



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
<u>8 September 2025</u>	
DATE	SIGNATURE

Case No. 050392/24

In the matter between:

**MBUSISENI THOLITHEMBA BRIGHT
SHABALALA**

Plaintiff/Respondent

and

NOMAKHOSAZANA PAMA SIHUNU

Excipient/Defendant

NEUKIRCHER J:

1] On 9 May 2024 the plaintiff served a combined summons on the defendant. In

it he claimed an amount of R1,000,000 in respect of reputational damages suffered as a result of alleged defamatory utterances made by the defendant.

2] The allegations in the particulars of claim are as follows:

- a) that during or about the period of 12 May 2021 the defendant “conveyed statements” to the Johannesburg Society of Advocates (JSA) and the Advocates for Transformation (AFT) who have a “substantial membership in South Africa”;
- b) “the nature and extent of the statements were, into alia, to or about the effect that the plaintiff repeatedly perpetrated rape of the defendant's daughter...”;
- c) that the statements are in their ordinary meaning wrongful and defamatory of the plaintiff and were conveyed with the intention of defaming and injuring the plaintiff's name and reputation;
- d) that the statements were published to various members of the advocates profession including members of the JSA and AFT and the subcommittees thereof;
- e) the statements were understood to mean that the plaintiff had perpetrated sexual misconduct of a criminal nature; and
- f) as a result of the deformation the plaintiff has suffered damages to his personal and professional reputation in the sum of R1,000,000.

3] On 2 July 2024, the defendant filed a notice of exception on the basis that the particulars of claim lacked averments that are necessary to sustain a cause of action. The exception is the following:

- “1. The plaintiffs claim against the defendant is for damages allegedly caused to his ‘*personal and professional reputation*’”;
2. The plaintiff alleges that the damages suffered were as a result of alleged defamatory statements “*conveyed*” by the defendant.
3. In failure of the duty upon the plaintiff to sustain a cause of action through the particulars of claim, the plaintiff omits:
 - 3.1 to allege in what manner did the defendant allegedly convey the statements. If the plaintiff alleges the defendant conveyed the alleged statements in writing, the plaintiff failed, refused and/or neglected:
 - 3.1.1 to attach the document containing the alleged defamatory statements; and/ or
 - 3.1.2 to plead the *ipsissima verbi* of the alleged defamatory statements that were so conveyed;
 - 3.2 to identify, name or otherwise point out the person to whom the defendant allegedly conveyed the statements;
 - 3.3 to identify the date on which the defendant allegedly conveyed the statements; and
 - 3.4 to identify the location where the defendant allegedly conveyed the statements.
4. Further to the above, the plaintiff claims payment of the global amount of R 1 million arising from alleged damage to his “*personal and professional*” reputation.
5. In failure of the duty upon the plaintiff to sustain a cause of action in respect of the damages claimed, the plaintiff omits in the particulars of claim:
 - 5.1 to apportion or allege an apportionment in terms of the alleged damages to the plaintiff's personal reputation, and the plaintiff's professional reputation; and

5.2 to allege whether the damage to his “*professional reputation*” constitutes patrimonial [pure economic] loss.

6. In the absence of the allegations set out above, regarding the publication of allegedly defamatory statements, the plaintiff has failed to allege facts that are necessary to sustain a cause of action of defamation.”

4] The plaintiff has refused to amend his particulars of claim to satisfy the grounds of exception raised, and thus the exception was set down for hearing.

5] The argument by the excipient is that the essential *facta probanda* upon which the cause of action of defamation and the *action iniuriarum* are based are missing from the plaintiff’s particulars of claim. Further, inasmuch as the entirety of the *facta probanda* are required in order to form a complete cause of action, the absence of even one element is sufficient to render the pleading excipiable on the basis that there is no proper cause of action set out. In essence, the argument presented before me is that the plaintiff has failed to plead:

- a) when the defamatory remarks were made;
- b) the actual words used;
- c) the method by which the words were communicated¹;
- d) precisely to whom the defamatory utterances were made or conveyed;
- e) facts upon which the plaintiff appears to be claiming both damages for loss of reputation under the *action iniuriarum* and patrimonial damages under the *lex aquilia*. If the claim is based on the latter, the complaint is

¹ Whether via a written document (and then a copy provided of that document) or other means

that the particulars of claim fails *in toto* to set out any facts upon which the claim is based.

The law

6] I do not intend to set out the legal principles applicable to an exception of this nature in any great detail as this has been traversed in many judgments and the principles are, by now, trite:

- a) the exception must go to the root of the entire claim;
- b) a pleading is excipiable if no possible evidence led on the pleadings can disclose or make out a cause of action²;
- c) “Furthermore, in approaching these exceptions, I shall bear in mind the following general principles:
 - (a) minor blemishes are irrelevant;
 - (b) pleadings must be read as a whole; no paragraph can be read in isolation;
 - (c) a distinction must be drawn between the *facta probanda*, or primary actual allegations which every plaintiff must make, and the *facta probantia*, which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations. Generally speaking, the latter are matters for particulars for trial and even then are limited. For the rest, they are matters for evidence;
 - (d) only facts need be pleaded; conclusions of law need not be pleaded;
 - (e) bound up with the last-mentioned consideration is that certain allegations

² *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706

expressly made may carry with them implied allegations and the pleading must be so read.”³

7] In actions for defamation the following must be alleged in the particulars of claim⁴:

- a) the plaintiff must set out the words alleged to have been used by the defendant. But it is not necessary to plead the actual words and the plaintiff may allege that the words are “more or less” the words used;⁵
- b) if the defamatory statements are contained in a document, that should be attached⁶;
- c) the plaintiff must allege publication of the defamatory statement to a person other than themselves. It is however not necessary to state the names of all the persons in whose presence the defamatory statement was made;⁷
- d) the plaintiff must allege that the defamatory words were published “of and concerning” him or her;
- e) although the plaintiff must allege that the statement is defamatory, it is a question of law whether the words complained of are reasonably capable of conveying to the reasonable reader a meaning which defames the

³ *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 902I – 903E

⁴ I do not intend to deal with what must be eventually proved as that is not relevant to the exception itself

⁵ *International Tobacco Co of SA Ltd v Wolheim* 1953 (2) SA 603 (A) at 613 - 614

⁶ *Kruger v Johnnic Publishing (Pty)Ltd and Another* 2004 (4) SA 306 (T) where the offending publications were attached.

⁷ *International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd* (4) 1955 (2) SA 40 (W) – although a failure to specify to whom the utterances were made may hamper the plaintiff in who he/she may call as witnesses. In *Amler's Precedents of Pleadings* 7th ed at pg 162, the author states: “If publication takes place in a publicly distributed document, it is not necessary to list the name or names of readers because it is factually presumed that publication took place.”

plaintiff;⁸

- f) if the plaintiff relies on innuendo the facts and circumstances warranting the innuendo pleaded.⁹

8] In *Le Roux v Dey*¹⁰ the Constitutional Court explained as follows:

"[84] ... In *Khumalo and Others v Holomisa* this court stated that the elements of defamation are '(a) the wrongful and (b) intentional (c) publication of (d) a defamatory statement (e) concerning the plaintiff'...

[86] 'Publication' means the communication or making known to at least one person other than the plaintiff. It may take many forms. Apart from the obvious forms of speech or print, the injurious information can also be published through photographs, sketches, cartoons or caricatures.

[87] Statements may have primary and secondary meanings. The primary meaning is the ordinary meaning given to the statement in its context by a reasonable person. The secondary meaning is a meaning other than the ordinary meaning, also referred to as an innuendo, derived from special circumstances which can be attributed to the statement only by someone having knowledge of the special circumstances. A plaintiff seeking to rely on an innuendo must plead the special circumstances from which the statement derives its secondary meaning. But an innuendo must not be confused with an implied meaning of the statement which is regarded as part of its primary or ordinary meaning.

[88] To add to the confusion that sometimes arises from all this, plaintiffs often wish to point out the sting of a statement which is alleged to be defamatory per se. The particular defamatory meaning contended for is then emphasised by a paraphrase of the statement which is referred to as a 'quasi-innuendo'. 'Quasi' because it is not a

⁸ *Amler's Precedents of Pleadings* 7th ed at pg 160 - 171

⁹ *New Age Press Ltd v O'Keefe* 1947 (1) SA 311 (W)

¹⁰ 2011(3) SA 274 (CC)

proper innuendo or secondary meaning. Background circumstances need not be pleaded. The disadvantage of relying on a quasi-innuendo, as opposed to the contention that the publication is defamatory per se, is that the plaintiff is bound by the selection of meanings pleaded. In this regard reference was made with approval in *Demmers v Wyllie and Others* to the following statement in *HRH King Zwelithini of Kwa Zulu v Mervis and Another*:

'(O)nce a plaintiff has selected the meanings of the offending words upon which he relies, he is bound by that selection and, if he should fail to establish that the words bore or bear such meaning or meanings, he cannot then fall back on any other defamatory meaning or meanings which he contends that the words bear per se, unless he has pleaded the selected meanings as an alternative to a general allegation that the words are defamatory per se.' "

9] Bearing this in mind, I intend to deal with each complaint separately.

When the defamatory remarks were made

10] As stated, the argument is that the plaintiff has failed to set out the precise date when the defamatory remarks were conveyed. But this is, in fact, incorrect. The particulars of claim state:

"3. During or about the period of 12 May 2021 the Defendant conveyed statements to ..."

11] In my view, this is entirely sufficient and there is therefore no merit in this complaint.

The precise words used

12] As stated *supra*, it is not necessary to plead the actual words used and the plaintiff may allege that the words are “more or less” the words used.¹¹ In this case, the plaintiff has pleaded that

“the nature and extent of the statements were, into alia, to or about the effect that the plaintiff repeatedly perpetrated rape of the defendant's daughter...”.

13] Instead of pleading that the statements were “more or less to or about the effect that the plaintiff repeatedly perpetrated rape on the defendant's daughter”, he used the words “the nature and extent of the statements were...”. In my view this is simply semantics. It is very clear what words were used and what the allegations were. There is therefore no merit in this argument.

The method of communication

14] This complaint relates to the fact that the plaintiff has failed *in toto* to set out how the communication occurred - whether it was communicated via an email or an oral communication or in any other document. The complaint is further that, were publication to have taken place via a written form of communication, that has not been attached to the particulars of claim which is necessary.

15] Rule 18(4) states:

“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.”

¹¹ *International Tobacco Co of SA Ltd v Wolheim* 1953 (2) SA 603 (A) at 613 - 614

16] Defamation is ‘the unlawful publication, animus iniuriandi of a statement that has the effect of injuring a person’s reputation, that is, lowering it in the estimation of right-thinking members of society.’¹²

17] “Publication” means the communication or making known to at least one person other than the plaintiff.¹³ In *Kruger v Johnnic Publishing (Pty) Ltd and Another*¹⁴, as in many other matters where the words were in the form of a written statement, this was attached to the particulars of claim. In my view this is necessary and there may be several reasons for this, not the least of which is to ascertain the context in which the words were used and any meaning or innuendo that should be attached to them.

18] In the present particulars of claim, the plaintiff merely alleges that the words were “conveyed”, but in my view that is insufficient and therefore this complaint is valid and it goes to the root of the claim.

The recipients of the defamatory statement

19] In *Crots v Pretorius*¹⁵, the SCA stated the following:

“Publication is an essential requirement of defamation that must be pleaded and proved. The names of the persons to whom the defamatory remarks were made and who were to be called as witnesses have to be pleaded and disclosed during cross-examination. The reasons are apparent. Apart from avoiding surprise, the identity of the persons involved is also relevant to enable the Defendant to raise appropriate

¹² *Botha v Marais* 1974 (1) SA 44 (A)

¹³ *Le Roux v Dey* 2011 (3) SA 274 (C) at par 86

¹⁴ 2004 (4) SA 306 (T)

¹⁵ 2010 (6) SA 512 (SCA) at par 15

defenses. For instance, depending on who the person is, the Defendant may reply on privilege.”

20] The defendant argues that the plaintiff simply does not go far enough in his particulars of claim in order to satisfy this requirement: to simply state that the statements were conveyed to members of the JSA and AFT and subcommittees “who have substantial membership in South Africa” does not sufficiently identify the recipients of the statement. At first blush, the argument seems to be overly technical. However, given the fact that the method of publication must be sufficiently identified, it may well be that (for example) were publication to have been via email, the recipients of the email would have to be identified. Thus, there is merit in this ground.

The lex aquilia

21] The plaintiff claims damages for the loss of his personal and professional reputation. He has not specified how much he claims in respect of each. The complaint is that the plaintiff appears to claim damages under the *lex aquilia* and absent a formulation of the grounds upon which this action is based, the cause of action is lacking.

22] As was stated in *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd*¹⁶

“[8] Despite the absence of any pertinent decision by this court in favour of the appellants, the respondent conceded that its claim for special damages can only succeed if it satisfies the requirements of the *actio legis Aquiliae*. I believe the concession was rightly made. As was explained by De Villiers JA in *Matthews v Young*

¹⁶ (437/2010) [2011] ZASCA 117; 2011 (5) SA 329 (SCA); [2011] 4 All SA 9 (SCA) (5 July 2011)

1922 AD 492 at 503-505, the rule of our law, in principle, is that patrimonial damages must be claimed under the *actio legis Aquiliae*, while the *actio iniuriarum* and its derivative actions, including the action for defamation, are only available for sentimental damages. In theory, the person injured by a defamatory publication would therefore have to institute two actions: a defamation action for general damages and the *actio legis Aquiliae* for special damages. But, as further explained by De Villiers JA, even at the time when *Matthews* was decided, two actions were no longer required by our practice. Accordingly, so De Villiers JA held, if one suffers an injury to your reputation, you can claim both kinds of redress in the same action, provided, of course, that the requirements of both actions are satisfied.

[9] The decision in *Matthews* was followed in a number of older provincial judgments (see eg *Bredell v Pienaar* 1924 CPD 203 at 213; *Van Zyl v African Theatres Ltd* 1931 CPD 61 at 64-65). These decisions have been supported by most of our academic writers on the subject (see eg Burchell *The Law of Defamation in South Africa* (1984) 40-41; Neethling, Potgieter and Visser *Law of Delict* 5 ed (2006) 298 and the authorities there cited). More recently, Magid J considered – in *Minister of Finance v EBN Trading (Pty) Ltd* 1998 (2) SA 319 (N) at 325G – whether the fundamental legal position had changed since *Matthews*. The conclusion he arrived at is that it had. I find no reason to disagree with that conclusion. What this means, of course, is that a plaintiff who seeks to recover special damages resulting from a defamatory statement, must allege and prove the elements of the *Aquilian* action...”

23] But there is no indication in the particulars of claim that the plaintiff intends to claim patrimonial damages. It is apparent that the plaintiff is claiming sentimental damages for the loss of his reputation on a personal and professional level in terms of the *actio iniuriarum*. That is the only cause of action pleaded and that would be all to which he may be entitled were he able to prove his claim.

24] Given this, it is not necessary for him to particularise his loss.

25] Thus this ground of exception must be dismissed.

Summary

26] Thus, as is set out supra, two of the necessary grounds to properly formulate a claim for defamation are lacking. This being so, the exception must succeed.

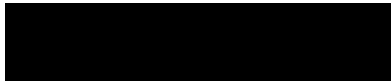
27] As the particulars of claim are bad in law, it must be struck out. However, I am however of the view the plaintiff must be given an opportunity to file an amended particulars of claim and must be given a period of time within which to do so.

Costs

28] Although not all of the defendant's grounds for exception have been upheld, the defendant has been substantially successful in the exception and therefore is entitled to her costs. The exception is not a simple one and so I am of the view that costs on scale B should be awarded.

ORDER

1. The exception is upheld.
2. The particulars of claim is struck out.
3. The plaintiff is afforded a period of 20 days from date of this order within which to file an amended particulars of claim.
4. The plaintiff is ordered to pay the defendant's cost of the exception which costs are to be taxed in accordance with scale B.



NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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 8 September 2025.

Appearances

For the appellant	:	Adv A Jansen van Vuuren
Instructed by	:	Davids Attorneys Inc
For the respondent	:	Adv LCM Morland
Instructed by	:	Manitha Naran Attorneys Inc
Matter heard on	:	2 September 2025
Judgment date	:	8 September 2025