

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

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

4 SEPTEMBER 2025

Case No: 2024/060427

In the matter between:

ETIENNE WILHELM SCHMIDT

APPLICANT / EXCIPIENT

and

SINDISWA MANDY TAPI

RESPONDENT

JUDGMENT

GOUWS, AJ

INTRODUCTION

- [1] There are two applications before me. The first is an exception taken to the defendant's plea under rule 23(1), on the basis that it fails to disclose a defence and that it is vague and embarrassing.
- [2] The second is an application to strike out certain paragraphs contained in the defendant's plea under rule 23(2), on the basis that they contain allegations that are vexatious, scandalous and irrelevant.
- [3] Both applications substantially succeed for reasons stated herein.
- [4] I propose to first deal with the plaintiff's exception, and then the application to strike out.
- [5] The plaintiff's pleaded cause of action is one of defamation. It is alleged that the defendant, during the period ranging from November 2021 through December 2023, published certain defamatory statements of and concerning the plaintiff. The plaintiff relies on 7 written publications, comprising e-mails and statements on a social media platform, to residents in the complex where the plaintiff and the defendant both reside.

- [6] The defendant has raised a special plea, and has also pleaded over on the merits. It is necessary to deal with the particular features of the defendant's plea in broad outline.
- [7] The defendant pleads a non-compliance with rule 41A of the Uniform Rules of Court. The conclusion pleaded by the defendant is that non-compliance with rule 41A renders the particulars of claim a nullity.
- [8] In paragraph 6.1 the defendant denies publication of the defamatory statements.
- [9] In paragraph 6.2, the defendant relies on typical defamation defences, including
- [8.1] truth and public interest;
- [8.2] fair comment; and
- [8.3] reasonable publication.
- [10] The defendant pleads that these justifications are relied upon in the event of a finding that the publications did in fact occur.
- [11] In paragraph 3.2.3 the defendant introduces ST1, being a report from a medical practitioner, that purports to support the defendant's allegation of a history of victimisation by the plaintiff.

THE EXCEPTION

- [12] The first ground of exception relates to the special plea. The excipient contends that rule 41A does not entail that any action or application is a nullity for its non-compliance. In the result the special plea, so the argument goes, is bad in law, discloses no defence, and renders the plea excipiable.
- [13] The second ground of exception relates to clause 6 of the defendant's plea, where publication is denied (clause 6.1), and in the alternative, reliance is placed on grounds for justification. Here the excipient argues that the plea is vague and embarrassing because the defendant is unable to ascertain:
- [10.1] whether the defendant denies the publications; or
- [10.2] whether the defendant admits the publication and pleads grounds for justification.
- [14] As a third ground of the exception the excipient contends that the inclusion of annexure ST1 amounts to the pleading of *facta probantia* that should not be contained in a plea. A further complaint is that the allegation at paragraph 3.2.3, where ST1 is introduced, also speaks of medical treatment for the defendant and her minor son, whereas ST1 only appears to relate to the defendant. As such the excipient argues that this renders the plea vague and embarrassing.
- [15] Rule 41A does not expressly impose any sanction for non-compliance. There is furthermore no provision in the rule that could support a proposition that failure to deliver a notice under rule 41A, would affect the legal validity of a process

initiating proceedings.

[16] I agree with the plaintiff's counsel that non-compliance with rule 41A does not create a defence that would result in a party being non-suited for lack of compliance, as is asserted by the defendant. I have not been provided with any authority that would support the defendant's assertion in this regard.

[17] A pleading lacks averments that are necessary to sustain a defence where the pleading does not justify the conclusions drawn therein (**See: Miller v Muller 1964(4) SA 458 (C) at 467A**).

[18] The special plea is bad in law.

[19] Seeing as an exception can be taken to a particular section of a pleading, provided that they are self-contained and amount in themselves to a separate defence¹, I will uphold the exception to the special plea for the reasons stated.

[20] I now proceed to deal with the second ground of the exception.

[21] The exception is directed at the defendant's denial of publication, read

¹ **Barclays National Bank Ltd v Thompson 1989 (1) SA 547 (A) at 543F**: *"It seems clear that the function of a well-founded exception that a plea, or part thereof, does not disclose a defence to the plaintiff's cause of action is to dispose of the case in whole or in part. It is for this reason that exception cannot be taken to part of a plea unless it is self-contained, amounts to a separate defence, and can therefore be struck out without affecting the remainder of the plea (cf Salzmann v Holmes 1914 AD 152 at 156; Barrett v Rewi Bulawayo Development G Syndicate Ltd 1922 AD 457 at 459; Miller and Others v Bellville Municipality 1971 (4) SA 544 (C) at 546).."*

conjunctively with its alternative plea of justification on the grounds already stated. The plaintiff contends in its notice of exception that it is unable to establish whether publication is denied, or whether publication is admitted, with a concomitant reliance on grounds for justification. It is argued that this renders the pleading vague and embarrassing.

[22] I cannot agree with this proposition.

[23] In paragraph 6.1 the defendant makes a general denial. This must perforce also amount to a denial of publication. In paragraph 6.2, the defendant then expressly pleads justification "If it was held that the defendant did publish the statements complained of...".

[24] The stance adopted by the defendant is clear. It puts the plaintiff to the proof of the alleged publication, and then relies on grounds for justification in the event of a finding that it did make the publications.

[25] I can find nothing objectionable in this approach in any of the authorities that I have been presented with.

[26] I also do not find anything inherently vague in these allegations.

[27] The second ground of exception accordingly fails.

[28] As it relates to the third ground of exception (the inclusion of ST1- the report from a medical practitioner), the question that presents is whether its inclusion into the

plea would render the pleading vague and embarrassing.

[29] It is a trite proposition that a plea must not contain evidence. It exists in order to define the issues between the parties only. By design, it is accordingly not well suited to deal with evidence that is aimed at corroborating any particular assertion. The distinction between *facta probanda* and *facta probantia* has been well-documented.

[30] The plaintiff's reliance on ***Deltamune (Pty) Ltd and Others v Tiger Brands Ltd and Others (2022) (3) SA 339 (SCA)*** at [25] is instructive:

“It is important to consider rule 18(4) in a proper perspective. The particularity required in that rule relates only to the material facts of the party’s case. Thus, the pleader is only required to set out the material facts – with due regard to the distinction that should be maintained between the facts which must be proved in order to disclose the cause of action (facta probanda) and the facts or evidence which prove the facta probanda (facta probantia). The latter should not be pleaded at all, whereas the former must be pleaded together with the necessary particularity”.

[31] I do not think that the impermissible pleading of *facta probantia* would automatically render a pleading excipiable.² Although the inclusion of the supporting evidence propounded in ST1 is objectionable because it introduces

² Although this may give rise to objections other than by way of exception.

impermissible *facta probantia* into the plea, the exception can only succeed if the inclusion of ST1 renders the pleading vague and embarrassing. In making this determination, I am constrained to consider whether the objection goes to the root of the defendant's proffered defences.³

- [32] If ST1, on proper determination, obfuscates the proffered defences, thereby resulting in the plaintiff not knowing what case it has to meet, the exception must be good.
- [33] ST1 is referenced in paragraph 3.2.3 of the plea in the context of the defendant's allegation that she and her son have been victimised by the plaintiff. It consists of a report by a medical practitioner that speaks to the negative impact that stress is having on the defendant's health. Part of the plaintiff's complaint in this regard is that ST1 makes no mention of the defendant's minor son, as is alleged in paragraph 3.2.3. As such, the allegation in the plea does not correspond to the content of ST1.⁴
- [34] The content of ST1 seeks to offer third party corroboration for the plaintiff's proffered assertion that she and her son have historically been victimised by the plaintiff.

³ **Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) at 905I:** "I must first ask whether the exception goes to the heart of the claim and, if so, whether it is vague and embarrassing to the extent that the defendant does not know the claim he has to meet..."

⁴ Ordinarily such a disparity would give rise to an exception that a pleading is vague and embarrassing, provided the disparity goes to the root of the pleaded defence, causing uncertainty or confusion as to what case a party has to meet.

[35] I do not think that the pleaded defences are obfuscated to any extent by the inclusion of ST1. The defendant clearly denies publication, and alternatively, relies on various grounds for justification. The pleading of this evidence, however impermissible, does not inform the objection made by the plaintiff.

[36] The third ground for the exception must fail.

THE APPLICATION TO STRIKE OUT

[37] The plaintiff seeks the striking of certain paragraphs contained in the defendant's plea on the basis that they are scandalous, vexatious and irrelevant. The particular paragraphs sought to be struck are briefly delineated hereunder:

[19.1] paragraph 3.2.2 and annexure ST1;

[19.2] paragraph 3.2.4;

[19.3] paragraph 3.2.5;

[19.4] paragraph 3.2.6;

[19.5] paragraph 3.2.7 in totality;

[19.6] paragraph 6.2.5; and

[19.7] paragraph 12.13 in its totality (incorporating ST5).

[38] Paragraph 3, including 3.2.2 (containing the reference to annexure ST1) through paragraph 3.2.7, all appear to relate to incidents involving the plaintiff that is intended to support the defendant's pleaded justifications. The upshot of the allegations are that:

[20.1] the plaintiff is a racist;

[20.2] the plaintiff is a violent person;

[20.3] the plaintiff is dishonest; and

[20.4] the plaintiff is an abusive person that commits acts of domestic violence.

[39] Rule 23(2) requires that matter must be scandalous, vexatious or irrelevant before it can be struck out.

[40] On an expansive reading of the defendant's plea, the allegations of violence, dishonesty and abuse may find relevance when determining the pleaded grounds for justification. Substantive relevance is however not the end of the inquiry. The allegations must be relevant to the pleading. As such, *facta probantia* may be relevant to the merits of the matter, but that does not mean that such matter must be included in a plea.

[41] All of the alleged offensive paragraphs contain, substantially, *facta probantia*. The narrative propounded in these paragraphs all serve to explain why the

principal propositions of racism, violence, dishonesty and abuse is true, seemingly in order to inform the grounds for justification pleaded later.

[42] There are also more particular instances where I think the defendant steps into the purview of rule 23(2).

[43] In the defendant's plea, allegations of racism on the part of the plaintiff are repeatedly raised for the first time. These allegations do not appear in any of the publications referenced in the particulars of claim. They also do not serve to inform, advance or sustain any of the pleaded defences. These allegations are substantively irrelevant.

[44] I accordingly do not think that the inclusion of such allegations in the plea serves any legitimate purpose. Instead, they operate only to cast aspersions on the character of the plaintiff, and they enlarge the dispute beyond the four corners of both the pleaded claim and the concomitant defences raised. By their arbitrary inclusion in the plea, these allegations are inherently scandalous and vexatious, and can only serve to harass.

[45] A court process is not the appropriate medium for an aggrieved party to vent personal animus or cast irrelevant aspersions and vitriolic commentary that bear no logical connection to the issues before a court. Such conduct, whether through intemperate rhetoric or arbitrary narrative, erodes the functional purpose of pleadings, and accordingly thereby destroys their usefulness. Practitioners are, and must be, firmly discouraged from this practice.

- [46] The prejudice to the plaintiff, in having to deal with defamatory allegations against him that have no bearing on the issues to be determined, is I think both inherent and self-evident.
- [47] Paragraph 3.2.7 and 12.3 furthermore contains no more than references to individuals that could provide support for the defendant's assertions. Such allegations have no relevance in a plea.
- [48] Paragraph 3.2.3 (particularly the introduction of ST1) and paragraph 12.3 (including the introduction of ST5), is also intended to provide support for assertions made in the plea.
- [49] This is not the only portions of the plea that transgress into the domain of supporting evidentiary matter. Various portions of the defendant's plea contain narrative that seeks to corroborate or explain propositions asserted. Matter of this nature constitute *facta probantia* and has no place in a plea. I however limit the purview of this judgment to those paragraphs that are sought to be struck out by the plaintiff.
- [50] A pleading, by its very nature, is not designed to introduce or address evidentiary materials. When a litigant is compelled to respond to a process that improperly incorporates evidence and supporting *facta probantia*, while being otherwise constrained to adhere to strict rules of pleading, the result is an inherent prejudice. The litigant cannot properly engage with the full scope of the extraneous evidence without itself running afoul of procedural norms. This is, I think, the fundamental reason for the formal distinction drawn between *facta probanda* and *facta probantia* in the context of pleading.

[51] Against this backdrop, I find that where evidence is impermissibly included in a pleading, such evidence is irrelevant to the pleading itself, and I find, at least *in casu*, that the plaintiff is inherently prejudiced by its inclusion.

[52] This offending matter falls to be struck out.

COSTS

[53] Both the exception and the application to strike out is substantially successful. In the result, there is no reason why costs ought not follow the result.

I grant the following order:

1. The exception taken to the special plea raised by the defendant is upheld. The balance of the exception fails.
2. The defendant is ordered to pay the costs of the exception on tariff scale B.
3. The entirety of paragraph 1 of the defendant's plea (the special plea) is struck out.
4. The defendant is afforded a period of 10 days in which to file an amended plea if it so chooses.
5. The application for striking out is upheld with costs on tariff scale B.
6. Paragraphs 3.2.2, 3.2.3 (ST1), 3.2.4, 3.2.5, 3.2.7, 6.2.5 and 12.3 in its entirety (including ST5) of the plea is struck out.



SG GOUWS

ACTING JUDGE OF THE HIGH COURT, PRETORIA

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