

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**



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

31 July 2025

DATE

SIGNATURE

Case No: 080172/24

In the matter between:

**NATIONAL DIRECTOR FOR PUBLIC
PROSECUTIONS**

First Excipient/Second Defendant

**THE MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Second Excipient/Third Defendant

and

SIZWE MAPHUMOLO AND 52 OTHERS

Respondent/Plaintiff

in re:

SIZWE MAPHUMOLO AND 52 OTHERS

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

**NATIONAL DIRECTOR FOR PUBLIC
PROSECUTIONS**

Second Defendant

**THE MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Third Defendant

Coram: Groenewald, RJ (AJ)

Heard on: 31 July 2025

Delivered: 31 July 2025 - This judgment was handed down electronically
by uploading to Caselines.

JUDGMENT

GROENEWALD AJ

Introduction:

- [1] This is an opposed exception brought by the Second Defendant and Third Defendant (jointly referred to as the Excipients) against claims 2 and 3 contained in the Plaintiff's particulars of claim.

- [2] The Excipients contend that the Plaintiff's particulars of claim lack averments, which are necessary to sustain a cause of action against the Second and Third Defendants.

The status of the pleadings:

- [3] The Plaintiff sought leave to amend its particulars of claim, and the incomplete Rule 28(1) notice appears in Case Lines at pages 010-1 to 010-10. In the Plaintiff's heads of argument, it is indicated that there was an objection to the proposed amendment, which appears at Case Lines pages 011-1 to 011-3.
- [4] It does not appear that a formal application to amend was brought in terms of Rule 28. Initially, Adv Seboko SC, for the Plaintiffs, submitted that the amendment was effected as the objection thereto was not delivered in time. She submitted that the notice of intention to amend was delivered and that delivery of the notice of intention to amend is reflected at Case Lines page 010-10. On this page of the Case Lines bundle, there is an acknowledgement of receipt by the State Attorney dated 18 September 2024.
- [5] When I pointed out that the objection was delivered to the Plaintiff's attorneys on 25 September 2024, Adv Seboko SC sought instructions from her attorney, but could not give a clear answer as to whether the amendment was effected or not. Adv Seboko SC's attorney, unfortunately, could not provide clarification as to the status of the amendment.

- [6] Adv Seboko SC submitted that, in any event, the '*amendment*' did not change the portions of the particulars of claim which form the subject of the exception. The parties were therefore in agreement that the Exception should be decided on the original particulars of claim.

The pleading:

- [7] The Plaintiffs launched an action against the First to Third Defendants following an incident which occurred on the 14th of October 2021 at the St George's Hotel in Pretoria. The incident is alleged to have resulted in the alleged unlawful arrest of the Plaintiffs.
- [8] Claim 1 deals with a claim premised upon an alleged unlawful arrest and detention of the Plaintiffs alleged to have occurred (see paragraph 7.3 of the particulars of claim) at the instance of the members of the SAPS, more specifically Warrant Officer Wynand Fourie from the Hawks who is alleged to have taken the decision to arrest the Plaintiffs whilst acting within the course and scope of his employment with the First Defendant.
- [9] The Plaintiffs' claim is against all of the Defendants jointly and severally, the one paying the other to be absolved, in respect of all of the claims. The implication being that a case must be made in respect of all three of the Defendants in each of the three claims.
- [10] Claim 2 is premised on malicious prosecution, and Claim 3 is in respect of the alleged assault of the Plaintiff by members of the SAPS. The exception only strikes at Claims 2 and 3.

The legal principles:

[11] 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).

[12] 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.”

[13] 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

[14] 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

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; *Buy 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 Garlicke & Bousfield Inc 2012 (4) SA 415 (KZP)* at 421H–422A.

relevant party (as was held in ***Makgae v Sentra-boer (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 relief which the plaintiff seeks.

- [15] 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.”

- [16] 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

- [17] The object of all pleadings is that a succinct statement of the grounds upon

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***.

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

[18] In an exception the excipient must persuade the Court that upon every interpretation which the Particulars of Claim can reasonably bear, no cause of action is disclosed.

[19] 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

[20] 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

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. Page132-133.

⁴ 2019 (2) SA 37 (CC).

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

⁶ (35381/2020) [2021] ZAGPJHC 120.

action which does not exist or is otherwise precluded on any lawful ground.”⁷

The first ground of exception:

[21] The first ground of exception strikes at Claim 2 contained in paragraphs 12 to 15 of the Particulars of Claim.

[22] The Excipients essentially contend that the Plaintiff has failed to make out a cause of action, with reference to paragraphs 12 and 13 of the particulars of claim, against the Second Defendant.

[23] In Claim 2, the allegation is made that on or about 14 October 2021, *‘members of the SAPS wrongfully and maliciously set the law in motion by initiating and instigating the prosecution of the Plaintiffs on various false charges, including conspiracy to commit kidnapping and kidnapping’.*

[24] Reference is also only made to the “*said members of the SAPS*” in paragraphs 13 and 14 of the particulars of claim.

[25] Save for reference to a letter from the DPP in paragraph 14, no reference is made in paragraphs 12 to 15 to either the Second Defendant or to its employees. There is also no reference to the Third Defendant. The only reference in Claim 2 relates to members of the SAPS.

[26] In paragraph 4.1 of the particulars of claim, the Plaintiff itself states that “*The members of the South African Police Services referred to below were acting within the course and scope of their employment with the First defendant*

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

alternatively (SAPS)”.

- [27] In paragraph 15 of the particulars of claim it is alleged that the Plaintiffs suffered damages, without differentiating what amount is claimed in respect of each of the respective Plaintiffs, in the sum of R26 500 000-00 in respect of costs reasonable expended by them in defending themselves (the details and amount of which is not pleaded) against the aforesaid charges, the bail application plus “*R26 500 000-00 being damages in contumelia, deprivation of freedom, violation of their rights to privacy and dignity, defamation of character and discomfort*”.
- [28] The Excipients do not rely on the particulars of claim being vague and embarrassing, albeit that paragraph 15 raises several questions.
- [29] It is trite that in respect of a claim for malicious prosecutions, the Plaintiff bears the *onus* to both plead and prove all the elements of the delict. Nowhere is it pleaded that the arrest or prosecution was set in motion by the Second or Third Defendants, and there is no indication that these Defendants acted maliciously or improperly, nor that they instigated any proceedings against the Plaintiffs. In fact, the positive allegation is made that it was the SAPS that acted wrongfully and maliciously.
- [30] It is not the Plaintiffs’ case that a warrant was improperly issued. It is expressly alleged that the arrests occurred without a warrant. Ultimately, there is no *nexus* between the alleged conduct of the SAPS and that of the Second or Third Defendants or their employees.

- [31] Adv Seboko SC conceded that the Particulars of Claim fall short in not including allegations contained in the affidavit opposing the exception. This information was not pleaded and does not appear in the pleading. Adv Seboko SC correctly conceded that the Court must decide the exception within the four corners of the pleading. It is of no assistance to the Plaintiffs to try and bolster their case with matter which does not form part of the pleading. It is peculiar that the Plaintiffs sought to deliver an answering affidavit to the exception. The document is replete with legal argument and information not contained in the particulars of claim. In the final paragraph of the affidavit, it prays that the exception be set aside with costs.
- [32] No complete cause of action has been made in Claim 2 against either the Second or Third Defendants.

The second ground of exception:

- [33] Claim 3, to which the second ground of exception relates, is premised upon injuries ostensibly suffered at the hands of the SAPS.
- [34] In paragraph 16 of the particulars of claim it is pertinently alleged that *"members of the SAPS unlawfully arrested, detained and assaulted six of the 53 Plaintiffs"* with reference to the relevant Plaintiffs' names.
- [35] It is further pleaded in paragraph 18 of the particulars of claim that the respective Plaintiffs (accused no. 53, 49 and 24) were admitted to the Tembisa Hospital, whereas accused no. 29 was admitted by a private doctor after his release from custody, and that they received treatment for their

injuries.

[36] No reference is made in paragraphs 16 to 19 to the Second or the Third Defendant or their employees, nor is it alleged that the assault occurred at one of their facilities or in the presence of their employees.

[37] It is clear from paragraph 16, read with paragraphs 17 and 18 of the particulars of claim, that the alleged assault occurred only at the hands of the SAPS. When this was pointed out to Adv Seboko SC, she conceded that the cause of action was incomplete and stated that she misread the references in the introductory paragraph of paragraph 7 of the Particulars of Claim to refer to prisons, not police stations. The introductory part of paragraph 7 of the Particulars of Claim states that "*Plaintiff's were detained at Lyttelton Police Station and Pretoria Central.*" Even if one were to presuppose, perhaps unjustifiably so, that the reference to Pretoria Central was in fact to the Prison (officially known as Kgosi Mampuru II Correctional Centre), it is not alleged that the assault by the SAPS occurred at a prison.

[38] Notwithstanding the above, the Plaintiff seeks judgment against the Defendants "*jointly and severally, the one paying the other to be absolved*" in the amount of R39 210 000-00. This amount is composed, as pleaded in paragraph 20 of the particulars of claim, as follows:

1. "*Payment of a sum of R10 710 000-00 for the unlawful arrest of the plaintiffs;*
2. "*Payment of the sum of R26 500 000-00 for the malicious prosecution*

of the Plaintiffs; and

3. *Payment of the sum of R500 000-00 per each injured Plaintiff in respect of the injuries sustained whilst detained, amounting to R2 000 000-00 (Four Million rand)". (sic)*

[39] I mention in passing that it is unclear how the Plaintiff arrives at the amount in prayer 2, mindful that in paragraph 17 reference is made to 6 Plaintiffs, in paragraph 20.3 the sum of R500 000-00 is claimed per Plaintiff which would amount to R3 000 000-00 and neither to the R2 000 000-00 nor to the four million rands in words. This is, however, not part of the Excipients' causes of complaint.

[40] Ultimately, in respect of Claim 2 and Claim 3, there is no *nexus* pleaded between the conduct of the SAPS, expressly referred to under these claims, and that of either the Second or Third Defendants or their employees. No complete cause of action is pleaded, which would imply any liability for the Second and Third Defendants on the pleading as it stands.

[41] It must therefore follow that a complete cause of action has not been pleaded in respect of the Second and Third Defendants, insofar as it relates to Claims 2 and 3 and that the exception must succeed.

[42] Mindful of the paragraphs referred to in the exception, the Excipients do not take issue at this stage with Claim 1.

[43] In light of the above, I come to the conclusion that the exception insofar as it

strikes at Claims 2 and 3, in respect of the Second and Third Respondents, must succeed.

[44] The Excipients sought an order that, in the event of the exception being upheld, the claims against the Second and Third Defendants should be dismissed. Adv Seboko SC contended that if the exception succeeds, leave to amend should be granted.

[45] 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 the exception is taken which is destroyed. The remainder of the edifice does not crumble.⁸ 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.

[46] In respect of costs, Adv Seboko SC contended that the **Biowatch**-principle⁹ should apply. The Mr Mulaudzi for the Excipients contended that costs should follow the result and that the Plaintiffs should pay the costs of the exception proceedings on Scale B. The Plaintiff has not made out a cause of action against the Second and Third Defendants. Ultimately, the basis for the claim is in delict, and the primary purpose is not the assertion of a constitutional right as provided for in terms of the **Biowatch**-principle.

[47] There is no reason to deviate from the general principle that costs should

⁸ *Ocean Echo Properties 327 CC v Old Mutual Life Assurance Co (South Africa) Ltd 2018 (3) SA 405 (SCA) at 409C.*

⁹ *Biowatch Trust v Registrar, Genetic Resources, and Others 2009 (6) SA 232 (CC).*

follow the event.

The order:

[48] The following order is made:

1. The exception is upheld;
2. The Plaintiffs' particulars of claim is struck out;
3. The Plaintiffs are granted leave to amend their particulars of claim, if so advised, within 20 days of this order;
4. The Plaintiffs are ordered to pay the cost of the proceedings on exception, 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 the hand-down is deemed to be 31 July 2025.

For the Excipients / 2 nd and 3 rd Defendants	:	Mr Mauludzi
Instructed by	:	The State Attorney Pretoria
For the Defendant / Respondent	:	Adv T Seboko SC
Instructed by	:	Nkome Inc Attorneys
Matter heard on	:	31 July 2025 - Court 6C
Judgment date	:	31 July 2025