REPORTABLE

CASE NO: SA 32/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

SONJA OLIVIER **Appellant**

and

ROUMIANA KOSTIN **Respondent**

Coram: SHIVUTE CJ, DAMASEB DCJ and HOFF JA

Heard: **25 June 2024**

Delivered: **1 August 2024**

Summary: The appellant is the president of the Namibian Gymnastics Federation (NGF) and a parent of two gymnasts. The appellant issued summons against a fellow sports administrator (the respondent) who, in a complaint to the gymnastics governing body, accused the appellant of conduct unbecoming of her office as president; nepotism for favouring (as a judge) her own gymnast daughters during competitions; and conflating her role as a parent of gymnasts

and as president. The appellant had previously been given a written warning by a responsible committee for favouring her daughters as a judge in a competition.

On 3 May 2019, the appellant had made it known that her daughters would no longer be participating in gymnastics in Namibia and that she would be training them herself and effectively withdrew them from the gymnastics club she owned.

A training camp for gymnasts was planned to take place in May 2019 at Walvis Bay and an invitation was sent to all the gymnastics clubs with a maximum of 20 participants. The venue was subsequently changed and the number of participants was also increased from 20 to 25. The training camp's change of venue from Walvis Bay to Swakopmund sparked the appellant's interest and she then, by email to Ms Bierbach, a witness for the respondent, asked that her daughters be included in the training camp. This request was refused by the respondent as the project manager.

When the request was refused, the appellant went to the training camp on 5 May 2019 and accused the organisers of discriminating against her daughters. She then announced that she was going to call an official meeting to address her unhappiness about the refusal. The respondent took the view that it was improper for the appellant to call an official meeting to deal with a private grievance. The appellant proceeded to call the meeting but the respondent refused to attend and instead wrote a complaint to members of the executive council and two other persons in the gymnastics community against the appellant – amongst others, accusing the appellant of nepotism and conduct unbecoming of a president.

In the particulars of claim in an action for defamation, the appellant alleged that the sting in the publication was that she practised nepotism and was a dishonest person. The respondent denied that she defamed the appellant and maintained that the statements were substantially true and were in any event protected by qualified privilege. The High Court sustained both defences and dismissed the claim, with costs.

On appeal, the appellant, relying on nine grounds of appeal, challenged the High Court's judgment and order – making sweeping and generalised complaints against the High Court's findings and conclusions without demonstrating in what way the trial judge misdirected herself.

Held on appeal, that this Court will not interfere with a trial court's findings of fact except on very limited bases. The applicable test restated. An appeal against a trial court's collateral findings of fact must demonstrate a structural error, error of approach, error of law, a miscarriage of justice or the trial judge's failure to take advantage of being steeped in the atmosphere of the trial.

This Court is not satisfied that the grounds of appeal meet the test for appellate interference.

Appeal dismissed, with costs.

APPEAL JUDGMENT

DAMASEB DCJ (SHIVUTE CJ and HOFF JA concurring):

Introduction

[1] The present is an appeal against a judgment of the High Court that dismissed a defamation suit by one sports administrator against another. At the end of her judgment, the trial judge described the defamation suit in the following terms:

> '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.'

[2] Taking a cue from the tone set by the learned judge in the above passage, it is fitting to preface this judgment with two prescient observations: The first from a judgment and the other from an academic source. As to the former, in *Farrar v Hay*[1] Innes CJ observed:

> '. . . it is our duty to see that the private character and personal honour of every citizen are protected against unjust attack. On the other hand, we must be careful not unduly to hamper the right of full and fair discussion upon matters of public interest which is so important to the welfare of the community.' (My underlining).

[3] And according to Burchell:

> 'It is when the law is made to serve a purpose for which it was not intended that it falls into disrepute.'[2]

[4] This case highlights the need for the courts to ensure that the law of defamation is not weaponised and that it serves its proper function of promoting frank and robust debate in a constitutional democracy on matters affecting the community.

[5] The appellant, who was the plaintiff *a quo*, and the respondent who was the defendant *a quo*, are deeply involved in the coastal gymnastics scene either as parents, administrators, judges and/or coaches. Regrettably, in Namibia the sport of gymnastics is run in a manner that suspicion and interpersonal conflict is inevitable. Just to give a foretaste: Parents of children participating in

---

[1] *Farrar v Hay* 1907 TS 194 at 199-200.
[2] J M Burchell *The Law of Defamation in South Africa* p 32.

competitions are allowed to sit as judges – deciding the fate of other children competing against their own children. The explanation given (and that is common cause) is that there are very few qualified judges and if parents were disallowed to sit in judgment of their own children when competing with others, no judging would take place.

Background

[6] I propose at this stage to sketch the common cause backdrop against which the present dispute arose, based on facts which are either common cause or undisputed as ventilated in the evidence led before the trial judge.

[7] The Namibian Gymnastics Federation (NGF) regulated by the Namibia Sports Commission (NSC) established under the Namibia Sports Act of 2003, oversees gymnastics activities including Rhythmic Gymnastics (RG). The NGF's Executive Council (EC), consisting of a president, treasurer, secretary and representatives from registered gymnastics clubs, elected the appellant as executive president on 23 February 2019. Other key figures include Ms Meagan Bierbach (vice president, RG coach, and owner of Illusion Rhythmic Gymnastics Club), Ms Leonie Botes (president of the RG section), and Mr Vesselin Kostin (National Technical Director and the respondent's husband).

[8] A conflict arose when the RG Committee, after a meeting in August 2018, issued a warning to the appellant for allegedly favouring her daughters during a national competition without giving her a chance to defend herself. Though the warning was later retracted by Ms Britt Adonis, the incident led to further discord.

Subsequently, a training camp organised for May 2019 saw changes in venue and participant numbers, with the appellant's daughters initially excluded due to a previous indication that they would not compete in Namibia.

[9] The appellant's request to include her daughters in the camp was denied, prompting her to call an official meeting to address the grievance, which the respondent viewed as improper. This led to further friction and a formal complaint against the appellant.

[10] Upon assuming office, the appellant questioned the appointment processes within the NGF, including the election of Ms Wietsa Snyman as RG President and the involvement of non-Namibian EC members. This scrutiny led to resignations and a re-evaluation of the NGF's leadership structure. An elective AGM validated by the Ministry of Sports, Youth and National Service and NSC ultimately confirmed the appellant's presidency, despite objections.

[11] The appellant also highlighted financial reporting lapses under previous leadership and pushed for the removal of the respondent and her husband from the EC. While the respondent was retained in an advisory capacity, her husband remained as Technical Director, indicating ongoing administrative tensions within the NGF.

[12] The above facts and circumstances preceded the invitations to the training camp, the events that followed thereafter, and the publication.

The publication

[13] On 15 May 2019, in a communication to the EC the respondent wrote the following about the appellant:

> '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:
>
> 1. Nepotism/Request Special treatment for her children: I attached the email where she approached 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".
>
> 2. Disrespect.
>
> 3. 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 acted in favour of her children. Last year Mrs

> Olivier received, an official 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 no confidence in her 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'

[14] In the wake of the publication, the appellant on 9 August 2019 issued summons against the respondent alleging that the words in the email were understood by its addressees and were intended by the respondent to mean that the appellant:

(a) is guilty of and practises nepotism;

(b) is dishonest and unreliable;

(c) abuses her position as president of the NGF; and

(d) does not acknowledge her responsibilities as president.

<u>The plea</u>

[15] In her plea the respondent denied that the email was meant to defame the appellant or to be understood by addressees of the email to mean that the appellant is guilty of nepotism or dishonesty.

[16] According to the respondent, she addressed the e-mail to the NGF EC members under circumstances of privilege to bring to their attention and resolution a serious and relevant matter concerning the affairs of the NGF and the appellant's conduct which she considered to be incompatible with the 'procedures, requirements and ethics of the gymnastics profession'.

[17] The respondent denied wrongfulness in the publication. She pleaded that she was entitled to lodge a complaint at a privileged occasion for it to be properly investigated and considered in the interest of the NGF and the children involved in gymnastics. The respondent further contended that all she did was to set out in the public interest, facts relating to certain irregular acts committed by the appellant.

[18] The respondent also alleged that the statements in the publication are 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 by the NGF.

The High Court

[19] Both parties led evidence at the trial. Since the statements were not denied and were presumed to be defamatory, the onus was on the respondent to prove her defences. She testified and also called Ms Bierbach to testify on her behalf.

[20] The evidence by and large confirms the facts and circumstances that I highlighted in paras [6] – [12] above and differs only in the meaning that either party wishes to place on them. The High Court analysed the evidence of either party in great detail including the various allegations and counter allegations made by the parties against each other at different times prior to the publication.

[21] What becomes apparent from the evidence is that there was a history of animosity between the appellant and the respondent. It is also clear that the appellant considered the respondent to be part of a group of individuals within the gymnastics community that wished to unseat her as president of the NGF. The learned judge specifically dealt with accusations levelled against the respondent in cross-examination by the appellant's counsel.

[22] The court recorded:

> '[35] . . .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.

> [36] 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.'

[23] As regards the event that triggered the publication, the learned judge recorded that the respondent testified that when the appellant arrived at the training camp on the morning of 5 May 2019 and spoke to Ms Botes and Ms Bierbach, the appellant was 'visibly angry'. The appellant then demanded a meeting and sent out an email calling for such a meeting.

[24] The court *a quo* also recorded in what it described as 'laborious cross-examination', that the respondent was cross-examined including on the issue of the warning given by the RG Committee against the appellant. According to the learned judge, it was put to the respondent that the warning was irrelevant because it had been retracted by Britt Adonis. The respondent testified that 'the warning still stood' as it was retracted by one person only when the decision to give the warning was made by a committee.

[25] The respondent conceded that the appellant ought to have been given an opportunity to state her case before the warning was given but testified that 'the appellant'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'.

[26] In cross-examination, the respondent admitted that in respect of the May 2019 training camp, in the end provision was made for more gymnasts than originally planned for and that the appellant's daughters would have qualified for selection to participate in the training camp. The respondent's concern though was the fact that the appellant as 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.

[27] The respondent accordingly persisted in her denial that she made the complaint because of animosity towards the appellant and maintained that the appellant was not defamed and that 'her complaint was in the circumstances truthful and justified'.

[28] The respondent's only witness was Ms Megan Bierbach who was part of the planning and preparation committee for the May 2019 training camp. Ms Bierbach authored the invitation for that training camp. She testified that prior to the appellant's request for the inclusion of her daughters, all available slots were taken up by gymnasts who had registered.

[29] The witness confirmed that on 5 May 2019 the appellant arrived at the training camp and asked Ms Botes of the host club whether her children could join. Ms Botes replied that the camp was already full and that the closing date had passed. Ms Botes also reminded the appellant that previously she had made known that her daughters would not be competing in Namibia in 2019. Thereupon, according to the witness, the appellant became 'visibly angry' and

alleged that her daughters were being discriminated against and demanded a meeting to discuss the problems in rhythmic gymnastics.

[30] According to the witness, the respondent objected to such a meeting but stated that if the appellant wished to proceed she should follow 'the correct procedure'. It is common cause that the appellant proceeded to call the meeting for 5 May 2019 but the respondent did not attend.

[31] The appellant also testified. According to the court *a quo*, the appellant highlighted what she perceived as the infighting 'between all the major participants in the gymnastics community, including the gymnasts, some of who were children of the Exco members'.

[32] The court proceeded in minute detail to refer to the various incidents relied on by the appellant, either as proof of an alleged campaign by the respondent and others to frustrate or to unseat her as president of the NGF, or to frustrate her and her daughters. In the latter respect, the court noted the appellant's testimony that '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'.

[33] This was done, according to the appellant, 'in the hope' that it would 'demotivate' her daughters and frustrate her to quit the sport. The appellant also testified that the warning given against her was an attempt by the 'defendant and her allies to get rid' of her.

[34] The appellant testified further that at the event in respect of which she was found to have favoured her daughters, Ms Bierbach's daughter was also a judge. According to the appellant, at that event Ms Bierbach's daughter attempted to improperly influence another judge and was, it is said, reported to the competition director.

[35] The appellant further testified that the warning was given to her by the RG Committee without *audi* and that she was not in any event guilty of the improper conduct imputed to her.

[36] As regards the events relating to the May 2019 training camp, the appellant testified that Ms Bierbach failed to inform her, as president, that the event was moved to Swakopmund from Walvis Bay. Since the event was moved to Swakopmund she became interested to register her daughters as the number of participants had been increased from 20 to 25. She stated that her daughters were qualified to participate in the training camp. She denied, the court recorded, being 'belligerent' when she was informed that her daughters could not be allowed in the training camp.

[37] According to the High Court:

> '[73] . . . 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."

> [74] 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.'

[38] The court continued at para 75 concerning the warning that was given to the appellant:

> '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.'

[39] Having summarised the evidence, the court *a quo* set out the applicable legal principles governing a claim for defamation.

[40] Briefly, the learned judge reminded herself that 'Whether the defendant's complaint is defamatory falls to be determined objectively'. Where a statement is found to be defamatory, the court *a quo* continued, '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'.

[41] The trial judge was satisfied that the respondent proved the absence of wrongfulness in the publication and dismissed the claim, with costs. The appeal lies against that order.

The appeal

The test for appellate interference: The law

[42] Granted, this is an appeal as of right to this Court – and as such the appellant is entitled to a rehearing of the merits. However, it is a deeply entrenched principle in the common law tradition that an appellate court will not lightly interfere with the factual findings of a trier of fact – even less with credibility findings.

[43] In *Worku v Equity Aviation (Pty) Ltd*,[3] Chomba AJA held (para 42) that:

> '. . . an appellate court should not lightly interfere with a trial court's evaluation as to credibility of witnesses . . . However, where the appellate court, upon a careful scrutiny of the evidence on record, is of the view that the trial judge has quite clearly not made proper use of his privilege of observation . . . then the appellate court is entitled to interfere and make its own evaluation of that evidence.'

[44] The animating rationale of the rule is that a trier of fact, steeped in the atmosphere of the trial, enjoys a benefit that an appellate court does not.

---

[3] *Worku v Equity Aviation (Pty) Ltd* 2010 (2) NR 621 (SC).

[45] There are limited exceptions to the rule as discussed by the Appellate Division, this Court's constitutional predecessor, in *Rex v Dhlumayo & another*.[4]

[46] Where there has been no misdirection on fact by the trial court, the presumption is that its conclusion is correct and the court of appeal will only reverse it where it is convinced that it is wrong. If the court of appeal is left merely in doubt as to the correctness of the conclusion, it will uphold it.

[47] There may be a misdirection on fact by the trial court where the reasons are either on their face unsatisfactory or where the record shows them to be such. There may be such a misdirection also where, though the reasons as far as they go are satisfactory, the trial court is shown to have overlooked other facts or probabilities.

[48] A court of appeal should not seek anxiously to discover reasons adverse to the conclusions of the trial court. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that because something has not been mentioned it has not been considered.

[49] Where the court of appeal is constrained to decide the case purely on the record the question of onus becomes all-important. In order to succeed, the appellant has to satisfy a court of appeal that there has been 'some miscarriage of justice or violation of some principle of law or procedure'.

---

[4] *Rex v Dhlumayo & another* 1948 (2) SA 677 (A). *BV Investment Six Hundred & Nine CC v Kamati another* SA 48/2016) [2017] NASC 26 (19 July 2017).

[50] The applicable test is to similar effect in England & Wales: *Thomas v Thomas*.[5] The Privy Council (PC) acts on the same principle.

[51] In *Central Bank of Ecuador v Conticorp SA*,[6] the PC reiterated that it 'will as a matter of settled practice decline to interfere with concurrent findings of pure fact, save in very limited circumstances'. The appeal court will more likely interfere where, from the reasons given by the trial judge, it becomes apparent that he or she 'had not made proper use of his inherent advantage' or the judge failed to test the evidence against the background of the available material.

[52] A further refinement of the test for appellate interference is *Cleare v The Attorney-General (Bahamas) & others*.[7] In that case, Lord Wilson set out how an appellate court might go about determining if the trial court misdirected itself on the facts. The law lord delineated what is referred to as a 'structural failing' or an 'error of approach'. (Based on *dicta* from the Court of Appeal of England and Wales in: *Armagos Ltd v Mundogas SA* (*The "Ocean Frost"*) [1985] 1 Lloyds Rep 1 at 57; *Mibanga v Secretary of State for the Home Department* [2005] EWCA CIV 367, [2005] INLR 377 and *Jakto Transport Ltd v Hall* [2005] EWCA CIV 1327).

Structural error or error of approach

[53] This would include where the trier of fact fails 'to test the veracity of a witness by reference to the facts ascertained independently of his testimony'.

[5] *Thomas v Thomas* [1947] AC 484. See the speeches by Lords Simonds and Thankerton. Although the law lords disagreed on the application of the test to the facts, there is no disagreement in their respective statements of the applicable test.
[6] *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11 para 4.
[7] *Cleare v The Attorney-General (Bahamas) & others* [2017] UKPC 38 paras 4-7.

Also, where expert evidence (such as medical evidence) was introduced at the trial, and the judge 'artificially separated' the expert evidence from the rest of the evidence and reached a conclusion as to credibility without reference to the expert evidence. This is also considered an 'error of law or principle'.

[54] It is on the strength of those principles that I will in due course consider whether the appeal grounds meet any of the recognised bases for appellate interference with factual findings – in so far as there is an attack against those.

[55] During the oral hearing on appeal, we invited the appellant's legal practitioner to indicate which of the nine grounds of appeal are directed at incorrect conclusions of law and which are an attack against factual findings. There was no satisfactory answer to this query. Counsel for the appellant stated that this Court is 'in just as good a position' as the court below to come to its own conclusions on the evidence on the record. It appears to me *that* approach is what informed the rather sweeping and generalised grounds of appeal without demonstrating in what way the trial judge misdirected herself – a necessary condition for appellate interference.

[56] Counsel was obviously mistaken as to the applicable test. To interfere with the trial judge's factual findings, we must be satisfied that the conclusions reached by her were so unreasonable or perverse or wholly unsupported by the admissible evidence[8] that no reasonable court, properly directing itself, would have come to the conclusion she did.

---

[8] Compare *Thomas v Thomas (supra)* at 583E.

[57] It is important to emphasise that an appeal against a trial court's collateral findings of fact must demonstrate a structural error, error of law, a miscarriage of justice or a failure by the trial judge to make proper use of the advantage available to the trier of fact from being steeped in the atmosphere of the trial.

Specific appeal grounds

[58] The appellant relies on nine grounds of appeal. Her counsel attacks the court *a quo's* findings of fact, including conclusions and inferences drawn by the learned judge based on admitted or common cause facts.

[59] *The first ground of appeal* alleges that the court *a quo* erred in law and on the facts in finding that the respondent pleaded the defence of truth and public benefit.

[60] *The second ground of appeal* criticises the court *a quo* for 'incorrectly assessing' a statement made by the defendant in the email to the effect that:

> 'It is not the first time that Mrs Olivier acted in favour of her children. Last year Mrs Olivier received an official warning from Rhythmic Gymnastics Technical Committee for judging incorrectly and in favour of her daughter.'

[61] According to appellant's counsel, the court *a quo* should have found that the sting in the statement was dishonesty and unfair judging by the appellant in favour of her children previously (as a fact) and not merely a warning and that the defendant failed to prove that fact.

[62] *The third ground of appeal* contends that the court *a quo* failed to find that publication that a warning was given against the appellant was harmful because, to the respondent's knowledge, that warning was not as a result of due process and had in any event been withdrawn.

[63] *The fourth, fifth and sixth grounds of appeal*. It is alleged that the High Court was wrong to find that the appellant testified that at the training camp she wanted to address the history of the animosity between her and the respondent.

[64] It is stated further that the following factual findings are wrong: (a) that the appellant's conduct displayed a manifestation of a conflict of interest and immature behaviour, (b) that the appellant was an irate parent, favoured her children, conflated her executive role with that of a parent, was guilty of nepotism, and requested that her daughters attend the training camp; and (c) when her request was denied she came to the hall and confronted the respondent and others and accused the coaches of discriminating against her daughters.

[65] *The seventh ground of appeal* contends that the court *a quo* erred 'in not considering' that the respondent failed to 'justify most' of the allegations which implied that the appellant was guilty of nepotism, was dishonest and unreliable, abuses her position as president of the NGF and does not acknowledge her responsibilities as president.

[66] *Under the eighth and ninth grounds of appeal*, it is stated that because of the then pre-existing animosity between the appellant and the respondent and

others, and a common purpose among respondent and others to ‘get rid’ of her as NGF president, the failure to mention in the publication that the warning had been withdrawn, and the fact that, objectively, there was room to accommodate the appellant’s daughters when she made a request for their inclusion – the publication was not in pursuit of a privileged communication.

Disposal

Alleged error regarding pleaded defence (first ground)

[67] It is arguable that the first ground of appeal raises a point of law. Whether a particular defence has properly been pleaded is a separate question to whether it has been discharged by evidence. It appears that the first ground of appeal suggests the former although, in the amplification of the ground, the suggestion is made that the respondent’s evidence did not make out such a defence.

[68] The assertion that truth and public benefit had not been pleaded, was raised *a quo* and was dismissed by the trial judge.

[69] The judge held at para 91:

> ‘. . . 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 extensive evidence placed before the court on this aspect by the plaintiff and by the defendant’s witnesses, to enable determination on this aspect.’

[70] That conclusion is unimpeachable for the following reasons.

[71] In answer to the allegation that she published the email 'wrongfully and with the intent to defame and insult' the appellant, the respondent pleaded that the 'statements are truthful, alternatively represent fair comments (*sic*) alternatively are in the public interest and were made at a privileged occasion with an honest intention to have the complaint investigated and considered by the NGF'.

[72] The pre-trial order of 29 April 2021 directed the parties 'to trial', amongst others, on:

> 'Whether on 15 May 2019 the defendant had grounds on which to allege that:
>
> 1.1.1 The plaintiff was guilty of and practised nepotism.
>
> 1.1.2 The plaintiff was dishonest and unreliable
>
> 1.1.3 The plaintiff abused her position as president of the Namibian Gymnastics Federation.
>
> 1.1.4 The plaintiff did not acknowledge her responsibility as president.
>
> 1.2. Whether the publication was made at a privileged occasion.
>
> . . .
>
> 1.8 Whether the statements were made in the public interest.'

[73] In his opening address, Mr Chibwana, instructed legal practitioner for the defendant *a quo* stated the following:

> 'The Defence is limited to two distinct issues. It is that first of all the complaint was lodged on a privileged occasion and it was for the purpose of an investigation into the conduct, that was complained of and that on its own we submit as a (indistinct) defence. The second defence that we proffer is that in any event, everything contained in the email, related to facts which the Defendant

> believed to be true and accurate and in particular there were two specific facts alleged. First of all that there was conduct on the 3rd and the 5th of May by the Plaintiff, that conflated her position first of all as a President of the Namibian Gymnastics Federation with her position as a parent of two children practising gymnastics in Namibia. And that conduct in our submission on the facts we shall demonstrate through evidence was not conduct consummate with her position as President of a National Federation. Second of all we will allege that with relation to her previous conduct that was fair comment, in that indeed at the second national conferring competition, held in Windhoek between 29th and 30th July the Plaintiff was a Judge, that on the 18th of August 2019, Gymnastics Committee under the Gymnastics Federation of Namibia held a meeting and at that meeting found that the Plaintiff had unfairly judged other competitors in favour of her children and we shall establish by way of evidence that on the 18th of September 2018, a warning was indeed given related to the manner in which the Plaintiff judged her own children. So as a matter of fact our defence on fair comment would be that, the Defendant did indeed believe the facts that were communicated in the email to be true and correct.' (My underlining for emphasis)

[74] The grounds of appeal do not take issue with the trial judge's statement that the defence of truth was fully ventilated in evidence and fell to be determined by the court. This Court recently cited with approval[9] the principle in *Shill v Milner*[10] that where an issue had been sufficiently traversed by the parties and they had the opportunity to fully deal with it, it lies ill in the mouth of one of them to suggest on appeal that the issue is not covered by the pleadings.

[75] As the learned judge had occasion to comment in her judgment (a fact amply supported by the record), the cross-examination by the appellant's counsel of the respondent's witness was 'laborious' and elicited exhaustive replies justifying the allegations made in the publication as truthful.

---

[9] *Mendonca v Billy* (SA 91-2021) [2024] NASC (25 April 2024) para 53.
[10] *Shill v Milner* 1937 AD 101.

[76] The High Court was therefore correct to conclude that there was no merit in the submission that the defence of truth was not pleaded nor a triable issue. The complaint that the defence of truth had not been raised as a triable issue by the pleadings and the pre-trial order is therefore without merit and the associated ground of appeal must fail.

[77] Whether the respondent proved the truth of the allegations or qualified privilege are separate issues which will be dealt with in relation to the remainder of the grounds of appeal.

[78] As must be apparent from my summary of the appeal grounds, many of the grounds overlap and raise the same complaint many times under the guise of separate and distinct grounds.

Alleged failure to identify the correct sting in publication (second ground)

[79] In my view, the issue is whether there was evidence on record which justified a finding that the stings of dishonesty and nepotism were established. In other words, that there was substantial truth in the allegations of nepotism and dishonesty.

[80] The High Court held:

> '[79] 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. 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.'

[81] The trial judge made the following crucial factual findings. The first is that the email of 3 May 2019 showed that the appellant conflated her roles as president and parent. On the one hand, the appellant had asked for inclusion in the training camp of her daughters after the registration deadline and wished to attend the training camp as president to welcome the facilitators. Disappointed that her daughters would not be allowed in the camp, she confronted Ms Botes about the exclusion as she was convinced that it was still possible to have the girls admitted because the maximum number of participants had in any event been exceeded.

[82] The judge held further that the appellant considered the rejection of her daughters as discriminatory and that the confrontation of the coaches 'occurred in full view' of those present. The learned judge added:

> '[93] . . . 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.'

[83] The High Court wrote:

'[94] 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.

[95] 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.' (Underlining is mine)

[84] The trial judge found in the appellant's conduct conflict of interest, immature behaviour, unfitness for office of president, nepotism, unbecoming behaviour for a president, and irate behaviour. The High Court consequently concluded that the respondent's statements in the publication imputing such conduct to the appellant are 'substantially true'.

[85] Can this Court interfere with those findings and the resultant conclusion?

[86] According to the respondent's legal practitioner, there was sufficient evidence on record to support the defence of truth and that the trial judge did not err in accepting such evidence. Counsel argued that the factual allegations found established by the High Court are not only unimpeachable but show conduct which proves truth in the sting.

[87] Counsel added that the proven facts point to the appellant using her office to seek special treatment for her daughters (which is an act of nepotism), and when that failed making allegations of discrimination by others against her daughters; and using her official position to call a meeting to ventilate personal grievances.

[88] I am persuaded that the judge's impugned findings and conclusions are fully supported by the evidence and are not perverse. I will briefly explain why.

[89] At the heart of the grievance that led to the respondent's complaint to the EC is the appellant's push to have her daughters admitted to the training camp and her conduct thereafter. Now, not only was the request made two days before the start of the training camp, it was made at the time she had withdrawn the girls from local participation and from training at the very club that she owned.

[90] Additionally, the request was made by her as an individual parent when the invitations to the training camp were extended to clubs which, in turn, would nominate the gymnasts. I already demonstrated that the appellant's own club had been invited to send an additional gymnast after the closing date. Could she have been unaware of that as a club owner?

[91] In my view, in such circumstances it matters not that the appellant's daughters would otherwise have qualified. It is conduct which reasonably supports an inference of a person who, as the court *a quo* found, conflated her official and parental roles, exhibited immature and irate conduct and a desire to put the interests of her children above those of other gymnasts.

[92] The relevant findings and conclusions by the trial judge are fully supported by the evidence and are not perverse.

[93] The appellant is most concerned about the imputations of nepotism and dishonesty in her conduct. It is necessary that I explain why the trial judge's conclusions pointing in that direction cannot be faulted.

[94] According to the Shorter Oxford English Dictionary, nepotism is 'the unfair preferment of relatives, friends, or *protégés*'.

[95] The tenor of the evidence is that invitations to the training camp were sent out to respective clubs and not to individual parents. The appellant had withdrawn her daughters not only from all local competitions but also from training in the club to which they belonged – the very club owned by the appellant! The appellant had thus assumed the role (previously held by the club) of training her own daughters. When she came to the training camp she came as an individual parent whose daughters had been withdrawn from local participation and who were not training under the aegis of a club. She was

reminded by Ms Botes of the consequences of her decision of withdrawing her daughters from local participation.

[96] On the one hand, the appellant withdrew her daughters from the local gymnastics scene when it suited her only to want to have them again included in local events because it suited her. That she would not expect a reasonable person to view that as nepotism and abuse of her office as president stretches credulity and defies reason.

[97] The appellant's behaviour supports the sting of nepotism and dishonesty. The specific allegation of dishonesty was not in the publication but was introduced in the litigation by the appellant and cast the onus on the respondent to prove it on a balance of probabilities.

[98] 'Dishonesty', as a sting to the publication, is, I repeat, a choice made by the appellant in the pleadings and became a triable issue in the pre-trial order. Neither the pleadings nor the pre-trial order assist in clarifying just what was its intended nuance – yet the noun 'dishonesty' has many shades of meaning. The Shorter Oxford English Dictionary renders the following alternatives of the word:

> '1. Dishonour, shame; a dishonourable act. 2. . . . 3. . . . 4. Lack of integrity or straightforwardness . . . willingness to steal, cheat, lie or act fraudulently. Also, a dishonest or fraudulent act.'

[99] It is also not a term of art and does not in its ordinary use bear a technical meaning. As I have shown, it is perfectly capable of conveying a connotation

short of fraud or deceit. It behoved the appellant – had she intended the latter nuance - to clarify that in the pleadings and in the pre-trial order.

[100] The reason the appellant advanced for wanting to participate in the forthcoming training camp hardly makes sense. According to her, she was changing her mind because the training would now be in Swakopmund and no longer in Walvis Bay. It seems rather suspect for a parent (and president of the association) who had disavowed all local participation, just in two days before commencement of the training camp organised for those desiring to participate locally, to want to register her daughters when she had previously made known that her daughters would not participate locally or be trained under the aegis of her own club.

[101] Discrimination connotes differentiation between people who deserve to be treated equally. If by that she meant that other girls got preferential treatment, the accusation was hollow because the other girls were differently circumstanced to her daughters. The other girls remained enrolled for local competitions and were trained by member clubs and were nominated by those clubs. The appellant's daughters fell in neither of those categories. The allegation of discrimination was therefore not genuine and was, on the probabilities, intended to serve an ulterior purpose – to put pressure on the coaches by a person who is the president of the federation.

[102] I am satisfied that a finding of nepotism and conflict of interest by the court *a quo* against the appellant was open to the court on the common cause and

admitted facts. Nepotism by a president of a body performing public functions constitutes lack of honour and integrity. The sting was therefore proved.

[103] There is no basis demonstrated in the appeal for this Court to interfere with the trial judge's adverse findings against the appellant. The second ground of appeal must therefore fail.

Alleged failure to find that there was no public benefit in publication of warning (third ground)

[104] The third ground of appeal makes the point that publication of the withdrawn warning was harmful to the appellant's reputation and served no public benefit and that the court *a quo* should have found as such.

[105] The concepts 'public benefit' and 'public interest' are used interchangeably in connection with the defence of 'justification' of defamatory statements. In my view, there is no legally consequential distinction between the two concepts. Both are used in the law reports and academic sources as the necessary condition for the success of the defence of truth or justification for defamatory statements. (See for example, the discussion on the subject by Burchell[11] at pages 206-218 and the case law there collected, in particular page 212 and footnote 58 thereat).

[106] This is what the trial judge said:

[11] See fn 2 above.

'[98] 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.

[99] 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.'

[107] As Wessels JA put it in *Johnson v Rand Daily Mails*:[12]

'. . . where matters are described which will not necessarily appear the same to two different persons, the defendant is not required to justify every detail when in fact the gravamen of the charge has been amply justified.'

[108] It is common cause that the appellant had been adjudged guilty of improper conduct by a committee of her peers for the manner in which she judged her daughters' participation in a competition to the detriment of other participating gymnasts. Although the evidence revealed that one of the committee members had since retracted the warning – that retraction was not shared by the other committee members including the respondent.

[12] *Johnson v Rand Daily Mails* 1928 AD 190 at 205-206.

[109] In my view, the appellant's opinion that she was not treated fairly in the way the warning was done, does not detract from the fact that an assessment was done – and barring the person who retracted – the respondent and others formed the view that the appellant acted unfairly towards other girls and in favour of her daughters.

[110] The appellant's grievance that she was not given *audi* before the warning was not considered a weighty consideration by the trial judge. The High Court concluded:

> '[100] 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.'

[111] I am not persuaded that the appellant's opinion that the matter remained unresolved because of her protestation about the procedure followed should trump that of the respondent that the appellant favoured her daughters at the expense of other gymnasts and that her most recent intervention on behalf of her daughters displayed a pattern of behavior which was unbecoming of a president and required consideration by the sport code's leadership.

[112] As far as the alleged lack of public benefit is concerned, it defies reason to suggest that raising the alarm on suspected nepotism practised by an official of a body performing public functions; conduct which evinces conflict of interest; and conflating private interests with one's official position and dishonesty, cannot be in the public benefit or public interest.

[113] On the test for appellate interference, the appellant failed to demonstrate that the court *a quo* misdirected itself in how it approached the matter and the conclusions and inferences it drew.

Alleged improper factual findings (grounds four, five and six)

[114] Ground four asserts that the High Court was wrong to find that the appellant had testified that when she came to the training camp on 5 May 2019, she wanted to address the history of the animosity between her and the respondent.

[115] Firstly, it is not made clear by the appellant what the consequence should be if that complaint is correct. Just to point to a wrong interpretation of evidence given at trial is not, without more, a valid ground for reversal.

[116] Secondly, and more importantly, the complaint is without merit. At para [37] I quoted the trial judge's recordal of the evidence relevant to this ground. That recordal is the very opposite of what appeal ground four professes. This ground therefore also fails.

[117] The remainder of the grounds (five and six) seek to impugn the judge's collateral findings of fact. There is no suggestion that the judge erred in her credibility findings, nor is any complaint made that the judge's factual findings and conclusions are wholly unsupported by the evidence. Grounds five and six also fail.

Defence not established (ground seven)

[118] This ground criticises the court *a quo* for failing to find that the respondent failed to justify the imputation of nepotism, dishonesty, unreliability and abuse of her position as president. It is apparent from my discussion of the second and third grounds of appeal that this ground is a repetition of the second and third grounds of appeal and should suffer the same fate.

Publication was not privileged (grounds eight and nine)

[119] Under the eighth and ninth grounds, it is stated that because of pre-existing animosity between the appellant and the respondent and others, and a common purpose among the respondent and others to 'get rid' of her as NGF president, the failure to mention in the publication that the warning had been withdrawn, and the fact that, objectively, there was room to accommodate the appellant's daughters when she made a request for their inclusion – the publication was not in pursuit of a privileged communication.

[120] It is apparent from the email exchanges between the appellant and the respondent that the appellant knew to whom the complaint was to be directed.

Although the full extent of it probably was not known to her, at the very least she ought reasonably to have been aware that it concerned her endeavour to register her daughters for the training camp and the disagreement that resulted between the two of them as a result of that. It ought also to have been reasonably obvious to her that the respondent took exception to her seeking an official meeting to pursue what the respondent considered a personal cause.

[121] According to the respondent, the publication was intended as a complaint against the appellant in her official capacity – for what the former, rightly or wrongly, perceived as unbecoming 'treatment of me'. The trial judge did not find that to be false or unreasonable. The court *a quo* was therefore satisfied that the respondent was justified to share the issues that concerned her with those who had reason to know.

[122] As Maritz J (as he then was) correctly pointed out in *Afshani & another v Vaatz*,[13] the defence of qualified privilege attaching to the occasion at which an impugned statement is made 'is so closely associated with the interest of the public to allow for a free flow of ideas and information between people on matters of common interest or for the common good . . .'.

[123] Maritz J recognised that the rationale of the defence is that it is in the public interest for the recipient of information to receive frank and uninhibited communication from the conveyer of the information. The defence applies, Maritz J held, where the statement is made '(a) in the discharge of a legal, social or

[13] *Afshani & another v Vaatz* 2006 (1) NR 35 (HC) paras 32-34.

moral duty to persons having a reciprocal duty or interest to receive them . . . and (b) in the protection or furtherance of an interest to a person who has a common or corresponding duty or interest in them . . . and the statement was relevant to the matter under discussion on that occasion'. For the defence to succeed, Maritz J added: 'the defendant must also show on a balance of probabilities that the defamatory statement was reasonably germane and relevant to the privileged occasion'.

[124] I agree with Maritz J that when considering where the balance is to be struck in considering the defence of qualified privilege 'some latitude must be allowed' for 'robust and frank comment' in the interest of accountability – important attributes of a democratic society.

[125] The trial judge stated the following proposition of law which is not challenged on appeal:

> '[85] 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.'

[126] The complaint made by the respondent to the EC must be considered against the backdrop of an organisation where conflict of interest (such as being a judge in own cause) is not only rife but is tolerated. Where the boundaries lie in the pursuit of such self-interest is a matter which the public justifiably has an

interest in being openly, frankly and robustly debated by the gymnastics community, particularly its leadership as represented by the EC.

[127] Rather than diminish the need for publication, the withdrawal of the warning by one member of a committee actually strengthened the case for publication – considering that the retraction was made by only one member of the RG Committee who also happens to be the coach of the appellant's club.

[128] In similar vein, the reliance by the appellant on the fact that at the time that she had asked for her daughters to be added to the training camp the number of participants had actually been increased, instead of undermining the case for publication, actually strengthens it. The issue is not so much that the daughters qualified, it is that their inclusion was refused because the respondent considered it improper coming from the president and that because of the refusal not only did the president seek to exert pressure by accusing those who refused of discriminating against her daughters but also using her official position to call an urgent meeting to deal with her personal grievance.

[129] The High Court found the following evidence established:

> '[12] 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".
>
> . . .
>
> [101] 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.'

[130] The respondent's case was that she found the conduct of the appellant inimical to the ethics of the gymnastics profession and wanted it addressed by the EC and that the communication was for that reason privileged. I am satisfied that the court *a quo* correctly sustained the defence. There is no legitimate basis for this Court to interfere with those findings and conclusions. The remaining two grounds of appeal are therefore also meritless.

Conclusion

[131] The nine grounds of appeal disclose no basis for this Court to interfere with the judgment and order of the High Court.

Costs

[132] The facts and circumstances of this case do not disclose any basis for deviating from the normal rule that costs should follow the result.

Order

[133] In the result:

1. The appeal is dismissed with costs.

_____

DAMASEB DCJ

_____

SHIVUTE CJ

_____

HOFF JA

APPEARANCES

APPELLANT:	J Olivier
	Of Jan Olivier & Co
RESPONDENT:	S Namandje
	Of Sisa Namandje & Co. Inc.