

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No.: HC-MD-CIV-ACT-DEL-2017/04304

In the matter between:

JOHAN LOMBAARD
GOLDEN GAME CC

FIRST PLAINTIFF
SECOND PLAINTIFF

and

NAMIBIA MEDIA HOLDINGS (PTY) LTD
FESTUS NAKATANA

FIRST DEFENDANT
SECOND DEFENDANT

Neutral citation: *Lombaard v Namibia Holdings (Pty) Ltd* (HC-MD-CIV-ACT-DEL-2017/04304) [2020] NAHCMD 102 (2 March 2020)

Coram: PRINSLOO J

Heard: 1 July - 2 July 2019; 5 July 2019; 12 July 2019; 7 - 8 October 2019 and
25 November 2019

Delivered: 2 March 2020

Reasons: 20 March 2020

Flynote: Civil Law – Defamation – Media – Defence of truth; public interest; fair comment and reasonable publication – Defendant must show that publication was reasonable and in the public interest in order to establish that publication was not wrongful – Publication of a defamatory statement(s) which is untrue or only partly

true can never be in the public interest – In publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond

Summary: The plaintiffs sued the defendants for alleged defamation and claim the sum of N\$ 100 000 in respect of each plaintiff. The alleged defamation arose from an article that was published in the Namibian Sun on 24 October 2017 under the caption "Court Order Sought Over Elephants¹". The article reported that the Ministry of Environment and Tourism (MET) has sought a court order against the first plaintiff, the owner of a game capturing company in Mariental, to force him to return three elephants to where they were captured. The article further reported that the elephants were illegally transported and were being kept in what the Ministry described as horrific conditions. The article stated that both a criminal and civil case have been opened against the first defendant to compel him to return the elephants to Eden Game Farm, a private game farm in the Grootfontein district. A photo was published with the article with the caption: 'DEPLORABLE: Elephants being kept in containers at Mariental'. The article proceeded to report on certain statements made by Dr Malan Lindeque, the then Permanent Secretary of MET, and Mr Pohamba Shifeta, Minister of MET.

The plaintiffs pleaded that the article published report that: a) the MET has sought a court order against the plaintiffs to force them to immediately return three elephants to where they were captured; b) the elephants were illegally transported; c) the elephants were kept for months in containers in horrific and deplorable conditions; and d) both a criminal and civil case have been opened against the first plaintiff.

¹ The full text of the article published in the Namibian Sun is appended to this judgment as an addenda.

It is the plaintiffs' case that these words/statements, in the context of the article are wrongful and defamatory of the plaintiffs as they were intended to convey to the reader that: a) the plaintiffs had unlawfully captured the three elephants; b) the plaintiffs had illegally transported the three elephants; c) The plaintiffs kept the elephants in horrific and deplorable conditions; d) the plaintiffs acted unlawfully; e) the plaintiffs are mean and cruel and mistreated the animals.

Held that if the allegations concerning the unlawful and criminal behavior of the plaintiffs is read with the further factual allegation that the elephants were kept in containers and in horrific conditions then any normal reader of the newspaper will come to the conclusion that the first plaintiff acted unlawfully to the extent that he will be prosecuted civilly and criminally. The fact that the first plaintiff allegedly kept the elephants in containers for months in horrific conditions would cause the reader to understand that the first plaintiff is engaging in cruelty to animals in the extreme, as the elephants were kept in containers. The photograph published in support of the article has the caption 'DEPLORABLE: Elephants being kept in containers in Mariental'.

Held that horrific and deplorable are not soft words. In fact they would refer to the extreme end of the spectrum of the conditions in which the elephants were allegedly kept in. Any reader that reads that elephants are kept in containers would regard it as horrific and deplorable and this is equated with cruelty to animals.

Held further that when the defence of public interest is raised it should be borne in mind that publication of a defamatory statement(s) which is untrue or only partly true can never be in the public interest

Held further that the defence of reasonable publication holds those publishing defamatory statements accountable. In publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the

response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond

ORDER

Judgment is granted in favor of the First and Second Plaintiffs against the First, Second and Third defendants, jointly and severally, the one paying the other to be absolved, in the following terms:

1. In respect of the First Plaintiff: Payment in the amount of N\$ 70 000;
 2. In respect of the Second Plaintiff: Payment in the amount of N\$ 50 000;
 3. Interest on respective amounts at the rate of 20% per annum from date of judgment to date of final payment;
 4. Cost of suit. Such cost to include the cost of one instructing and one instructed counsel.
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JUDGMENT

PRINSLOO J

Introduction

[1] The plaintiffs, Johan Lombaard, a game farmer from Mariental and Golden Game CC, a close corporation conducting business as a game trader, are suing Namibia Media Holdings (Pty) Ltd, a newspaper trading as Namibian Sun and Festus Nakatana, the editor of the Namibian Sun, for alleged defamation and claim the sum of N\$ 100 000 in respect of each plaintiff.

[2] The alleged defamation arose from an article that was published in the Namibian Sun on 24 October 2017 under the caption “Court Order Sought Over Elephants²”

[3] The article reported that the Ministry of Environment and Tourism (MET) has sought a court order against the first plaintiff, the owner of a game capturing company in Mariental, to force him (them) to return three elephants to where they were captured. The article further reported that the elephants were illegally transported and were being kept in what the Ministry described as horrific conditions. The article stated that both a criminal and civil case have been opened against the first defendant to compel him to return the elephants to Eden Game Farm, a private game farm in the Grootfontein district.

[4] A photo was published with the article with the caption: ‘DEPLORABLE: Elephants being kept in containers at Mariental’.

[5] The article proceeded to report on certain statements made by Dr Malan Lindeque, the then Permanent Secretary of MET, and Mr Pohamba Shifeta, Minister of MET.

Pleadings

[6] The plaintiffs pleaded that the article published on 24 October 2017 report that:

- a) The MET has sought a court order against the plaintiffs to force them to immediately return three elephants to where they were captured;
- b) The elephants were illegally transported;
- c) The elephants were kept for months in containers in horrific and deplorable conditions;
- d) Both a criminal and civil case have been opened against the first plaintiff.

² The full text of the article published in the Namibian Sun is appended to this judgment as an addenda.

[7] It is the plaintiffs' case that these words/statements, in the context of the article are wrongful and defamatory of the plaintiffs as they were intended to convey to the reader that:

- (a) The plaintiffs had unlawfully captured the three elephants;
- (b) The plaintiffs had illegally transported the three elephants;
- (c) The plaintiffs kept the elephants in horrific and deplorable conditions;
- (d) The plaintiffs acted unlawfully;-
- (e) The plaintiffs are mean and cruel and mistreated the animals.

[8] According to the plaintiffs the words were capable of being so understood by readers of this widely distributed newspaper, and as a result of the publication of the defamatory words the plaintiffs have been damaged in their reputation and seek damages against the defendants jointly and severally, the one paying the other to be absolved.

[9] The plaintiffs pleaded that the second defendant is liable in this matter due to the fact that at all material times he was acting within the course and scope of his employment with the first defendant.

The plea

Special plea

[10] The defendants initially raised a special plea of non-joinder wherein the defendants pleaded that the Minister and Permanent Secretary of MET should have been joined and are necessary parties to the action. The defendants however elected not to pursue with the special plea and withdrew the plea on 5 June 2018.

Pleading on the merits

[11] In their plea the defendants admitted that the specific article was published on 24 October 2017 but deny that the passages complained of defamed the plaintiffs as alleged or at all and that any damages was suffered whatsoever. The defendants

pleaded that the words appearing in the article and pleaded by the plaintiff were words quoted *verbatim* from the Minister of MET, Mr Pohamba Shifeta and/or Dr Malan Lindeque, the Permanent Secretary to MET during a press conference held on 23 October 2017.

[12] In the alternative the defendants pleaded that in the event that the words in the article were understood by the readers of the newspaper to have one or more meaning attributed to them, then:

- (a) In so far as the words complained of are statements of fact they are true in substance and in fact, and in so far as the statements complained of are expression of opinion, they are fair comment based on a matter of public interest.
- (b) The printing of the article by the first defendant was reasonable and the act of editing and publishing was done by the second defendant in exercising his constitutional right to freedom of speech and expression and in order to ensure the importance of the free flow of information and the role of the media in a democratic society.
- (c) That in all circumstances the publication was on a matter of public interest and the defendant acted reasonably and responsibly to publish it.

Evidence adduced on behalf of the plaintiff

Johan Lombaard

[13] On behalf of the plaintiffs Mr Lombaard (the first plaintiff) testified that he is a farmer and a business person, and is the managing manager of Golden Game CC (the second plaintiff). He stated that his core business, by means of the second plaintiff, is the capturing and the selling of game to overseas markets.

[14] Mr Lombaard testified that during 2015 the second plaintiff submitted a tender to the Dubai Safari Park for the supply and delivery of game. The game to be supplied included antelope, lion and elephant. Mr Lombaard sourced the game in South Africa and Namibia and for purposes of this contract he purchased 10

elephants from one Mr Hanse of farm Eden in the Grootfontein district. According to Mr Lombaard he intended to transport five of the elephants to Dubai and of the remaining five elephants he sold two to N/a'an ku sê Wildlife Sanctuary and intended to keep the remaining three elephants on his farm.

[15] Mr Lombaard obtained the relevant permits in respect of the elephants destined for Dubai. In addition thereto the following permits were obtained in respect of the capture and removal of the elephants:

- a) A capture permit obtained from MET by Mr Hanse, the owner of the farm.
- b) A Veterinary Services Permit to move the animals dated 10 April 2017³ and 12 April 2017⁴ issued to Mr Hanse. The permits authorized the move of the elephant from Farm Eden to Farm Geluksberg.
- c) The general permit from MET dated 7 March 2017 issued to Mr Hanse;

[16] Mr Lombaard explained that MET granted Mr Hanse permission to sell 14 elephants of which the plaintiffs bought 10 and proceeded to capture only 6 elephants. The elephants were captured by the veterinarians appointed by Super Game Dealers CC (not by Dr Tubbesing personally of Super Game Dealers CC), under the licence held by Super Game Dealers CC. The 6 captured elephants were transported to N/a'an ku sê Wildlife Sanctuary, where they were offloaded and kept in a boma⁵. A week later three of these elephants were loaded and transported to the first plaintiff's farm, Geluksberg in the Mariental district.

[17] Within two days after their arrival at Farm Geluksberg the elephants broke out of the constructed boma and had to be recaptured. Mr Lombaard testified that in order to avoid damage to fences and infrastructure the elephants were returned to a temporary enclosure consisting of eight shipping containers measuring 324 square meters, whilst the existing boma was being strengthened to accommodate the elephants.

³ Permission to move 2 elephant.

⁴ Permission to move 6 elephant.

⁵ A boma is an enclosure or stockade to secure animals.

[18] Mr Lombaard testified that he ensured that the elephants were properly kept and cared for and he inspected the elephants on a daily basis as the elephants were a very expensive investment and he had to ensure their well-being. He testified that the elephants ate well, drank water and their condition did not deteriorate in any way whatsoever. Mr Lombaard testified that he emphatically denies the allegation by the defendants that the elephants were kept in containers as it is devoid of any truth

[19] Mr Lombaard testified that he was approached by a journalist of the *Confidante* Newspaper regarding the elephants. The journalist reporting on behalf of *Confidante* made enquiries regarding the alleged illegal capture and transport of elephants to his farm and invited Mr Lombaard to comment on it. According to Mr Lombaard he explained the correct position to the journalist and that was the end of it. He only became aware of the publication in *Confidante* when the article was discovered by the defendants.

[20] Mr Lombaard further testified that the publication in the *Namibian Sun* Newspaper had far reaching consequences, not only for him personally but also in respect of the second defendant. He testified that he was unaware of the newspaper article and that on the morning of 24 October 2017 he received calls from different people enquiring about the front page article alleging that he acted illegally by capturing, transporting and holding elephants on his farm. Mr Lombaard obtained a copy of the newspaper straightaway and after reading the article contacted his legal practitioner and instructed him to take immediate steps against the defendants.

[21] Mr Lombaard testified that as a result of the article he would be stopped by local people wherever he would go enquiring about the truthfulness of the newspaper article and what the situation of the elephants were and he had to explain over and over in an attempt to undo the damage.

[22] A few days after the publication of the newspaper article he was informed by Dubai Safari Park that their purchase order for the elephants was cancelled. A tender to a game park in Libya also fell through as a result of the publication of the newspaper article. According to Mr Lombaard the article was published on the

internet and his business acquaintances had access to it. He tried to explain the position as best as he could but could not undo the damage. The same happened in respect of a potential customer and wildlife partner in Texas, United States of America. Mr Lombaard testified that he travelled to the United States to go and see this potential customer but upon his return to Namibia he was informed that the customer saw the article on the internet. He tried to undo the negative publicity but the communication with the client seized thereafter.

[23] The witness testified that prior to the newspaper article in the Namibian Sun on 24 October 2017 he received regular enquiries from potential overseas customers as he advertised his business/second defendant's business internationally. However, since the publication the plaintiffs did not receive any enquiries and Mr Lombaard submitted that the export part of second plaintiff's business effectively seized.

[24] Mr Lombaard testified that the factual allegations from the alleged sources are incorrect and had the newspaper conducted the necessary enquiry they would have determined the truth without difficulty and would have known that the allegations made are not true.

[25] Mr Lombaard testified that the following information contained in the article is incorrect:

- (a) MET has never sought an order against him or the second plaintiff.
- (b) The elephants were not illegally transported or transported without a permit.
- (c) The elephants were never kept in horrific or deplorable conditions.
- (d) The elephants were never kept in containers.
- (e) No urgent application was launched by MET.
- (f) The allegations that the second plaintiff is not registered to capture elephants is correct but that the article failed to mention that the plaintiffs made use of a registered veterinarian to conduct the capture.

[26] During cross-examination by Mr Maasdorp, counsel for the defendants, Mr Lombaard confirmed that in a letter of the second defendant dated 30 October 2017

an offer was extended to him. The second defendant offered to publish an article in the Namibian Sun newspaper stating Mr Lombaard's side of the story but he did not accept the offer. This offer was apparently again extended during mediation but it was also not accepted. Mr Lombaard testified that the damage was already done by the first article and expressed the view that a follow up article could not replace or turnaround the first article.

[27] Mr Lombaard further testified that at mediation when the issue of the follow-up article was raised he insisted that he wanted the follow-up article to be the same size and at the front page of the newspaper as it was the case with the original article. Mr Lombaard confirmed further that the defendants indicated that they cannot guarantee a front page article but that it would appear in the first three pages of the newspaper and it would be an exclusive article. He however stated that this was not acceptable to him and that there would have been no need for a further article to clarify the issue if the defendants had approached him for his side of the story before publishing the defamatory article.

[28] When Mr Lombaard was confronted with the relevant permits and the remarks contained therein he testified that the general permit which was issued by MET always have a remark that MET staff must attend capture sessions but stated that in the 15 years that he has been in the game capturing business the staff of MET have never attended a game capturing session. Mr Lombaard testified further that the general permit always contains this remark but the arrangement is that MET will be notified seven days prior to an intended capture and if their staff are not available then the capture can proceed in the MET's absence. In the matter at hand the general permit was duly issued to Mr Hanse (the farmer) and MET Otjiwarongo was informed of the intended capture but they did not attend.

[29] When questioned regarding the validity of the certificates of registration of both Golden Game CC and Super Game CC Mr Lombaard insisted that both entities are duly registered to capture game although the certificates that were discovered had expired. Mr Lombaard testified that the certificates are renewable annually and that MET would not issue a certificate to capture if a game dealer does not have a valid certificate of registration.

[30] On the issue of public interest and publishing of information regarding the capturing and exporting of elephants Mr Lombaard testified that he agrees that the information will be in the public interest but stated that by virtue of the article published by the defendants he was convicted in the press without having the opportunity to vindicate himself. Mr Lombaard further stated that in his opinion it is not in the public interest to publish articles on the front page of a newspaper without verifying the facts. Mr Lombaard stated that the result of the article is that the Namibian wildlife export industry was negatively affected.

[31] Regarding the enclosure and the condition of the elephants Mr Lombaard testified that the elephants were never kept in containers. Their temporary enclosure consisted of a number of containers which were high enough to prevent the elephants from escaping and safe enough that the elephants cannot hurt themselves.

[32] When questioned about the directions of MET that the elephants must be captured and returned to Farm Eden Mr Lombaard testified that a meeting was held with MET to determine the reason for this direction. Mr Lombaard testified that the explanation was that because Dr Tubbesing of Super Game Dealers CC did not capture the animals they must be returned to the farm of origin, where the animals needed to be re-captured after a further permit is obtained. After discussions MET realized that this direction would serve no purpose and would unnecessarily endanger the animals and the direction was withdrawn and Mr Lombaard was allowed to keep the animals on his farm provided the animals cannot break out of the farm.

[33] On a question of Mr Maasdorp whether farm Geluksberg was approved by MET for keeping of elephants Mr Lombaard testified that his farm need not be approved and during the past 10 years he brought rhinos and buffalos to the farm which animals fell in the same category as elephants and only when the elephants in question were offloaded on the farm did MET take issue.

Evidence adduced on behalf of the plaintiff

[34] On behalf of the defendants three witnesses were called to testify, namely Ella Sophia Smit, Festus Kondjashili-Sindano Nakatana and Dr Malan Lindeque.

Ella Sophia Smit

[35] Ms Smit is employed as a senior journalist at the Namibian Sun which is a subsidiary of the first defendant.

[36] The witness stated that she was employed as a journalist at the Republikein from November 2006 and joined the Namibian Sun as a senior journalist in 2010, and is still so employed. Ms Smit testified that as part of her portfolio as a journalist with the first defendant she concentrates on issues pertaining to the tourism industry, environment and the agricultural sector in the Republic of Namibia.

[37] Ms Smit indicated that between 13 and 15 October 2017 she received a photograph from a confidential source. The photograph had been circulating on social media and depicted two elephants that were kept in a container in a deplorable condition. Ms Smit further testified that her source informed her that MET intended to obtain a court order against the plaintiffs so she proceeded to contact the spokesperson of MET on 16 October 2017. The witness stated that she spoke telephonically with one Mr Muyunda and requested his comment on the photograph concerned. Mr Muyunda however indicated that he had not seen the photo and was unable to comment. Mr Muyunda requested Ms Smit to forward her questions that she might have to his office, and given the fact that she was of the opinion that the photo appears to be a clear depiction of cruelty, she proceeded to send a list of questions via electronic mail on 17 October 2017.

[38] Ms Smit testified that on 19 October 2019 Mr Muyunda referred her to the Minister of MET, Mr Pohamba Shifeta. She contacted the Minister the same date but was referred to the Permanent Secretary of MET, Dr Malan Lindeque (as he then was). Ms Smit testified that she contacted Dr Lindeque requesting a meeting to obtain more information regarding the elephants but managed to have a telephonic conversation with Dr Lindeque on 23 October 2017. During their telephone

conversation Dr Lindeque confirmed that MET had sought a court order against the first plaintiff and that the ministry would proceed with a criminal case against the first plaintiff.

[39] On 23 October 2017 the witness also proceeded to attend a press conference at MET's head office which related to the latest poaching statistics (at the time).

[40] Before the press conference the witness met with Dr Lindeque and she testified that Dr Lindeque confirmed what he had already told her telephonically. The witness stated that during the press conference she made a contemporary written recording of everything stated during the press conference by the Minister and the Permanent Secretary.

[41] During the press conference questions were raised by other journalists regarding the conditions of the elephants and Ms Smit testified that she recorded the response of the Minister and the Permanent Secretary thereto verbatim.

[42] Ms Smit testified that the following was stated during the press release:

- a) That the elephants were transported illegally and without valid permits and were kept in deplorable and horrific conditions;
- b) That the first plaintiff is not registered to capture large wild animals such as elephants and therefore MET had not provided the required approval for the capture and transport of the elephants;
- c) MET had not approved the conditions where the elephants were kept at the first plaintiff's farm;
- d) MET had not approved the export of the five elephants from farm Eden to Dubai although permission was obtained from the Convention on International Trade in Endangered Species on Fauna and Flora (CITES);
- e) That MET had made a demand to the first plaintiff to return the elephants to farm Eden, however the first plaintiff refused to comply;
- f) That the elephants should be kept on a farm of about 1000 hectares;

- g) That MET sought a court order against the first plaintiff to compel him to return the elephants in question to farm Eden, and that the instructions were already provided to the Attorney-General;
- h) That MET considered the matter urgent and that it calls for an urgent application to court.

[43] Ms Smit testified that she thereafter proceeded on 23 October 2017 to prepare an article regarding the elephants in question for publication. On the same date and after writing the article she attempted twice to get in touch with the plaintiff via cellular phone but the first plaintiff's phone was off. As she was unable to get hold of the first plaintiff for his comment the article was published without his input. Ms Smit testified that a number of other journalists also attended the press conference so the publication of the article was time sensitive and the story could not be held back to the next day to obtain the comment of the first plaintiff.

[44] On 27 October 2017 Ms Smit was informed that the first plaintiff addressed a letter of demand to the first defendant as a result of the article published on 24 October 2017. On 30 October 2017 the second defendant prepared a letter on behalf of the first defendant in response to the plaintiff's letter of demand. This letter afforded the first plaintiff to state his side of the story but the first plaintiff did not want to take up the offer.

[45] Ms Smit testified that the article in question does not reflect her personal view or that of the first defendant but is based on verbatim quotes obtained from the relevant governmental authorities. She further testified that she cannot attest as to the legality or illegality of the first plaintiff's actions or inactions. She further testified that she believes that she performed her duties responsibly and that the publication of the article was in the public interest and the defendants acted responsibly to publish it.

[46] Ms Smit testified that she had no reason to doubt the accuracy of the statements made on behalf of MET and submitted that it would be unreasonable to expect of her to verify the accuracy of the information from other sources prior to publication of the article in question.

[47] The witness denies that the article was wrongful or defamatory towards the plaintiffs or that the words were intended or understood by the readers of the newspaper to mean what was stated and pleaded by the plaintiffs. The witness further testified that if the statements in the article were understood by the readers of the newspaper to have one or more of the meanings as alleged and listed by the plaintiff then the alleged defamatory words are true in substance and in fact and submitted that in so far as the statements complained of a situation or expressed an opinion, they are fair comment based on a matter of public interest. The witness however emphasized that it is denied that the statements are defamatory in any way.

[48] During cross-examination by Mr Barnard, counsel for the plaintiffs, the witness was confronted with the fact that the story about the elephants in question was not new news as the Confidante published an article regarding the elephants on 12 October 2017 already. Ms Smit however indicated that she was not aware of the article in the Confidante and only came to know about it after the defendants received the letter of demand issued by the plaintiffs' legal practitioner.

[49] Ms Smit was further confronted regarding her attempts to get the comment of the first plaintiff and the fact that she had information regarding the elephants almost two weeks prior to the publication and only attempted to call the first plaintiff the afternoon before the article was published. Ms Smit confirmed that she made two calls to Mr Lombaard on 23 October 2017 in short succession (at 14h14 and at 14h28) but the phone was off. The witness stated that the defendants had to publish the article as a matter of urgency and that by keeping the article back for two or three days it would become old news.

[50] Ms Smit conceded that the two phone calls were the only attempt made to reach the first plaintiff but stated that up to that point she could not approach Mr Lombaard for his comment as she was still trying to establish if there was any truth to the allegations and that the facts were only confirmed on the morning of the 23rd of October 2017 when she had her conversation with Dr Lindeque. Ms Smit confirmed that she accepted what was said at the press conference and during her conversation with Dr Lindeque on face value as the truth.

[51] Mr Barnard also confronted the witness with the time lines that she had in obtaining the relevant information for the article and when he put to her that she took 9 days to get information from MET and gave the plaintiff only 14 minutes (time lapse between the two phone calls) Ms Smit testified that she did not know that first plaintiff's phone would be off by the time she wanted to submit the article for publication. She thought that she could prepare her story on 23 October 2017 and speak to Mr Lombaard but when the other journalists posed questions regarding the elephants at the press conference it changed the situation and she could no longer hold back on the article.

[52] Mr Barnard further confronted Ms Smit with a number of issues imparted by MET that appears to be incorrect, for example that no court order was sought by MET and that the elephants were not kept in containers. Ms Smit remained firm and stated that she was informed that an application was sought. When requested to consider the photograph depicting the elephants 'in the so-called "container"' the witness stated that from her observation there were two elephants and only one container and that the elephants were kept 'in the container'.

[53] After further cross-examination on the observations of the witness Ms Smit conceded that the elephants were not kept in a container as previously testified.

[54] Ms Smit was also invited to indicate to court on what she basis her fact that the elephants were kept in deplorable conditions, if one has regard to the photograph that was published with the article. Ms Smit testified that the animals were kept in deplorable conditions as they were kept in a very small space. Ms Smit however added that it was not her opinion that the conditions were deplorable but it was the statement by MET. The witness however conceded that she followed up the story of the elephants after she received a news tip from a source and thought it was newsworthy as the elephants were not kept in proper conditions.

[55] The witness was also confronted on whether she was aware of the criteria for a reasonable publication as set out in the *Trustco Group International Ltd v Shikongo*

matter⁶ where the Supreme Court referred to the Code of Ethics of the Society of Professional Journalist. Ms Smit testified that she was well aware of the criteria set.

[56] Mr Barnard had put to the witness that she did not test the accuracy of the information from MET nor did she take care to avoid an inadvertent error by accepting on face value what was said by the Minister and Permanent Secretary. Ms Smit testified that she had no reason to doubt what the Minister and Permanent Secretary had said as it was the Minister of MET that was giving out the information.

[57] Mr Barnard further put to the witness that she failed to diligently seek out to the subjects of the story and give them the opportunity to respond to the allegations of wrong doing. Ms Smit was adamant that she complied with this duty but confirmed on further questions by Mr Barnard that she made no further attempts to contact Mr Lombaard by using other mediums like sms, WhatsApp or e-mail when she was unable to reach him telephonically.

Festus Kondjashili-Sindano Nakatana

[58] Mr Nakatana testified that he is employed by the first defendant as the editor of the Namibian Sun and has been so employed from about October 2014. Prior to his current position he was employed by the first defendant as a news editor from September 2011 to September 2014. Mr Nakatana stated that in carrying out his duties he was acting on behalf of the first defendant and in his official capacity at all material times.

[59] Mr Nakatana testified that during the month of October 2017 their office received an invitation to attend a press conference held by MET which was scheduled for the 23rd of October 2017. The purpose of the press conference was to discuss the poaching statistics at the time. Ms Ella Smit, a senior reporter, was directed to attend the press conference as she was the one dealing with issues relating to environment and tourism.

⁶ (SA 8/2009) [2010] NASC 6 (07 July 2010).

[60] After the press conference the first defendant's editorial team which is made up of the news editor, sub editor and Mr Festus Nakatana was briefed by Ms Smit on the details of the press conference, which included more than just the current poaching statistics. Ms Smit shared with the team her interest in the MET's concerns and actions regarding the elephants then in possession of the plaintiffs. Mr Nakatana testified that Ms Smit prepared an article on the issue relating to the elephants and the information obtained during the press release and submitted the article for his consideration.

[61] Mr Nakatana testified that he considered the editorial content and streamlined it to ensure that the quality of the newspaper article was maintained. He decided that Ms Smit's article should be published on the 24th October 2017 as he was of the opinion that the issue relating to the plaintiffs and the elephants was newsworthy and important as a matter of public interest.

[62] On the 26th October 2017 after the publication of the article, the defendants received a letter of demand under the hand of the plaintiffs' legal practitioner which suggested that the publication was defamatory. Mr Nakatana testified that he responded to the letter on 30 October 2017 wherein it was made clear that the defendants deny the allegation and invited the first plaintiff to give his side of the story, however to date the plaintiffs have not responded to the letter.

[63] Mr Nakatana emphatically denies that the article published was defamatory and stated that the contrary is in fact true as the article contains verbatim quotes from the Minister, Mr Shifeta and the Permanent Secretary Dr Malan Lindeque which were made at the press conference. Mr Nakatana also pointed out that the first plaintiff admitted in his witness statement that the elephants were indeed kept in containers.

[64] Mr Nakatana further denies that the statements were intended or understood by the readers of the newspaper to mean that which was attributed to it by the plaintiffs and added that should the words or statements be understood to have one or more meanings attributed to them as alleged by the plaintiffs then it is his view that the statements were true in substance and in fact in favour of public interest. He

further testified that the defendants at all times acted reasonably and responsibly in publishing the article.

[65] During cross-examination Mr Barnard confronted the witness with his contention that the first plaintiff admitted that the elephants were kept in containers. The witness was referred to paras 11 and 12 of the witness statement of Mr Lombaard that speaks of an enclosure, constructed of eight shipping containers. Mr Nakatana however testified that it was his assertion that the elephants were kept in those containers.

[66] When it was put to the witness that the enclosure in which the elephants were kept was 18 meters by 18 meters (324 square meters in total) Mr Nakatana replied that if one looks at the publication of the article and the pictures that were used in support thereof then it appears that there is a limited view and one cannot make out whether it is indeed 324 square meters.

Malan Lindeque

[67] Dr Lindeque testified that he is the retired Permanent Secretary of MET and that he was employed in the capacity of Permanent Secretary from 2014 to July 2018.

[68] The witness testified that his actions and those of MET were guided by the reports made to MET and the reports were produced by officials of MET to him in his official capacity.

[69] Dr Lindeque testified that during April 2017 a report was received from the first plaintiff's neighbor at farm Brokerhill number 85, in the district of Mariental that there were three elephants causing damage to his fence and gate on his farm and MET was requested to take action. According to the witness it was also brought to the attention of MET for the first time that six elephants were captured and transported from farm Eden to farm Frauenstein⁷. Three elephants were then recaptured and transported to Geluksberg, the farm of the first plaintiff.

⁷ Also known as N/a'an ku sé Lodge and Sanctuary.

[70] The witness testified that the owner of farm Eden applied and obtained a general permit from MET for capturing and transportation of 14 elephants. The general permit issued specifies the following conditions:

*'MET staff to always attend each capture session;
7 days prior notice to MET in Grootfontein and neighbours,
Capture to be done by Super Game Dealers,
Please report back one month after expiration date.'*

[71] He confirmed that Super Game Dealers CC was approved to do the capturing and transportation of the elephants and held an unrestricted registration to capture any type of wild animal. Dr Lindeque testified that Dr Tubbesing is a veterinarian who was also authorized to use the capture drugs and stated that if Dr Tubbesing was not a veterinarian he would have had to enlist the veterinarian to do so as only veterinarians are allowed to use the class and type of drugs used for this purpose.

[72] Dr Lindeque testified that contrary to the understanding that Dr Tubbesing of Super Game Dealers CC would capture the elephants, the first plaintiff captured 6 elephants with the assistance of two veterinarians. According to the witness the second plaintiff was not registered as a game dealer for elephants as its game dealer certificate was restricted to capture antelopes and zebras in bomas and transporting such animals. As a result of this contravention a criminal case was opened during May to June 2017 against the first plaintiff and a number of other persons under Windhoek CR number 921/06/2017.

[73] Dr Lindeque testified that during the month of July 2017 a photograph of a juvenile elephant that was kept between containers emerged and made its way through social media platforms, which resulted in a public outcry. The witness testified that the enclosure made from shipping containers presented a danger to the elephants as it was made from solid steel against which the elephants could easily injure themselves if they were to triumph the sides of the containers in an attempt to escape.

[74] The witness testified that on 16th of August 2017 the Minister of MET gave a directive to the first plaintiff in writing to immediately return the elephants from farm Geluksberg to their original habitat being farm Eden. The first plaintiff failed to adhere to the directive and in October 2017 the witness provided the Government Attorneys with instructions to obtain an urgent court order to return the elephants to their original habitat. The Government Attorneys responded in December 2017 wherein the MET was advised against an urgent application but to rather proceed with an application in the ordinary course.

[75] Dr Lindeque referred to the Nature Conservation Ordinance 4 of 1975 and testified that the Ordinance stipulates that no person shall capture, transport or keep game or any other wild animal for commercial purposes unless he/she is licenced as a game dealer. He further testified that the plaintiffs were in possession of a permit to move animals, but the permit was issued by veterinary services and not by MET. The witness stated that the veterinary permit is not considered sufficient or compliant with the Nature Conservation Ordinance which provides that only game dealers can capture and transport wild animals for commercial purposes. The permit from veterinary services is meant to be a disease control measure and does not substitute or satisfy the requirements of MET, concerning the conditions under which wild animals such as elephants are transported.

[76] Dr Lindeque testified that he considered the article in question published in the Namibian Sun newspaper and also considered the reporter's (Ms Smit) written notes and it appears to be correct to his recollection. He stated that he could not recall the date of the conversation with Ms Smit or the length thereof. The witness however testified that he did not have the time to go through the article in detail.

[77] In following up on this statement the court enquired from Dr Lindeque against what source he verified the notes of Ms Smit and Dr Lindeque testified that he saw the notes of the journalist approximately a month prior to the commencement of the trial but that he had a fair recollection of the media briefing. The witness further testified that although Ms Smit forwarded her article to him he only read it on his cell phone and he told Ms Smit that he did not have the time to look at the article in detail

but on an overview the article appeared to be correct. Dr Lindeque testified that his issue was more related in ascertaining whether the minister and he were correctly quoted verbatim, but that he also informed Ms Smit that he was unable to go through the article line by line to ascertain whether she quoted them correctly. The witness was therefore unable to confirm that the actual statements were correctly quoted, but stated that the gist of the article was correct.

[78] Mr Barnard cross examined the witness regarding the permit process and the general permit and the numerous contraventions with the permits and the Ordinance that the witness raised in his evidence in chief and during the course of cross examination the witness conceded the following:

- a) An unrestricted permit to capture was allocated to Super Game Dealers CC and not to Dr Tubbesing personally;
- b) The capture of the elephants had to be done by Super Game Dealers CC with all its equipment and expertise and staff;
- c) The witness cannot deny that Super Game Dealers CC was present during the capture of the elephants;
- d) That the general permit issued to Mr Hanse to capture the elephants did not contain any conditions but merely remarks but testified that he does not understand why it was not indicated as such;
- e) It was the application for the general permit by Mr Hanse which was accompanied by a letter from Super Game Dealers CC and not that of Mr Lombaard.

Arguments by the parties

On behalf of the defendants

[79] Mr Maasdorp argued that on the evidence ruled admissible by this court the defendants were unable to prove that the plaintiffs 'kept the elephants for months in horrific and deplorable conditions' and conceded that this court would thus be entitled to find that the defendants have not proven that the elephants 'were kept for months in horrific and 'deplorable conditions''. However, Mr Maasdorp argued that

the reasonable reader will see that the word 'deplorable', which appears for the first time in the headline of the article, is a quote and that it is not the point of view of the journalist. The source of the information becomes clear in the body of the article and although the words 'deplorable conditions' were not proven it was correctly reported as words having been said by the highest officials of MET.

[80] Mr Maasdorp argued that the court should not make a positive finding that the elephants were not kept in 'deplorable conditions'. Mr Maasdorp submitted that the first plaintiff's evidence should be approached with considerable circumspection as he failed to produce a single photograph of the condition of the elephants. Mr Maasdorp further maintained that the first plaintiff failed to produce any admissible evidence of the inspection of the elephants or the inspection of the circumstances in which the elephants were kept and failed to offer any explanations for not producing such evidence. Therefore the court can safely draw the inference that the lack of photographic evidence and expert evidence cannot support the first plaintiff's *ipse dixit* in this respect.

[81] Mr Maasdorp submitted that the defendants have proven that a criminal case has been opened against the first plaintiff and although the defendants have not proven that the Ministry filed an urgent application against the plaintiffs the undisputed evidence is that the Ministry indeed requested the Government Attorney to launch such an urgent application. Mr Maasdorp drew the court's attention to the initial correspondence by the MET dated 4 October 2017, the follow up correspondence dated 27 October 2017 and the reply thereto by the Government Attorneys dated 8 December 2017.

[82] Mr Maasdorp argued that a reasonable reader reading the statement complained of and through a constitutional prism would not naturally assume or understand that the plaintiffs were guilty of the alleged transgression. He argued that the reasonable reader would assume or understand that the Ministry held sufficient evidence to believe that they need to approach a court for relief and that they had reasonable prospects to succeed in persuading the court to grant the relief. He continued and argued that the reasonable reader would also understand that the plaintiffs would have an opportunity to defend the claims against them, that they may

have a valid defence and that the outcome of any court application is not a foregoing conclusion. Therefore there can be no defamation in this regard.

[83] Further on the statement that the elephants were illegally transported, Mr Maasdorp referred the court to the evidence of Dr Lindeque who testified that the Ministry's understanding and interpretation of the relevant legislation was that 'all sales, capturing and transportation of elephants must be done in terms of the Nature Conservation Ordinance'. Mr Maasdorp argued that the court must find on a balance of probabilities that the plaintiffs transported the elephants illegally based on the following:

- a) The contents of the relevant permits;
- b) The absence of anyone from Super Game Dealers CC to testify on the qualifications and authorization of the alleged veterinary officials who allegedly acted on its behalf;
- c) The fact that MET's position on the illegality of the transportation of the elephants was investigated at length by the Prosecutor General and instructions were given to prosecute the first plaintiff and others in respect of the transport and capturing of the elephants; and
- d) That a criminal case commenced.

[84] Mr Maasdorp submitted that: firstly the court is not required to make a conclusive finding that the plaintiffs were guilty in the criminal sense of any offence as that is the duty of the criminal court seized with the matter; secondly that not every illegal action carries a conviction of a crime. He argued that this is borne out by the context of the relevant article, including the statement on the first page of the article that 'all aspects of the situation is under investigation'.

[85] Mr Maasdorp maintains that a reasonable person would have understood that there were reasonable grounds on which a charge could be levelled against the plaintiffs, and not understood that the plaintiffs were necessarily guilty of a crime.

[86] On the issue of reasonable publication in the public interest Mr Maasdorp argued that it is not truly disputed that the public had a legitimate interest in the

information published by the defendants. Therefore, so he argued, even if this court finds that the defendants failed to prove that the relevant claims made in the article published on 24 October 2017 are substantially true (as the defendants do not have to prove that every allegation is true) and any comment thereon was fair, the defendants still have established the defences pleaded.

[87] Mr Maasdorp submitted that the defence of reasonable publication should be upheld and that the court should not hold the journalist in the matter in casu to a standard of perfection nor should the court lose sight of the pressured circumstances in which journalists work and not expect more than what is reasonable and that in line with the *Trustco Group International Ltd* matter the court should ultimately undertake a balancing exercise.

[88] Mr Maasdorp maintains that the evidence before court demonstrates that Ms Smit did her very best both before and after the publication of the article to ensure that she had the correct facts. Counsel argued that Ms Smit had impeccable sources, whom she had no reason to suspect of any improper motive and whom she clearly identified as the sources of the information in the article. The information was not clandestinely delivered to her but she obtained it at a press conference called by the Ministry. She reported the information she had received precisely as received and the majority of the information fell within the personal knowledge of the real and identified sources of the information.

[89] Mr Maasdorp argued that much was made by the plaintiffs of the fact that Mr Lombaard did not have a reasonable opportunity to comment but Mr Maasdorp reminded the court that Ms Smit's evidence in this regard is that she called the first plaintiff twice on his cellular phone while preparing the article and after she had finished writing the article. Unfortunately the first plaintiff's phone was off both times. Mr Maasdorp submits that Ms Smit cannot be faulted for waiting to confirm the information received from her anonymous source before confronting the first plaintiff. He submitted that the actions of Ms Smit is that of a responsible journalist, given the circumstances, therefore the criticism leveled against Ms Smit in this regard is unfounded.

[90] Mr Maasdorp conceded that Mrs Smit can be criticized for the fact that she only called the first plaintiff twice within the space of 14 minutes and did not try again to get in touch with him or attempted to do so through other modes of communication. However, it was argued that such criticism does not necessarily defeat the defence of reasonable publication in the public interest.

[91] On the claim for damages Mr Maasdorp submitted that it is trite that an assessment must be made by the court in light of the various factors, ie:

- a) The nature and degree of defamation,
- b) The presence of malice; and
- c) The acceptance of an opportunity 'to print the other side' or an apology or retraction.

[92] In the matter in casu the first plaintiff attempted to lead evidence on the actual damages suffered by the plaintiffs but the first plaintiff's material evidence on damages offended the best evidence rule in respect of various contracts, tenders and emails. Mr Maasdorp argued that the first plaintiff claims that his exporting business ceased but offered no proof in support of this claim. Mr Maasdorp argued further that without the proof such as written documents, books of account, financial statements, etc the evidence of the first plaintiff has no probative value and must be disregarded. The court is called upon to draw an inference from the fact that since the documentary proof was available but not presented to court the plaintiff suffered no financial harm from the publication of the article.

[93] Mr Maasdorp submitted that this inference is further supported by the incongruity between, on the one hand, the first plaintiff's allegation that he was interested in having his version also published (with regards to Ms Smit's failure to provide the first plaintiff a reasonable opportunity to comment) and on the other hand his refusal to accept the defendants' offer to publish the plaintiffs side of the story. The first plaintiff refused this offer and counsel argued that the response of the first plaintiff was unreasonable as the article, if published, would have mitigated the plaintiffs alleged damages, if not completely then at least significantly.

[94] In conclusion Mr Maasdorp argued that the plaintiffs are not entitled to any damages.

On behalf of the plaintiff

[95] Mr Barnard submitted that the defendants make much of the fact that the article just contains quotations of high ranking officials in MET but argues that the defendants lost sight of the fact that a person who re-publishes, repeats, or adopts a defamatory statement will be held to have published the statement⁸, therefore a repetition is as bad as the original statement.

[96] Mr Barnard is in agreement with the opposing counsel that the article in question must be read as a whole however Mr Barnard invited the court to look holistically at the article and to note the following:

- a) The line 'court orders have been obtained' is repeated 7 times;
- b) The fact that the elephants were illegally transported by the plaintiff was repeated 4 times;
- c) The word 'deplorable' was repeated twice;
- d) The word 'horrific' was repeated twice, separately from deplorable.

[97] Mr Barnard argued that the impact of the full article will bring any reasonable reader to the conclusion that Mr Lombaard is a terrible character who is doing deplorable and horrific things. Counsel argued that the article is unequivocal in that it attributes illegal activities to the plaintiffs, so serious that a court order is sought and both criminal and civil cases are opened against the plaintiffs.

[98] Mr Barnard submitted that the article states as a fact that the elephants were being kept for months in containers in horrific and deplorable conditions. Counsel argued that the evidence of Ms Smit was that the photograph clearly depicted cruelty to animals. He further argued that Ms Smit persisted with the correctness of the

⁸ Kelsey Stuart's *The Newspaperman's Guide to the Law* 5 ed (1990) by Bell Dewar and Hall at 43. Referred to in *Tsedu v Lekota* (715/07) [2009] ZASCA 11 (17 March 2009) and also *Nuule v Kambwela* (I 629-2009) [2014] NAHCMD 219 (21 July 2014).

statement that the elephants were kept in containers and the witness with great difficulty conceded during cross-examination that she made a mistake, which concession she recanted later. Mr Barnard argued this is not a case of objective reporting. The journalist has put her own slant in the article and then repeated words to emphasize her point. Counsel further argued that the photograph which was placed in the newspaper in support of the article cannot support the contention that the elephants were kept in horrific and deplorable conditions.

[99] Mr Barnard submitted that the journalist was not reasonable in her actions, nor was the editor. He further argued that it was not a case of whether they acted irresponsible or *mala fide* or with intent, the requirement is that they must have acted reasonable and not negligent. Mr Barnard argued that the defendants were fully aware of the responsibilities resting on the media to verify their facts and to give an opportunity to the first plaintiff to respond and give his side of the story but the defendants failed to comply with those obligations in that regard.

[100] Mr Barnard contended that the two short phone calls before publishing were, in his opinion, perfunctory simply so that the journalist can say that she gave the first plaintiff the opportunity but in actual fact there was no real opportunity.

[101] Counsel argues that Ms Smit testified that she became aware of the issue regarding the elephants nine days before the article was published, yet according to the evidence of Dr Lindeque this situation circulated on social media since July 2017. There was thus no urgency in publishing the article and urgency was not proven by the defendants.

[102] Once Ms Smit picked up on the story she sent a list of questions to MET but none to the first plaintiff. Mr Barnard argues that a diligent journalist would have sent the same list to the first plaintiff or travel to the farm to do a proper investigation but instead of verifying the information independently the journalist relied on one source only, which source is described by the defendants as impeccable.

[103] On the defendants' argument that the first plaintiff should have presented evidence that the elephants were not kept in deplorable conditions Mr Barnard

argued that such an argument is without merits as the defendants bore the onus. He argued that it was the defendants that had to prove at least some of the facts to succeed with the defence of truth and public interest, fair comment and to discharge the burden of proving that they acted reasonably. He continued to argue that even during the course of the litigation there was no proper investigation.

[104] Mr Barnard submitted that the first plaintiff indeed gave a detailed explanation regarding the condition of the elephants and how it was in his best interest to ensure that the elephants were kept in proper conditions due to the huge investment made not only in the price of the animals but also in the capturing thereof.

[105] Mr Barnard submitted that much was made of the evidence of Dr Lindeque to say that his evidence shows that the elephants were illegally transported however Mr Barnard pointed out that Dr Lindeque could not deny that the owner of the elephants was issued with a permit to capture and transport the animals. Dr Lindeque could further not deny that the approved specialist company, ie Super Game Dealers CC was involved in the capture of the elephants, even if Dr Tubbesing was not personally present. Mr Barnard further argued that Dr Lindeque could not show a provision in the Ordinance that stipulate that both the seller and the purchaser must have a permit to transport where a specialist company does the transport. He argued that ultimately it was on the defendants to prove that the transport was illegal and argued further that even if they had done so it would not have been good enough because the mere imputation of unlawful or immoral conduct is defamatory. In this regard the court was referred to *Hassen v Post Newspapers (Pty) Ltd and Others*⁹.

[106] In conclusion Mr Barnard argues that the article was a deliberate distortion of the facts by the journalist and that the matter in casu is a clear instance where the media was irresponsible in its reporting. He submitted that the media is in an incredible powerful position as the general public afford credibility to newspapers and a follow up article giving the first plaintiff his side of the story will not set things right. He submitted that damage cannot be undone with a follow-up article as the general public have no reason to believe the first plaintiff.

⁹ 1965 (3) SA 562 (W) at 564-5.

[107] On quantum Mr Barnard argues that the court should not lose sight of the fact that the second plaintiff is not claiming special damages for loss of profits but claims for *iniuria*. Counsel continued to point out the fact that first plaintiff's evidence was that the consequences of the publication were far reaching and there was a reaction to the article not only locally but also internationally, which was very detrimental to the business of the second defendant.

The law in defamation

[108] The law of defamation is settled in Namibia. A claim for defamation is based on *actio injuriarum* but subject to modern development.

[109] In *Trustco Group International Ltd v Shikongo*¹⁰ O'Regan AJ stated as follows in this regard:

'[24] To succeed in a defamation action, a plaintiff must establish that the defendant published a defamatory statement concerning the plaintiff. A rebuttable presumption then arises that the publication of the statement was both wrongful and intentional (*animo injuriandi*). In order to rebut the presumption of wrongfulness, a defendant may show that the statement was true and that it was in the public benefit for it to be made; or that the statement constituted fair comment; or that the statement was made on a privileged occasion. This list of defences is not exhaustive¹¹. If the defendant can establish any of these defences on a balance of probabilities, the defamation claim will fail.'

[110] A further defence available to the media has been developed by courts in South Africa, namely the defence of reasonable publication. In *National Media Ltd v Bogoshi*¹², the South African Supreme Court of Appeal held that the media will be liable for the publication of defamatory statements unless they establish that they are not negligent. This approach was accepted by our Supreme Court in the *Trustco Group International Ltd* matter¹³.

[111] The enquiry that this court must do is three fold, ie:

¹⁰ *Supra* at footnote 5.

¹¹ *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) at 1213.

¹² *Ibid*

¹³ *Trustco Group International Ltd* op cit para 55.

- a) Were the statements contained in the article dated 24 October 2017 defamatory;
- b) If it was, have the defendants established a defence; and if not
- c) The quantum of the award for defamation in favor of the plaintiffs.

Were the words complained of defamatory?

[112] The publication of the article and the content thereof is not in dispute as is clear from the pleadings and the pre-trial order. The question is whether the words complained of are defamatory or not.

[113] In determining whether the article in question is defamatory the Supreme Court in *Free Press of Namibia (Pty) Ltd v Nyandoro*¹⁴ referred to *Tsedu and others v Lekota and another*¹⁵ where Nugent JA had the following to say:

‘[13] In deciding whether the statements I have outlined are defamatory, the first step is to establish what they impute to the respondents. The question to be asked in that enquiry is how they would be understood in their context by an ordinary reader. Observations that have been made by our courts as to the assumptions that ought to be made when answering that question are conveniently replicated in the following extract from a judgment of an English court:

“The court should give the article the natural and ordinary meaning which it would have conveyed to the ordinary reasonable reader reading the article once. Hypothetical reasonable readers should not be treated as either naïve or unduly suspicious. They should be treated as capable of reading between the lines and engaging in some loose-thinking, but not as being avid for scandal. The court should avoid an over-elaborate analysis of the article, because an ordinary reader would not analyse the article as a lawyer or an accountant would analyse documents or accounts. Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made upon the hypothetical reasonable reader. The court should certainly not take a too literal approach to its task.”

¹⁴ 2018(2) NR 305(SC) para 41.

¹⁵ 2009 (4) SA 372 (SCA) at 377C.

[114] If one reads the article it is clear that it attributes illegal activities to the plaintiffs which is of such a serious nature that MET has filed an urgent application in the High Court of Namibia as well as opening a criminal and civil case against the plaintiff(s).

[115] In the sub-heading of the article as well as in the body thereof it is indicated that the elephants were illegally transported by the plaintiffs. In addition thereto the article states that the elephants were kept in horrific conditions. The article also states that the elephants were kept for months in containers on the farm of the first plaintiff.

[116] If the allegations concerning the unlawful and criminal behavior of the plaintiffs is read with the further factual allegation that the elephants were kept in containers and in horrific conditions then any normal reader of the newspaper will come to the conclusion that the first plaintiff acted unlawfully to the extent that he will be prosecuted civilly and criminally. The fact that the first plaintiff allegedly kept the elephants in containers for months in horrific conditions would cause the reader to understand that the first plaintiff is engaging in cruelty to animals in the extreme, as the elephants were kept in containers. The photograph published in support of the article has the caption 'DEPLORABLE: Elephants being kept in containers in Mariental'.

[117] Horrific and deplorable are not soft words. In fact they would refer to the extreme end of the spectrum of the conditions in which the elephants were allegedly kept in.

[118] Mr Barnard referred the court to dictionary meanings of horrific and deplorable as previously indicated as follows:

'horrific' – causing horror, dreadful, horrendous, horrifying, horrible, frightful, awful, terrible, fearful, shocking, monstrous, nightmarish, sickening, nauseating;

'deplorable'- deserving strong condemnation, completely unacceptable, with synonyms: disgraceful, shameful, dishonorable, disreputable, unworthy, shabby, inexcusable, unpardonable, unforgiving.

[119] Any reader that reads that elephants are kept in containers would regard it as horrific and deplorable and this is equated with cruelty to animals.

[120] I have no doubt from the context of the article that an ordinary reader would have gained the impression that:

- (a) The plaintiffs had unlawfully captured the three elephants;
- (b) The plaintiffs had illegally transported the three elephants;
- (c) The plaintiffs kept the elephants in horrific and deplorable conditions;
- (d) The plaintiffs acted unlawfully, are mean and cruel and mistreated the animals.

Defences

[121] The defences raised by the defendants, in the event that the court finds that the article was defamatory, amounts to the following:

- a) truth;
- b) public interest;
- c) fair comment; and
- d) reasonable publication by the media.

[122] The defences overlap but for purposes of this judgment I will deal with the defences of truth, public interest and fair comment as one and with reasonable publication separately.

Truth, public interest and fair comment

[123] On behalf of the defendants it was conceded that the truthfulness of the statements could not be proven but that the information was obtained from an

impeccable source, ie the Minister of MET and the former Permanent Secretary of MET.

[124] The defendants rely heavily on the evidence of Dr Lindeque to show the truthfulness of the statements made in the article, however it was clear from his evidence that there were a number of facts that he either had no knowledge of or had the wrong information. This is with specific references to the illegal capturing and illegal transport of the elephants. Dr Lindeque was adamant that the elephants were illegally captured as Dr Tubbesing of Super Game Dealers CC did not personally capture the elephants but from the evidence it is clear that Super Game Dealers were involved with the capture and transport of the animals. Dr Lindeque also testified that the first plaintiff did not comply with the conditions of the general permit issued to Mr Hanse but it became clear during cross-examination that there were no conditions to comply with in law but that it was indeed only remarks contained in the permit.

[125] Because of the 'impeccable' nature of the information, the journalist did not verify the truthfulness thereof. Interestingly enough based on the photograph received by Ms Smit from her source she came to the conclusion that the elephants were kept in horrible and deplorable conditions in containers. From her evidence it appears that Ms Smit already made up her mind about the conditions of the elephants and this prompted her to send a questionnaire to MET.

[126] With regard to the additional information about the alleged illegal transportation of the elephants Ms Smit had apparently obtained the said information at the press conference and by discussing the issue with the former Permanent Secretary.

[127] On behalf of the defendants the point was made that the information was obtained from an impeccable source and that nothing more should be required of the journalist concerned.

[128] In this regard I deem it appropriate to refer to the Code of Ethics of the Society of Professional Journalists as referred to by the court in the *Trustco Group*

International Ltd matter which states as follows¹⁶: (I will only refer to the portion relevant to the matter before me)

“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.
- 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.’ (my emphasis)

[129] The need for verification of all information became abundantly clear when it appeared during cross-examination that not all the information at the disposal of Dr Lindeque was necessarily correct. There was no urgent application or civil case filed. The issue of illegal capture and illegal transport of the animals also appears not to be factually correct.

[130] In the *Tsedu* matter¹⁷ the court stated as follows:

‘[4] ...[It] is evident from that remark that he was under the impression that a newspaper may publish defamatory statements with impunity if they have been originated by someone else. Well, journalists who keep *Kelsey Stuart’s Newspaperman’s Guide to the Law* by their side know that that is not so from the following passage:

“[a] person who repeats or adopts and re-publishes a defamatory statement will be held to have published the statement. The writer of a letter published in a newspaper is *prima facie* liable for the publication of it but so are the editor, printer, publisher and proprietor. So too a person who publishes a defamatory rumour cannot escape liability on the ground that he passed it on only as a rumour, without endorsing it.”

[5] A newspaper that publishes a defamatory statement that has made by another is as much the publisher of the defamation as the originator is. Moreover, it will be no defence for the newspaper to say that what was published was merely repetition. For while the truth of the statement (if it is published for the public benefit) provides a defence to an action for

¹⁶ *Trustco Group International Ltd* op cit para 76.

¹⁷ *Supra* footnote 14.

defamation, the defence will succeed only if it is shown that the defamation itself is true, not merely that it is true that the statement was made. The authors of *Gatley on Libel and Slander* (dealing with the tort of libel in English law, which in this and other respects substantially coincides with our law) put that as follows:

“The defendant must prove that the defamatory imputation is true. It is not enough for him to prove that he believed that the imputation was true, even though it was published as belief only. “If I say of a man that I believe he committed murder, I cannot justify by saying and proving that I did believe it. I can only justify by proving the fact of the murder”. The same is true if the defendant says that he is only repeating what others have said or that there is a rumour. So if the defendant has written, “A said that P had been convicted of theft”, it will be no defence for the defendant to prove that A did tell him so, that he honestly believed what A said, and only repeated it. He must prove as a fact that P was convicted of theft. “If you repeat a rumour you cannot say it is true by proving that the rumour in fact existed; you have to prove that the subject matter of the rumour is true.” This is the “repetition rule”.¹⁸

[131] Ms Smit did not investigate this matter further neither did she speak to the first plaintiff to hear his side of the story. Ms Smit stated emphatically that she could no longer wait and withhold the article after the press conference of 23 October 2017 and relies on the issue of public interest to substantiate the urgency in publishing the article on 24 October 2017. I however fail to see the urgency as this was not breaking news. An article regarding the elephants was already published on 12 October 2017 by the *Confidante* newspaper and according to Dr Lindeque the issue of the elephants was already circulating on social media platforms since July 2020.

[132] Ms Smit did nothing apart from the two phone calls prior to publication to get Mr Lombaard’s comment. In fact on her own version the article was already written when she phoned Mr Lombaard. She obtained his phone number from the internet and failed to obtain an email address although she was able to do so. Ms Smit conceded that she did not invite Mr Lombaard via e-mail, sms or WhatsApp for him to furnish her with his comment before publication of the article.

[133] I am of the view that there was a duty on Ms Smit to make a genuine and reasonable effort to contact Mr Lombaard, bearing in mind that the article publically

¹⁸ *Tsedu* op cit Footnotes 2 to 5 omitted.

accused and criticized the plaintiffs and two phone calls in short succession shortly before publication is not a genuine and reasonable effort on her part.

[134] I am mindful that courts should not hold journalists to a standard of perfection and that the court should take into account the pressured circumstances in which journalists work and that the court should not expect more than what is reasonable of them¹⁹, however there is a duty to protect the legitimate interests of those who are the subject matter of reporting. By failing to do due diligence in respect of the plaintiffs a distorted article was published which appears to be to a large extent factually incorrect.

[135] I absolutely agree with the defendants that the issue regarding the elephants was of public interest then and is still of public interest today and in light of such a subject matter Ms Smit could have done so much more to present a well-balanced investigative report which reflected all the facts. The media is in a powerful position to bring about change where there is injustice but can also bring about devastation to the reputation of a businessman like Mr Lombaard, if the article is not factually correct.

[136] When the defence of public interest is raised it should be borne in mind that publication of a defamatory statement(s) which is untrue or only partly true can never be in the public interest²⁰.

[137] In light of the fact that the defendants were unable to establish the truth of the statements published results in the defences of truth, public interest and fair comment to fail as all three of these defences rely on the truthfulness of the publication in order to succeed.

Reasonable publication

[138] What then remains to consider is the defence of reasonable publication.

¹⁹ *Trustco Group International Ltd* op cit para 77.

²⁰ *Du Toit v Amupadhi* (HC-MD-CIV-ACT-DEL-2016/02822) [2019] NAHCMD 216 (1 July 2019) at [35] with reference to *Modiri v Minister of Safety and Security and Others* 2011 (6) SA 370 (SCA) at 379 F.

[139] It is trite that media can escape liability for publication of defamatory statements even if it cannot prove the truth of the statements, if it can prove that it was reasonable under the circumstances to publish and the defendants did not act negligently.

[140] If one apply the Code of Ethics as set in out para [128] above it is clear that the journalist did not test the accuracy of the information in any way nor did she take care to avoid error. Further to that she did not seek out Mr Lombaard diligently to give him the opportunity to respond and ended up misrepresenting even the objective facts available, ie the photo by alleging that the elephants were kept in containers. It does not matter which way you look at the photograph concerned, there is not, even with a stretch of the imagination, a way in which any person can draw a conclusion from that photograph that the elephants were kept in containers. By publishing that photo with the caption 'DEPLORABLE: Elephants kept in containers ' it is misleading to say the very least.

[141] As already pointed out the defendants accepted the information received from the Minister and the Permanent Secretary on face value as the truth and no effort was made to test the accuracy of the information. The article was submitted to the second defendant, the editor, who had the opportunity to consider and reflect on the article, but decided to publish it despite the fact that the journalist's facts do not appear to be verified independently. It would appear that both the journalist and the editor failed to strike a proper balance between the protection of the right to freedom of expression on the one hand and the plaintiffs' right to their reputation on the other.

[142] In the *Bogoshi* matter²¹ the Supreme Court of Appeal in South Africa stated as follows in considering the reasonableness of the publication:

'In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that greater latitude is usually allowed in respect of political discussion (*Pienaar and Another v Argus Printing and Publishing Co Ltd* 1956 (4) SA 310 (W) at 318C-E), and that the tone in which a

²¹ *Bogoshi Supra* footnote 10 at 1212 H -1213 B.

newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper. Prof Visser is correct in saying (1982 THRHR 340) that a high degree of circumspection must be expected of editors and their editorial staff on account of the nature of their occupation; particularly, I would add, in light of the powerful position of the press and the credibility which it enjoys amongst large sections of the community.'

[143] Following on the *Bogoshi* case the court in *Mthembi-Mahanyele v Mail and Guardian Ltd and Another*²² stated as follows on reasonableness:

'[61] Of particular importance in this matter is the approach to reasonableness enunciated by Brennan CJ in *Lange*:

"Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond."

[62] This passage was approved by Hefer JA in *Bogoshi*. The court there held (*contra Holomisa*, above) that the defendant bears the onus of proving reasonableness. In the inquiry as to the reasonableness of the publication, account must be taken of the tone of the publication – whether there is an unnecessary sting attached; the nature of the information published; the reliability of the source; and steps taken to verify the information. These questions relate both to unlawfulness (the unnecessary sting or the

²² 2004 (6) SA 329 (SCA) at paras 61 and 62

gravamen of the statement) and to fault – negligence – (steps taken to verify the information). But the inquiries inevitably overlap;’

[144] The defence of reasonable publication holds those publishing defamatory statements accountable while not preventing them from publishing statements that are in the public interest. It will result in responsible journalistic practices that avoid reckless and careless damage to the reputations of individuals²³.

[145] After having considered all the facts in this matter and in light of my earlier discussion I cannot find that the publication of the article in the circumstance as discussed was reasonable or constituted responsible journalism. Of particular importance is the fact that Mr Lombaard was never given an effective opportunity to respond to the defamatory article that was to be published about him.

Quantum

[146] The determination of the award to be granted in favour of a successful plaintiff in a defamation suit is not an exact science and the difficulty in quantifying harm to reputation in monetary terms was discussed in the *Trustco* matter²⁴, wherein O’Regan AJA pointed out that reputation cannot be restored to what it was by a higher award and less restored by a lower one. Rather, it is the judicial finding in favour of the integrity of the plaintiff that vindicates his or her reputation and not necessarily the amount that he or she receives as damages.²⁵

[147] In determining the amount of damages to be awarded I will consider that the first plaintiff, Mr Lombaard was depicted as being involved in criminal activity relating to the capture and transporting of the elephants and in addition thereto that he treated these animals in a cruel manner by keeping them in containers. These are extremely serious allegations as they cut to the heart of the business that the plaintiffs conduct.

²³ *Trustco Group International Ltd* para 56.

²⁴ *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 110

²⁵ At 403C-E. See further cases of *Nuule v Kambwela* (I 629-2009) [2014] NAHCMD 219 (21 July 2014) and *University of Namibia v Kaaronda* (I 1838/2010) [2012] NAHCMD 221 (23 July 2014).

[148] The article was published on the front page of the newspaper which is widely read in Namibia and has a substantive support base not only within our country's borders but outside as well. Articles published in the Nambian Sun newspaper are also coupled by publication on the internet which leads to the access to the articles unlimited and the publication is therefore unlimited.

[149] During his evidence Mr Lombaard explained in detail to this court the consequences that flowed from the publication of this damning article, not only to him in his personal capacity but also in respect of the second defendant's export business. It stands undisputed that the export business of the second defendant has all but ceased.

[150] Mr Maasdorp argued that the plaintiffs were given the opportunity to have a follow up article published by the defendants setting out their side of the story and this was done within 6 calendar days after the letter of demand was received but the plaintiffs did not respond to the offer. He argued that this conduct on the part of the plaintiffs was unreasonable as the article, if published would have resolved the plaintiff's concern that the public did not know their version and would have mitigated the plaintiffs (alleged) damages. Mr Maasdorp therefore argued that under the circumstances the plaintiffs are not entitled to damages.

[151] It is clear from the evidence of Mr Lombaard that the defendants were not prepared to accede to his demand to have the article published on the front page as was the case with the initial article. It would appear that this offer by the defendants was rejected during mediation. It is Mr Lombaard's case that a follow-up article would not undo the damage that was already done by the publishing of the article. He took the position that he wanted to vindicate his name and that of the second plaintiff and that can only be done by a court order.

[152] I do not believe that the offer by the defendants was a fair one under the circumstances. The defendants did not hesitate to publish the defamatory article on the front page of the paper in the boldest terms and when the first plaintiff's request to receive the same exposure at the same place in the paper that was not doable. He was offered a space in the first three pages of the paper but not the front page. I

cannot agree with Mr Maasdorp that because the plaintiffs did not immediately take up the offer of the defendants that they no longer have a claim for damages. The defendants did not offer to retract the article or to remove it from their website. So even if a follow up article was published the original one would still be there for anybody and anyone to read, without having a clue about the proffered follow-up article.

Comparable awards

[153] Damaseb JP in *Ndeitunga v Kavaongelwa*²⁶ state that the court has a wide discretion when it comes to quantum, to be exercised judicially and guided by comparable awards in previous cases.

[154] *Trustco Group International Ltd and Others v Shikongo*²⁷

The appellant Company, the proprietors of a newspaper, were sued for an article published by their newspaper, to the effect that the Mayor of Windhoek had been involved in an underhand land deal, which was described in the article as a 'Broederbond cartel'. The Supreme Court on appeal awarded the plaintiff an amount of N\$100 000, overturning an award of N\$175 000 granted by this court. The Supreme Court was of the considered view that the award by this court was extremely high in view of all the circumstances attendant to the matter.

[155] *Universal Church of the Kingdom of God (Incorporated Association Not for Gain) v Namzim Newspaper (Pty) Ltd t/a The Southern Times*²⁸

In this case, the defendant, a newspaper, published an article entitled, 'State Bans Satanic Sect'. In another article, in the same newspaper, the readers were informed that the Zambian chapter of the same church had been banned. The court was of the view that a reasonable reader would conclude that the latter article in question had a

²⁶ (I 3967/2009) [2012] NAHC 319 (27 November 2012) para 106.

²⁷ (SA 8/2009) [2010] NASC 6 (7 July 2010).

²⁸ 2009 (1) NR 65 (HC).

bearing on the plaintiff specifically. The court thus awarded the plaintiff an amount of N\$60 000 in damages.

[156] *Nghimtina v Trustco Group International Ltd*²⁹

In this matter the plaintiff sued the defendant for an article published by its newspaper, captioned, 'Nghimtina Hijacks Rural Power Plan to Pamper In - Laws'. This court, after considering comparable awards and the circumstances of the case, awarded damages in the amount of N\$60 000.

[157] *Tuhafeni Hangula v Trustco Newspapers (Pty) Ltd*³⁰

The plaintiff is the Deputy Commissioner General of the Correctional Service who sued the Informanté for N\$500 000 in damages. The court reduced the award to N\$50 000.

[158] *Du Toit v Amupadhi*³¹ Plaintiff, a practicing legal practitioner instituted an action against the editor of The Namibian newspaper for an article headed "Shyock Justice for the Greedy". The court awarded damages against the first and second defendants jointly and severally in the amount of N\$100 000.

[159] Having considered the comparable awards made by our courts in respect of defamation claims against newspapers it would appear to range between N\$ 100 000 and N\$ 50 000. In the matter in casu Mr Barnard submitted that the facts of the matter justifies an award of N\$ 70 000 in respect of each of the plaintiffs. In exercising my judicial discretion I am of the view that N\$ 70 000 is not an unreasonable request and will award same to the first plaintiff for the various reasons set out above.

Damage in respect of the second plaintiff

[160] The second plaintiff is a close corporation duly incorporated in terms of the laws of Namibia. The action before me is one for defamation which is derived

²⁹ (I 2976/2010) [2014] NAHCMD 11 (23 January 2014).

³⁰ (I 4081/2011) [2012] NAHCMD 77 (November 2012).

³¹ (HC-MD-CIV-ACT-DEL-2016/02822) [2019] NAHCMD 216 (1 July 2019).

ultimately from the *action iniuriarum*, which rests on wounded feelings rather than patrimonial loss. Since corporations and other legal personae have no feelings, simple logic seems to dictate that they should have no claim for defamation.

[161] Since the *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk*³² case courts have held that a trading corporation can sue for damages in respect of a defamation which injures its good name and business reputation; and that it may recover such damages without having to prove actual loss³³. In so holding this Court endorsed what had been stated in *G A Fichardt Ltd v The Friend Newspapers Ltd*³⁴ and other cases decided after 1916. In addition, a corporation so defamed may also claim damages to compensate it for any actual loss sustained by it by reason of the defamation³⁵.

[162] It was held by Solomon JA in the *Fichardt* matter³⁶ that:

'It has been settled by a series of decisions, both in England and in South Africa, that an action will lie at the suit of a trading company for statements defaming it in its business character or reputation. For example it is actionable to write or say of such a company that it conducts its business dishonestly or that it is insolvent. And for defamatory statements of that nature general damages may be given, just as when an individual is defamed, nor is it necessary to prove that actual loss had been sustained. The law on this subject is now well settled, and it is unnecessary, therefore, to discuss the authorities dealing with it.'

[163] Mr Maasdorp raised the issue that no case was made out for damages in respect of the second defendant as no documentary evidence was presented to court to show that the second plaintiff suffered financial harm due to the publication of the article.

[164] Corbett CJ in *Financial Mail (Pty) Ltd v Sage Holdings Ltd*³⁷ held that:

³² 1979 (1) SA 441 (A).

³³ see *Dhlomo N O v Natal Newspapers (Pty) Ltd and Another* 1989 (1) SA 945 (A), at 952 E - 953 D

³⁴ 1916 AD 1.

³⁵ *Caxton Ltd and others v Reeve Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A), at 560 I - J

³⁶ Supra footnote 34 at 8.

³⁷ 1993 (2) SA 451 (A) at 460G-461H.

‘ . . . [T]his Court has held that a trading corporation can sue for damages in respect of a defamation which injures its good name and business reputation; and that it may recover such damages without having to prove actual loss . . . In addition, a corporation so defamed may also claim damages to compensate it for any actual loss sustained by it by reason of the defamation . . . These developments in the law of defamation are not directly pertinent to the issues in the present case, but I refer to them to indicate that, as a matter of general policy, the Courts have, in the sphere of personality rights, tended to equate the respective positions of natural and artificial (or legal) persons where it is possible and appropriate for this to be done. In the sphere of defamation this can be done . . . ’

[165] The claim by the second defendant is for general damages and not specific damages which would require the action to be instituted in terms of *actio legis aquilliae*. Therefor this court will draw no negative inference from the fact that no documentary proof was submitted in support of its damages claim.

[166] Just as in the case of the first plaintiff the second plaintiff was defamed and Mr Lombaard testified that the defamatory statements that were made by the second defendant had far reaching implications for the business. He testified that international tenders fell through and an export contract in respect of the elephants was cancelled. MET was actually aware of the latter as a permit was obtained by Mr Lombaard from MET to export the animals to Dubai.

[167] From the evidence of Mr Lombaard it is clear that the reputation of the second plaintiff was harmed to the extent that it is unable to do international business.

[168] I noted that there is only one reference to the second defendant by name in the article and in the subheading of the article it refers to a ‘game-capturing company’ that was then identified in the body of the article as Golden Game CC. However I am of the view that the reference in the article to the alleged illegal activities and cruelty to the elephants was directed more to Mr Lombaard than to the second defendant, Golden Game CC, therefore the award in respect of the second plaintiff will accordingly be reduced.

[169] Under the circumstances I am of the view that an award in the amount of N\$ 50 000 in favour of the second defendant will be just.

[170] My order is therefore as follows:

Judgment is granted in favor of the first and second plaintiffs against the first, second and third defendants, jointly and severally, the one paying the other to be absolved, in the following terms:

1. In respect of the first plaintiff: Payment in the amount of N\$ 70 000;
2. In respect of the second plaintiff: Payment in the amount of N\$ 50 000;
3. Interest on respective amounts at the rate of 20% per annum from date of judgment to date of final payment;
4. Cost of suit. Such cost to include the cost of one instructing and one instructed counsel.

J S Prinsloo
Judge

APPEARANCES

For the plaintiffs:

Adv P Barnard

On the instructions of Behrends and Pfeiffer,
Windhoek

For the defendants:

Adv R Maasdorp

On the instructions of Koep and Partners,
Windhoek

ADDENDA

THREE JUMBUS KEPT IN DEPLORABLE CONDITIONS

Court order sought over elephants

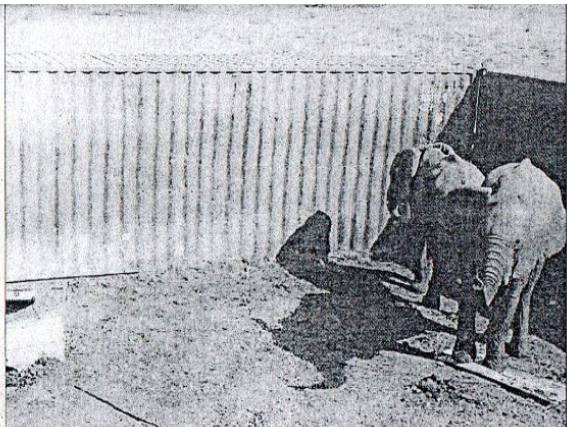
ELLANIE SMIT

The environment ministry has 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



DEPLORABLE: Elephants being kept in containers at Mariental. PHOTO: CONTRIBUTED

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.

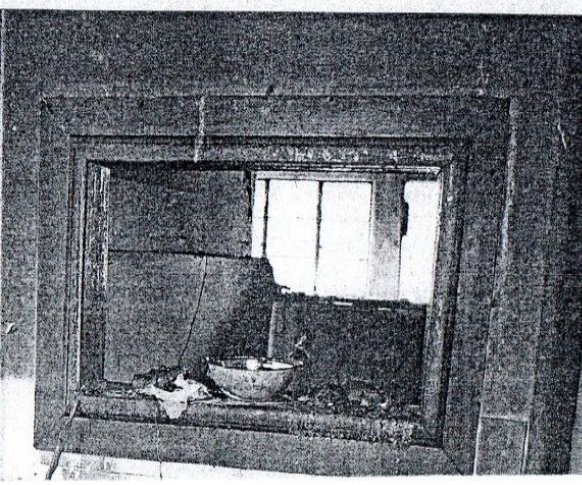
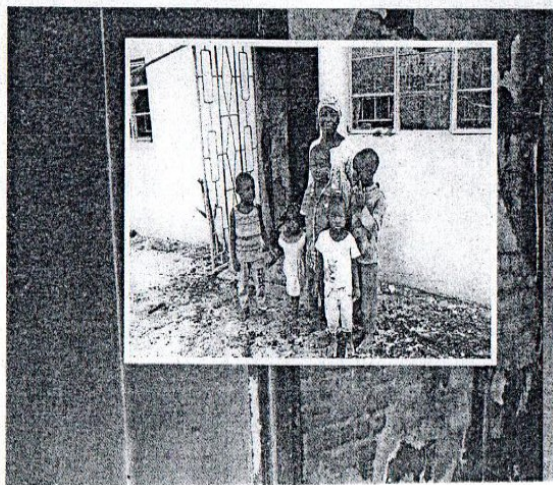
The elephants were kept by Lombaard on farms Geleksberg 82 Mari-

ental 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.

CONTINUED ON PAGE 2



Elephants

CONTINUED FROM PAGE 1

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

He explained that all five elephants were initially kept at N/a'an ku sé but three of them were then transported to the farm near Mari-ental. The elephants at N/a'an ku sé 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 has 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 1 000 hectares must be available where such animals can be kept.

Shifeta said the ministry had approached the attorney-general and sought a court order. "This is a very urgent 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.

"It is no joke keeping elephants. When we say 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.

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