

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING: INTERLOCUTORY

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) [2019] NAHCMD 246 (12 July 2019)

**Coram:** PRINSLOO J

**Heard:** 05 July 2019

**Delivered:** 12 July 2019

**Reasons:** 19 July 2019

**Flynote:** Civil practice and procedure – Calling witnesses to testify during trial whose names were not contained in the pre-trial order – pre-trial orders – varying and

effect thereof – signing the pre-trial order the legal practitioners of the parties signified their assent to the contents of it.

**Summary:** This is an application brought before court to permit the defendants to call two further witnesses to testify on reports they produced, which reports were not made available during the pre-trial stage and also varying the pre-trial order in so far as it may be necessary.

*Held that* at no stage prior to commencing with the trial did the defendants raise the issue of the report or the difficulty in sourcing it. The report that the defendant seek to present to court was drafted by an expert, namely Dr Janine Sharpe, yet the parties clearly indicated in the case management report dated 16 April 2018 that neither parties foresee the use of any expert witnesses.

*Held further that* at no stage during the conduct of the matter was the report material to the case of the defendants, this much is clear from the pre-trial order. The report only became critical for the defendants after the evidence of first plaintiff and the two witnesses who testified on behalf of the defendant was presented to court. The current application was therefore brought in reaction to the evidence which was presented up to this point.

*Held further that* the days that legal representatives prepare as they go along in a case and solely in reaction to the conduct of the other party(ies) are gone. Therefor this application filed on behalf of the defendants is refused and dismissed.

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## ORDER

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1. The application to permit the calling of two additional witnesses to testify and the varying of the pre-trial order in as far as it may be necessary is refused.

2. The defendants to pay the costs of the application, jointly and severally, consequent upon the employment of one instructing and one instructed counsel on the ordinary scale.

**Further conduct of the matter:**

3. The case is postponed to **15/07/2019** at **08:30** for Status hearing (Reason: Further Hearing Dates (Assign)).

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**RULING**

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PRINSLOO J:

The Application

[1] Presently serving before this court is an application to:

- (a) permit the defendants to call two further witnesses by the names of Mr Benjamin Shipindo and Dr Janine Sharpe to testify on reports they produced in respect of the elephants kept at Farm Geluksberg; and
- (b) vary the pre-trial order in line with the first prayer in so far as it may be necessary.

[2] For purposes of this ruling, I shall refer to the parties as they are in the main action.

## Background

### *Pleadings*

[3] The matter before me dates back to 09 November 2017 when the summons commencing the action was filed. The plaintiffs' claim for defamation is based on an article which was published in the Namibian Sun Newspaper on 24 October 2017 under the heading 'Court order sought over elephants'. In paragraph 6.3 of the particulars of claim one of the statements on which the claim for defamation is based was formulated as follows:

'That the elephants were kept for months in containers in horrific and deplorable conditions; . . .'

[4] On 09 March 2018 the defendants pleaded as follows:

'6. The contents of this paragraph are denied and the Plaintiff is put to the proof thereof. The Defendant, without derogating from the generality of the denial, plead as follows:

. . .

6.2.1 In so far as the words complained of are statement of fact they are true in substance and in fact and, in so far as the statement complained of are expressions of opinion, they are fair comment based upon a matter of public interest.'

[5] Hereafter the matter progressed fairly smoothly through judicial case management up to pre-trial conference which was held on 16 July 2018. During the pre-trial conference the parties defined the issues in dispute between them clearly and

succinctly. In the proposed pre-trial order the parties agreed that the court must determine the following as an issue of fact during the trial<sup>1</sup>:

'1.10 Whether the words complained of are true in substance and in fact.'

[6] From the particulars of claim and the plea filed in response thereto it is evident that one of the clear issues of dispute between the parties is the truthfulness of the statement regarding the conditions that the elephants were kept in, as a result of which the defendants attracted the burden of proof of the truthfulness of the statement.

*Judicial Case management and events leading up to the application*

[7] The case ran its course through the judicial case management process. The pre-trial conference was held on 19 July 2018 and the allocation of trial dates was done on 11 March 2019.

[8] In terms of the court order of 11 March 2019 the matter was scheduled for trial for the period of 01 to 05 July 2019. The trial commenced on schedule on Monday morning, the 01<sup>st</sup> of July 2019. After a full day of trial the matter was adjourned to Tuesday, 02 July 2019, for continuation. On Tuesday morning, after concluding the evidence of Mrs Smit and Mr Nakatana, who testified on behalf of the defendants, the matter stood down until 14:15 for the next witness, Dr Malan Lindeque. Shortly before the matter was to be called after lunch the court was approached in chambers by counsel and was duly informed by Mr Maasdorp, counsel for the defendant, that the defendant wish to bring an application to call two more witnesses and whereas the application was going to be opposed by the plaintiffs, the defendants were ordered to file their application on 03 July 2019 and the plaintiffs in turn were ordered to file their opposing papers on 04 July 2019. Thereafter, the matter was postponed for hearing of the interlocutory application for 10h00 on 05 July 2019.

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<sup>1</sup> The parties agreed on 16 different issues of fact to be determined by court during the trial. Paragraph 1.10 is highlighted merely for purpose of the current ruling.

[10] Counsel diligently filed their notes on argument on 04 July 2019 and I would like to express my gratitude for their industry in this regard.

### The application

#### *Defendant's case*

[11] The founding affidavit was deposed to by Mr Nakatana, the second defendant and a further affidavit was deposed to by Ms Cagnetta, the instructing counsel in this matter.

[12] Mr Nakatana substantiated the application as follows:

- (a) The first plaintiff stated in his witness statement<sup>2</sup> that he would subpoena the author of the Ministry of Environment and Tourism (MET) reports and stated that he was informed that the elephants were in good condition, not stressed and kept in proper conditions and they<sup>3</sup> were happy with the situation. The plaintiffs issued a subpoena in respect of the relevant official, who turned out to be Dr Sharpe, but filed a return of non-service.
- (b) The defendants' counsel met with Dr Lindeque, the former Permanent Secretary of Ministry of Environment and Tourism on 28 June 2019, seeking a copy of the said report. Dr Lindeque did not have the report at the time but the defendants' counsel received a WhatsApp copy of the said report from Dr Lindeque on Monday afternoon, 1 July 2019.
- (c) On Tuesday, 02 July 2019, the defendants' counsel succeeded in locating the author of the said report, ie Dr Janine Sharpe and consulted with her at around 11h00 on 02 July 2019. After consulting Dr Sharpe she secured permission from her Executive Director to release the report dated 5 March 2018 as well as a

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<sup>2</sup> Para 23 of Plaintiff's witness statement.

<sup>3</sup> . The 'they' in this context were a veterinarian, Dr Andreas Gaugler, and a state veterinarian instructed by MET.

report dated 8 February 2018. These reports were made available to the plaintiff's counsel.

(d) From the report of Dr Sharp it followed that a further witness would be required to testify, namely Mr Benjamin Shipindoh, a Game Warden with direct knowledge of the disputed issues. Counsel for the defendant was able to consult with Mr Shipindoh around 17h00 on 02 July 2019. After consultation with Mr Shipindoh counsel for the defendants received a further report from Mr Shipindoh.

[13] Mr Nakatana submitted that the witnesses are highly relevant witnesses on the material issues in dispute under the pre-trial order, and that for the interest of justice the witnesses ought to be called to testify.

[14] In her affidavit Ms Cagnetta sets out the time lines and what was done on the part of the defendants as from the time that she received the file on 17 January 2019. After having been advised by MET to direct any requests or enquiries via the offices of the Government Attorneys attempts were made to secure a meeting with Dr Lindeque. It would appear that after a line of electronic mails to the office of the Government Attorney Ms Cagnetta managed to contact Dr Lindeque on 27 March 2019 telephonically and a meeting was scheduled for 01 April 2019. During the said meeting Dr Lindeque confirmed the existence of the veterinary report which relates to the matter at hand but he had no copy in his possession.

[15] On 17 or 18 June 2019 Ms Cagnetta instructed Ms Nel, a candidate attorney at the firm, to take urgent steps to attempt to locate the report from MET and to subpoena the relevant individual. Ms Nel apparently attempted to secure a copy of the report but was informed that certain steps needed to be followed to obtain a copy of the report.

[16] On 20 June 2019 the plaintiff uploaded a subpoena for Dr Sharpe to ensure that she attends and produces the veterinary report at court. Ms Nel was instructed to seize any effort to obtain the report as it would constitute a duplication with the subpoena. A return of non-service was however filed on 26 June 2019 on E-Justice by the plaintiffs.

This prompted Ms Cagnetta to give instructions again to Ms Nel to take urgent steps to locate and secure the veterinary report. Mr Cagnetta proceeds to explain what happened from 28 June 2019 to 02 July 2019 in much detail and I do not intend to repeat same.

[17] To the affidavit deposed to by Mr Nakatana and Ms Cagnetta detailed reports were attached in support of the defendants' application.

### *Opposition*

[18] The plaintiffs did not file any answering affidavits but duly filed a notice of opposition to the application by the defendants.

### Arguments advanced

#### *On behalf of the defendants*

[19] Mr Maasdorp submitted that the application before court is hybrid in nature and conceded that should the defendant succeed with the application before court it would imply that the court will effectively be requested to vary the pre-trial order, it might also mean that the plaintiffs may have to re-open their case. He however argued that the defendants are not attempting to delay the matter or play the system in any way. He submitted that the defendants took part in the judicial case management process in a diligent manner and that the *bona fides* of the defendants are clear from the fact that they offered to publish an exclusive article setting out the position of the plaintiffs herein, already during mediation, which took place three months into the prosecution of this matter.

[20] Mr Maasdorp argued that the matter before court cannot be regarded in the same light as the *Arangies and Another v Unitrans Namibia (PTY) Ltd and Another*<sup>4</sup>

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<sup>4</sup> 2018 (3) NR 869 (SC).



matter where the matter was set down for trial no less than six times. Mr Maasdorp argued the matter *in casu* progressed through the judicial case management process fairly expeditiously. He argued that the defendants pray for an opportunity to put into evidence the reports and the authors of those reports that have direct bearing on two of the main issues that were identified in the pre-trial report namely:

- a) 'Whether the said words complained of are true in substance and in fact' (para 1.10); and
- b) 'Whether the statements complained of are fair comment based upon matters of public interest.' (para 1.12).

[21] Mr Maasdorp further argued that the matter *in casu* is an appropriate case to allow the defendants to call the witnesses they intend to call and that the calling of these witness will be in the interest of justice. He pointed out that the defendants are not the repositories of the information necessary to prove the defendants' case and that the defendants went to great lengths to procure the evidence required.

[22] Mr Maasdorp further submitted, with regard to the non-filing of the answering affidavits by the plaintiffs, that whereas the plaintiffs were very critical of the affidavits filed in support of the application, none of the criticism were stated under oath by filing an answering affidavit to enable the defendants to reply to it.

[23] In conclusion Mr Maasdorp submitted that the long and short of the defendants' application is that an issue has arisen and that should the court deem it appropriate the pre-trial order can be varied and therefore prayed that the court allows the relief prayed for.

*On behalf of the Plaintiffs*

[24] As the plaintiffs' were criticized for failing to file an answering affidavit during argument Mr Barnard, counsel acting on behalf of the plaintiff, directed the court's

attention to the matter of *Grobbelaar and Another v Council of the Municipality of Walvis Bay and Others*<sup>5</sup> wherein the court ruled that a party is not obliged to file an answering affidavit if no case is made out in the founding affidavit. Mr Barnard submitted that the plaintiffs were therefor not obliged to file an answering affidavit wherein they need to point out the shortcomings in the founding affidavit just to afford the defendants to fix up their case.

[25] Mr Barnard argued that the particulars of claim on the cover of summons clearly sets out the allegations upon which the claim of defamation was set out and the defendants pleaded that the statements are true in substance and in fact. He argued that the truthfulness of the statements were in dispute from the onset and remains in dispute and therefore it is incumbent on the defendants to prove the truth of the statements they rely on. This, he argued, meant that the defendants had to investigate their case in order to prepare and prove their case at trial. Mr Barnard submitted that the defendants did not do so either before or after the offending publication.

[26] Mr Barnard further argued that the plaintiffs' witness statements were filed on 16 October 2018 wherein reference is made to the report of Dr Sharpe and that he was of the opinion that the report would be in his favour and therefor, then already, the defendant had to realize they needed this report, yet no enquiries were made regarding the report. He argued that in any event this report was never the defendants case as they based their case solely on the statements made by the Minister of MET and the then Permanent Secretary of MET.

[27] Mr Barnard argued that the defendants cannot now say they were surprised by the evidence before court to date and that the defendants at this very late stage of the proceedings wish to change their strategy and their approach to the conduct of the defendants' case.

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<sup>5</sup> (PA46/04 ) [2004] NAHC 1 (16 April 2004).

[28] Mr Barnard argued that the steps taken by the defendants to obtain the report cannot be regarded as convincing and that the defendants' explanation for the delay in obtaining the report is lacking as the defendants should have started to take the necessary steps as far back as before filing their plea.

[29] Mr Barnard submitted that should the court grant the defendants' application it will have far reaching consequences for his clients, not only in respect of their reputation but also in respect of the impact on the plaintiffs' ability to do business. He submitted that the granting of the application to allow the defendants to present a report(s) and evidence that cannot assist their case in proving the truthfulness of the statement would set the finalization of the matter back months and his clients would be severely prejudiced as a result thereof. Mr Barnard therefor submitted that the application should be dismissed.

#### The relevant legal principles

[30] It has been repeatedly stated by this court that the managing judge at all times is sought to act in terms of the overall objective of the case management system namely, to finalise the matter and avoid further delays.

[31] This position taken by court is in line with Rule 1(3) and (4) which narrates as follows:

'(3) The overriding objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable by –

- (a) ensuring that the parties are on an equal footing;
- (b) saving costs by, among others, limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and timely disposal of a cause or matter; . . .
- (d) ensuring that cases are dealt with expeditiously and fairly;

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

- (a) the extent to which the parties have complied with any pre-trial requirements or any other mandatory or voluntary pre-trial process;
- (b) the extent to which the parties have used reasonable endeavours to resolve the dispute by agreement or to limit the issues in dispute;
- (c) the degree of promptness with which the parties have conducted the proceeding, including the degree to which each party has been prompt in undertaking interlocutory steps in relation to the proceeding;
- (d) the degree to which any lack of promptness by a party in undertaking the step or proceeding has arisen from circumstances beyond the control of that party;'

[32] Special leave is sought by the defendants to call further witnesses who were not indicated in the pre-trial order. This application was bought at the stage of the defence case, with only one witness left to testify.

[33] Both parties are in agreement that the position in law applicable is as set out in *Arangies and Another v Unitrans Namibia (PTY) Ltd and Another*<sup>6</sup> as discussed by Frank AJA as follows:

'[9] The managing judge must see to it that the objectives of case management are attained, ie that a matter is dealt with 'justly and speedily, efficiently and cost effectively as far as practicable'.<sup>7</sup> To do this it is necessary to determine the real disputes between the parties, limit interlocutory applications to those necessary to achieve a 'fair and timely disposal'<sup>8</sup> of the matter. Parties, and especially legal practitioners, are duty bound to assist the managing judge in this regard.<sup>9</sup> The rules are so designed to ensure that when an action is referred to trial all the preliminary preparation has been done and all the preliminary or interlocutory issues have been determined. Thus the pre-trial order will stipulate all the matters relevant to the ensuing trial, such as, facts and disputes, facts not in dispute, issues of law to be decided, the names of the

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<sup>6</sup> Supra at footnote 4.

<sup>7</sup> Rule 1(3) read with rule 17 of the High Court Rules.

<sup>8</sup> Rule 1(3) (b) and (d) of the High Court.

<sup>9</sup> Rule 17(2) of the High Court.

witnesses (and when the witness statements have to be filed) as well as any expert notice.<sup>10</sup> By this time discovery of documents should also have been done.<sup>11</sup> The general rule thus is, when the pre-trial order is given, it should be adhered to and that the parties are ready to proceed with the trial on the date indicated. Where issues arise from the pre-trial order, such as problems with witness statements, the party incurring such problems must require a status hearing so that the managing judge can give directions in respect of the issue or issues in question.

[10] The purpose of the case management system is to avoid unnecessary delays in the finalisation of trials. The rationale for this has been stated as follows:<sup>12</sup>

“The law's delays have been the subject of complaint from litigants for many centuries, and it behoves all courts to make proper efforts to ensure that the quality of justice is not adversely affected by delay in dealing with the cases which are brought before them, whether in bringing them on for hearing or in issuing decisions when they have been heard.”

[11] It is advisable that in all cases where a party cannot comply with a pre-trial order that the opposing party(ies) be approached first to seek consent for the indulgence that will be sought at the status hearing. If all the parties consent to the envisaged action this is a relevant factor for the managing judge to consider. I wish to emphasise that it is a factor and not the only factor. Furthermore, the case management process is a step away from the previous practise where the parties could by agreement determine the process and where a party would be entitled to delay (postpone) the process by tendering wasted costs, provided there would be no prejudice on the merits of the case to the other party or parties involved caused by such postponement. It is exactly these never-ending pending cases where no real emphasis was placed on the matter reaching finality which allowed legal practitioners to be slack in the preparation of cases as they could fix issues intermittently as they cropped up, provided they could tender costs. The reality of such approach was to favour those litigants with deep pockets and those with meritless cases as cost awards seldom cover all the costs of litigants.

[12] If a client appoints a legal practitioner who is lax when it comes to preparation he will now run the risk that he will not be granted a postponement or indulgence to bolster his or

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<sup>10</sup> Rule 26 of the High Court.

<sup>11</sup> Rules 28 read with 29 and 26 of the High Court.

<sup>12</sup> *New Clicks* case above at 262B.

her case if he or she did not prepare properly. The proof of such laxity will be the legal practitioner's inability to adhere to the case management process and/or the pre-trial order. This does not mean that the pre-trial orders cannot be altered. It simply means that there must be an acceptable explanation for the non-compliance. The nature of trials is such that unexpected evidence may arise, (although this aspect has been mitigated by the necessity of filing witness statements) new evidence may become available as a result of the publication of the case or issues arising from cross-examination may need to be addressed. The point is that unless a case is made out (other than the unpreparedness by design or omission or because of a lackadaisical attitude in general) for an alteration to a pre-trial order, this will not be granted. To do otherwise would be to assist in discrediting the administration of justice and in the destruction of the court's integrity in the eyes of the public. This would also undermine the rules of the High Court which are designed to stop this erosion of trust in the judiciary which occurred under the previous rules where cases could simply carry on without end . . . .'

#### Application of the relevant legal position on the facts

[34] In the *Unitrans* matter the case was set down for trial on six occasions and each time it was set down for at least four consecutive days. On each occasion the trial could not proceed. Mr Maasdorp argued that the matter *in casu* cannot be said to fall under the same umbrella as there were no previous postponements requested or any undue delay on the part of the defendants. He submitted that the opposing party cannot rely on technicalities in opposing the defendants' application.

[35] I believe that it is important to consider the history of this case in order to decide if the plaintiffs' opposition is merely technical.

[36] Mr Lombaard, the first plaintiff, filed his witness statement as far back as 16 October 2018 wherein he stated that the veterinarian from the MET and a veterinarian from the plaintiffs inspected the elephants and they were both happy with the situation and they informed Mr Lombaard that the elephants were in good condition, not stressed and kept in proper conditions.

[37] Mr Lombaard confirmed his witness statement under oath during trial without any amplification and stood by this statement during cross-examination. Therefore the plaintiffs' position in this regard remained unchanged with no surprises arising during the plaintiffs' case.

[38] At no stage prior to commencing with the trial did the defendants raise the issue of the report or the difficulty in sourcing it. It should be borne in mind that the report that the defendant seek to present to court was drafted by an expert, namely Dr Janine Sharpe, yet the parties clearly indicated in the case management report dated 16 April 2018 that neither parties foresee the use of any expert witnesses.

[39] A pre-trial status hearing was held on 16 May 2019 and a further status hearing on 6 June 2019. The purpose of the pre-trial status hearing held was to determine if any issues arose since the date the matter was set down for trial and to confirm that the parties are ready to proceed to trial. The only issue arising during the pre-trial status hearing was the fact that the plaintiffs' legal practitioner intended to withdraw as counsel of record. Counsel however indicated on the next status hearing that he is still on record and ready to proceed to trial. It is significant to note that once the matter was set down for trial it was safe to accept that the parties are ready to proceed to trial. They were clearly satisfied with their cases as it was to be able to go to trial.

[40] Mr Maasdorp attempted to show that the defendants legal practitioner did everything possible to secure the report, however if one has careful regard to the pleadings and the time lines set out by Ms Cagnetta in her affidavit the following becomes apparent:

- (a) The defendants' legal practitioner only started enquiring about the report they now wish to introduce during January 2019 when Ms Cagnetta received the file (prior to this date another legal practitioner in the same firm was seized with the matter).

- (b) The inactivity in obtaining the report file prior to January 2019 was not explained by the defendants. The inquiries regarding the report started only a good 13 to 14 months after the action was instituted.
- (c) Counsel for the defendants had a meeting with Dr Lindeque on 01 April 2019 during which meeting Dr Lindeque acknowledged the existence of the report but indicated that he did not have a copy in his possession.
- (d) From the date of the said meeting on 01 April 2019 no steps were taken to obtain the report until 17 or 18 June 2019 when Ms Nel on the instructions of Ms Cagnetta started taking steps again to locate the report.
- (e) Ms Nel made certain enquiries during 18 June 2019 and then halted her efforts on 20 June 2019 when the plaintiffs filed a subpoena for Dr Sharpe.
- (f) When a return of non-service was filed on 26 June 2019 the efforts of the defendants took on frantic proportions as the trial date was approximately 2 court days away.
- (g) Ultimately, after consulting with Dr Lindeque on 01 July 2019, the first day of trial, it was determined that he was in possession of a copy of the report which was then made available to the defendants by means of WhatsApp. Hereafter Dr Sharpe was contacted and thereafter Mr Shipindoh.

[41] Prior to January 2019, when the enquiries about the report commenced, the parties went through court-connected mediation and completed the exchange of pleadings and no steps were taken to secure the report as it appear that the defendants were confident that they can refute the plaintiffs' claim with the way in which they presented their case.

[42] Up to January 2019 there was no investigation into the truthfulness of the statement and no attempts made to obtain the expert report. The defendants' case was that the statement was made by the Minister Hon. Shifeta and the Permanent Secretary Dr Lindeque and that it could be accepted as the truth.



[43] At no stage during the conduct of the matter was the report material to the case of the defendants, this much is clear from the pre-trial order. The report to prove the contents of the truthfulness of the statement only became critical for the defendants after the evidence of first plaintiff and the two witnesses who testified on behalf of the defendant was presented to court.

[44] The defendants attempted to place some weight on the fact that the plaintiffs subpoenaed Dr Sharpe and then filed a return of non-service. This is of no moment as the plaintiff had no onus in respect of the report.

[45] The current application is clearly brought in reaction to the evidence which was presented up to this point.

[46] Frank AJA made it very clear in the *Unitrans* matter that the days that legal representatives prepare as they go along in a case and solely in reaction to the conduct of the other party(ies) are gone<sup>13</sup>.

[47] In the event that the court grants the application by the defendants at this late stage of the trial it would cause the case to take a number of steps back to before the pre-trial conference stage, which would cause weeks, if not months, delay in concluding this trial. This is neither in the interest of justice nor is it in the spirit of the overriding objectives of the Rules. Apart from these factors I cannot lose sight of the prejudice which the plaintiffs will suffer if the finalization of this case is delayed by months.

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<sup>13</sup> [33] As indicated earlier in this judgment, the days that legal representatives prepare as they go along in a case and solely in reaction to the conduct of the other party(ies) are gone. Counsel is appointed to act and within the limits of his or her brief, is the person who makes the decisions relating to the conduct of a case and where he or she exercises his or her discretion in this regard the client is bound by his or her judgment. Legal practitioners must prepare timeously as the reputation of the administration of justice and the integrity of the courts are more important than the convenience of legal representatives.'

[48] The defendants wish to introduce into evidence an expert report which should have been dealt with as far back as case management conference and this is where this matter will revert to should the court grant the relief sought in order for the defendants to comply with the relevant rules relating to expert witnesses. The plaintiff must be granted the opportunity to obtain expert reports of its own as well. Consequently the pre-trial order also needs to be varied. The plaintiffs will have to re-open their case and must be given the opportunity to address the issues raised in the report by the defendants. This is not a matter where the issues can be put to rest during rebuttal by the plaintiff.

[49] In light of the new evidence which will be presented by Mr Shipindoh, should he be allowed to testify, this will cause the plaintiffs to call further factual witnesses to testify on the condition in which the elephants were kept and the behavior and the appearance of the elephants at the material times.

[50] The report by Dr Sharpe was drafted on 05 March 2018, which is a good five months after the article was published, and incorporated her observations at the time of drafting her report. The value of such a report is therefore limited. Mr Shipindoh's report dates back to 19 July 2017 but Mr Shipindoh is not able to give expert evidence and the question then arises is whether he is qualified to give the opinion he is sought to give.

[51] The absolute bottom line is that the report that the defendants now wish to rely on should have been available at the commencement of the trial and if the issue of the report was given timeous and diligent attention the application before me would not have been necessary. Therefor for the reasons advanced above this application filed on behalf of the defendants must be refused and stands to be dismissed.

### Costs

[52] The only remaining issue for determination is the issue of cost. Mr Barnard submitted that the cost must at least include the cost of four wasted court days. In

addition thereto Mr Barnard argued that this is not an ordinary interlocutory application and should therefore not be limited to the N\$ 20 000 as provided for in rule 32(11). Mr Maasdorp in turn submitted that the cost issue must stand over.

[53] I do not agree that the cost issue must stand over as this was an interlocutory application in its own right and I do not see why the cost should stand over to the end of the matter. Clearly the cost must follow the result. The question then is to what extent the cost should follow the result. The defendants had one witness left to call and I do not see that the application launched by the defendants brought about a waste of four court days. I also do not regard this matter of such a complicated nature that it justify a cost order in the excess of rule 32(11).

[54] My order is therefore as follows:

1. The application to permit the calling of two additional witnesses to testify and the varying of the pre-trial order in as far as it may be necessary is refused.
2. The defendants to pay the costs of the application jointly and severally, consequent upon the employment of one instructing and one instructed counsel on the ordinary scale.

**Further conduct of the matter:**

3. The case is postponed to **15/07/2019** at **08:30** for Status hearing (Reason: Further Hearing Dates (Assign)).

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JS Prinsloo  
Judge

APPEARANCES

APPELLANT:

P Barnard

Instructed by Behrens and Pfeiffer, Windhoek

RESPONDENT:

R Maasdorp

Instructed by Koep and Partners, Windhoek

