministry officials and their reports. Their sustained efforts were frustrated by bureaucratic red tape and delays. It was not a case of repeated lackadaisical unpreparedness by design or omission which confronted the court in *Unitrans*.

[93] Whilst the respondents could not complain of prejudice in Dr Sharpe being called, Mr Shipindoh's evidence may give rise to the need for them to reopen their case. But his report had only come to the attention of the appellants at a very late stage, although referred to in Dr Sharpe's report. Calling these additional witnesses could have however been achieved with reasonable expedition as their reports were attached to their

⁹ Para 26.

affidavits. A factor pertinent to this matter referred to in rule 1(4) concerns the public importance of the issues in dispute, a factor not taken into account by the trial court and which should have been. The trial concerned the constitutional rights to freedom of expression and the media as well as dignity in the form of the respondents' rights to their reputation and it also concerned a matter of considerable public importance being allegations of ill treatment of animals and in this case elephants which are specially protected not only under Namibian law but also under international law in terms of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).¹⁰

[94] Mr Barnard correctly referred to the narrow ambit of an appeal against the exercise of a discretion by a High Court to regulate its own procedures. A court of appeal would be slow to interfere with the exercise of a discretion on procedural matters, particularly in the course of JCM, unless it is exercised capriciously or upon a wrong principle or where a court has not brought an unbiased judgment to bear or not acted for substantial reasons or materially misdirected itself.¹¹

[95] In this matter, the court below correctly set out the principles applicable to case management and especially concerning the avoidance of delays in finalising proceedings. The court however misdirected itself by failing to take into account that Dr Sharpe was subpoenaed by the respondents and the lack of prejudice which would arise if she were to give evidence and also did not take into account the lack of control the

¹⁰ CITES is an international treaty adopted on 3 March 1973. Namibia ratified CITES shortly after independence on 18 December 1990. Elephants were included in Appendix I of CITES as from 1990. See: *Trustees for the time being of the Humane Society International – Africa Trust & others v Minister of Forestry, Fisheries and the Environment & another* (6939/2022) [2022] ZAWCHC 55 (21 April 2022), paras 11-15.

¹¹ *Rally for Democracy and Progress & others v Electoral Commission for Namibia & others* 2013 (3) NR 664 (SC) para 106.

appellants had in accessing the reports in question and the bureaucratic difficulties faced by the appellants in attempting to do so.

[96] This case is unlike most instances which arise where additional witnesses are sought to be called as a consequence of a lack of diligent and timeous preparation by parties and their practitioners, as is required by JCM. The report of Mr Shipindoh only came to the appellants' lawyers' attention in the course of the trial. Whilst their preparation was not without shortcomings and had an unexplained gap of inaction, the public importance of the evidence should also have swayed the court to permit that evidence when considered with the two prior factors not sufficiently taken into account.

[97] It follows that this ruling and its cost order should be set aside. Even though the appellants were seeking an indulgence, the opposition was in my view unreasonable, given the fact that Dr Sharpe was subpoenaed by them. As an indulgence was sought, fairness dictates that no order as to costs should be made.

Appeal on the merits

[98] The thrust of the appellants' appeal on the merits centred on the defence of reasonable publication of facts in the public interest. Both sides accepted that the elements of this defence were established by this court in the leading case of *Trustco*.

[99] It was also common cause between them, and correctly so, that the issue raised in the article concerns one of public interest. Reporting on allegations of ill treatment of elephants, made by the political and executive heads of the ministry constitutionally

mandated to enforce provisions of laws aimed at the prevention of ill treatment of this protected species is inherently a matter in the public interest.¹²

[100] The parties differed however as to whether the appellants established the defence of reasonable or responsible publication.

[101] The appellants in essence argued that the reporting of the factual statements in the report made at a public press conference by the Minister and the then Permanent Secretary was reasonable on the part of the appellants. It was argued that it was reasonable for the appellants to accept the correctness of the factual matter so disclosed by those officials at the press conference. Counsel for the appellants argued that they were reliable sources and further that aspects of illegality with regard to the lack of the requisite permits were established at the trial and that Dr Lindeque was justified in expressing a view that the conditions under which the elephants were held were unsuitable and posed a danger of harm to the elephants. Counsel contended that it was reasonable to report his description of the conditions as deplorable in that he would have had a basis to express that opinion as well as to report the Minister's description of the conditions.

[102] Counsel for the respondents' principal attack upon the report was the failure on the part of Ms Smit to test the accuracy of the statements. This failure was said to have

¹² In Dr Lindeque's evidence, he referred to accepted protocols for managing elephants. Whilst the ministry would not appear to have published guidelines, the South African Department of Environmental Affairs and Tourism has published in Government Notice 251 of 29 February 2008 (Gazette 30833) the National Norms and Standards for the Management of Elephants in South Africa in terms of section 9 of the National Environmental Management: Biodiversity Act 10 of 2004. In the first of the guiding principles (which are to be regarded in any activity which relates to elephants), this document states that: 'elephants are intelligent, have strong family bonds and operate within highly socialised groups and unnecessary disruption of these by human intervention should be minimised'. It is also to be noted that it is an offence in Namibia under s 2(b) of the Animals Protection Act 71 of 1962 to confine or secure any animal under such conditions or in such a manner to cause that animal suffering or in any place which affords inadequate space, ventilation or shelter from heat or cold weather.

been contrary to generally accepted sound journalistic practice. Counsel argued that the two attempts in quick succession to call Mr Lombaard were hopelessly inadequate for him to have the opportunity respond to the very serious allegations made against him and Golden Game CC. Counsel also argued that there was no effort at all made to test the accuracy of the information given at the press conference and that it was insufficient that Ms Smit regarded the sources as credible and reliable. He asserted that Ms Smit could and should have travelled to Mr Lombaard's farm near Mariental to see the conditions for herself. Counsel submitted that the High Court correctly rejected the defence of reasonable publication and supported the approach taken by that court.

The defence of reasonable publication of facts in the public interest

[103] This court in *Trustco* adopted the defence of reasonable or responsible publication where the statements are in the public interest. This defence essentially means that media defendants are not liable for the publication of defamatory statements which are in the public interest if they can establish that they were reasonable or responsible in publishing them.

[104] In view of the approach of the High Court in this matter and other recent matters involving claims against the media, it is necessary to refer to the reasoning of the court in *Trustco* in developing the common law to include this defence and have regard to the approach of other jurisdictions where this defence had originated from and has developed.

[105] In adopting the defence of reasonable or responsible publication of matters in public interest, the court in *Trustco* made it clear, that defamation defences previously available under the common law were inadequate to protect the right to freedom of

expression and the media protected under Art 21 of the Constitution. The common law thus needed to be developed, as had happened in other jurisdictions ‘to provide greater protection to the media to assure that their important democratic role of providing information to the public is not imperilled by the risk of defamation claims’.¹³

[106] After conducting a thorough survey of other common law jurisdictions, this court in *Trustco* observed a considerable convergence in judicial approaches¹⁴ concerning the need to liberalise the law of defamation in recognition of the crucial role of the media in democracies but at the same time acknowledging the need to balance the right of the media with the right to reputation (protected by Art 8 of the Constitution), given the power of the media. That convergence largely, but not exclusively,¹⁵ was reflected in the development of the defence of reasonable or responsible publication of matters in the public interest as achieving the balance between the right of the media with the right to dignity.¹⁶

[107] *Trustco* expressly held that this defence struck that balance (between freedom of the media and the right to reputation protected in Art 8):

‘. . . (T)he development of a defence of reasonable or responsible publication of facts that are in the public interest . . . will provide greater protection to the right of freedom of speech and the media protected in art 21 without placing the constitutional precept of human dignity at risk.’¹⁷

¹³ *Trustco* para 50.

¹⁴ *Trustco* paras 49-50.

¹⁵ A different test was adopted in the United States of America in the leading case of *New York Times Co v Sullivan* 376 US 254 (1964) which restricted defamation claims of public officials unless shown that the publisher acted with actual malice.

¹⁶ In South Africa in *National Media Ltd & others v Bogoshi* 1998 (4) SA 1196 (SCA); in the United Kingdom in *Reynolds v Times Newspapers Ltd & others* [1999] 4 All ER 609; in Canada in *Grant v Torstar Corporation* 2009 SCC 61, [2009] 3 S.C.R. 640; in Australia in *Lange v Australian Broadcasting Corporation* [1997] HCA 25, 189 CLR 520; in New Zealand in *Lange v Atkinson* [2000] 3 NZLR 385.

¹⁷ *Trustco* para 53.

[108] Whilst the constitutional setting and the common law basis of defamation differ in the United Kingdom, the genesis and development of this defence in that jurisdiction is of relevance and instructive in applying the defence in Namibia, given this court's reliance upon the approach in *Reynolds*¹⁸ (which established this defence in the UK). Lord Nicholls in *Reynolds* provided a list of ten factors which may be taken into account in determining whether the publication was covered by a responsible journalism defence:

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.¹⁹

¹⁸ Referred to in *Trustco* para 40.

¹⁹ Page 626. In *Grant*, the Canadian Supreme Court too set out seven non-exhaustive factors to be taken into account in para 126.

[109] Lord Nicholls however stressed that the list was illustrative and not exhaustive and that the weight to be given to the factors on the list and other relevant factors will vary from case to case.²⁰

[110] Lord Nicholls expressly held that 'the failure to report the plaintiff's explanation is a factor to be taken into account. Depending upon the circumstances, it may be a weighty factor. But it should not be elevated into a rigid rule of law'.²¹

[111] These factors however proved difficult for courts to apply correctly. The House of Lords in *Jameel & others v Wall Street Journal Europe SPRL*²² subsequently criticised courts for applying the *Reynolds* factors restrictively 'as a series of hurdles to be negotiated by a publisher'.²³ Lord Hoffman, for the majority in *Jameel* stated it thus:

'In *Reynolds*, Lord Nicholls gave his well-known non-exhaustive list of ten matters which should in suitable cases be taken into account. They are not tests which the publication has to pass. In the hands of a judge hostile to the spirit of *Reynolds*, they can become ten hurdles at any of which the defence may fail. That is how Eady J treated them. The defence, he said, can be sustained only after "the closest and most rigorous scrutiny" by the application of what he called "Lord Nicholls' ten tests". But that, in my opinion, is not what Lord Nicholls meant. As he said in *Bonnick* (at p 309) the standard of conduct required of the newspaper must be applied in a practical and flexible manner. It must have regard to practical realities.'²⁴

[112] Lord Hoffmann concluded that, while it may have been better for the newspaper to have delayed publication to give Mr Jameel the opportunity to comment, the failure on the part of the journalist to afford Mr Jameel an adequate opportunity to comment

²⁰ Page 626.

²¹ Page 624.

²² *Jameel & others v Wall Street Journal Europe SPRL* [2006] UKHL 44 (11 October 2006); [2006] 4 All ER 1279. Also referred to in *Trustco*, para 40.

²³ Para 33 per Lord Bingham

²⁴ Para 56.

prior to publication, did not preclude establishment of the defence (of responsible publication).²⁵ Lord Hoffmann found that it had been established.

[113] This approach was followed by the Privy Council in *Seaga v Harper*.²⁶

[114] In a subsequent matter which served before the UK Supreme Court in *Flood v Times Newspapers Limited*,²⁷ the defendant published an article taken to mean that there were reasonable grounds to suspect that the claimant, a police officer, had corruptly taken bribes. The allegation turned out to be false. The Supreme Court unanimously held that the media defendant nevertheless had established a defence of responsible publication in the public interest. Lord Phillips for the court held that the defence arose if a journalist/publisher had taken reasonable steps to satisfy himself (or herself) that the allegation was true and that verification involved both subjective and objective elements in that the journalist had to believe in the truth of the allegation and that it was reasonable for him (or her) to have held that belief.²⁸

[115] In dealing with a duty of verification, Lord Phillips in *Flood* stated:

'Not all the items in Lord Nicholls' list in *Reynolds* were intended to be requirements responsible journalism in every case. The first question is whether on the facts of this case, the requirements of responsible journalism included a duty of verification and, if so, the nature of that duty.'²⁹

²⁵ Para 85.

²⁶ *Seaga v Harper* [2008] 1 All ER 965 (PC), [2008] UKPC 9.

²⁷ *Flood v Times Newspapers Limited* [2012] UKSC 11.

²⁸ Para 79.

²⁹ Para 75.

[116] Lord Phillips further found that where a responsible journalist satisfied himself that grounds for misconduct (on the part of the police claimant) exist 'based on information from reliable sources, or inferred from the fact of a police investigation in circumstances where such inference is reasonable',³⁰ the defence would be met.

[117] The court in *Flood* found on the facts that, even though the claimant had not been approached for comment, the actions on the part of the journalist in relying upon implications which could reasonably be drawn from police conduct and other circumstances satisfied the requirements of responsible journalism.³¹

[118] Lord Phillips referred to the defence of *reportage*, which has been raised by Ms Bassingthwaite in her argument before us. Lord Phillips explained that it is a 'special, relatively rare form of the *Reynolds* privilege'.³² It would arise where it is not the content of an allegation which is in the public interest, but the fact that the allegation is made. It would protect a publisher making the allegation provided it is not adopted by the author or publication.³³ It comprises the accurate reporting of allegations as part of the coverage of political debate by third parties where the repetition rule would not apply. Under that rule, repeating a defamatory statement would otherwise and ordinarily have the same legal consequences as originating it.³⁴ *Reportage* is an exception to this rule in the confined circumstances where fairly reported statements 'whose public interest lies in the fact that they were made matter than their truth or falsity'.³⁵ McLachlin, CJ in

³⁰ Para 80.

³¹ Para 99.

³² Para 77. It was also found to be the case in Canada by McLachlin, CJ in *Grant* paras 120-121.

³³ Para 77.

³⁴ *Grant* para 119. See also *Tsedu & others v Lekola & another* 2009 (4) SA 372 (SCA) para 4; *Lachaux v Independent Print Ltd & another* [2019] UKSC 27, [2019] 4 All ER 485 para 23.

³⁵ *Grant* para 120.

Grant set out the four requisites for satisfying a defence based on *reportage* as a form of reasonable or responsible publication, namely:

- (1) the report attributes the statement to a person, preferably identified thereby avoiding total unaccountability;
- (2) the report indicates, expressly or implicitly, that its truth has not been verified;
- (3) the report sets out both sides of the dispute fairly; and
- (4) the report provides the context in which the statements were made.³⁶

[119] Although this case to an extent approaches *reportage* in the sense that the report clearly identifies its source and does not itself adopt the allegations (except with reference to the conditions under which the elephants were held by placing a photograph depicting them), this instance is however different to *reportage*. This is because the public interest in the allegations lies in their content and not merely that they were made by the Minister and Dr Lindeque. In this instance, the public interest in learning of the allegations lies in the fact that they are or could be true.³⁷

[120] It follows that the species of the reasonable or responsible reporting defence in the form of *reportage* does not arise in this appeal.

[121] In order to establish the defence of reasonable or responsible reporting, the journalist in question would need to satisfy herself that her belief in the truthfulness of the allegations is the result of a reasonable investigation and must be a reasonable

³⁶ *Grant* para 120, also citing English authority.

³⁷ *Flood* para 78.

belief to hold.³⁸ A similar approach has been adopted by the Canadian Supreme Court in *Grant*.³⁹ This is also the basis to this defence established in *Trustco*.

[122] Following the decision in *Flood*, the UK Parliament passed s 4 of The Defamation Act 2013 which abolished the *Reynolds* defence and enacted a defence of publication on matter of public interest in these terms:

‘4. Publication on matter of public interest

(1) It is a defence to an action for defamation for the defendant to show that -

(a) the statement complained of was, or formed part of, a statement on a matter of public interest; and

(b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

(2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.

(3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.

(4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgment as it considers appropriate.

³⁸ *Flood* para 79.

³⁹ Paras 98-126.

(5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.

(6) The common law defence known as the Reynolds defence is abolished.’

[123] This new defence was carefully analysed by the UK Supreme Court in *Serafin v Malkiewicz & others*⁴⁰ with reference to *Reynolds* and subsequent cases and the passage of the bill into law. The court referred to the Explanatory Notes which accompanied the original bill and its amendments through Parliament which explained that the intention was to reflect the common law as set out in *Flood* and in particular the subjective and objective elements of the requirement contained in s 4(1)(b). It was also stated that the reason to abolish the defence known as the *Reynolds* defence was to codify the common law.⁴¹

[124] In the course of its judgment, the unanimous court in *Serafin* overruled the approach of the Court of Appeal which held that it was a basic requirement of fairness and responsible journalism to afford the person who is the subject of the story to put his or her side of the story.⁴² The unanimous court in *Serafin* emphatically held in this regard:

‘A failure to invite comment from the claimant prior to publication will no doubt always at least be the subject of consideration under subsection (1)(b) and may contribute to, perhaps even form the basis of, a conclusion that the defendant has not established that element of defence. But it is, with respect, too strong to describe the prior invitation to

⁴⁰*Serafin v Malkiewicz & others* [2020] UKSC 23, [2020] 4 All ER 711.

⁴¹ Para 66. In *Lachaux*, Lord Sumption in the UK Supreme Court said that the Defamation Act broadly speaking sought to ‘modify some of the common law rules which were seen unduly to favour the protection of reputation at the expense of freedom of expression’. That appeal however did not concern s 4 of the Defamation Act.

⁴² Para 76. See also *Economic Freedom Fighters & others v Manuel* 2021 (3) SA 425 (SCA) for a helpful discussion of the development of this defence across several jurisdictions.

comment as a “requirement”. It was never a “requirement” of the common law defence: see the *Jameel* case, cited at para 53 above; and so to describe it would be to put gloss on subsection (1)(b) and (2) of the section.⁴³

[125] The development of this defence in English law, brought about in the *Reynolds* defence expanded upon in *Jameel*, and the defence of responsible publication in Canada, both referred to and relied upon in *Trustco*, are relevant in the development of this defence in our common law. The court in *Trustco* referred to salient components of a code of ethics for journalists to assist in assessing whether the publication of matter was reasonable.⁴⁴

‘Journalists should be honest, fair and courageous in gathering, reporting and interpreting information. Journalists should:

- test the accuracy of information from all sources and exercise care to avoid inadvertent error. Deliberate distortion is never permissible.
- diligently seek out subjects of news stories to give them the opportunity to respond to allegations of wrongdoing.
- identify sources wherever feasible. The public is entitled to as much information as possible on sources’ reliability.
- always question sources’ motives before promising anonymity. Clarify conditions attached to any promise made in exchange for information. Keep promises.
- make certain that headlines, news teases and promotional material, photos ... and quotations do not misrepresent. They should not oversimplify or highlight incidents out of context.
- ...
- avoid undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the public. Use of such methods should be explained as part of the story.
- ...

⁴³ Para 76.

⁴⁴ Para 76.

- avoid stereotyping by race, gender, age, religion, ethnicity, geography, sexual orientation, disability, physical appearance or social status. . . .’

[126] It has now become important to stress that these are mere guidelines outlining generally good journalistic practice to assist in assessing whether conduct was reasonable and are not rules to be strictly or rigidly complied with. The repeated admonitions by the House of Lords and later the UK Supreme Court that guidelines of this nature are nothing more than that and are to be applied with flexibility and practicality, apply with equal force to the position in Namibia. The UK Supreme Court indeed made it clear in *Serafin*⁴⁵ that the removal of the list in *Reynolds* and substitution with a reference to ‘all the circumstances’ meant that those factors were no longer to be used as a checklist.

[127] The experience in England and in this country have gradually shown that the strict and rigid application of guidelines can lead to a narrow and rigid approach which defeats the object of providing greater protection to the media and at the same time failing to achieving the balance with the right to reputation.⁴⁶ I have no doubt that O’Regan AJA in *Trustco*, like Lord Nicholls in *Reynolds*, most certainly did not intend that the guidelines listed in *Trustco* be rigidly applied to be requirements of responsible journalism in every case but, as O’Regan, AJA clearly articulated, rather to ‘provide helpful guidance to courts when considering whether a journalist has acted reasonably or not in publishing a particular article’.⁴⁷ Plainly the guidelines are to be applied in a practical and flexible manner, having regard to the practical realities of reporting matters in Namibia.⁴⁸

⁴⁵ Para 69.

⁴⁶ See Baroness Hale in *Jameel* para 146.

⁴⁷ Para 75. See also *Flood* para 75.

⁴⁸ As was held by Lord Hoffmann in *Jameel* para 56.

[128] The court in *Trustco* was furthermore clearly concerned that an overly strict and rigid approach to the guidelines or the code of conduct quoted by it could have this effect in wisely cautioning:

'Of course, courts should not hold journalists to a standard of perfection. Judges must take account of the pressured circumstances in which journalists work and not expect more than is reasonable of them. At the same time, courts must not be too willing to forgive manifest breaches of good journalistic practice. Good practice enhances the quality and accuracy of reporting, as well as protecting the legitimate interests of those who are the subject matter of reporting. There is no constitutional interest in poor quality or inaccurate reporting so codes of ethics that promote accuracy affirm the right to freedom of speech and freedom of the media. They also serve to protect the legitimate interests of those who are the subject of reports.'⁴⁹

[129] Similar sentiments were expressed by McLachlin, CJ in the Canadian Supreme Court in this very context, articulating a similar balance of the rights and interest at stake:

'The protection offered by a new defence based on conduct is meaningful for both the publisher and those whose reputations are at stake. If the publisher fails to take appropriate steps having regard to all the circumstances, it will be liable The requirement that the publisher of defamatory material act responsibly provides accountability and comports with the reasonable expectations of those whose conduct brings them within the sphere of public interest. People in public life are entitled to expect that the media and other reporters will act responsibly in protecting them from false accusations and innuendo. They are not, however, entitled to demand perfection and the inevitable silencing of critical comment that a standard of perfection would impose.'⁵⁰

⁴⁹ Para 77.

⁵⁰ *Grant* para 62.

[130] The danger of using judicial hindsight in making this assessment, stressed by Lord Phillips in *Flood*,⁵¹ also needs to be emphasised. A court must have regard to the circumstances and practical realities which prevailed when the decision to publish was made.⁵² As was said by Lord Hoffmann in *Jameel*:

‘The fact that a judge, with the advantage of leisure and hindsight, might have made a different editorial decision, should not destroy the defence.’⁵³

Application of these principles to the facts in this appeal

[131] As is already noted, reporting on allegations of ill treatment of elephants, specially protected game, is a matter of compelling public interest.

[132] The Ordinance envisages an elaborate permit system for the capturing, transporting, keeping, buying and selling of game at the pain of criminal sanction.

[133] The journalist in question, Ms Smit, received a photograph of elephants kept in undoubtedly cramped and visibly spare circumstances and was informed by her source that the ministry intended to obtain a court order against the respondents because of the conditions in which the elephants were kept. In seeking to verify the allegations, Ms Smit telephonically contacted the ministry’s spokesperson and followed this up with detailed questions in writing via email. After no response was received, Ms Smit called the Minister who referred her to Dr Lindeque. Ms Smit enquired from Dr Lindeque prior to a scheduled public press conference of the ministry. He confirmed to her that the ministry was seeking a court order against the respondents and would be laying criminal

⁵¹ Para 99.

⁵² See also *Seaga* p 971d-e.

⁵³ Para 51.

charges against the respondents for lacking the required permits and said the ministry took issue with the conditions in which they were kept.

[134] At the press conference, the Minister and Dr Lindeque answered questions posed by other journalists on the subject and confirmed that the elephants were transported illegally without valid permits and were kept in deplorable and horrific conditions.

[135] Ms Smit proceeded to prepare a report along the lines of what both the Minister and Dr Lindeque had stated to the above effect at that press conference. There were other journalists who attended the press conference who were also interested in the story. Ms Smit attempted twice to call Mr Lombaard on the afternoon of 23 October 2017 but he did not answer his cell phone. She then decided to finalise her report, fearing that other journalists would publish ahead of her if the article were to be held back. Unbeknown to her, *Confidante* had already published a report on the matter earlier that month.

[136] It was plain from her evidence that Ms Smit believed in the truth of the allegations contained in the report as they had been confirmed by or were stated by the Minister and Permanent Secretary of the ministry. At no stage during the trial did the respondents take issue with the accuracy of her report concerning the statements attributed to the Minister and Dr Lindeque.

[137] Did the appellants establish that her belief in the truth of the allegations was reasonably held? Or stated otherwise that her conduct in publishing the report equated to that of a reasonable or responsible journalist?

[138] In my view, the answer to these questions is an unequivocal yes. The verification of the allegations of illegality surrounding the capture and transport of the elephants and their conditions was sought and obtained from the Minister and the then Permanent Secretary of the ministry charged with the responsibility of enforcing and implementing the provisions of the Ordinance and protecting Namibia's wildlife and implementing Namibia's obligations under CITES. The ministry has an investigative, enforcement and supervisory role with regard to the granting of the requisite permits and ensuring compliance with them and the provisions of the Ordinance and CITES, including the conditions under which wild animals in captivity are to be kept.

[139] Ms Smit was plainly entitled to accept the accuracy of what was stated by both the Minister and Dr Lindeque in their respective capacities as political and executive heads of the ministry in addressing a public press conference on the subject. Ms Smit would then be entitled to report on what was stated by them at that press conference without the need to go behind their statements to verify their correctness, particularly in the context of this case when she had received information and a photograph to that effect from a source before the press conference. There is no indication of a casual, slipshod or careless approach on the part of Ms Smit and her editor. The indications are quite to the contrary.

[140] The court below found that there was a duty on Ms Smit to approach the respondents before publishing. But as resoundingly stated by the House of Lords and later the UK Supreme Court in the self-same context, the guidelines governing journalistic practice are to be applied in a practical and flexible manner with due regard to practical realities. In many, if not most instances the subjects of reports should be

contacted for their version. But as Lord Phillips in *Flood* stressed, no hard and fast principles must be applied by rote, adding:

‘They would impose too strict a fetter on freedom of expression.’⁵⁴

[141] I subscribe wholeheartedly to that view. The fundamental question to be answered in each case – with reference to its very own facts and circumstances – is whether the journalist in question acted reasonably or responsibly in publishing the article.

[142] By accurately reporting on the statements made by the Minister and Dr Lindeque at the press conference clearly satisfied the test of a reasonable or responsible journalist. What more was required when informed at such a public forum by those constitutionally responsible for wild life protection in Namibia? To first independently verify the correctness of their statements before publishing? Clearly the answer to that is an equally unequivocal no. In this instance, the Minister and Dr Lindeque had in fact verified allegations told to Ms Smit by her source.

[143] Mr Barnard complained that the caption to the photograph juxtaposed with the story stated that the elephants were ‘kept in containers’. But the photograph did not show elephants inside a container but rather in a very cramped and sparse enclosure surrounded by containers – a scene which depicts an enclosure which would be unacceptable for keeping elephants for the length of time they were kept (or for any length of time for that matter) when considered in the context of Dr Lindeque’s evidence of current standards and protocols. Mr Lombaard himself acknowledged that the

⁵⁴ Para 80.

conditions in which they were kept (some six months after being on his farm) were not 'conducive' (*sic*). The fact that the article referred to a court order being applied for may be inaccurate but is in essence truthful as the ministry had instructed the institution of urgent court proceedings against the respondents (and also proceeded with criminal charges with the office of the Prosecutor-General).

[144] In short, the appellants satisfied the standard of reasonable or responsible reporting.

[145] It follows that this defence should have succeeded and the defamation action been dismissed with costs. In view of this conclusion, it is not necessary to refer the matter back to receive the evidence of Dr Sharpe and Mr Shipindoh. Nor is it necessary to address the question of the damages awarded, particularly to Golden Game CC, the second respondent.

[146] In the result, the following order is made:

(a) The appeal against both the judgment and order of 2 March 2020 and the ruling of 12 July 2019 succeeds with costs, including those occasioned by employing one instructing and one instructed legal practitioner.

(b) The order of the High Court is set aside and replaced by the following:

'The plaintiffs' claim is dismissed with costs, including one instructing and one instructed legal practitioner.'

(c) The ruling of the High Court refusing the application for leave to call two further witnesses is set aside with no order as to the costs of that application in the High Court.

SMUTS JA

DAMASEB DCJ

HOFF JA

APPEARANCES

APPELLANTS:

N Bassingthwaighte

Instructed by Tjombe-Elago Inc.

RESPONDENTS:

P C I Barnard

Instructed by Behrens & Pfeiffer