



- (1) REPORTABLE: YES / **NO**
 (2) OF INTEREST TO OTHER JUDGES: YES / **NO**
 (3) REVISED: YES / **NO**

30 July 2025

DATE

SIGNATURE

Case No: **079472/2024**

In the matter between:

SIPHO SHOBA

Plaintiff/Respondent

and

SINDISO MALAKU

Defendant/Excipient

Coram: Groenewald, RJ (AJ)

Heard on: 28 July 2025

Delivered: 30 July 2025 - This judgment was handed down electronically by uploading to Caselines.

JUDGMENT

GROENEWALD AJ

Introduction:

- [1] This is an opposed exception. The Plaintiff called upon the Defendant, in terms of the provisions of Uniform Rule of Court 23(1), to remove the causes of causes of complaint set out in that notice.
- [2] In reaction to the Rule 23(1) notice the Plaintiff delivered a document styled as being a "*reply to Defendant's Rule 23 notice*" wherein the Plaintiff proceeded to deliver an *ad seriatim* response to the Rule 23(1) notice and alluding to the intention to amend the particulars of claim.
- [3] Although the amended particulars of claim appears in section 006 of the Case Lines file folder no Rule 28 notice was delivered in respect of the amended particulars of claim. The Plaintiff simply delivered the amended particulars of claim without complying with the provisions of Rule 28. This was raised during argument, and counsel on behalf of both parties indicated in turn that, although Rule 28 was not complied with, the parties accepted that the amendment had been properly effected, that the amended particulars of claim has been accepted and the excipient/ defendant does not challenge the amendment.
- [4] Notwithstanding the somewhat unusual course adopted by the parties, it

appears common cause that the Defendant accepted the amended particulars of claim and proceeded, consequent upon the delivery of the amended particulars of claim, to deliver a formal exception.

- [5] Where the Rule 23(1) notice alluded to averments being vague and embarrassing, the exception itself appears to be premised solely upon the basis that the amended particulars of claim lacks averments necessary to sustain a cause of action and/or that the Plaintiff's claim and/or claims are bad in law. The initial grounds of objection in the Rule 23(1) notice was therefore not persisted with.
- [6] Before dealing with the specific grounds of exception it is prudent to note that the Plaintiff proceeded to deliver an answering affidavit in respect of the exception opposing the same. In this answering affidavit the Plaintiff deals with what it refers to as "*grounds for dismissing the exception application*".
- [7] Counsel for the Plaintiff also attached a document as annexure "B" to his heads of argument, which appears to be correspondence directed by the Defendant seeking a settlement in the form of a monetary payment to the Defendant. This document does not appear as part of the pleadings and cannot be relied upon by the Plaintiff. The attachment of the document was ill-considered and inappropriate. I shall return to this document below within the context of the argument advanced on behalf of the Plaintiff.
- [8] In determining an exception, the Court held in ***Trope v South African Reserve Bank and another and two other cases 1992 (3) SA 208 (T)*** at **page 211** that the ultimate test must still be whether the pleading complies

with the general rule enunciated in Rule 18(4).

- [9] Uniform Rule of Court 18(4) requires that:

"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."

- [10] In **McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD at 23** the following definition of "cause of action" was adopted by the Appellate Division:

*"...every fact which it would be necessary for the plaintiff to prove, if the traversed, in order to support the right to judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."*¹

- [11] It therefore follows that, in order to ensure that his or her summons is not excipiable on the ground that it does not disclose a cause of action, the relevant party (as was held in **Makgae v Sentraboer (Koöperatief) Bpk 1981 (4) SA 239 (T) at 245D.**) must ensure that: the material facts (in other words the *facta probanda* and not the *facta probantia* or evidence proving the *facta probanda*) of his claim have been alleged with sufficient clarity and particularity that, if the existence of such facts are accepted, that it would support the legal conclusion and would allow him to succeed in law with the

¹ See also: *Evans v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 838E-F*; *Minister of Law and Order v Thusi 1994 (2) SA 224 (N) at 226H-I*; *Buyts v Roodt 2000 (1) SA 535 (O) at 539G-H*; *Gardener's Grapevine CC t/a Grapevine v Flowcrete Precast CC 2009 (1) SA 324 (N) at 326F-G*; *Stols v Garlick & Bousfield Inc 2012 (4) SA 415 (KZP) at 421H-422A*.

relief which the plaintiff seeks.

- [12] It was held in ***Stafford v Special Investigating Unit 1999 (2) SA 130 (E)*** at 138 that:

“...each cause of action which the plaintiff seeks to rely upon should have been set out separately in such a way as to enable the defendant to assess what was claimed from it in each case.”

- [13] The Full Court held in ***International Tobacco Co of SA Ltd v Wolheim 1953 (2) SA 603 (A)*** at 613A-C:

“All that need be said on this point is that, in my view, if it can be shown on exception that a declaration discloses no cause of action, an exception on this ground should be allowed; if the exception is that the declaration is vague and embarrassing, then, if it be shown, at any rate for purposes of his plea, that the defendant is substantially embarrassed by vagueness or lack of particularity, it equally should be allowed.”²

- [14] The object of all pleadings is that a succinct statement of the grounds upon which a claim is made or resisted shall be set forth shortly and concisely, and where such statement is vague, it is either meaningless or capable of more than one meaning. It is embarrassing that it cannot be gathered from

² See also: “Herbstein and Van Winsen – The Civil Practice of the High Courts of South Africa” (5th Ed.) Vol 1, page 632 to 634 and 638 to 641; ***Barclay’s National Bank Ltd v Thompson 1989 (1) SA 547 (A)*** at 553; ***Van Lochen v Associated Office Contracts (Pty) Ltd 2004 (3) SA 247 (W)*** at 252; ***Dharumpal Transport (Pty) Ltd v H Dharumpal 1956 (1) SA 700 (A)*** at 706.

the pleading what ground is being relied upon by the pleader.³

- [15] In an exceptions the excipient must persuade the Court that upon every interpretation which the Particulars of Claim can reasonably bear, no cause of action is disclosed.
- [16] It was held in ***Pretorius & Another v Transport Pension Fund & Another***⁴ that the purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs of an exception. It is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided.⁵
- [17] The Honourable Court in ***Hassim v Lishiva***⁶ elucidated upon the position in ***Pretorius & Another v Transport Pension Fund & Another supra***, as follows:

*"When an exception is raised against the pleading on the basis that it lacks averments necessary to disclose a cause of action, this implies that even if one were to accept the factual averments as set out in the pleading is correct, these factual averments do not justify the conclusion of law or the relief the pleader intends to reach. It therefore follows that the defendant cannot plead the defence to a cause of action which does not exist or is otherwise precluded on any lawful ground."*⁷

The grounds of exception:

³ *Lockhart and Others v Minister of the Interior* 1960 (3) SA 765 (D); *Cf International Tobacco Co of SA Ltd v Wolheim and Others* 1953 (2) SA 603 (A); Daniels: "Beck's Theory and Principles of Pleading in Civil Actions" 6th Ed. Page 132-133.

⁴ 2019 (2) SA 37 (CC).

⁵ *Pretorius & Another v Transport Pension Fund & Another supra* paragraph 15.

⁶ (35381/2020) [2021] ZAGPIHC 120.

⁷ *Pretorius & Another v Transport Pension Fund & Another supra* at paragraph 14.

[18] I proceed to deal with the respective grounds of exception:

Ground 1: The Plaintiff is precluded by law from instituting a defamation claim pursuant to the provisions of the Protected Disclosure Act 26 of 2000:

[19] Essentially, the Plaintiff contends that the 'disclosure' contained in the letter, forming an annexure to the amended particulars of claim, contains a disclosure within the ambit of the **Protected Disclosures Act, 26 of 2000** ("the PDA") and, as there is no allegation in the amended particulars of claim that the disclosure was made inappropriately, so the argument does, the Plaintiff is precluded in terms of section 9A of the PDA from instituting these civil proceedings.

[20] The PDA defines a "disclosure" as follows:

"means any disclosure of information regarding any conduct of an employer, or of an employee or of a worker of that employer, made by any employee or worker who has reason to believe that the information concerned shows or tends to show one or more of the following:

- (a) That a criminal offence has been committed, is being committed or is likely to be committed;*
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;*
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;*
- (d) that the health or safety of an individual has been, is being or is likely to be endangered;*

- (e) *that the environment has been, is being or is likely to be damaged;*
- (f) *unfair discrimination as contemplated in Chapter II of the Employment Equity Act, 1998 (Act 55 of 1998), or the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or*
- (g) *that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed;"*

[21] The PDA further defines a "protected disclosure" as follows:

"means a disclosure made to-

- (a) *a legal adviser in accordance with section 5;*
- (b) *an employer in accordance with section 6;*
- (c) *a member of Cabinet or of the Executive Council of a province in accordance with section 7;*
- (d) *a person or body in accordance with section 8; or*
- (e) *any other person or body in accordance with section 9,*

but does not, subject to section 9A, include a disclosure-

- (i) *in respect of which the employee or worker concerned commits a criminal offence by making that disclosure; or*
- (ii) *made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5;"*

- [22] The objects of the PDA includes protecting an employee or worker, whether in the private or public sector, from being subjected to an “*occupational detriment*” on account of having made a protected disclosure and provides for certain remedies in connection with any ‘occupational detriments’ suffered on account of having made a protected disclosure.
- [23] Section 3 of the PDA provides that “*No employee or worker may be subjected to any occupational detriment by his or her employer on account, or party on account, of having made a protected disclosure.*” The PDA is primarily designed to protect an employee from ‘occupational detriment’ which he or she may suffer at the hands of his or her employer. The present matter is not such a case. The parties are both employees of the same employer, but the Defendant is not an employee of the Plaintiff.
- [24] It is within the context of section 3 of the PDA that section 4 thereof provides for certain remedies. In other words, in the relationship between employer and employee.
- [25] Section 9(3) of the PDA, which relates to general protected disclosures, list a number of aspects which must be given consideration to in determining, for purposes of section 9(1)(ii), whether it was reasonable to make such a disclosure. These aspects are the following:
- “(a) *the identity of the person to whom the disclosure is made;*
 - (b) *the seriousness of the impropriety;*
 - (c) *whether the impropriety is continuing or is likely to occur in the*

future;

- (d) *whether the disclosure is made in breach of a duty of confidentiality of the employer towards any other person;*
- (e) *in a case falling within subsection (2) (c), any action which the employer or the person or body to whom the disclosure was made, has taken, or might reasonably be expected to have taken, as a result of the previous disclosure;*
- (f) *in a case falling within subsection (2) (c) (i), whether in making the disclosure to the employer the employee or worker complied with any procedure which was authorised by the employer; and*
- (g) *the public interest."*

[26] To qualify for the protection provided by the PDA, any such qualifying disclosure, must be made in 'good faith' and requires consideration of the factors set out in section 9(3) of the PDA.

[27] Section 9A of the PDA, upon which the Plaintiff relies in his exception, provides as follows:

"Exclusion of civil and criminal liability

- (1) *A court may find that an employee or worker who makes a protected disclosure of information-*
 - (a) *referred to in paragraph (a) of the definition of disclosure;*
or
 - (b) *which shows or tends to show that a substantial contravention of, or failure to comply with the law has*

occurred, is occurring or is likely to occur, shall not be liable to any civil, criminal or disciplinary proceedings by reason of having made the disclosure if such disclosure is prohibited by any other law, oath, contract, practice or agreement requiring him or her to maintain confidentiality or otherwise restricting the disclosure of the information with respect to a matter.

- (2) *Exclusion of liability as contemplated in subsection (1) does not extend to the civil or criminal liability of the employee or worker for his or her participation in the disclosed impropriety."*

(Own emphasis applied.)

[28] Section 9A of the PDA refers to a discretionary power afforded to the court under circumstances where the disclosure would have been prohibited '*by any other law, oath, contract, promise or agreement*' requiring the party making the disclosure to maintain confidentiality or otherwise restricting the disclosure of the information with respect to a matter. Upon being questioned within which of these categories a claim for defamation would fall, counsel for the excipient could not provide a cogent answer. Section 9A of the PDA appears to be directed at a scenario where there is a legal obstacle to making the disclosure, the breach of which may give rise to a civil or criminal liability within the ambit of section 9A.

[29] The Court in *Tshishonga v Minister of Justice and Constitutional Development and Another 2007 (4) SA 135 (LC)*⁸ dealt extensively with the provisions of the PDA and the test which the court should apply. The

⁸ Also reported at: (2007) 28 ILJ 195 (LC).

court made a detailed analysis of the meanings of 'disclosure', 'protected disclosure', 'general protected disclosure' and 'impropriety' contained in the PDA with reference to international and local authorities. Regarding general protected disclosures provided for in section 9, the court noted that several requirements have to be met for a disclosure to qualify as a general protected disclosure. It has to be in good faith; the employee must have a reasonable belief that the information is substantially true, and the disclosure should not be for personal gain. These three requirements of good faith, reasonable belief and personal gain overlap and are mutually reinforcing. A weakness in one can be compensated for by the others. These requirements must be construed in a manner that does not defeat the objectives of eliminating crime, promoting accountable governance and protecting employees against reprisals. The disclosure must in addition be filtered through two more tests: The disclosure must meet one or more of the four conditions in section 9(1) and it must be reasonable to make the disclosure. Reasonableness must be assessed against the seven criteria in section 9(3). These tests shift the focus away from an assessment of the employee's good faith and the reasonableness of his beliefs to more tangible and objectively determinable facts. Whether the relief is reasonable is a finding of fact based on what is believed.⁹

- [30] The defence that any one of the requirements in s 9 is lacking must be specifically pleaded and proved. Deciding whether all the requirements have been met is a question of fact.

⁹ *Tshishonga v Minister of Justice and Constitutional Development and Another supra at par 185.*

- [31] The PDA is conceived as a four-staged process that begins with an analysis of the information to determine whether it is a disclosure. If it is, the next question is whether it is protected. The third stage is to determine whether the employee was subjected to any occupational detriment and lastly, what the remedy should be for such treatment. It is not an enquiry into wrongdoing, but about whether the employee deserves protection. Structured in this way the inclination to shift the emphasis from the conduct and credibility of the wrongdoer to that of the whistleblower is real.
- [32] Several hurdles must be overcome before disclosures can qualify as general protected disclosures. First, the disclosure must be in good faith. In *Tshishonga*,¹⁰ the Court held that:

"[204] By setting good faith as a specific requirement, the legislature must have intended that it should include something more than reasonable belief and the absence of personal gain. An employee may reasonably believe in the truth of the disclosures and may gain nothing from making them, but his good faith or motive would be questionable if the information does not disclose an impropriety or if the disclosure is not aimed at remedying a wrong.

[205] Good faith is a finding of fact. The court has to consider all the evidence cumulatively to decide whether there is good faith or an ulterior motive, or, if there are mixed motives, what the dominant motive is." (Own emphasis applied.)

- [33] It stands to reason that where the reliance on the PDA is presupposed on

¹⁰ *Supra* at par 204 and 205.

findings of fact and is combined with the requirement to consider evidence in concluding whether the party making those disclosures was acting in good faith, a defence under section 9A of the PDA, even if at all available to the Defendant in these proceedings, cannot be entertained at exception stage.

[34] Therefore:

[34.1] Firstly, the court cannot, under the present circumstances, at exception stage, make a finding as to whether the disclosure was made in good faith or not; and

[34.2] Secondly, the discretionary protection against liability, provided for in terms of section 9A of the PDA, does not appear to be an absolute bar to civil proceedings being instituted against a party who has made a disclosure. For the Court to exercise a discretion to exclude civil liability, as a general proposition, evidence must be presented.

[35] The Defendant does not suffer prejudice as he can still plead this defence, if so advised, as part of its opposition to the action.

[36] Therefore, this first ground of exception must fail and stands to be dismissed.

Ground 2: No cause of action for defamation:

[37] In the second ground of exception the Defendant contends that the Plaintiff has failed to make out a cause of action for a claim based upon defamation.

[38] The Plaintiff contends, *inter alia*, (see par. 11 of the exception) that:

[38.1] The Plaintiff does not rely on an innuendo or secondary meaning to be attached to the statement; and

[38.2] The words or statement, understood in the context of the whole document, and considering their grammatical meaning, are not capable of a defamatory meaning and consequently not defamatory to the Plaintiff.

[39] It is correct that the Plaintiff does not appear to rely on innuendo. The Plaintiff's case appears to be that the contents of the letter, attached to the Amended Particulars of Claim, are *per se* defamatory. The voluminous document refers to '*concrete proof of corruption and fraud*' ostensibly perpetrated by the Plaintiff, includes allegations of sexual misconduct and in the conclusion refers to the Plaintiff as '*someone who lacks mental stability, psychological fitness, and chemical balance*'. The contention in the exception that these words or statement, understood in the context of the whole document, and considering their grammatical meaning, are not capable of a defamatory meaning and consequently not defamatory to the plaintiff is rejected. Certainly, these are not trifling statements.

[40] Whilst there is much to be said that several of the allegations contained in the particulars of claim may be vague and embarrassing, the Defendant has elected not to rely on those grounds in attacking the pleading.

[41] In paragraph 4.4 of the Amended Particulars of Claim the Plaintiff contends

that the Defendant 'further said the plaintiff is known for hiring hitman 'inkabi'. This statement does not appear in the relevant letter. When I asked Mr Mello where this statement appears he indicated that it appears in the document annexed as annexure "B" to his heads of argument. I have already made reference to this letter which was attached to Mr Mello's heads of argument above. Mr Mello explained that the purpose of attaching this document was, *inter alia*, to demonstrate that the Defendant is acting with an ulterior purpose and to demonstrate that the Defendant had used the word 'inkabi' in this further letter. The reliance on this further document, which does not form part of the pleading, is of course impermissibly. However, Mr Mello's explanation points to the obvious, the pleading does not attach nor quote a document which appears to be central to his case.

- [42] The Plaintiff does not, as correctly conceded by Mr Mello, rely on an inuendo. In failing to either attach the further letter or by failing to properly plead the reliance thereon, demonstrates that a complete cause of action has not been made out. This is apparent from considering the Amended Particulars of Claim within the four corners of the pleading.
- [43] The Plaintiff has, failed to disclose a complete cause of action premised upon allegations contained in paragraph 4.4 of the Amended Particulars of Claim.
- [44] Accordingly, the second ground of the exception must succeed in so far as stated above.

Ground 3: The claim for potential financial loss is bad in law:

- [45] The Plaintiff claims damages in the amount of R1.8 million for 'potential financial loss'. This is not done as a separate head of damages, but is part of the larger claim totalling the sum of R3 million and composed of (as set out in "*amended paragraph 7.2*" of the Amended Particulars of Claim), R800 000-00 for damage to reputation; R400 000-00 for emotional distress and anguish and R1.8 million for potential financial loss.
- [46] The Defendant contends that: the Plaintiff seeks to recover pure economic loss under defamation and must therefore plead and prove the elements of the *aquilian* action; that the Plaintiff has failed to plead and prove wrongfulness in the context of a claim for pure economic loss; and that the Plaintiff failed to plead and prove an intentional wrong on the part of the Defendant.
- [47] Save for an anaemic reference in paragraph 7.1.1 of the Amended Particulars of Claim that as a direct result of the statements, the Plaintiff has suffered and continues to suffer harm, including but not limited to, harm to '*his career prospects*'. The pleading does not even allege what impact the statements will have on the Plaintiff's career prospects, what harm is being suffered and there is no apparent *nexus* between the bald allegation and the amount being claimed.
- [48] Therefore, this ground of exception must also succeeds.

Ground 4: The claim for damages for emotional distress and anguish is bad in law:

[49] The Plaintiff claims damages in the amount of R400 000-00 for emotional distress and anguish.

[50] The Defendant contends that has not made the averments necessary to complete a claim under an action for pain and suffering.

[51] In ***Simmonds v White 1980 (1) SA 755 (C) at 758*** it was held that a plaintiff should particulate general damages or provide particulars about the Plaintiff's reputation, standing in the community or character or the extent of the publication.

[52] A Plaintiff may claim for actual patrimonial loss suffered because of defamation. The cause of action is then the *lex aquilia*, being a claim for pure economic loss, and the Plaintiff bears the *onus* in respect of all the elements of that action. See in this regard: ***Economic Freedom Fighters and others v Manuel 2021 (3) SA 425 (SCA) at par. 91.***

[53] The Plaintiff has failed to properly plead the elements for this claim.

[54] Therefore, this ground of exception succeeds.

The relief sought:

[55] Mr Toma, for the Excipient/Defendant, contended that if the exception succeeds, premised on the first ground of exception, that the Defendant's claim should be dismissed. The first ground of exception has failed, for the

reasons stated above, but in any event, a dismissal of the claim is not justified, nor would it be prudent.

[56] If the exception is successful, the proper course for the court is to uphold it. When an exception is upheld, it is the pleading to which exception is taken which is destroyed. The remainder of the edifice does not crumble.¹¹ The upholding of an exception to a declaration or a combined summons does not, therefore, carry with it the dismissal of the summons or of the action.

[57] There is no reason why the normal principle that the costs follow the result should not be applied. The conduct of the Plaintiff is not such as to justify a punitive cost order.

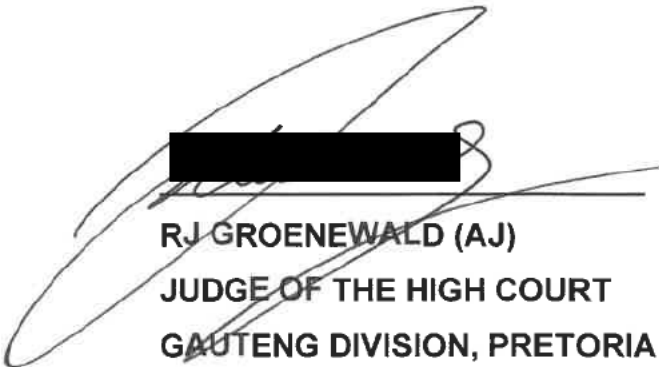
The order:

[58] The following order is made:

1. Ground 1 of the exception is dismissed;
2. Grounds 2, 3 and 4 of the exception are upheld;
3. The Plaintiff's amended particulars of claim is struck-out;
4. The Plaintiff is given leave to file an amended particulars of claim, if so advised, within 20 days of this order; and
5. The Plaintiff is ordered to pay the costs of proceedings on exception on a

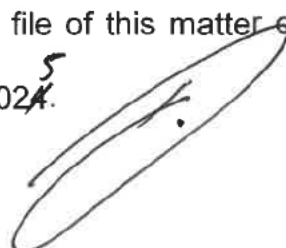
¹¹ *Ocean Echo Properties 327 CC v Old Mutual Life Assurance Co (South Africa) Ltd 2018 (3) SA 405 (SCA) at 409C.*

party and party basis, including costs of counsel on Scale B.



RJ GROENEWALD (AJ)
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 30 July 2024⁵.



For the Excipient / Defendant	:	Adv K Toma
Instructed by	:	Machingura Attorneys
For the Respondent / Plaintiff	:	Adv L Mello
Instructed by	:	S Mgwenya Attorney Inc
Matter heard on	:	28 July 2025 - Court 6C
Judgment date	:	30 July 2025