

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: **HC-MD-CIV-ACT-DEL-2019/03603**

In the matter between:

**SONJA OLIVIER**

**PLAINTIFF**

And

**ROUMIANA KOSTIN**

**DEFENDANT**

**Neutral citation:** *Olivier v Kostin* (HC-MD-CIV-ACT-DEL-2019/03603) [2022]  
NAHCMD 180 (8 April 2022)

**Coram:** Schimming-Chase J

**Heard:** 1 – 4 November 2021, 16 December 2021

**Delivered:** 8 April 2022

**Flynote:** Defamation – Defamatory statements – Publication in context of a complaint to a governing body in the Namibian gymnastics community admitted – Rebuttal required of presumption that publication wrongful and intentional – Proof required that statements true and in the public interest or made on privileged occasion – Defendant proved truthfulness of the statement and that it was made in the interests of the gymnastics community – Action dismissed.

**Summary:** Defendant, a member of the Walvis Bay gymnastics community, lodged via email a complaint against plaintiff, addressed to various members of the gymnastics

community and the Executive Council of the Namibian Gymnastics Federation alleging bias, nepotism and conflict of interest in that plaintiff the president of the Namibia Gymnastics Federation was conflicted because she inter alia favoured her daughters who are gymnasts over and above the other gymnasts and the general Walvis Bay gymnastics community.

Defendant admitted the complaint but alleged that it was truthful, based on facts and in the interests of the gymnastics community, alternatively that the statements were made in a privileged setting. Plaintiff replicated that the statements in the complaint were made with malice by the defendant and her faction, who were attempting to improperly remove her from the presidency of the Gymnastics Federation and to undermine her.

*Held*, the context of the statement and facts leading up to the complaint were substantially truthful in the circumstances.

*Held*, together with plaintiff's own admissions, the defence of truth and public interest was proved on a balance of probability.

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### **ORDER**

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The plaintiff's claim is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

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### **JUDGMENT**

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SCHIMMING-CHASE, J

#### Introduction

[1] The plaintiff, Mrs Sonja Olivier, president of the Namibia Gymnastics Federation sued the defendant, Mrs Roumiana Kostin for damages in the amount of N\$30,000,<sup>1</sup> as a

<sup>1</sup> The plaintiff's initial claim was for the amount of N\$100,000. However in argument, the plaintiff's counsel

result of an email complaint that the defendant lodged against the plaintiff on 15 May 2019. This email was addressed to the erstwhile Executive Council members of the Namibia Gymnastics Federation<sup>2</sup> (“NGF”) and other persons in the gymnastics community. The email was copied to the plaintiff amongst others and reads as follows:

‘Categories: NGF Executive

Dear Members of GFN EXCO

It is with great unhappiness and uneasy feelings that I must send my first letter of complaint to the Gymnastic Federation in the past 18 years of working with NGF. I have been a loyal committed coach to Namibia and its children for more than 18 years.

I would like to make an official complaint against the current president and confirm that I have no confidence in her ability to act in the benefit of Gymnastics.

I will list my complaints as best as possible:

[2] Nepotism/Request Special treatment for her children: I attached the email where she approach (sic) me as a parent to get permission for her daughters to attend the training camp knowing that the closing date has lapsed. When this request was denied she came to the hall to intimidate us and threaten me and the other coaches, that we are being “discriminating against her children”.

[3] Disrespect.

[4] Mrs Olivier uses the Presidency to serve only her own needs – because she was not happy that she could not get her way she called a meeting as president. This was not sparked by a general interest to improve Rhythmic Gymnastics but because her children could not attend a training camp. She failed to follow the correct procedures and channels.

It is not the first time that Mrs Olivier acting (sic) in favour of her children. Last year Mrs Olivier received officially warning from RG TC for judging incorrectly and in favour of her daughter.

The fact that she was demanding special treatment for her children that I cannot have confidence in her ability to be impartial and thus I have not (sic) confidence in her

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submitted that damages as set out would be apposite.

<sup>2</sup> Established under the auspices of the Namibia Sports Act, 12 of 2003.

leadership

I can now assure you that Mrs Olivier will now attempt everything in her power to victimise and show open hostility towards me without making any attempt to acknowledge her responsibility as President.

Yours faithfully

Roumiana Kostin

WBGC Head RG Coach'

### The pleadings

[5] The plaintiff pleaded that the statements were understood by the addressees of the email and were intended by the defendant to mean that the plaintiff is guilty of and practices nepotism; is dishonest and unreliable; further that the plaintiff abuses her position as president of the NGF and does not acknowledge her responsibilities as a parent.

[6] The defendant admitted the publication of the email, however, she denied that she authored and published the communication wrongfully and with the intent to defame the plaintiff. In amplification she pleaded that the email was a formal way of lodging a complaint against the plaintiff to the executive council members of the NGF in order to address a serious and relevant matter concerning the affairs of the NGF and the president's conduct, that was alleged to be incompatible with the procedures, requirements and ethics of the profession and the industry concerned. She further pleaded that she was entitled to lodge a complaint against the plaintiff for further action and investigation, and she therefore set out the essential facts relating to certain irregular acts of the plaintiff, in the public interest.

[7] The defendant pleaded in addition that the statements reflected in her email were truthful, alternatively represent fair comment, alternatively are in the public interest and were made at a privileged occasion with an honest intention to have the complaint investigated. The defendant accordingly refused to apologise on those grounds.

[8] The plaintiff replicated and denied that the publication was made at a privileged occasion or that the defendant had any right to make the publication. The plaintiff also

denied that the statements were true. The plaintiff pleaded that:

- (a) the defendant knew that the statements were not true, alternatively did not know whether the statements were true or not and continued to publish them regardless;
- (b) the defamatory publication is part of an ongoing feud between factions in gymnastics in Namibia; and
- (c) the publication was thus not truly made in pursuit of the privileged occasion, but to harm the plaintiff.

### The Evidence

[9] Recognising the plaintiff's duty to begin, the defendant's case was presented first. The defendant is the head coach for the Walvis Bay gymnastics club - rhythmic gymnastics<sup>3</sup> section. She was previously president of the rhythmic gymnastics section of the NGF, from May 2010 to July 2018. Currently she is the advisor to the NGF rhythmic section. The defendant confirmed that she authored and transmitted the email dated 15 May 2019 to eleven persons who were newly elected members of the executive committee of the NGF and two members of the Walvis Bay club's management committee. This was effectively everyone related to gymnastics in Namibia. The defendant also copied the plaintiff, in her capacity as president, as well as the vice president.

[10] Attached to the complaint was an earlier email of the plaintiff dated 3 May 2019, referred to below.

[11] The defendant relayed in her evidence the facts giving rise to and in support of her complaint.

[12] On 14 March 2019, one Ms Leonie Botes, in her capacity as the rhythmic gymnastics section president, issued a notice to gymnastics club representatives, informing of a gymnasts' training camp that was to take place at the Walvis Bay Indoor Sports Centre from 5 to 10 May 2019. Representatives were requested to submit their

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<sup>3</sup> Also referred to as "RG".

gymnasts' registrations to the secretary, Ms Meagan Bierbach,<sup>4</sup> and to Ms Leonie Botes by Friday, 22 March 2019.

[13] The defendant confirmed that she was the project manager for the upcoming training camp and that timeous registration was necessary because there were limited spaces available for the training camp. The defendant referred to an email from the plaintiff dated 3 May 2019<sup>5</sup> which the plaintiff addressed to the defendant stating the following:

'Subject: Invitation for RG training camp funded by FIG/Region 5

Good evening Roumiana

With reference to the above. I notice that you are the designated Project Manager of this camp. I was at the Dome today to have a meeting with Dave and Buttons. We briefly spoke about the venue for this event that has changed to Swakopmund. Please let me know what time is the arrival for the facilitator and other attendees. I would like to be there to also welcome them. I am sure Britt must have told you that my daughters will not be competing in Namibia this year. I have also deregistered them from Britt's club. I am training them on my own now. I notice that the closing date for the registration has already passed and would like to know if the 20 places for gymnasts have already been filled, as I would like for my daughters and myself to attend this week, since the venue is now at the Dome and would not require of us to drive to Walvis Bay every day. The experience would be invaluable for us. I would appreciate your soonest reply, so I can start making arrangements.'

[14] The defendant responded to this email on 4 May 2019. She copied Ms Botes in this email. The email stated the following:

'Good morning Sonja

I regret to inform you but the deadline for registration has closed and the 20 positions have been filled.

With regards to your request to welcome the delegates as your request is as a parent I am not in a position to authorise such a request and would suggest you approach the Rhythmic Gymnastics President Leonie Botes.

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<sup>4</sup> Ms Bierbach testified for the plaintiff.

<sup>5</sup> The defendant included this email in the complaint.

Official request in your capacity as President must be made through the correct channels with Exco knowledge and approval.'

[15] The defendant pointed out that according to the rhythmic section rule book, it was specifically provided that no parent can contact any member of a rhythmic committee and its officials. She stated further that all the invitations for the training camps were sent to the gymnastics clubs and not to any parents. The plaintiff has two daughters who are gymnasts and the defendant testified that she was aware that on 25 April 2019, the selection of gymnasts for the training camp had been completed, and due to the limited spaces available, a streamlining process had to be applied. The plaintiff referred to an earlier email authored by Ms Bierbach that was admitted into evidence. The upshot of this email was the necessity to streamline the numerous entries received for the training camp and to set a guideline in order to '...ensure the level of the camp'.

[16] The defendant testified that she was surprised by the email of the plaintiff requesting space for her daughters at the training camp after the closing date. She testified that there were numerous other parents who had timeously applied for registration but could not be accommodated due to the limited space. She stated that the plaintiff, who at the time was the executive president of the NGF must have been aware of the fact that the request was made late, and in those circumstances, the defendant held the view that this action did not augur well for transparency and accountability, given the plaintiff's position.

[17] The plaintiff arrived at the training camp on the morning of 5 April 2019. The defendant was at the time in the middle of the floor of the hall with the gymnasts. She saw that the plaintiff had entered and was talking to Ms Botes and Ms Bierbach. The plaintiff according to the defendant looked visibly angry. The plaintiff then demanded a meeting and transmitted an email to the relevant members of the association calling for a meeting.

[18] The defendant responded to this email on 6 May 2019, and also copied in the relevant members of the gymnastics community. The defendant stated in this email that she would not be attending the meeting because she did not think such a meeting was necessary. The defendant further stated that:

'We are all grown up and we all know why we are involved in Rhythmic gymnastics. We

are all humans and all different. We are guided by the specific rules. If we don't agree with each other's professional decision there is always a way to try to get to solution. The invitation for the meeting you want to organise looks very personal and there is no exact point regarding RG in Namibia to be discussed. That is why I think it is not necessary to be (sic) such a meeting.'

[19] On the same day the plaintiff responded to the email. The defendant was advised in this email that she had been sent a notice to attend a meeting, and not a personal invitation. The plaintiff also informed that all RG coaches that she knew of had been similarly notified about the meeting. The plaintiff also stated the following:

'I remind you that it was your specific insistence that the correct process be followed for this meeting, which you specifically detailed as it being done in writing. Your apology for non-attendance is noted. The meeting will proceed as notified.'

[20] On 7 May 2019, the defendant responded to the plaintiff as follows:

'...

You know that the intention of this email was to express my concern that this will not be good for us to take time to discuss past problems without independent person to help us, and that with the current situation this would not serve to improve the understanding.

I intend to appeal to the Exco with an official complaint of your treatment of me. You are not acting in the best interest of Rhythmic Gymnastics but I will use the proper process and lodge a complaint against you as president.

My official letter of complaint will be sent to the Exco and the NSC.'<sup>6</sup>

[21] On 8 May 2019, the plaintiff responded, in a lengthy email, the upshot of which – for purposes of this case – was 'I will not deny you the recourse available to all. It is your prerogative to lodge a complaint'.

[22] The defendant lodged the complaint via email, and this is the email giving rise to the action.

[23] The plaintiff testified in essence that her main issue with the plaintiff was the way she allowed her personal interest in her daughters, who she was also training, to conflict with her responsibility and interests as president of the NGF. She had no confidence in the defendant's ability to be impartial, or in her leadership as a result.

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<sup>6</sup> Namibia Sports Commission.



[24] The defendant referred to a further incident that occurred in August 2018, relating to the plaintiff. Minutes of a meeting of the NGF - rhythmic gymnastics section held on 18 August 2018 were presented into evidence. This meeting was attended by the defendant, Ms Bierbach, Ms Wietsa Snyman, Ms Leonie Botes and Ms Britt Adonis, all of whom were members of the aforementioned body. In the minutes, it was recorded that after analysis of the scores of the gymnasts at the national qualifying competition held in Windhoek on 29 and 30 July 2018, the plaintiff who was a judge at the competition, scored in a biased manner in favour of her own daughters, who competed at the event where the plaintiff was a judge. The minutes read as follows:

'WS <sup>7</sup> advised that she requested BA <sup>8</sup> verbally following the 2<sup>nd</sup> QC to analyse the scores provided by infinity Judge Sonja Olivier during the High Performance competitions. The request was reiterated by WS to BA again thereafter and BA advised that she had indeed created an analyses (sic), which she then showed on her laptop. MB <sup>9</sup> advised that she had completed an additional and more extensive analyses, which cemented further evidence against SO's judging at the competition in these categories. BA confirmed that prejudice is evident in the scores submitted by Sonja Olivier, and added that she had already addressed this matter with Sonja Olivier in the past. BA was advised that SO appeared to be attempting to intimidate other judges, it was also advised that numerous judges have requested not to judge on a panel with SO. All agreed that BA is to issue SO with a verbal warning (as per GFN Judges Rules for First Offence), which well be documented with proof and kept on record by the GFN-RG.'

[25] The defendant testified that complaint that she lodged was also in the interest of the persons that received the complaint and in the interest of gymnastics in Namibia as a whole. In addition, the complaint was truthful in so far as it referred to actual events that had taken place between the plaintiff and the defendant and also events that had taken place prior when the plaintiff was sanctioned for judging a national competition unfairly and in favour of her daughters.

[26] Mr Jan Olivier, husband to and employer of the plaintiff, and father to the two daughters that were mentioned in relation to the plaintiff, appeared on her behalf. He cross examined the defendant at length on the aspects the plaintiff referred to concerning

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<sup>7</sup> Wietsa Snyman.

<sup>8</sup> Britt Adonis.

<sup>9</sup> Megan Bierbach.

the complaint made in her evidence-in-chief. It is not necessary, for purposes of this judgment, to delve into the laborious cross-examination for purposes of making a determination as to whether the defendant discharged her onus to prove the defences raised.

[27] The defendant was cross-examined about the fact that the verbal warning against the plaintiff had been retracted, because the plaintiff was inter alia not provided an opportunity to defend the allegations against her relating to biased judging. Evidence of the plaintiff's written demand of a retraction of the warning dated 18 September 2018 containing a lengthy explanation for the events was provided. The defendant responded in the affirmative, and confirmed that the retraction of the warning was made by Ms Adonis in her personal capacity and on her own volition, in response to the plaintiff's email demanding a retraction. The email, dated 27 September 2018 contained the words 'I retract this warning.'

[28] The defendant was asked whether she knew about the retraction of the warning when she made the complaint against the plaintiff. She testified that she knew, but she felt that the warning still stood, and that it was retracted by one person only when the decision to give a warning was made by the RG Committee. She did concede however that the plaintiff should have been given an opportunity to explain before the warning was given, but testified that the plaintiff's behaviour was in essence ongoing, and that she was constantly conflicted between her official duties in the gymnastics community, and her interest as a parent to two gymnasts. The defendant maintained that the plaintiff was not defamed, and that her complaint was in the circumstances truthful and justified.

[29] The defendant was also questioned about the number of gymnasts that were eventually permitted to attend the training camp. In particular, that in the end space was made for 23 gymnasts, which the defendant did not dispute. The defendant – who had also previously coached the plaintiff's daughters – also admitted that the plaintiff's daughters (but for the limited space at the initial venue for the event in Walvis Bay before the event was moved to Swakopmund) would have qualified for selection to attend the training camp. The defendant pointed out that her issue was with the fact that the plaintiff, the newly elected president of the NGF, immediately started to ask favours or seek special treatment for her children by requesting attendance post the closing date. The defendant reiterated her issue with the conflation of the plaintiff's role as president and

parent, and at times, trainer of her daughters. In addition, the plaintiff was also a judge at competitions where her daughters performed. This, the defendant testified, was the genesis of her complaint.

[30] The defendant was questioned about the relationship between her and the plaintiff. It was suggested that the complaint may have been made because of animosity towards the plaintiff. The defendant responded that she and the defendant indeed had their differences, but that there was no animosity, from her side.

[31] The defendant was also asked about the events at the training camp when the plaintiff called for a meeting to actually iron out their issues, and for no other reason. The defendant responded that the manner in which the meeting was called, after the plaintiff's 'outburst' at the training camp, revealed that the issues were personal as opposed to affecting rhythmic gymnastics as a whole. The defendant testified that this form of behaviour of the plaintiff contributed, amongst others, to her deciding to make the complaint and to have it investigated.

[32] As regards the letter of the plaintiff dated 3 May 2019 (referred to in paragraph [10] above) addressed to the defendant, the defendant was asked whether it was normal for the plaintiff as president of the NGF to welcome a foreign coach. The defendant responded in the affirmative, but reiterated that she had, in her response to the plaintiff's email, advised her to take up her query on welcoming the foreign delegate with Ms Botes in her capacity as rhythm gymnastics president. The defendant stated that as project manager of the training camp she did not have the authority to make such a call in any event.

[33] The defendant was asked whether she was advised to lodge the complaint, and if anyone assisted her in authoring the complaint given that English is not her first language. The defendant replied that she was assisted, but testified that irrespective of whether she was assisted or not she stood by her complaint, and that it was launched for purposes of resolution within the auspices of the Namibia Gymnastics Federation.

[34] With regards to the complaint itself, the defendant testified that nothing happened subsequent to her complaint, and it had not been heard by the time summons was instituted. The plaintiff was questioned about the procedure followed for the lodging of

the complaint, and whether it was not appropriate to first lay the complaint through the relevant gymnastics club. The defendant testified that it may have been a proper procedure, but she thought she was lodging the complaint to the proper body, and the plaintiff in writing pertinently advised that she could lodge the complaint.

[35] The defendant was asked whether she wanted to get rid of the plaintiff, which was denied. The defendant was also asked whether she was happy with the plaintiff as president of the NGF. The defendant responded that she did not agree with the plaintiff being president because of the conflicts she could not manage, and she conceded that the plaintiff was not her choice of president. However, this was not the reason for her complaint against the plaintiff. When asked about other concerns she had with the plaintiff, the defendant testified that the plaintiff felt that she was always right, did not take advice and preferred to work alone.

[36] What also emerged from the cross examination is that the gymnastics community is a very small community, and that some members of the NGF also had children who competed as gymnasts. Some parents were also coaches, and coaches also trained the children of members of the gymnastics community. Because of the size of the gymnastics community and the absence of qualified coaches and judges, it happened sometimes that parents judged their children in local competitions. Her issue was with the plaintiff's biased judging in favour of her daughters.

[37] The defendant was asked whether there were any major conflicts between her and the plaintiff. The defendant replied that there was conflict at times, but that it was not major. Following her response, reference was made to an event where the plaintiff's daughter, who at the time was being coached by the defendant, was selected to participate on behalf of Namibia and that the defendant appealed the decision to let the daughter participate at this event. The defendant testified that this decision concerning the plaintiff's daughter was taken by the rhythmic gymnastics committee, of which the defendant was president at the time, because the plaintiff's daughter was not deemed ready to participate at that time.

[38] Questions were directed to the defendant about various events in the gymnastics community and the NGF and related bodies, resulting in differences in opinion on how the Federation should be run, and which gymnasts were selected to participate at local

and international events. The thrust of the cross examination was that the defendant held a grudge against the plaintiff, and that the complaint was malicious, motivated by a desire to get rid of the plaintiff. The defendant disputed this and maintained her stance contained in the complaint. She did state that the first part of her complaint may have been harsher than intended but the facts of the complaint were essentially the truth.

[39] The defendant was asked about a motion of no confidence planned against the plaintiff at a council meeting set for 23 March 2019, and an attempt to declare the previous elections at which the plaintiff was elected NGF president invalid. The defendant confirmed that she agreed with the motion to declare the election invalid, because at the meeting, clubs who were not registered to vote were permitted to vote, which was irregular.

[40] The defendant was also asked whether she persisted with the complaint levelled against the plaintiff, and she responded that it should be dealt with by the disciplinary committee.

[41] Ms Megan Bierbach also testified on behalf of the plaintiff. Ms Bierbach is also a rhythmic gymnastics coach and owner of a rhythmic gymnastics club in Walvis Bay. She testified that she was part of the planning and preparation committee for the rhythmic gymnastics training camp that was scheduled for 5 May 2019 and that she authored the email of 25 April 2019 relating to the training camp. She stated that all available slots were duly taken up by the gymnasts who had registered for the training camp.

[42] Ms Bierbach testified that on 5 May 2019, and at the training session, the plaintiff, who at the time was the executive president of the NGF, arrived at the event and she observed the plaintiff asking Ms Botes of the host club whether her children could join the training camp. The plaintiff was informed by Mrs Botes that the camp was already full, and that the closing date for entries had passed, Ms Bierbach also informed the plaintiff that the plaintiff herself had previously (on 3 May 2019) informed that her daughters would not be competing in Namibia that year. According to Ms Bierbach, she observed the plaintiff become visibly angry, and she stated that her children were being discriminated against. She then demanded a meeting to discuss the problems in rhythmic gymnastics. The defendant then informed the plaintiff that such a meeting was not necessary but that if she wished to hold a meeting she should follow the correct

procedure for calling such a meeting. The plaintiff, according to Ms Bierbach, then left the training area.

[43] The plaintiff thereafter proceeded to notify the Namibian rhythmic gymnastics clubs per email of an intended meeting with the rhythmic gymnastics section. The email from the plaintiff was dated 5 May 2019 notifying Ms Bierbach and the other coaches to attend a meeting with the plaintiff.

[44] Ms Bierbach also confirmed that she also attended a meeting of the NGF - rhythmic gymnastics committee in Walvis Bay on 18 August 2018. During that meeting, the judging at the National Qualifying Competition held in Windhoek on 29 and 30 July 2018 was discussed and deliberated on. Evidence in the form of an analysis of the original score sheets, and a tabulated summary that she (Ms Bierbach) personally drew up was shared with all present. The committee found that the plaintiff who was a judge at the aforesaid competition judged in a manner biased in favour of her daughters (who also competed at the event) and a warning was issued to the plaintiff and copied to the rhythmic committee in an email addressed to the plaintiff dated 18 September 2018.

[45] Ms Bierbach also confirmed that Ms Adonis as head of judging issued the verbal warning and communicated same to the plaintiff, subsequent to the meeting of the NGF - rhythmic gymnastics committee.

[46] Ms Bierbach was cross examined about the guidelines for the administration of the rhythmic gymnastics committee, and on the elections of office bearers for the NGF, which takes place every second year. As regards the verbal warning, it was sought to establish through Ms Bierbach's cross examination, and for purposes of showing malice, that the procedure for the sanction of the plaintiff for biased judgment in favour of her daughters was incorrectly followed, and that the scoring was not properly evaluated. In this regard, it is accepted for purposes of this judgment, that Ms Britt Adonis personally withdrew the verbal warning on demand from Mrs Olivier, and that her guilt, as set out in the rules and the procedures, had not been fully established beyond reasonable doubt as required by the aforementioned guidelines.

[47] In response to a question from the court whether it was common for parents to judge the performance of their own children, Ms Bierbach responded that attempts are

made to avoid this, but it was common especially at the higher level of gymnastics, because there are insufficient judges with the qualifications. The plaintiff, as well as Ms Bierbach, did have those qualifications.

[48] It was also put to Ms Bierbach that she and the defendant and other members who participated in the meeting leading to the verbal warning were trying to get rid of the plaintiff as president of the NGF. Ms Bierbach responded in the negative.

[49] Ms Bierbach also confirmed that she was one of the members who sought to invalidate the council elections and election of the president (the plaintiff) on 22 February 2019. Ms Bierbach testified that the grounds for the motion to declare the elections invalid had been based on irregularities relating to the eligibility for voting in respect of clubs that had not registered. However, the result of the plaintiff's appeal was that the NSC requested the body elected in February 2019 to deal with matters that were pivotal to the continuity of the Gymnastics Federation until such time as a new election took place. In this regard Ms Bierbach testified that according to her knowledge, there was a court case pending in on this aspect.

[50] As regards the email giving rise to the action, Ms Bierbach confirmed that she was aware of the email as she had also received it as one of the addressees.

[51] Ms Bierbach was handed a copy of a letter dated 17 May 2019, which she co-signed, together with other members of the gymnastics committee and Exco members, which was addressed to members and stakeholders of registered gymnastics clubs affiliated to the NGF. In that correspondence a number of complaints were raised against the plaintiff, inter alia the concern with the regularity of the election process of the Exco of the NGF held on 22 February 2019. This was the election where the plaintiff was elected president. The letter also addressed the issue of the plaintiff's appeal against the verbal warning, which it was alleged was submitted privately to the NSC without prior knowledge or discussion with the remaining members. The issue of the events at the training camp were also raised in this correspondence with the complaint that the plaintiff had attempted to include her daughters in the training camp after the registration date had passed. The issue of nepotism was mentioned, with the request that the Minister of Youth, Sport and National Service convene a special guest assembly in order to hold a re-election where the NGF members who were legitimately authorised to vote, could

vote. The letter concluded with the assurance that attempts would be made to resolve the issues amicably. The defendant was not one of the signatories to the letter, but her husband, Vesselin Kostin, national technical director was.

[52] Ms Bierbach testified that she was aware that the plaintiff had demanded a retraction of the defendant's complaint (at pain of legal action), but she was not aware what had happened to the complaint from the NGF Council. It was clear from her testimony that no disciplinary action had been taken against the plaintiff as a result of the complaint.

[53] Ms Bierbach was also referred to an incident involving her own daughter (who is also a gymnast) during a gymnastics competition, where her daughter informed her that the plaintiff was demanding that she and another judge exchange places as the plaintiff did not want to sit next to a particular judge. In the end, and after checking with Ms Adonis, the head of judging, Ms Bierbach's daughter was directed to comply and change the seating as per the plaintiff's request. It was put to Ms Bierbach that the plaintiff would testify that she laid an official complaint because Ms Bierbach's daughter had instructed one of the other judges next to her on how to score. In response, Ms Bierbach confirmed that a complaint was made and that the plaintiff was directed to follow the proper procedures by addressing the complaint to the relevant club. Further incidences of the plaintiff complaining about a parent who walked into the judges' designated area was also put to Ms Bierbach, but Ms Bierbach did not have a recollection of an official complaint or whether steps were taken against the parent concerned.

[54] As regards the events of 5 May 2019 at the training camp, Ms Bierbach confirmed that the limit of attendees was eventually exceeded, and that two registered gymnasts did not attend after registering to attend. She also confirmed that the plaintiff's daughters would have qualified to attend had they timeously applied.

[55] With regard to the plaintiff calling for a meeting of the rhythmic club representatives at that event, Ms Bierbach confirmed that she asked the plaintiff in what capacity she was calling the meeting, and that she informed the plaintiff that the Exco was illegal. She used the words 'you are all illegal'. She also confirmed that the plaintiff walked on to the training competition floor amongst the gymnasts where the defendant was busy with the gymnasts, which was not permitted.



[56] After the defendant closed its case, the plaintiff testified. It must be mentioned that the plaintiff's witness statement was particularly lengthy. It was 32 pages consisting of 88 paragraphs. In the result, the court exercised its inherent discretion to receive the statement into the record as read.<sup>10</sup> Only the relevant portions of the plaintiff's testimony is included in this judgment.

[57] The plaintiff testified that she is the executive president of the NGF and was so elected on 23 February 2019. She testified that the defendant acted with malice together with others in the gymnastics community to defame her and to try to get rid of her as elected executive president. She stated that there remained a long-standing feud between her and the defendant, and that the defendant, her husband and other members of the gymnastics community including Ms Bierbach were attempting to discredit her. The defendant's complaint was one of the first salvos fired at the plaintiff by this 'faction'. They needed to discredit her because her agenda was in direct conflict with theirs, namely to ensure that gymnastics is established in all the regions of Namibia and becomes the sport of choice. In order to do this, the NGF was required to act in a fair and transparent manner in accordance with good governance principles.

[58] The plaintiff testified that at the time she was elected executive president there were 19 clubs. By October 2020 the clubs numbered 38. She stated that the defendant and her husband had for many years stored and kept under lock and key, most, if not all of NGF's equipment which was not being made available to other clubs. She further stated that during this period, the defendant and her husband failed to execute their fiduciary duties in that they failed to make sure that the NGF's financial records were kept up to date, which included the maintenance of the asset register, thus ensuring that members of the NGF were unaware and/or confused about the actual financial position of the NGF and the value of the assets it owns. This, according to the plaintiff, was to their personal benefit as it ensured that they personally held NGF assets in storage which they could use whenever they wanted. They could therefore portray the false image that their club had the best and most current equipment which would ensure that they had the largest numbers of gymnasts, could offer the most disciplines and be the natural hosts for the NGF sanctioned national, regional and international competitions. The benefit to them personally was that it increased the income of their own gymnastics club.

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<sup>10</sup> *Botes v McLean* (I 853/2014) [2019] NAHCMD 330 (2 September 2019) paras 108 - 119.

[59] She testified that the defendant at all times knew that the factual allegations in her email were false and that she knew that the plaintiff was not involved in gymnastics only for the benefit of her own children. She still undertook 'mountains' of work for gymnastics, and the defendant knew this.

[60] The plaintiff testified that she was involved in gymnastics since 2012 when her second daughter took up rhythmic gymnastics at the Walvis Bay gymnastics club. Her eldest daughter also attended the club as a trampoline gymnast. The defendant also trained both her daughters at different times. The plaintiff qualified as a national judge in 2017 and continued to coach them until the end of January 2016.

[61] During 2014 and 2015 she started to disagree with the Council of the Walvis Bay gymnastics club. The disagreements mostly related to the safety of gymnasts, the prevention of parents attending training sessions, the Exco's failure to act in accordance with the constitution of the club and their poor record keeping. Effectively and until that time, the defendant and her husband were effectively making all Exco decisions themselves even though they were conflicted because they were also full-time employees of the club. One of the aspects that the plaintiff queried was the employment of a non-Namibian which the plaintiff queried with club management.<sup>11</sup> According to the plaintiff, the defendant and her husband took deep affront to the plaintiff lodging a complaint against the employment of a non-Namibian.

[62] Much of the plaintiff's evidence-in-chief related to the various disputes and incidents that took place between members of Exco, the gymnastic community in Walvis Bay and the gymnasts. An explanation for her actions taken in respect of each incident and dispute mentioned, was provided in full. A plethora of hearsay evidence was also presented.

[63] In this regard, the plaintiff testified that she discovered on a reading of the Sports Act, that the defendant and her husband were not eligible to become members of the Executive Council because they were not Namibian. Needless to say, the plaintiff's evidence-in-chief gave the impression of manifold infighting between all the major participants in the gymnastics community, including the gymnasts, some of whom were children of the Exco members.

<sup>11</sup> It is not in dispute that defendant and her husband are not Namibian.

[64] During the dispute concerning the eligibility of the defendant and her husband to sit on Exco, a further dispute arose between the plaintiff and the defendant about the criteria set for awarding of medals based on a benchmark that the gymnasts had to achieve. The development of these criteria were complex and detailed. The dispute surrounding the criteria was according to the plaintiff, partly aimed at frustrating her, and there was a clear sense of agreement in the defendant's faction to ensure that the plaintiff's daughters were not awarded sufficient scores and would therefore not receive the benchmark scores so as to receive medals. This was done, according to the plaintiff, in the hope that this would demotivate the plaintiff's daughters and frustrate the plaintiff to the point where she would simply quit the sport. Her second daughter was particularly targeted, as she was the only competition of one of the other up and coming gymnasts coached by a member of the community, Ms Wietsa Snyman.

[65] The plaintiff testified that she firmly believed that the warning issued against her for scoring in favour of her daughter in one of the competitions which she judged, was an attempt by the defendant and her 'allies' to get rid of the plaintiff. From their perspective, the plaintiff had been a thorn in their side for too long.

[66] During the competition which gave rise to the warning, the plaintiff confirmed that she officiated as head judge on the panel where Ms Bierbach's daughter also officiated. During one of the cycles of the competition the plaintiff observed Ms Bierbach's daughter attempting to influence one of the judges by instructing this judge on which deductions to enter for gymnasts that had just performed. This was unethical and strictly forbidden, and accordingly this conduct was reported to the competition director after the cycle. When the next cycle of the competition commenced, and Ms Bierbach's daughter and the judge she sought to influence were again seated next to each other, the plaintiff restructured the seating arrangements. Apart from the fact that she was not guilty of the allegations leading to the warning, the plaintiff pointed out that she had not been provided an opportunity to state her case. Also, the defendant being aware that the warning was retracted, did not mention this fact in her email complaint.

[67] As regards the invitation to the training camp, the plaintiff testified that it was the defendant that had authored the invitation, and set a closing date, however, Ms Bierbach emailed Ms Adonis asking if she would like to enter one of her gymnasts. This was 20

days after the deadline registration and 10 days before the training camp. Also, Ms Bierbach did not inform the plaintiff that the training camp had been moved to Swakopmund instead of Walvis Bay. The plaintiff stated that she should have been informed of this in her capacity as president of the NGF. This, according to the plaintiff, was an indication that the defendant did not recognise her as the NGF executive president, and that the defendant sought to exclude both her and her children.

[68] When she found out that the training camp had been moved to Swakopmund, the plaintiff then became interested for her daughters to attend. After all, the scope of the camp was to advance and develop the talent of the gymnasts. Also, the number of gymnasts attending increased to 25, with no apparent reason why, and in any event her daughters were qualified and would have made the cut. This is why the plaintiff sent the email to the defendant to enquire if her daughters could attend. As regards her request to attend to greet the facilitator, this request stemmed from the normal protocol for the NGF president to greet foreign experts who facilitate at the training camps. Since the defendant refused to recognise the plaintiff as the legitimate president of NGF, the defendant attempted to dissuade the plaintiff from attending, claiming that the plaintiff wanted to attend as a parent.

[69] The plaintiff gave her version of the events that unfolded at the training camp. Firstly she denied being belligerent, and stated that she only spoke to Ms Botes. She simply asked Ms Botes why there was no space left for her daughters to attend, since the registration deadline had been extended. In response Ms Botes maintained that the deadline had passed and that 20 spots had been filled. When pressed about the extension of the deadline and the increased quantity of gymnasts attending, Mrs Botes veered off into mentioning another gymnast that was also unable to attend.

[70] The plaintiff then asked that they all attend a meeting to clear the air and resolve their differences, at which point Ms Bierbach asked, in what capacity the meeting was being called, and the plaintiff responded that the meeting was being called in her capacity as president of the NGF. Nevertheless there was agreement that the meeting should be called properly and suggestion was made that the plaintiff send out a notice.

[71] The plaintiff also asked Ms Botes whether the NSC had been informed that a foreign coach was in the country facilitating a course. From Ms Botes' physical reaction,

the plaintiff observed that that they realised that they had not notified the NSC. Thereafter the plaintiff left the training camp to go home and prepare a notice of the meeting.

[72] In cross examination, the plaintiff admitted that in her capacity as president of the NGF she became the Namibian representative of the sport of gymnastics as a whole. It was put to her that in her aforementioned capacity she had a duty to represent each and every Namibian gymnast. When asked whether she accepted that she was required to separate her role as president from her role as a parent, the plaintiff's response was:

'In so far as it is humanly possible ... I am only human ... I try my very best to not set foot on that slippery slope and to always think of all the gymnasts from other disciplines ... I do forget, I am conscious of the fact that I can be conflicted and I try not to be.'

[73] The plaintiff was taken to the contents of the complaint, as well as her own letter dated 3 May 2019 that formed part of the cause of the complaint. The plaintiff was asked in which capacity she authored the letter, and the plaintiff responded that she authored the letter in her capacity as president of the NGF. The plaintiff confirmed that it would be fair in those circumstances for the defendant to understand that she was dealing with the president. The plaintiff also conceded that it would not be unreasonable for the defendant to also assume that the plaintiff was writing to her both as president of the NGF and as a parent.

[74] The plaintiff accepted that in the second portion of her letter relating to her request for her daughters to attend training camp, she was writing in her capacity as a parent. The plaintiff also accepted that she transmitted the email to the defendant's project manager of the training, both as president and as parent. The plaintiff attempted to reason that it would have been more prudent of the defendant to ask her in what capacity her requests were being made. The onus was placed on the defendant to request clarification so as to avoid any conflict.

[75] The plaintiff also testified that she was actually not aware of the closing date for the registration of the training camp, because she had not been properly informed of this in her capacity as president as she should have been. She accepted that she sent the email only two days before the camp was to start, namely on 3 May 2019, and one day before the arrival of the participants and experts.

[76] The plaintiff also testified, eventually, that she attended the training camp on 5 May 2019 as president of the NGF. The plaintiff conceded that the capacity in which she enquired why her daughters were excluded from the training camp, was as a parent. The plaintiff explained her position as follows:

‘... Yes I arrived at the training camp as president and as a parent, the setting is informal. In the past there has also been blurred lines as well as for previous presidents and also given the history of animosity between myself and the defendant and her friends, there was an opportunity for me to address it, and I wanted to address it there. Had I known that if other gymnasts had been specifically excluded I would certainly have made an effort to have them included as well.’

[77] With regard to the plaintiff’s comment that her children were being discriminated against, she did not dispute that she said those words, but testified that she never shouted, although she was upset at the way her daughters were being treated.

[78] In relation to the portion of the complaint that stated that the plaintiff had received an official warning, the plaintiff testified that this was only half true, as the decision was not confirmed, and she was not given an opportunity to properly explain her version. It was put to the plaintiff that one of the persons who held the view that the plaintiff was biased in her judging in favour of her children was their own coach. The plaintiff did not provide a meaningful response to this. She instead relied on the fact that Ms Adonis (the coach) retracted the warning. It was then put to the plaintiff that the minutes of the committee that resulted in the warning made it clear that Ms Adonis was given the mandate to issue the verbal warning, and that the retraction of the warning was not formal, as testified by the defendant and Ms Bierbach. The plaintiff responded that the warning was rightly retracted after the plaintiff objected to being issued with the warning in the first place.

[79] The plaintiff was in conclusion requested to comment on the defendant’s version that the persons to whom she addressed the complaint were either members of the executive committee of the NGF, or persons relevant in so far as they may be in the employ of the gymnastic circle. The plaintiff’s response was the following:

‘Ms Kostin I believe, testified that her understanding of the procedure of lodging a complaint is to take her complaint to her club committee. Her club would then decide whether to

take it to the technical committee, the technical committee would then decide whether to take it to the executive council. Clearly Ms Kostin did not follow the procedure and had I been less human I would have referred Ms Kostin back to her procedure and told her please take your complaint to your club's committee first so that they can elevate it to the technical committee and the technical committee can then elevate it to the executive council in case they needed to. I did not do that. I immediately responded to her and said to her she has recourse available. Ms Kostin, Ms Bierbach, everybody knows, it's not a secret and even if they were not questioned on it, the chaos that ensued as a result of the letter that was written two days later made it almost impossible time-wise to establish a disciplinary committee to actually have them bring charges. .. that would be the executive council, and I would have recused myself from that decision.'

### **Applicable legal principles**

[80] Whether the defendant's complaint is defamatory falls to be determined objectively. The court will consider the contents of the complaint, draw its own inference about the meaning and effect thereof, and then assess whether it tends to lower the plaintiff in the estimation of right thinking members of society generally. The standard from which the enquiry should depart is the ordinary reader with no legal training or other discipline, described as a "reasonable", "right thinking" individual of "average education" and "normal intelligence". It is through the eyes of such a person who is not "super-critical" or possessed of a "morbid or suspicious mind" that the court must read the statement.<sup>12</sup>

[81] After it is established that a defamatory statement was indeed made, a rebuttable presumption arises requiring the defendant to prove on a balance of probability that the publication of the statement was not unlawful (*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. The list of defences is not exhaustive. If the defendant can establish any of these defences on a balance of probabilities, the defamation claim will fail.<sup>13</sup>

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<sup>12</sup> *Afshani v Vaatz and Another* 2006 (1) NR 35 (HC) at 45 para 22 and the authorities collected and applied there. See also *Kandando and Another v Namibia Medical Care and Another* [2003] NAHCMD 84 (4 April 2013); *Trustco Group International Ltd and Others v Shikongo* 2010 (2) NR 377 (SC) at 388 para 24.

<sup>13</sup> *Afshani v Vaatz* supra at 49 para 31; *Shikongo v Trustco Group International Ltd and Others* 2009 (1) NR 363 (HC) at 384 para 35; *Valindi v Valindi and Another* 2009 (2) NR 504 (HC) at 522 para 34.

[82] As regards the defence of truth and public benefit, it is well established that it is lawful to publish a defamatory statement, provided that publication is true and for the public benefit.<sup>14</sup> When it comes to the issue of truth, all that is required is that the defendant must prove that the defamatory statement or general charge is substantially true. This does not require the proof of each and every fact relied upon.<sup>15</sup> Thus, the defamatory nature of a statement does not depend on its falsity alone.<sup>16</sup>

[83] To that end, the defendant must present facts which support the allegations concerning the plaintiff contained in the complaint.

[84] The question of public interest depends on the subject matter of the statement and the time, manner and occasion of the publication.<sup>17</sup> It follows that some advantage must be conveyed to the public by the communication of the information.<sup>18</sup>

[85] As regards the defence of qualified privilege, Corbett JA explained this defence in *Borgin v De Villiers*<sup>19</sup> thus:

'The particular category of privilege which . . . would apply in this case would be that which arises when a statement is published by one person in the discharge of a duty or the protection of a legitimate interest to another person who has a similar duty or interest to receive it. . . . The test is an objective one. The Court must judge the situation by the standard of the ordinary reasonable man, having regard to the relationship of the parties and the surrounding circumstances. The question is did the circumstances in the eyes of a reasonable man create a duty or interest which entitled the party sued to speak in the way in which he did? And in answering this question the Court is guided by the criterion as to whether public policy justifies the publication and requires that it be found to be a lawful one.'

[86] Thus, in determining whether the occasion may be so regarded, the court will objectively (with the standard of the reasonable person in mind) consider all the circumstances under which the statement was made, such as the contents thereof, the

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<sup>14</sup> *Coetzee v Central News Agency* 1953 (1) SA 449 (W) at 452F-H.

<sup>15</sup> *LAWSA*, 2<sup>nd</sup> Ed, Vol 7 par 247 at 245; *Universal Church of the Kingdom of God v Namzin Newspapers (Pty) Ltd* 2009 (1) NR 1 (HC) at 76 para 34; *Johnson v Rand Daily Mails* 1928 AD 190 at 205-206.

<sup>16</sup> *Sutter v Brown* 1923 AD 155 at 172.

<sup>17</sup> *Zillie v Johnson* 1984 (2) SA 185 (WLD); *Mohamed v Kassim* 1973 (2) SA 1 (RAD).

<sup>18</sup> *Shikongo v Trustco* supra at 390 para 55.

<sup>19</sup> *Borgin v De Villiers* 1980 (3) SA 556 (A) at 577D-F.



occasion at which it was made and the relationship of the parties. The courts in this regard have recognised that the defence applies where the statement has been made (a) in the discharge of a legal, social or moral duty to persons having a reciprocal duty or interest to receive it, and (b) in the protection or furtherance of an interest to a person who has a common or corresponding duty or interest to receive it, and the statement was relevant to the matter under discussion on that occasion. These grounds, founded upon public policy, are for that reason not limited and may be extended whenever the dictates of public and legal policy so require, the boundaries of which fall to be determined by applying the general criterion of reasonableness.<sup>20</sup>

[87] At paragraph 34 of the *Afshani* decision, Maritz J (as he then was), also stated that for the defence to succeed, the defendant must show on a balance of probabilities that the defamatory statement was reasonably germane and relevant to the privileged occasion.<sup>21</sup> For the defendant to establish the privileged occasion and relevance, she need also not show that the statement was correct in all respects.<sup>22</sup>

[88] A plaintiff may only defeat this defence if she pleads and proves affirmatively that the defendant published the statement with an improper motive or malice, or that the defendant abused or exceeded the ambit of qualified privilege. The plaintiff can do so by proving that the defendant's motive in making the communication was not a sense of duty or the desire to protect an interest but some improper motive.<sup>23</sup>

[89] This issue should be raised by the plaintiff in a replication,<sup>24</sup> so that the defendants are placed in a position to meet such a case.

## **Arguments**

[90] Mr Chibwana appearing for the defendant argued that the complaint made against the plaintiff was truthful, and in the public benefit. Should the court find that the statements contained in the complaint were not true or substantially true, then the

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<sup>20</sup> *Afshani v Vaatz* supra 49-50 paras 32 and 33 and the authorities collected there where Maritz J (as he then) provided an insightful exposition of the law relating to the defence of qualified privilege.

<sup>21</sup> *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* 2001 (2) SA 242 (SCA) paras 22 to 26.

<sup>22</sup> *Afshani v Vaatz* supra at para 37 and the authorities collected there.

<sup>23</sup> *Afshani v Vaatz* supra at para 41.

<sup>24</sup> *Mydoo and Others v Vengtas* 1965 (1) SA (a) at 21A-C; *Afshani v Vaatz* supra para 42.

defendant relied on the defence of qualified privilege.

[91] Mr Olivier for the plaintiff argued firstly, that the defendant had not pleaded the defence of truth and public benefit and that the defendant was accordingly not entitled to rely thereon. He further argued that the defendant's defence of qualified privilege could not hold because the plaintiff had proved on a balance of probability that the defendant's statements were actuated by malice, and an attempt to get rid of her because she was in the process of effecting good governance and beneficial change in the gymnastics federation that was heretofore improperly managed by the defendant and her husband, together with a faction solely aimed at discrediting the plaintiff.

[92] For purposes of the argument on the absence of a properly pleaded defence of truth and public benefit, the following is apparent from the pleadings on this aspect of the defendant's defence. The defendant admitted the contents of the complaint. The defendant pleaded that she published the complaint, the terms of which were truthful, alternatively represented fair comment, alternatively were in the public interest to receive. The defendant pleaded in this regard, and in relation to the basis of the complaint, that she set out the essential facts relating to certain irregular acts of the plaintiff. The defendant pleaded further that the only meaning reflected was the truth and/ or fair comment on the conduct of the plaintiff. The basis for the defendant's refusal to apologise was pleaded on these terms.

[93] In the pre-trial order the following were inter alia set out as issues of fact to be resolved at the trial, namely whether the statement set out facts and if so whether such are essential facts, and whether they were made in the public interest. Also:

[94] whether there were complaints made in relation to the manner in which the plaintiff judged her daughters and other competitors at the second qualification competition held in Windhoek on 29 and 30 July 2018;

[95] whether the complaints in relation to the plaintiff's judging at the second qualification competition held in Windhoek on 29 and 30 July 2018 alleged that the plaintiff favoured her daughters when judging and scoring the competitors;

[96] whether the head of judging, Ms Britt Adonis gave the plaintiff a verbal

warning in relation to the manner in which she judged the competitors at the second qualification competition held in Windhoek on 29 and 30 July 2018.

[97] Given the above, it is the court's view that the defendant sufficiently pleaded her defence of truth, even though it is not specifically stated to be a question of law in the pre-trial order. Also, there is the extensive evidence placed before the court on this aspect by the plaintiff and by the defendant's witnesses, to enable determination on this aspect.

[98] Turning to the complaint itself, it is apparent from the email dated 3 May 2019 that the plaintiff conflated her role as president of the NGF and parent to her two daughters (whose training she had also taken over). She asked about the arrival of the facilitators so that she could welcome them, and she asked about her daughters being able to attend whilst being aware at the time that the deadline had passed. This email was also sent two days before the training camp. This is to be considered together with the plaintiff's own admissions that some parts of the letter were addressed as parent, and some parts were addressed as president. In this regard she testified that there had been blurred lines in the past as well and given the history of the animosity between her and the defendant, there was an opportunity to address it at the training camp, and she wanted to address it there.

[99] Then there are the events at the training camp, which the plaintiff on her own version attended in her capacity as president, and also to welcome the facilitators. Instead, because of her disappointment at her daughters not being selected for the event, the plaintiff decided to then and there, confront Ms Botes about her children not being provided a space when the maximum had in any event been exceeded, and the resultant rejection of and discrimination against her daughters. This exchange occurred in full view of some of the attendees. In addition the plaintiff found it opportune to at the training event, query whether the NSC had been informed that a foreign coach was in the country facilitating the same course. This was the same person who had requested information on the facilitators so that she could welcome them. She then also thought it wise to call a meeting to resolve all the differences at that moment.

[100] As president of the NGF, the plaintiff's role was to represent all gymnasts and also to behave in a manner that was accordant to her position. Whilst the disappointment at

her children not attending is not unjustified (irrespective of the number of attendees), the time and place to deal with that was not at the training camp, where she had to consider all gymnasts in her official capacity. The plaintiff's conduct displayed a manifestation of a conflict of interest, and was exacerbated by somewhat immature behaviour at the event. A reasonable person of average intelligence would have questions about the plaintiff's conduct, and her fitness for the position for which she was elected.

[101] This conduct also exhibited signs of bias by the plaintiff towards her daughters, as the entirety of her actions were underpinned by the fact that her daughters were excluded. Rightly or wrongly, this was not conduct becoming of a president of the NGF. The plaintiff acted as an irate parent. It is accordingly substantially true that the plaintiff, based on her actions, favoured her children and conflated her executive role with her role as a parent. She effectively, through her own conduct, made herself guilty of nepotism by requesting that her daughters attend the training camp, knowing that the closing date had lapsed. It is not lost on the court that there were more gymnasts that eventually attended the event, but it must also be acknowledged that the plaintiff's request was made two days before the event and addressed to the project manager, the defendant.

[102] It is also substantially true that when the request was denied, the plaintiff came to the hall and confronted the defendant and others, and accused other coaches of discriminating against her daughters.

[103] As regards the biased scoring in favour of her daughters at a previous competition, it must be mentioned that it does not augur well for any parent to judge her own children in a competition. This was a recipe for disaster at the outset, although the court takes cognisance of the testimony about the small number of judges available. Some form of procedure to manage this conflict is vital for the existence of this body in Walvis Bay at least.

[104] As regards the verbal warning, it is true that a verbal warning was given and that the members of the committee felt they had enough evidence to show that the plaintiff was biased on her judging of her daughters in a competition. Cognisance is taken of the fact that the verbal warning was later withdrawn by the person that had initially been given the mandate by the aforesaid committee to issue the warning. The court also takes into consideration that the procedure leading to the verbal warning may have been

incorrectly followed. But it is not untrue that a warning was given. The defendant was aware that the warning was withdrawn, and it may well have behoved her to add this, but the facts are not false per se.

[105] Taking the contents of the statement as a whole, and the surrounding facts as testified by the plaintiff and the defendant, the plaintiff was not defamed. The conduct of the plaintiff as set out in the statement, whether intentional or not, together with her actions at the training camp, showed the contents of the defendant's complaint to be substantially true, and it was, as a result, necessary for this to be brought to the attention of the gymnastics community.

[106] In addition, on the evidence as a whole, the defendant's complaint was a valid complaint, which was supposed to be investigated by the bodies tasked within the NGF to deal with it. In that forum, the plaintiff would have had the opportunity to defend all her actions and a decision could be taken after hearing both sides. The plaintiff made equally negative allegations about the defendant and her husband during her evidence, accusing them of conduct not becoming of coaches and employees, as well as taking action in their own personal interest. The plaintiff herself launched a number of complaints to the sports body against the defendant and other members of the gymnastics community.

[107] The plaintiff's testimony was also replete with hearsay and a deluge of information about her own efforts to bring order to the gymnastics community. This was aggravated by an argumentative bearing when she was asked pertinent questions in cross examination on the issue. In fact, it was the defendant that appeared to be the most objective witness. There was no malice on the part of the defendant in any event, in the circumstances. Ms Bierbach was definitely more antagonistic towards the plaintiff. The in-fighting in the gymnastics community is an embarrassing situation for all the parties involved. All in all, the quote from the play 'Hamlet' by William Shakespeare that 'The lady doth protest too much, methinks', would be apposite in the circumstances.

[108] In light of the foregoing the plaintiff's defamation claim cannot stand, the defendant having discharged the onus upon her on a balance of probability.

[109] The following order is made:

The plaintiff's claim is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

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EM SCHIMMING-CHASE

Judge

## APPEARANCES

PLAINTIFF:

Mr Jan Olivier  
Du Pisani Legal Practitioners  
Correspondent attorneys for Jan Olivier & Co

DEFENDANT:

Adv T Chibwana instructed by  
Sisa Namandje & Co Inc