



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Unreportable

Case no: 056015/2025

In the matter between:

IVAN MARK GABRIEL

Plaintiff

and

DELOITTE & TOUCHE HOLDINGS SA (PTY) LTD First Defendant

DELOITTE & TOUCHE

Second Defendant

Coram: LOUW AJ

Heard: 5 May 2026

Delivered: 31 August 2026

Summary: Pleadings - Exceptions - Vague and embarrassing pleading - No cause of action - Malicious prosecution claim - Distinction between *facta probanda* and *facta probantia* - Rule 23(1) of Uniform Rules - Striking out - Scandalous, vexatious and irrelevant matter - Rule 23(2) - Prejudice - Punitive costs.

ORDER

- 1 The first, second, third, fourth, and sixth exceptions are upheld.
- 2 The plaintiff is afforded a period of 10 days to amend his pleadings, if so advised.
- 3 That the following averments are struck from the plaintiff's particulars of claim:
 - 3.1 The remainder of paragraph 11.10 after the first sentence;
 - 3.2 The words in the first sentence from 'who the' to 'the case' in paragraph 15;
 - 3.3 Paragraphs 19, 20–26, 27–33 in toto;
 - 3.4 Subparagraph 40.3.1 in toto.
- 4 The plaintiff shall pay the excipients' costs on the attorney and client scale, including the costs of senior counsel on scale C.

JUDGMENT

Louw AJ:

Introduction

[1] This matter concerns an exception and an application to strike out brought by the first and second defendants, Deloitte & Touche Holdings SA (Pty) Ltd and Deloitte & Touche, against the plaintiff's particulars of claim in terms of Uniform Rule 23(1) and Rule 23(2) of the Uniform Rules. The defendants contend that the plaintiff's pleading is legally defective because it either fails to disclose a cause of action or is so vague and embarrassing that they are unable properly to plead thereto. In addition, they seek the striking out of various portions of the particulars of claim on the basis that such passages comprise legal argument, evidence, opinions, vexatious material and irrelevant matter.

Factual background

[2] The plaintiff, Mr Ivan Mark Gabriel ("the plaintiff"), instituted action proceedings against Deloitte & Touche Holdings SA (Pty) Ltd, cited as the first defendant, and Deloitte & Touche, cited as the second defendant (collectively, "the Deloitte defendants"). The plaintiff seeks damages arising from the alleged malicious institution or instigation of criminal proceedings against him amounting to approximately R38 million. The criminal proceedings ultimately terminated in the plaintiff's favour when he was acquitted on 26 April 2022 following the upholding of an application in terms of section 174 of the Criminal Procedure Act 51 of 1977.

[3] Following service of the plaintiff's particulars of claim dated 18 April 2025, the Deloitte defendants delivered a notice in terms of Rule 23(1) and (2) dated 26 May 2024 identifying alleged defects in the pleading on the basis that certain averments are scandalous, vexatious, or irrelevant affording the plaintiff fifteen days within which to remove the alleged causes of complaint. The plaintiff failed or refused to remedy the identified defects and objected to the notice in terms of Rule 23(1) and (2) on the grounds that the aforementioned notice amounts to irregular steps. The Deloitte defendants proceeded with their exception and application to strike out various passages contained in the particulars of claim on 24 June 2025. They persisted with five of six exceptions originally noted.

[4] On 28 April 2026, shortly before the matter was heard, the plaintiff delivered a notice of intention to amend his particulars of claim in various respects. The proposed amendments include the insertion and deletion of certain words, the introduction of various new paragraphs, and the deletion of a number of existing paragraphs. However, few, if any, of the proposed amendments are directed at the grounds of complaint advanced by the Deloitte defendants in their exceptions and striking-out application. The amendments do not materially address, let alone cure, the defects upon which these proceedings are founded.

[5] The issue before this Court is confined to the legal sufficiency and form of the plaintiff's particulars of claim. This Court is not concerned, at this stage, with the merits of the plaintiff's allegations that the Deloitte defendants maliciously instituted or instigated criminal proceedings against him, nor with whether the defendants are ultimately liable for any damages claimed.

Arguments before court

[6] Mr Dyke on behalf of the Deloitte defendants, relied upon Rule 23(1), which permits a party to take exception to a pleading on the basis that it does not disclose a cause of action or is vague and embarrassing, provided that the opposing party has first been afforded an opportunity to remove the cause of complaint. The Deloitte defendants also relied upon Rule 23(2), which permits an application to strike out matter from a pleading where such matter is scandalous, vexatious or irrelevant and where prejudice would be occasioned if it were allowed to remain. The striking-out application was directed at passages alleged to contain legal argument, evidentiary matter, opinions and irrelevant allegations.

General arguments on exception principles

[7] The Deloitte defendants' exceptions are directed at the legal sufficiency and formulation of the plaintiff's particulars of claim. Counsel acting for the Deloitte defendants, submitted that the pleading fails to comply with Rules 18 and 23 in that it does not clearly and coherently set out the material facts necessary to sustain the causes of action relied upon. He contended that the particulars of claim contain contradictory allegations, imprecise references to persons and entities, inadequate averments in support of the malicious prosecution claim, uncertainty as to the basis upon which liability is attributed to the Deloitte defendants, and insufficient particularity regarding the plaintiff's alleged psychological injuries. These defects, it is argued, either result in the particulars of claim disclosing no cause of action or render the pleading vague and embarrassing, thereby preventing the Deloitte defendants

from pleading meaningfully thereto. The principal submission is that, even accepting the pleaded allegations as true, the pleading does not contain the necessary factual averments required to sustain a legally cognisable claim against the Deloitte defendants.

[8] In support of these propositions, counsel for the Deloitte defendants submitted in essence that the purpose of pleadings is to define clearly and precisely the issues that must be determined by the court and the case that the opposing party is required to meet. Reliance was placed on *GCC Engineering (Pty) Ltd and Others v Maroos and Others*¹ where the Supreme Court of Appeal ('SCA') emphasised that pleadings serve to identify the disputes between the parties, and that a court must adjudicate only those disputes.

[9] The Deloitte defendants' counsel further relied on *Standard Bank of SA Ltd v Snyders and Eight Similar Cases*,² where this Division reaffirmed the principle that pleadings must state a party's case with precision,³ and stressed that the object of pleadings is to bring the issues clearly to the attention of both the court and the parties. He also relied on *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd*⁴ to argue that there is a well-established distinction between material facts (*facta probanda*), which must be pleaded, and the evidence by which those facts are to be proved (*facta probantia*), which should not be pleaded. According to counsel, substantial portions of the particulars of claim consist of evidential matter, commentary and opinion

¹ 2019 (2) SA 379 (SCA) at para 22, while the SCA referred to *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC) at para 6.

² 2005 (5) SA 610 (C).

³ While also referring to *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C-E and *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1082.

⁴ 1948 (2) SA 891 (C).

rather than concise allegations of material fact, thereby rendering the pleading defective. He also pointed to *Trope v South African Reserve Bank and Two Other Cases*,⁵ where it was held that pleadings must be formulated with sufficient clarity and precision to enable an opposing party properly to plead.

[10] Mr Papier, counsel for the plaintiff, submitted that Rule 23 permits a party to except to a pleading on two grounds: first, that it is vague and embarrassing; and secondly, that it lacks the averments necessary to sustain a cause of action. Relying on *Living Hands (Pty) Ltd and Another v Ditz and Others*,⁶ counsel emphasised that, when considering an exception that a pleading discloses no cause of action, the court must accept the pleaded facts as true and determine whether they sustain a recognised claim in law. Counsel further submitted that the purpose of an exception is to raise a substantive point of law capable of disposing of the matter, and not merely to exploit technical deficiencies in a pleading. In this regard, pleadings must be read as a whole, an overly technical approach should be avoided, and minor defects should, where appropriate, be remedied by a request for further particulars.

[11] The plaintiff's counsel further relied on *Merb (Pty) Ltd and Others v Matthews and Others*,⁷ where the court reaffirmed that an exception on the ground that no cause of action is disclosed can succeed only if, on every reasonable interpretation of the pleading, no cause of action is made out. Counsel also referred to the distinction between *facta probanda* and *facta probantia*. As regards vagueness and embarrassment, counsel submitted, with reference to *Merb*, that the excipient must establish both that the pleading is

⁵ 1993 (3) SA 264 (A).

⁶ 2013 (2) SA 368 (GSJ).

⁷ (2020/15069) [2021] ZAGPJHC 693 (16 November 2021).

vague, ambiguous or capable of more than one meaning, and that such vagueness causes prejudice by impairing the excipient's ability to plead properly.

[12] Counsel for the plaintiff further submitted that it is well established that an excipient bears the onus of demonstrating that no cause of action is disclosed on any reasonable construction of the pleading.⁸ Counsel also contended that an exception based on vagueness and embarrassment cannot succeed unless the excipient establishes serious prejudice.⁹ Reliance was further placed on *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)*¹⁰ and *Constantaras v BCE Foodservice Equipment (Pty) Ltd*¹¹ for the proposition that the upholding of an exception will not ordinarily dispose of the action, as the pleader may, in appropriate circumstances, be afforded an opportunity to amend the defective pleading.

[13] The plaintiff's counsel accepted that Rule 18(4) requires a pleading to contain a clear and concise statement of the material facts relied upon, pleaded with sufficient particularity to enable the opposing party to answer thereto. In support of this submission, counsel relied on *McKenzie v Farmers' Co-operative Meat Industries Ltd*¹² where the Appellate Division explained that a cause of action comprises every fact which a plaintiff must prove, if disputed, in order to obtain judgment. Counsel accordingly submitted that a

⁸ While relying on *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) and *Pete's Warehousing & Sales CC v Bowsink Investments CC* 2000 (3) SA 833 (E).

⁹ With reference to *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) and *Barloworld Logistics Africa (Pty) Ltd v Ford* 2019 (5) SA 133 (GJ).

¹⁰ 1993 (2) SA 593 (A).

¹¹ 2007 (6) SA 338 (SCA).

¹² 1922 AD 16.

pleading must allege all material facts necessary to sustain the claim, but not the evidence by which those facts are to be proved.

[14] Plaintiff's counsel further submitted that, in determining an exception, a court must accept the pleaded facts as true unless they are manifestly untenable, relying on *Marney v Watson*¹³ and *Voget v Kleynhans*.¹⁴ Counsel also referred to *Trope*¹⁵ for the principle that an exception based on vagueness and embarrassment is directed at the manner in which a cause of action is pleaded rather than its legal validity.

[15] Counsel for the plaintiff concluded that the ultimate consideration is whether the impugned pleading causes prejudice to the excipient. In that regard, reliance was placed on *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another*,¹⁶ where counsel is claiming this Division recognised prejudice as the decisive factor in determining whether an exception should be upheld.

Arguments regarding exceptions one to four and six

[16] Regarding the first exception, the Deloitte defendants contended that the particulars of claim, read as a whole, do not comply with Rules 18(3) and 18(4). They argued that the pleadings are difficult to follow, lack a coherent narrative and fail to identify clearly the case that the defendants are required to meet. Their counsel argued that the plaintiff advances mutually destructive versions regarding who instituted or instigated the criminal prosecution. In

¹³ 1978 (4) SA 140 (C).

¹⁴ 2003 (2) SA 148 (C).

¹⁵ Above fn 5.

¹⁶ 2010 (1) SA 627 (WCC).

paragraph 9 of the particulars of claim, the plaintiff alleges that the prosecution was instigated by the Premier's Office or the Western Cape Department of Economic Development and Tourism ("DEDAT"); in paragraph 36 he refers to the National Prosecuting Authority ("NPA") or the Director of Public Prosecutions ("DPP") instituting and prosecuting the criminal proceedings; and in paragraph 37 he alleges that 'the Defendant' instituted or instigated the proceedings. According to the Deloitte defendants, these three different versions cannot stand together and render the cause of action legally defective.

[17] The Deloitte defendants further complained that paragraphs 10 to 35 consist largely of a summary and criticism of evidence led in the criminal proceedings, rather than a pleading of the material facts required to sustain a cause of action. Counsel contends that the plaintiff has impermissibly pleaded *facta probantia* rather than *facta probanda*. In support of this submission, reliance is placed on *Du Toit NO and Others v Steinhoff International Holdings (Pty) Ltd and Others and a Related Matter*,¹⁷ where this Division affirmed that a plaintiff is required to plead the material facts necessary to sustain each essential element of the cause of action relied upon, and not the evidence by which those facts will ultimately be proved.

[18] The Deloitte defendants argued that the plaintiff had failed to set out a coherent factual foundation for the claims advanced against them. Their counsel submitted that they are unable meaningfully to plead to what amounts, in substance, to the plaintiff's commentary on the evidence rather than a concise statement of the material facts relied upon. Counsel further contended

¹⁷ [2020] 1 All SA 142 (WCC).

that the particulars do not make clear which of the two Deloitte defendants is alleged to have engaged in the conduct complained of. For these reasons, their council submit that the particulars of claim disclose no cause of action and are, in any event, vague and embarrassing.

[19] Counsel for the plaintiff disagreed. He argued that the particulars of claim, read as a whole, comply with Rule 18(4) by setting out clearly and concisely the material facts upon which the plaintiff relies. It was argued that paragraph 8 identifies the basis upon which the defendants are alleged to be liable, while paragraphs 9, 36 and 37, read with paragraphs 10 to 35, disclose a recognisable common-law claim for malicious prosecution. Accordingly, counsel contended that the particulars of claim disclose a cognisable cause of action and are neither vague nor embarrassing.

[20] The second exception concerns the plaintiff's use of undefined references throughout the particulars of claim. The Deloitte defendants' counsel pointed to numerous paragraphs (that is, paragraphs 10.4.3; 10.4.7; 13; 14; 15; 17; 19; 21; 22; 23; 25; 26; and 27) in which reference was made to "our client" without any explanation of who that person is. In addition, paragraph 17 refers to "accused 1 and 2" without identifying either individual. Counsel argued that it is impossible to determine whether "our client" refers to one of those accused persons, both of them, the plaintiff himself, or some other person. As a result, the defendants submit that the pleading lacks the precision required of a proper pleading and that they cannot identify the factual allegations to which they are expected to respond. The uncertainty is said to render the particulars vague and embarrassing and incapable of sustaining a proper cause of action.

[21] In relation to the second exception, counsel for the plaintiff submitted that the complaint has been rendered moot by his notice of intention to amend the particulars of claim. The amendment will replace the words “our client” with “the plaintiff” and “Accused 1 and 2” with “the plaintiff and Dale Peter Millar”. Counsel accordingly contended that the basis for the second exception no longer exists and that it should therefore be dismissed.

[22] The third exception is directed specifically at the malicious prosecution claim. The Deloitte defendants contended that the particulars of claim fail to plead the facts necessary to establish that Deloitte, rather than DEDAT, the Premier’s Office, the NPA or the DPP, instituted or instigated the prosecution. The plaintiff alleges that Deloitte prepared reports and affidavits, but the Deloitte defendants argue that the plaintiff does not explain how the preparation of those documents amounted to the institution or instigation of criminal proceedings.

[23] Counsel for the Deloitte defendants further asserted that the pleading fails to allege, with sufficient particularity, how Deloitte ‘set the law in motion’, ‘acted without reasonable and probable cause’, or acted with ‘malice or *animo injuriandi*’. Relying on *Holden v Assmang Ltd*,¹⁸ counsel submitted that those are essential elements of a claim for malicious prosecution and must be properly pleaded. On that basis, counsel submitted that the particulars of claim do not contain the necessary averments to sustain a cause of action.

[24] In response to the third exception, counsel for the plaintiff in contrast argued that the Deloitte defendants had failed to identify a proper basis for

¹⁸ 2021 (6) SA 345 (SCA).

contending that the particulars of claim do not disclose how the Deloitte defendants allegedly instigated or procured the criminal prosecution. Counsel argued that paragraphs 3 to 36 of the particulars of claim, read cumulatively, allege the facts upon which the plaintiff relies, and in particular that paragraphs 34 to 36 expressly aver that Deloitte, through its employees, provided false, unverified and unsubstantiated information to the police and prosecuting authorities, thereby causing or instigating the criminal proceedings against the plaintiff.

[25] Plaintiff's counsel further argued that the cumulative effect of these allegations falls to be assessed by the trial court when determining the merits of the action. On that basis, it was contended that the particulars of claim contain the necessary averments to sustain a cause of action for malicious prosecution and are neither vague nor embarrassing.

[26] The fourth exception concerns the plaintiff's alleged failure to distinguish between the conduct of the various actors involved. Counsel for the Deloitte defendants argued that the particulars of claim impermissibly conflate the roles of Deloitte, DEDAT, the Premier's Office, the NPA, the DPP and the South African Police Service. According to the defendants, the plaintiff does not identify which acts are attributed to which party and does not explain the legal basis upon which the Deloitte defendants can be held liable for conduct allegedly committed by organs of state or public officials.

[27] Thus, the plaintiff has failed to plead a recognisable cause of action against the Deloitte defendants. Alternatively, even if a cause of action could be discerned, the allegations were contradictory and uncertain, rendering the particulars vague and embarrassing. In support of this contention, counsel

relies on *EOH Mthombo (Pty) Ltd v Clarke and Others*,¹⁹ where the court held that a pleading is vague if it is incapable of conveying a clear, single meaning. Counsel again referred to *Trope*²⁰ where contradictory allegations were recognised as being inherently vague and embarrassing.

[28] In response to the fourth exception, counsel for the plaintiff submitted that the Deloitte defendants had failed to identify clearly the basis upon which it is alleged that the particulars of claim do not specify the conduct attributed to them or the legal basis for their liability. Counsel argued that paragraphs 3 to 6 of the particulars of claim set out the relevant conduct of the defendants' employees and that the claim is founded on the defendants' own alleged wrongdoing through those employees, rather than on any alleged liability for the conduct of state officials.

[29] Plaintiff's counsel further contended that the particulars of claim adequately plead the factual basis for the claim and that the defendants' exception does not comply with Rule 23(3) in failing to set out clear and concise grounds for the complaint. Accordingly, it was submitted that the particulars of claim disclose a cause of action and are neither vague nor embarrassing.

[30] As the fifth exception was abandoned, the sixth exception is the only remaining exception for determination. It concerns the plaintiff's claim for damages arising from alleged psychological harm. The Deloitte defendants

¹⁹ [2023] JOL 61834 (GP).

²⁰ Above fn 5.

note that, although the plaintiff alleges in paragraph 44 that he suffers from various psychological disorders, he does not identify those disorders.

[31] The Deloitte defendants contend that this lack of particularity renders the claim vague and embarrassing, as they are unable to assess the nature of the alleged injuries or plead meaningfully thereto. They accordingly submit that the sixth exception should be upheld.

[32] In response to the sixth exception, the plaintiff's counsel submitted that the complaint will be cured by the notice of intention to amend the particulars of claim. The proposed amendment provides further detail regarding the psychological disorders allegedly suffered by the plaintiff and the future medical expenses claimed. Counsel accordingly contended that the sixth exception should thus be dismissed.

Arguments on striking out

[33] The Deloitte defendants also seek to strike out a number of passages from the particulars of claim on the basis that they contain argument, rhetoric, opinion and evidence rather than material facts. They contend that these passages are irrelevant to the issues in dispute and prejudice the Deloitte defendants because they cannot meaningfully plead thereto. The Deloitte defendants accordingly sought orders upholding the exceptions and striking out the offending passages from the particulars of claim.

[34] Counsel for the Deloitte defendants relied on *Flentov v Trappler and Others*,²¹ where Lekhuleni J summarised the principles applicable to

²¹ (16925/2021) [2023] ZAWCHC 18 (6 February 2023).

applications to strike out. Lekhuleni J held that scandalous, vexatious or irrelevant allegations may be struck out, particularly where they contain damaging and unsubstantiated assertions. However, the power to strike out is discretionary, and the decisive consideration is whether the impugned allegations cause prejudice to the applicant. Counsel further emphasised the court's statement that, for purposes of Rule 23, matter is irrelevant only if it is unrelated to an issue arising on the pleadings. The enquiry is whether the allegations sought to be struck out are relevant to the issues in dispute, and where there is doubt as to relevance, the matter should not be struck out.

[35] In particular, the Deloitte defendants seek to strike out the remainder of paragraph 11.10 after the first sentence as being argumentative and irrelevant, and part of paragraph 15 as being vexatious and irrelevant. The Deloitte defendants further seek to strike out paragraph 19, paragraphs 20 to 26 in their entirety, paragraphs 27 to 35 in their entirety, and paragraph 40.3.1. Counsel contends that these paragraphs consist largely of a narration and criticism of evidence arising from the criminal proceedings, together with legal argument and commentary. According to the defendants, the plaintiff has pleaded evidence rather than the material facts necessary to sustain the causes of action, with the result that the paragraphs are irrelevant and embarrassing and ought to be removed from the pleading.

[36] In response to the striking-out application, counsel for the plaintiff submitted that the allegations following the first sentence of paragraph 11.10 are historical facts relevant to the criminal proceedings instituted against the plaintiff. Counsel argued that the allegations are neither argumentative nor irrelevant and accordingly do not constitute matter that falls to be struck out.

Counsel for the plaintiff submitted that the allegation that Mr Nigel Holmes was found by the criminal court to be an unreliable and untruthful witness who twisted and lied about the facts is based on a specific judicial finding and is therefore neither fictitious nor scandalous in paragraph 15. Plaintiff's counsel further argued that the allegation is directly relevant to the plaintiff's claim for malicious prosecution, particularly the element of *animus iniuriandi*, and should accordingly not be struck out.

[37] Counsel for the plaintiff submitted that paragraph 19, read together with paragraphs 20 to 26 of the particulars of claim, forms part of the historical and factual background to the plaintiff's claim for malicious prosecution. These allegations are said to be relevant to the issues in dispute and supportive of the cause of action pleaded against the Deloitte defendants. Counsel accordingly contended that the Deloitte defendants' characterisation of the allegations as rhetorical, evidential, argumentative and irrelevant is unfounded, and that their relevance and weight are matters to be determined by the trial court rather than on a striking-out application.

[38] Counsel for the plaintiff submitted that paragraphs 27 to 35 also contain historical facts relevant to the claim for malicious prosecution. It was further contended that the Deloitte defendants have failed to demonstrate any prejudice arising from those allegations remaining in the particulars of claim, with the result that there is no basis for striking them out. Counsel for the plaintiff submitted that paragraph 40.3.1 is directly relevant to the plaintiff's claim for future loss of income and the damages allegedly suffered, including harm to his reputation. It was further contended that the defendants have failed

to demonstrate any prejudice arising from the allegation remaining in the particulars of claim, and accordingly there is no basis for it to be struck out.

[39] In conclusion, counsel for the plaintiff submitted that the impugned allegations are neither scandalous, vexatious nor irrelevant. Read in the context of the particulars of claim as a whole, they are relevant to the plaintiff's claim and capable of proof at trial. Counsel further contended that the Deloitte defendants have failed to demonstrate any prejudice arising from the allegations remaining in the pleading. Accordingly, the striking-out application should be dismissed.

[40] The Deloitte defendant's counsel relied on *Du Toit v Du Toit*²² in support of the striking-out application, submitting that this Court should remove matter which is irrelevant, argumentative, vexatious or otherwise inappropriate to a pleading. Counsel argued that large portions of the particulars of claim constitute legal argument, opinion and evidential narrative rather than material facts and should therefore be struck out.

[41] Counsel for the plaintiff disagreed, and in contrast submitted that Rule 23(2) confers a discretion on the court to strike out scandalous, vexatious or irrelevant matter, but only where the impugned allegations cause prejudice to the applicant.²³ Counsel further focused on the definitions of scandalous, vexatious and irrelevant matter, and submitted that relevance must be assessed with reference to the issues raised on the pleadings. In this regard, reliance was placed on *Meintjes v Wallachs Ltd*,²⁴ where the court held that allegations

²² 1958 (2) SA 354 (N) at 356C-F.

²³ Reliance was placed on *Titty's Bar & Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T) and *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm).

²⁴ 1913 TPD 278.

should not be struck out if they are relevant to an issue to be determined, even if their truth remains to be established at trial.

[42] Plaintiff's counsel also relied on *Golding v Torch Printing and Publishing Co (Pty) Ltd*²⁵ and *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*²⁶ for the principle that allegations cannot be regarded as irrelevant where evidence in support thereof would be admissible at trial. Finally, counsel submitted that the decisive consideration remains prejudice and that a striking-out application should not succeed unless the applicant demonstrates prejudice in the conduct of its defence.

Issues for determination

[43] The primary issue is whether the plaintiff's particulars of claim disclose a valid cause of action against the Deloitte defendants. In deciding that question, this Court must determine whether the pleading contains the material factual averments necessary to sustain a recognised claim in law, accepting the pleaded facts as true. If it does not, the particulars of claim are excipiable and the exceptions must be upheld.

[44] However, if this Court finds that a cause of action has been pleaded, it must then determine whether the particulars of claim are vague and embarrassing. The question is whether the allegations are pleaded with sufficient clarity and particularity to enable the Deloitte defendants to understand the case against them and plead thereto.

²⁵ 1948 (3) SA 1067 (C).

²⁶ 2006 (6) SA 68 (C).

[45] A further issue is whether substantial portions of the particulars of claim constitute matter that ought not properly to appear in a pleading. This Court must therefore consider whether the impugned passages amount to legal argument, evidentiary material, personal opinion, vexatious allegations or other irrelevant matter, rather than concise statements of the material facts upon which the plaintiff seeks to rely.

[46] Finally, this Court must determine whether the Deloitte defendants have established a proper basis, in terms of Rule 23, for the relief sought. That entails deciding whether the exceptions should be upheld, whether the impugned passages should be struck out, and what consequential order should follow in relation to the plaintiff's particulars of claim.

Applicable legal principles and discussion

Rule 23(1): Exceptions

[47] Rule 23(1) permits an exception to be taken to a pleading on the grounds that it is vague and embarrassing or that it lacks the averments necessary to sustain a cause of action or defence. The purpose of an exception is not to exploit technical deficiencies in a pleading but to raise a substantive issue of law which, if upheld, may dispose of the matter or a portion thereof.

[48] The principles applicable to exceptions are well established. In *Living Hands*, Makgoka J summarised the applicable approach.²⁷ In considering an

²⁷ *Living* above fn 6 at para 15.

exception that a pleading discloses no cause of action, the court must accept the pleaded facts as true and determine whether, on those facts, a recognised claim in law is disclosed. Pleadings must be read as a whole and not in a piecemeal fashion. An overly technical approach is to be avoided, as it undermines the utility of the exception procedure as a mechanism for disposing of legally unsustainable claims.

[49] In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* the SCA stressed that exceptions should be dealt with sensibly and not in an over-technical manner.²⁸ An excipient bears the onus of showing that upon every reasonable interpretation which the pleading can bear, no cause of action is disclosed.²⁹ The material facts which must be pleaded are the *facta probanda* and not the *facta probantia*. The classic definition of a cause of action remains that set out in *McKenzie*, namely every fact which must be proved to sustain a right to judgment.³⁰

[50] Where an exception is taken on the ground that a pleading is vague and embarrassing, a different enquiry arises. In *Trope* the Appellate Division held that such an exception is directed at the formulation of the cause of action rather than its legal validity.³¹ The accepted test was articulated in *Jowell v Bramwell-Jones and Others*.³² The court must first determine whether the pleading is vague, in the sense that it is ambiguous, contradictory, meaningless or capable of more than one reasonable interpretation. If so, the court must then determine whether the vagueness causes prejudice to the

²⁸ 2006 (1) SA 461 (SCA) at para 3.

²⁹ This principle finds further support in *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 183E-F.

³⁰ *McKenzie* above fn 12 at 23.

³¹ *Trope* above fn 5 at 269I-270E.

³² 1998 (1) SA 836 (W) at 902I-903A.

excipient by preventing a proper response to the pleading. In my view, prejudice is indeed the decisive consideration and an exception founded on vagueness and embarrassment will not succeed unless the excipient demonstrates prejudice of a degree that impairs its ability properly to plead or prepare its case. However, *Hunkydory*,³³ in my view, is not authority for that proposition as was advanced by plaintiff's counsel. That decision concerned summary judgment proceedings and did not deal directly with the role of prejudice in determining an exception.

Rule 23(2): Applications to strike out

[51] Rule 23(2) provides for the striking out of matter in a pleading that is scandalous, vexatious or irrelevant. Unlike an exception, which attacks the legal sufficiency or formulation of a cause of action, a striking-out application is directed at particular allegations contained in a pleading.

[52] The power to strike out is discretionary. Even where matter falls within one of the categories contemplated by the rule, a court is not obliged to strike it out.³⁴ The exercise of the power remains a matter for judicial discretion.

[53] The generally accepted definitions of scandalous, vexatious and irrelevant matter were stated in *Vaatz*.³⁵ Scandalous matter is matter that is abusive or defamatory; vexatious matter is matter intended to harass or annoy; and irrelevant matter is matter unrelated to the issues requiring determination in the proceedings. In determining relevance, the pleading must be considered

³³ *Hunkydory* above fn 16.

³⁴ In *Titty's Bar* above fn 23 at 368F-H.

³⁵ *Vaatz* above fn 23 at 566C-E.

as a whole. In *Meintjes*,³⁶ it was held that allegations should not be struck out if they are relevant to an issue to be determined, even though the party relying on them may ultimately fail to prove them. Similarly, in *Golding* the court held that matter will generally not be regarded as irrelevant where evidence in support thereof would be admissible at trial.³⁷ A court should therefore be slow to strike out allegations where their relevance is arguable or where they form part of the factual matrix underlying the claim.

[54] Most importantly, prejudice remains the cornerstone of a striking-out application. In *Living* the court held that scandalous, vexatious or irrelevant matter should only be struck out where the applicant will be prejudiced if the offending material remains.³⁸ The same principle was endorsed in this Division in *Flentov*, where my brother Lekhuleni J stressed that the ‘key consideration is that of prejudice’.³⁹ Matter should not be struck out simply because it is objectionable; the applicant must show that allowing it to remain will cause identifiable prejudice.

[55] More recently, in *Du Plessis NO and Others v Standard Bank of SA Ltd and Others*,⁴⁰ a full court in this Division reaffirmed that the court’s power to strike out objectionable matter is a discretionary one. The full court further considered the nature of scandalous, vexatious and irrelevant matter within the context of Rule 6(15), observing that the enquiry is directed at the

³⁶ *Meintjes* above fn 24 at 285-286.

³⁷ *Golding* above fn 25 at 1090.

³⁸ *Living* above fn 6 at para 76.

³⁹ *Flentov* above fn 21 at para 7.

⁴⁰ (A262/2025) [2026] ZAWCHC 10 (20 January 2026).

character of the impugned allegations and their relevance to the issues before the court.⁴¹

Assessing prejudice

[56] The distinction between Rule 23(1) and Rule 23(2) is therefore clear. An exception under Rule 23(1) is concerned with whether a cause of action or defence is legally sustainable or sufficiently pleaded. A striking-out application under Rule 23(2) is concerned with whether particular allegations are scandalous, vexatious or irrelevant and whether their continued presence in the pleading causes prejudice to the opposing party. In both exceptions and striking-out applications, prejudice is often the decisive consideration, but the nature of the prejudice differs depending on the remedy sought.

[57] In relation to a pleading alleged to be vague and embarrassing, the prejudice enquiry is whether the impugned pleading is so unclear, contradictory, ambiguous or lacking in particularity that the excipient cannot reasonably be expected to plead to it.

[58] In *Jowell* the court explained that after establishing vagueness, the court must determine whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced in pleading.⁴² The prejudice must be serious and practical, not merely technical. Similarly, in *Trope* the Appellate Division held that the enquiry is directed at the formulation of the case and whether the excipient can ascertain with sufficient certainty the case it is required to

⁴¹ (A262/2025) [2026] ZAWCHC 10 (20 January 2026) at paras 44 and 50.

⁴² *Jowell* above fn 32 at 902I-903A.

meet.⁴³ The question is therefore whether the excipient can ascertain with sufficient certainty the case it is required to meet and plead thereto. If the pleading is sufficiently clear to enable the formulation of a meaningful plea, an exception based on vagueness and embarrassment will not succeed. By contrast, where the complaint is that no cause of action is disclosed, the primary enquiry is not prejudice but whether the pleading contains the material averments necessary to sustain a recognised cause of action in law. Absent such averments, the pleading is excipiable irrespective of whether prejudice can be shown.

[59] In applications to strike out, the decisive consideration is whether the impugned allegations cause prejudice to the opposing party. Scandalous, vexatious or irrelevant matter will not be struck out merely because it is objectionable; the applicant must demonstrate identifiable prejudice if the allegations are allowed to remain. At the same time, courts adopt a practical rather than technical approach and will be slow to uphold exceptions or striking-out applications based on purely formal defects. The ultimate enquiry is whether the impugned matter prejudices the fair and proper determination of the issues between the parties.

[60] The authorities demonstrate that prejudice, for purposes of Rule 23, must be real and practical rather than speculative or technical. Prejudice may arise where a party is required to plead to allegations that are so unclear, ambiguous or contradictory that a meaningful response cannot reasonably be formulated, or where the pleading fails to identify the case to be met with

⁴³ *Trope* above fn 5 at 269I-270E.

sufficient particularity. In the context of a striking-out application, prejudice may also result from the inclusion of scandalous allegations that unnecessarily impugn a party's reputation, or from irrelevant matter that expands the issues, increases costs, and requires a party to answer allegations unrelated to any issue in dispute. Conversely, courts have consistently held that mere irritation or annoyance does not constitute prejudice, nor does the fact that allegations are evidential in nature or may ultimately prove to be incorrect. Where the relevance of allegations is reasonably arguable, the matter should ordinarily be left for determination at trial rather than struck out at the interlocutory stage.⁴⁴

[61] The decisive consideration, both in an exception based on vagueness and embarrassment and in an application to strike out under Rule 23(2), is whether the impugned pleading causes prejudice to the excipient or applicant. Such prejudice must be real and substantial. In the case of a vague and embarrassing pleading, the prejudice lies in the inability properly to identify the case to be met and to plead thereto. In the case of a striking-out application, the prejudice lies in the adverse effect occasioned by the continued presence of scandalous, vexatious or irrelevant matter in the pleading. Mere technical objections or dissatisfaction with the manner in which a case has been pleaded will not suffice.

Application to the facts before this court

[62] I agree with the Deloitte defendants' counsel that the plaintiff's particulars of claim are excipiable. On a proper reading thereof, the pleading

⁴⁴ See *Meintjes* above fn 24 at 285-286; *Golding* above fn 25 at 1090; *Living* above fn 6 at para 76; and *Flentov* above fn 21 at para 7.

is deficient in material respects. It does not clearly and coherently set out the factual basis upon which liability is attributed to the Deloitte defendants and, at times, is both vague and embarrassing. Indeed, I found it necessary to read the particulars of claim repeatedly in an attempt to ascertain precisely who was alleged to have instituted or instigated the criminal proceedings against the plaintiff and what role each of the various individuals and entities was alleged to have played.

[63] The particulars of claim are characterised by substantial portions of evidential matter, commentary, opinion and argument rather than concise allegations of material fact. Regrettably, the pleading is replete with *facta probantia* instead of *facta probanda*. It lacks the precision and clarity required by the Uniform Rules and fails adequately to identify the material facts upon which the plaintiff relies. Material allegations are pleaded in a manner which is ambiguous, imprecise and, in some instances, contradictory. The result is a pleading that does not define the issues with the degree of certainty required of proper pleadings.

[64] While pleadings may include sufficient historical background to enable the opposing party to understand and answer the case it is required to meet, they are not intended to serve as a repository of evidence.⁴⁵ The difficulty arises when what is presented as background is, in truth, *facta probantia* rather than *facta probanda*. A pleading should set out the material facts upon which the claim is founded, not the evidence by which those facts are to be proved

⁴⁵ For a similar view, see *Myburg, Krone en Kompagnie Bpkt (in liquidation) v Ko-operatiewe Wijnbouwers Vereniging van Zuid-Afrika Bpkt* 1923 CPD 389 and *Secretary For Finance Esselmann* 1988 (1) SA 594 (SWA) at 596H and cited in Van D E Van Loggerenberg *Erasmus: Superior Court Practice* Volume 2, Second Edition (loose-leaf) Service 29, 2026 at page D1 Rule 18–8A.

at trial. When evidential detail, commentary and argument supplant concise allegations of material fact, the issues become obscured and the opposing party is deprived of a fair opportunity to plead meaningfully thereto.

[65] Whether a pleading contains sufficient particularity depends on the circumstances of each case. The test is whether it defines the issues with enough clarity to enable the opposing party to know the case it must meet. Thus, a plaintiff relying on a complex contract may need to identify the relevant contractual provisions, while a plaintiff relying on delict must plead the material facts establishing the elements of the delict.⁴⁶

[66] Plaintiff's counsel correctly submitted that an exception may be founded either on the ground that a pleading is vague and embarrassing or on the ground that it lacks the averments necessary to sustain a cause of action. Counsel was also correct in submitting that a court must read a pleading as a whole, avoid an unduly technical approach, and, when considering an exception that no cause of action has been disclosed, accept the pleaded facts as true for purposes of determining whether they sustain a recognised claim in law.

[67] Those principles are uncontroversial. The difficulty for the plaintiff is that the defects identified by the Deloitte defendants are neither technical nor inconsequential. They go to the heart of the pleading. The particulars of claim fail, with sufficient clarity and precision, to set out the material facts necessary to sustain the causes of action relied upon. The pleading contains confusing references to various persons and entities, uncertainty regarding the basis

⁴⁶ See *Erasmus* above fn 45 at page D1 Rule 18–11 and the authorities relied upon.

upon which liability is attributed to the Deloitte defendants, and insufficient particularity concerning aspects of the plaintiff's alleged damages, including his psychological injuries. The cumulative effect of these deficiencies is that the particulars of claim are capable of more than one interpretation and do not enable the Deloitte defendants to ascertain with certainty the case they are required to meet.

[68] The Deloitte defendants, as excipients, bear the onus of establishing the defects complained of and, where relevant, the prejudice resulting therefrom.⁴⁷ An exception will succeed only if the excipient shows that, on every reasonable interpretation, the pleading discloses no cause of action or defence.⁴⁸ Its purpose is to dispose of legally unsustainable cases at an early stage and to prevent serious prejudice arising from defective pleadings.⁴⁹ In my view, the Deloitte defendants have discharged that onus. The lack of clarity and precision in the particulars of claim prevents the Deloitte defendants from delivering a meaningful plea and from properly identifying the issues requiring adjudication. Given that damages in excess of R38 million are claimed, the prejudice occasioned by requiring the Deloitte defendants to plead to the particulars of claim in their present form is manifest. To do so would undermine one of the primary purposes of pleadings, namely the proper definition of the issues between the parties.

[69] While it is so that pleaded facts must ordinarily be accepted as true for purposes of deciding an exception, that principle presupposes the existence of a coherent and intelligible pleading. In the present matter, the allegations are

⁴⁷See *Erasmus* above fn 45 at page D1 Rule 23–7 and the authorities relied upon.

⁴⁸ See *Erasmus* above fn 45 at page D1 Rule 23–5 and the authorities relied upon.

⁴⁹ Ibid.

pleaded in such an inaccurate, diffuse and confusing manner that the factual basis of the plaintiff's case cannot readily be discerned. The difficulty is not that the pleaded facts are improbable; rather, it is that the material facts are obscured by a mass of evidential material, argument and irrelevant matter. In these circumstances, the pleading fails to comply with the requirements of Rules 18 and 23. This difficulty was underscored by the plaintiff's counsel's own submissions, particularly in relation to the third exception, where it was effectively acknowledged that the Deloitte defendants were required to wade through numerous scattered paragraphs in order to ascertain the substance of the case sought to be pleaded. That is precisely the mischief which the rules governing pleadings are intended to prevent.

[70] In my view, the plaintiff was afforded an opportunity to remove the causes of complaint identified by the Deloitte defendants, but elected not to do so. Although a notice of intention to amend was subsequently delivered just before this Court heard the matter, it will not meaningfully address the bulk of the defects raised in the exceptions and striking-out application. Had the particulars of claim been properly amended when those complaints were first raised, much of the present litigation may well have been avoided. Litigation is costly and court resources are limited. Courts should not be required to comb through lengthy and convoluted pleadings in an attempt to distinguish material averments from evidential matter. Parties are entitled to pleadings drafted with the degree of care, precision and accuracy expected of legal practitioners, particularly where claims of considerable magnitude are involved. The numerous inaccuracies and misdescriptions contained in the particulars of claim cannot, in my view, be dismissed as mere typographical

errors. They reflect a lack of precision that has contributed materially to the present difficulties.

[71] The plaintiff's notice of intention to amend the particulars of claim proposes to include the insertion and deletion of certain words, the addition of new allegations and the removal of a number of existing paragraphs. However, few, if any, of the proposed amendments are directed at the substantive complaints advanced by the Deloitte defendants. At best for the plaintiff, the proposed amendments appear to address only limited aspects of the second and sixth exceptions. While some of the proposed insertions may provide greater clarity to certain allegations and render parts of the pleaded cause of action more readily understandable, they do not materially address the principal grounds upon which the exceptions are founded.

[72] In any event, the proposed amendment is not presently before this Court. The exceptions must be determined on the basis of the particulars of claim as they stand. A court assesses the excipiability of a pleading with reference to the pleading before it and not by reference to proposed amendments which have yet to be effected or adjudicated upon. The notice of intention to amend therefore does not alter the outcome of the present proceedings.

[73] The defects raised in the first, second, third, fourth and sixth exceptions remain extant in the particulars of claim presently before the Court. Accordingly, the proposed amendments provide no basis for refusing the relief sought by the Deloitte defendants. In the result, those exceptions fall to be upheld.

[74] The Deloitte defendants also rely on Rule 23(2), which permits the striking out of scandalous, vexatious or irrelevant matter where prejudice would result if such matter were allowed to remain. As already noted, *Flentov*⁵⁰ confirms that prejudice is the decisive consideration and that only matter unrelated to an issue arising on the pleadings is liable to be struck out. Where doubt exists as to relevance, the matter should ordinarily remain.

[75] Applying those principles, I am satisfied that the requirements for striking out have been established. Save for paragraphs 34 and 35, there is, in my view, no genuine doubt regarding the irrelevance and prejudicial nature of the impugned allegations. The passages complained of consist largely of legal argument, evidential material, opinion and other allegations which do not properly belong in particulars of claim and which serve no legitimate purpose in defining the issues for determination by the court. The application to strike out must therefore substantially succeed.

Costs

[76] Counsel for the Deloitte defendants submitted that the defendants had made out a proper case for both the exceptions and the application to strike out. He argued that, despite being afforded an opportunity to cure the defects in the particulars of claim, the plaintiff failed to do so. Counsel further contended that the excipiable and impugned allegations prejudice the Deloitte defendants' ability to plead meaningfully and accordingly sought that the relief be granted, together with a punitive costs order on the attorney and client scale, including the costs of senior counsel.

⁵⁰ *Flentov* above fn 21.

[77] The award of costs is a matter within the discretion of the court. A punitive costs order is warranted where a litigant's conduct merits the court's disapproval and has unnecessarily increased the costs of the litigation.⁵¹ In the present matter, the plaintiff was afforded an opportunity to remove the causes of complaint identified by the Deloitte defendants but failed to do so. Although a notice of intention to amend was later delivered, it did not meaningfully address the majority of the defects raised in the exceptions and striking-out application. As a result, the Deloitte defendants were compelled to incur the costs of these proceedings unnecessarily.

[78] Given the serious and pervasive defects in the particulars of claim, the plaintiff's failure to remedy them when afforded the opportunity to do so, and the consequent waste of costs and court time, I am satisfied that this is an appropriate case for a punitive costs order. The plaintiff should therefore pay the Deloitte defendants' costs on the attorney and client scale, including the costs of senior counsel on Scale C.

Order

[79] The following order is made:

- 1 The first, second, third, fourth, and sixth exceptions are upheld.

⁵¹ See *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC) para 3; *Plastic Converters Association of South Africa on behalf of Members v National Union of Metalworkers of South Africa and Others* (2016) 37 ILJ 2815 (LAC) para 46; and *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) paras 9 and 97. In *In re Alluvial Creek Ltd* 1929 CPD 532 at 535, it was observed that an attorney and client costs order may also be justified where a litigant's conduct has caused the opposing party unnecessary trouble and expense which it ought not to bear.

- 2 The plaintiff is afforded a period of 10 days to amend his pleadings, if so advised.
- 3 That the following averments are struck from the plaintiff's particulars of claim:
 - 3.1 The remainder of paragraph 11.10 after the first sentence;
 - 3.2 The words in the first sentence from 'who the' to 'the case' in paragraph 15;
 - 3.3 Paragraphs 19, 20–26, 27–33 in toto;
 - 3.4 Subparagraph 40.3.1 in toto.
- 4 The plaintiff shall pay the excipients' costs on the attorney and client scale, including the costs of senior counsel on scale C.



M LOUW
ACTING JUDGE OF THE HIGH COURT

Appearances

For plaintiff: Adv G Papier
Instructed by: Roelf Jumat Attorneys Inc, Cape Town

For defendants: Adv B C Dyke SC

Instructed by: Deneys, Johannesburg c/o Deneys, Cape Town