THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case 15855/21

In the matter between:

MARK ERWIN PAULSMEIER	**Plaintiff**

and

MEDIA 24 (PTY) LTD	**First Plaintiff**
NASPER	**Second Plaintiff**
WALDIMAR PELSER	**Third Plaintiff**
GERRIT VAN ROOYEN	**Fourth Plaintiff**
ANTOINETTE SLABBERT	**Fifth Plaintiff**

Coram: Rogers J

Heard on: 12 May 2022

Delivered: 20 May 2022 (at 09h30 by email)

JUDGMENT

ROGERS J:

Introduction

[1] The defendants have excepted to the plaintiff's particulars of claim (particulars) on seven grounds. The plaintiff, who drafted the particulars himself, is Mr Mark Erwin Paulsmeier. The first to fifth defendants, in order of citation, are Media24, Naspers, Mr Waldimar Pelser, Mr Gerritt van Rooyen and Ms Antoinette Slabbert. Mr Paulsmeier claims compensatory damages of R30 billion from the defendants jointly and individually. Additionally, and save as against Naspers, he seeks punitive damages of R16.1 million, claimed from the individual defendants as follows: R10 million from Media24, R5 million from Mr Pelser, R1 million from Mr van Rooyen, and R100,000 from Ms Slabbert.

[2] Although Mr Paulsmeier drafted the particulars and written submissions opposing the exception, attorneys came on record for him in late April 2022, and he was represented by counsel at the hearing.

[3] In his written submissions, Mr Paulsmeier has set out some of the facts which will, he says, be established by evidence led to support various allegations in the particulars. I express no opinion on whether those facts, if they had been alleged in the particulars, would have neutralised any of the grounds of exception. Those facts are irrelevant to the adjudication of the exception.

[4] The defendants' exception was preceded by a notice in terms of rule 23(1) to remove the causes of complaint. Together with that notice, the defendants served a notice in terms of rule 35(12) and (14). Mr Paulsmeier delivered replies to those notices, and contends that this was done in an endeavour to remove any causes of complaint which might be justified. I do not consider that I am required to examine those replies. If the particulars are excipiable, they must be amended. I simply add that, although a supplementary bundle was handed up containing the rule 35(12) and (14) notice and replies, the documents discovered by Mr Paulsmeier in response to the notices were not included; they were attachments to a sequence of emails which Mr Paulsmeier sent to the

defendants' attorneys. Counsel for the defendants told me that the discovered documents run to more than a thousand pages.

[5] The particulars do not allege that Media24 is a subsidiary of Naspers, but counsel for the defendants was willing to argue the exception on the basis that this could be accepted as a fact. Whether Media24 is a direct or indirect subsidiary of Naspers was not mentioned.[1]

The particulars of claim

[6] Mr Paulsmeier's allegations in the particulars, which for purposes of the exception must be taken to be true, can be summarised thus. He initiated a drought relief project in South Africa under the brand name GABM to help drought-stricken farmers. The particulars mention an American company, IBDF International LLC (IBDF), but do not explain its connection, if any, with the drought project. The particulars also mention a financial instrument called the "Investment SNG Global Dollar Bearer Bond" (SNG Bond). The particulars do not explain what an SNG Bond is, but there is an allegation that 250 SNG Bonds, worth more than R1 billion, were donated to the drought project.

[7] Over the period July 2016 to May 2021, Media24 published defamatory articles about Mr Paulsmeier as part of what he styles a "fake news campaign" and "character assassination plot" directed at him, the drought project, IBDF and its divisions, and SNG Bonds. The particulars allege that the campaign and plot included eight articles, identified with reference to the newspaper or platform, author, date of publication and headline (in Afrikaans). Five were published in *Rapport*, two in *Beeld* and one on *Netwerk24.* Mr Pelser is the editor of *Rapport*. Mr van Rooyen was the journalist who wrote the first *Rapport* article.

[1] If the information in the Competition Tribunal's decision in *MIH Ecommerce Holdings (Pty) Ltd v Takealot Online (RF) (Pty) Ltd* (LM038May17) [2017] ZACT 53 at paras 3-7 remains current, it seems that Naspers holds the present first defendant, Media24 (Pty) Ltd, through an intermediate holding company, Media24 Holdings.

[8] As part of the character assassination plot, the defendants, other than Naspers, published “defamatory innuendo and statements” about Mr Paulsmeier, namely that he was a swindler, dishonest, a liar, took part in criminal activities, used the GABM brand and IBDF corporate infrastructure to operate a pyramid scheme, and lacked integrity. This was done wrongfully and with intent to injure Mr Paulsmeier

[9] As part of the fake news campaign, Media24 published “defamatory innuendo and statements” about the drought project, namely that it was a pyramid scheme, that Mr Paulsmeier was involved in the pyramid scheme, and that the drought project was a scam intended to defraud farmers rather than a genuine philanthropic project. This, too, was done wrongfully and with intent to injure Mr Paulsmeier. It violated his fundamental right to dignity and has caused him damages.

[10] As part of the fake news campaign, Media24, Mr Pelser and Mr van Rooyen, published “defamatory innuendo and statements” that IBDF and its corporate divisions were empty shells and were involved in criminal activities. This was done wrongfully and with the intent to injure Mr Paulsmeier, IBDF and the latter’s corporate divisions. This injured the good reputation of IBDF and its divisions, and caused them damages

[11] As part of the fake news campaign, Media24 and Mr Pelser alleged, in the articles previously mentioned, that SNG Bonds did not have a long-standing trading record of more than 36 years, were not credible, and did not have a sound reputation. This was done to injure CamRey Associates (CamRey). (The particulars do not contain any information about CamRey or its connection with SNG Bonds.) This injured the good reputation of SNG Bonds and “caused damages”.

[12] Media24’s fake news campaign and character assassination plot enabled and facilitated a fraud scheme that caused the misappropriation of 250 SNG Bonds worth more than R1 billion donated to the drought project. The campaign and plot also served as a mechanism to cover up the fraud

scheme: through the creation of confusion and distrust in Mr Paulsmeier and IBDF, enquiries about the fraud scheme were quashed and diverted.

[13] In December 2017, IBDF engaged Callister International's corporate security division (Callister) to investigate the fraud scheme. Callister issued its report in December 2020. The report was provided to Media24 and Naspers. The report alleged that Media24, Mr Pelser and Mr van Rooyen had a direct involvement in the misappropriation of the 250 SNG Bonds; and that the fake news campaign and character assassination plot were key to the misappropriation of the 250 SNG Bonds.

[14] The defendants do not have evidence to support their false and defamatory statements. The publication of the statements is not in the public interest, was not fair or just, and was malicious. The eight articles do not meet the standards or requirements of the SA Press Council.

[15] The first to fourth defendants were notified that the articles were false and defamatory and were causing reputational damage and financial loss to Mr Paulsmeier and IBDF. The first to third defendants were offered direct access to IBDF's records in order to get correct information about Mr Paulsmeier and IBDF, but they irrationally ignored or declined the offers. The first to fourth defendants have ignored many requests from Mr Paulsmeier and third parties to revise or retract the articles.

[16] Media24 and Naspers were notified that the drought project was Mr Paulsmeier's private initiative and that he would, "in terms of Rule 6 of the IBDF Management Rules and Regulatory Code" (Code), be held financially responsible for the defendants' wrongful actions if these defendants failed to resolve the fake news campaign and character assassination plot with IBDF. The latter made a fair and reasonable proposal to Media24 and Naspers to resolve the matter, but they irrationally ignored or declined it.

[17] The defendants' wrongful conduct, and their refusal to revise or retract, caused the termination of Mr Paulsmeier's membership, association and

contracts with IBDF. The defendants' conduct also caused significant reputational damage and financial losses to IBDF, the cancellation of "the $20 billion IBDF Africa Expansion Project", significant damage to the South African economy, a loss to the South African Revenue Service (SARS) of billions of rands in tax, and the freezing of at least another R1 billion in foreign donations facilitated by Mr Paulsmeier for the benefit of drought-stricken farmers in this country.

[18] As a result of all of this, IBDF on 15 June 2021 debited Mr Paulsmeier's "personal SNG Global Dollar account" with the amount of R30 billion as compensation for IBDF's financial losses. This has caused Mr Paulsmeier to suffer damages in a like amount, for which compensatory damages the defendants are jointly and individually liable.

[19] Additionally, and having regard to the violation by the defendants (other than Naspers) of Mr Paulsmeier's fundamental right to dignity, appropriate relief includes a further sum of R16.1 million. This is "appropriate relief in terms of punitive constitutional damages", alternatively as "punitive damages … under the common law of delict developed to promote the spirit, purport and objectives of the Bill of Rights".

First ground of exception (conduct of Naspers and Mr Pelser)

[20] The first ground of exception is that the particulars contain no, alternatively insufficient, allegations of fact to sustain a cause of action against Naspers and Mr Pelser. In particular, no conduct on their part, such as would attract liability, has been alleged.

Cause of action against Naspers

[21] As mentioned earlier, counsel for the defendants was willing to argue the exception on the basis that Media24 is a subsidiary of Naspers. The thrust of this ground of exception, in relation to Naspers, is that a holding company is a juristic person apart from the subsidiary and is not in law vicariously liable for the wrongful conduct of a subsidiary. The fact that a subsidiary has by its wrongful conduct caused damage to a claimant does

not exclude the possibility that its holding company also committed wrongful conduct which caused or contributed to the same damage. In such a case, however, the wrongful conduct of the subsidiary is not attributed to the holding company; rather, the holding company is held liable for its own wrongful conduct.

[22] The above statement of the legal position is undoubtedly correct.[2] It follows that, if the holding company is to be held liable, the claimant's pleading must allege facts to establish the holding company's separate liability. The particulars in this case fail to do so. Mr Paulsmeier does not allege that Naspers participated in the fake news campaign or character assassination plot or that it published any of the defamatory articles.

[23] The particulars allege that Naspers (among other defendants) was made aware of certain facts; was offered access to records so that it could ascertain the true position; that it irrationally and intentionally or negligently ignored requests to revise or retract; and that it refused to comply with a letter of demand from IBDF "and thereby collectively *[that is, with Media24]* approved and supported" the fake news campaign and character assassination plot. The mere fact, however, that Naspers was notified of certain facts did not, without more, impose legal duties on it to act in response to requests and demands from Mr Paulsmeier or IBDF. In the absence of further pleaded facts, Naspers as a holding company was under no legal obligation, and had no legal power, to dictate to Media24

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[2] The leading authorities on the subject in England were recently surveyed by the Supreme Court in *Vedanta Resources Plc v Lungowe* [2020] AC 1045 at paras 49-51. Lord Briggs, in delivering the Supreme Court's unanimous judgment, said the following (at para 49):

> "[T]he liability of parent companies in relation to the activities of their subsidiaries is not, of itself, a distinct category of liability in common law negligence. Direct or indirect ownership by one company of all or a majority of the shares of another company (which is the irreducible essence of a parent/subsidiary relationship) may enable the parent to take control of the management of the operations of the business or of land owned by the subsidiary, but it does not impose any duty upon the parent to do so, whether owed to the subsidiary or, a fortiori, to anyone else. Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary. All that the existence of a parent subsidiary relationship demonstrates is that the parent had such an opportunity."

and the latter's employees how they should act. Media24's business, including the operations of its publications, was under the legal control and management of Media24's board, not that of Naspers.[3]

[24] Counsel for Mr Paulsmeier did not seek to persuade me that the legal position was not as set out above. Her submission was that an exception was not the appropriate way to raise the procedural challenge. Naspers, she argued, should rather file a plea of misjoinder. I disagree. Misjoinder, in its strict sense, covers two situations. The first is where a person against whom no relief is claimed is joined by virtue of a supposed interest in the proceedings. If the person in truth has no interest in the subject matter of the proceedings, it is a misjoinder to cite that person as a defendant. The second situation is where different claims against different defendants are advanced in a single action. Some or all of the defendants may complain that it is a misjoinder to lump those claims and parties together in a single action.

[25] It is unnecessary to decide whether a challenge of misjoinder in the above senses can be raised by way of exception, though there is authority that it can.[4] Naspers' objection here is not a complaint of misjoinder in the true sense. Mr Paulsmeier is seeking relief against Naspers on the basis that it is jointly and individually liable with the other defendants to pay him R30 billion. Naspers self-evidently has a direct interest in proceedings in which a claim of R30 billion is made against it. And Naspers' complaint is not that Mr Paulsmeier's claim against it should not have been joined in the same proceedings as Mr Paulsmeier's claims against the other defendants. Naspers' complaint is that Mr Paulsmeier has not pleaded facts to disclose a cause of action against it.

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[3] *Pepkor Holdings Ltd v AJVH Holdings (Pty) Ltd; Steinhoff International Holdings NV v AJVH Holdings (Pty) Ltd* [2020] ZASCA 134; 2021 (5) SA 115 (SCA) at paras 43-4.

[4] See *Collin v Toffie* 1944 AD 456 at 466 and *Anderson v Gordik Organisation* 1960(4) SA 244 (N) at 247D, decided before the Uniform Rules of Court came into force. In *Smith v Conelect* 1987 (3) SA 689 (W) at 692D-693F and *McIndoe v Royce Shoes (Pty) Ltd* [2000] 3 All SA 19 (W) at 22e-23e, it was held that the formulation of rule 23(1) has not done away with the right of a litigant to raise misjoinder or non-joinder by way of exception, provided the objection can be sustained *ex facie* the pleading to which exception is taken, without reliance on extraneous facts.

Cause of action against Mr Pelser

[26] Counsel for the defendants submitted that the particulars do not allege that Mr Pelser was the editor of *Rapport* at the time the impugned articles were published. Although he is, in his citation, described as the editor, that means only that he was the editor when summons was issued.

[27] If the particulars can reasonably be read as alleging that Mr Pelser was *Rapport*'s editor when the articles were published, this ground of exception cannot succeed, given the basis on which our law imposes liability on the editor of a newspaper.[5] In my view, the particulars can reasonably be read in that way. The particulars allege, among other things, that Mr Pelser was one of the parties who published the defamatory matter with the intent to injure Mr Paulsmeier and IBDF. This can be read as a reference to Mr Pelser in the way in which he is cited, namely as editor.

Conclusion on first ground

[28] The first ground of exception thus succeeds in respect of Naspers but fails in respect of Mr Pelser.

Second ground of exception (the impugned words)

[29] The second ground of exception is a complaint that the particulars fail to set out the words alleged to be defamatory. The contention is that, without this detail, the particulars either fail to disclose a cause of action or are vague and embarrassing.

[30] The eight articles, identified in the way I mentioned earlier, are not attached to the particulars, nor is their impugned wording set out in the body of the particulars. The defamatory words allegedly published by a defendant are an essential element of a plaintiff's cause of action; it is not

[5] Subject to the defence of reasonable publication subsequently recognised in *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA), the editor of a newspaper is among the persons held strictly liable for defamatory statements published in the newspaper: Burns *Media Law* (Butterworths, 1990) at 154-6.

sufficient for a plaintiff to content himself merely with an allegation as to the meaning or effect of the published statement.[6] An allegation that an article published on a particular date was defamatory of the claimant is a conclusion. The facts to sustain the conclusion should be alleged in the particulars. If a plaintiff relies on an article in its entirety, he or she can attach the article or set out its entire content in the particulars.[7]

[31] Where an action for defamation is properly pleaded, that is by identifying the impugned words, it is open to a defendant to except to the particulars on the ground that the words in question are not capable of being understood in the defamatory sense pleaded by the plaintiff.[8] Where an exception on this basis is taken, the test is whether a reasonable person of ordinary intelligence might reasonably understand the words of the article to convey a meaning defamatory of the plaintiff, that is a meaning having the tendency, or being calculated, to undermine the status, good name or reputation of the plaintiff. [9] The fact that an exception can be taken on this basis demonstrates why it is necessary for a plaintiff to plead the impugned words as part of his or her cause of action. If the impugned words are not pleaded, it is impossible to test, by way of exception and as a matter of law, whether the published words pass the threshold test of being defamatory.

[32] Since the alleged articles in this case appeared in Afrikaans media under Afrikaans headlines, Mr Paulsmeier's various allegations, in English,

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[6] *International Tobacco Company of SA Ltd v Wollheim* 1953 (2) SA 603 (A) at 613H-614C and 615D-E. See also *Bell v Cohen* 1910 WLD 103 at 111-12; *Foodworld Stores Distribution Centre (Pty) Ltd v Akbar Allie* [2002] ZAWCHC 21 at para 35; *Gwe v De Lange* (2020) 41 ILJ 341 (ECP) at paras 11-12.

[7] Whether a plaintiff, in order to avoid embarrassment to the defendant, must identify the specific passages in an attached article depends on the circumstances: *Deedat v Muslim Digest* 1980 (2) SA 922 (D) at 928E-G. See also *HT Group (PTY) Ltd v Hazelhurst* [2003] 2 All SA 262 (C). In both these cases, the impugned articles were attached to the particulars, the complaint being that the failure to identify the specific passages complained of rendered the particulars vague and embarrassing. In both cases the exceptions on this ground succeeded.

[8] *Stanford v West* 1959 (1) SA 349 (C) at 351E-F; *A Neumann CC v Beauty Without Cruelty International* 1986 (4) SA 675 (C) at 680C and 680G-H.

[9] *Argus Printing & Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 (A) at 20E-21B. This is the test on exception. At trial, the test is "would", not "might": *Le Roux v Dey* 2010 (4) SA 210 (SCA) at note 3.

of the "defamatory innuendo and statements" contained in the articles cannot be read, insofar as the word "statements" is concerned, as an allegation that the pleaded defamatory statements are the words actually used in the Afrikaans articles.[10] Furthermore, Mr Paulsmeier has not distinguished between the "innuendo" and the "statements".[11] To the extent that the meanings are matters of innuendo (that is, a secondary meaning), they are clearly not merely a literal translation of the Afrikaans words used. The absence of particularity is aggravated by the fact that, to the extent that any of the alleged meanings are matters of innuendo, Mr Paulsmeier has not, as is required, pleaded the special circumstances giving rise to the secondary meaning.[12]

[33] The defendants raised a subsidiary contention as part of this ground of exception, namely that the eight listed articles are introduced by an allegation that the campaign and plot "include[d]" the eight articles, thereby implying that Mr Paulsmeier relies on other articles which he has not pleaded. I will not uphold this objection. The particulars can be read as conveying that Mr Paulsmeier will rely, for the claimed relief, on the eight listed articles, even though there might have been others. The defendants are not prejudiced, because Mr Paulsmeier would not be entitled, at trial, to rely on other supposedly defamatory articles without having pleaded them.

[34] Nevertheless, the primary basis of the second ground of exception is sound.

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[10] Cf *Van Niekerk v Botha* 1913 CPD 41 at 44. In that case, which was an appeal following a trial in a magistrate's court, the appeal court – while recognising the principle that the actual published words should be pleaded – was not willing, *ex post facto*, to non-suit a claimant who had pleaded the defamatory words in English whereas they had been spoken in Dutch. The superior courts, it was said, looked with some leniency on pleadings in the magistrates' courts, and no injustice had resulted.

[11] In para 62 of his written submissions, Mr Paulsmeier says that evidence will be led to establish which specific statements in the articles fall into the following categories: false and defamatory; misleading; factually incorrect; biased; not within context; not balanced; innuendo; malicious; and unfair and unjust.

[12] *Le Roux v Dey* [2011] ZACC 4; 2011 (3) SA 274 (CC) at para 87.

Third ground of exception (punitive damages of R16.1 million)

[35] The third ground of exception is that the particulars do not allege facts to sustain the legal conclusion that punitive damages can be recovered at all, alternatively in the amount of R16.1 million. Counsel for the defendants referred me to passages in *Fose*[13] militating against the recognition of punitive constitutional damages.[14] Counsel for Mr Paulsmeier submitted that *Fose* is distinguishable, as it involved a claim for punitive damages against the State. It is so that the reasoning in *Fose* was formulated with reference to claims against the State, and that some of the circumstances said to militate against awarding such damages focused on the undesirability of granting large punitive awards that would have to be satisfied from the public purse.[15]

[36] In my view, an exception is not the appropriate mechanism to test whether punitive damages against private persons should in principle be recognised for particularly egregious violations of the right to dignity, which is a right protected by the law of defamation; and, if so, whether Mr Paulsmeier has alleged sufficient facts to establish an entitlement to punitive damages. I say so for the following reasons.

[37] The purpose of a well-founded exception is to avoid the time and expense of adducing evidence when the pleaded facts, even if established by evidence, would not in law give rise to a cause of action. From this flows the principle that it is not permissible to except to only one of several claims made by a plaintiff on the strength of a single cause of action.[16] This

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[13] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC).

[14] Id at paras 69-74 (per Ackermann J), paras 79-84 (per Didcott J) and paras 101-2 (per Kriegler J).

[15] Didcott J, in his minority judgment, made this distinction explicit in para 87. Subsequent decisions of the Constitutional Court on the question of punitive damages have also been formulated with reference to claims against the State: see *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police* [2021] ZACC 37; 2022 (1) BCLR 46 (CC) at paras 134-6; *Thubakgale v Ekurhuleni Metropolitan Municipality* [2021] ZACC 45 at paras 190-4.

[16] See, for example, *Stein v Giese* 1939 CPD 336 at 338; *Dharumpal Transport (Pty Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706A-H; *Compagnie Inter Africaine De Tranvaux, South African Branch v Abercom Africa (Pty) Ltd.* [1985] ZASCA 60 (unreported) at pp 82-3; *Santos v Standard General Insurance Co Ltd* 1971 (3) SA 434 (O) at 437B-E. It is, of course, possible that the striking out of one particular claim could substantially reduce the extent of the evidence led at the trial. For example, one

will not avoid the necessity, in order to adjudicate the remaining claims, of evidence to establish the cause of action. Such an exception, if successful, does not strike at the cause of action, only at one particular claim. Neither side referred me to this line of authority, but in my view it finds application to the third ground of exception.

[38] The claim for punitive damages of R16.1 million is one of several claims Mr Paulsmeier makes on the basis of a cause of action to the effect that the defendants violated his dignity by publishing the defamatory articles as part of the alleged character assassination plot. The cause of action is the *actio iniuriarum*. The other claims are for (a) a retraction from all the defendants' news and social media platforms; (b) a written undertaking that the defendants will cease publishing the defamatory statements; and (c) a written public apology in a form approved by Mr Paulsmeier, published with the same prominence as the impugned articles. The defendants have not, in their exception, contended that these other claims are not competent. The importance of relief in the form of an apology should not be underestimated.[17]

[39] Conceivably Mr Paulsmeier might not wish to persist with the action, or the defendants might not wish to persist with a defence, if only a retraction and apology are at issue. In that event, they can ask the trial court, in terms of rule 33(4), to decide the question whether punitive damages can in principle be recovered. If the parties in any event wish to persist with the action and defence, the competence of a claim for punitive damages as a matter of law can be argued at the end of the trial.

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component of a claim for damages for breach of contract might be for loss of profit, and substantial evidence might be needed to prove the quantum of the lost profit. If, however, the claim for loss of profit were bad in law, the trial court could be asked to decide this as a preliminary issue in terms of rule 33(4).

[17] The competence of the remedy of an apology was recognised by the Constitutional Court in *Le Roux v Dey* above note 12, and its value appears from the discussion at paras 195-203 of that case. See also the remarks in the minority judgments of Mokgoro J and Sachs J in *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC) at paras 68 and 117 respectively.

[40] Furthermore, although the particulars describe the damages of R16.1 million as punitive damages, a trial court – if it rejected punitive damages, either as a matter of principle or in this particular case – might nevertheless regard the particulars as sufficient to found an award of ordinary damages as a *solatium*. The particulars could reasonably be read as asking for damages exceeding those which would ordinarily be awarded, in order to punish the defendants. Read in that way, the damages can be understood as including, within the composite sum of R16.1 million, the amount which would be awarded without a penal uplift. One should bear in mind that the particulars do not include a separate prayer for conventional damages, and it is unlikely that Mr Paulsmeier intended to forego a conventional award of damages if penal damages were for any reason refused. This is another reason not to decide the question of punitive damages on exception, since it affects only the quantum of the damages.

[41] Yet another consideration militating against an adjudication of the legal validity of one particular claim arising from the cause of action is this. If the matter goes to trial, and if the defendants succeed on the merits, all questions of relief, including the contentious claim for punitive damages, will fall away. The court is thus being asked to decide, at this stage, a legal issue which might never arise at the trial.

[42] The third ground of exception therefore fails.

Fourth ground of exception (compensatory damages of R30 billion)

[43] The claim for compensatory damages of R30 billion, which is attacked by way of the fourth ground of exception, is not hit by the principle on which I have decided the third ground. The sum of R30 billion is not claimed because of the violation of Mr Paulsmeier's dignity. If a cause of action exists to recover the sum of R30 billion, it is not the same cause of action as the one giving rise to Mr Paulsmeier's claim for a retraction, apology and damages of R16.1 million.

[44] Mr Paulsmeier's claim for compensatory damages of R30 billion appears to me to be an Aquilian delictual action for pure economic loss. In order to establish the cause of action, he will – given the allegations in the particulars – need to show that IBDF suffered financial losses of R30 billion and that, in terms of the contract between Mr Paulsmeier and IBDF as embodied in Rule 6 of the Code, IBDF was entitled to debit his SNG Global Dollar account in the said sum of R30 billion.

[45] Although more fundamental objections might perhaps have been taken to this cause of action, the fourth ground of exception is confined to a complaint that the particulars fail to identify with specificity the Rules and Code on which reliance is placed, and do not identify the text of Rule 6 on the strength of which IBDF debited Mr Paulsmeier's account. This objection, in my view, is sound. The contract between Mr Paulsmeier and IBDF, as embodied in the Code, and particularly Rule 6 thereof, is an essential element of his claim against the defendants. The defendants are entitled to know, before pleading, what the Code is, when and how it became binding on Mr Paulsmeier, and what it stipulates in the respects relevant to the claim. Without this detail, the particulars do not disclose that IBDF was entitled to debit Mr Paulsmeier's account.

[46] The fourth ground of exception thus succeeds.

Fifth ground of exception (alleged harm to third parties).

[47] The fifth ground of exception is directed at the allegations in the particulars about the harm caused to IBDF, CamRey, SNG Bonds, the South African economy, SARS and drought-stricken farmers. The exception complains that, on the face of it, the particulars rely on alleged injuries to these third parties to sustain Mr Paulsmeier's cause of action. The particulars are said to lack allegations to permit Mr Paulsmeier to rely on injuries and harm done to third parties. Alternatively, it is said that the basis on which he relies on such matters is unclear, vague and embarrassing.

[48] The allegations about the defendant's intentions towards IBDF and the harm IBDF allegedly suffered appear be relevant to Mr Paulsmeier's compensatory claim for damages of R30 billion. In any event, I think Mr Paulsmeier, in alleging and describing the fake news campaign and character assassination plot, was entitled to identify the entities, in addition to himself, which were the targets of the campaign and plot.

[49] The particulars mention CamRey in the context of alleging that the defendants' statements about the SNG Bonds were intended to injure him and CamRey. I do not think that the particulars, read as a whole, mean that Mr Paulsmeier is relying on injury to CamRey as part of his causes of action. He is merely saying that the fake news campaign in this respect was directed not only at him but at CamRey. It can be viewed as narrative background.

[50] The allegations about the harm caused to the South African economy, SARS and drought-stricken farmers might be relevant to the claim for punitive damages, if in due course such a claim is found to be legally permissible.

[51] While I may be taking an unduly charitable approach to the particulars, they were drafted by a layperson, and I have to be satisfied that they are excipiable on any reasonable reading. In any event, the allegations about third parties are not fatal to the pleaded causes of action nor are they in truth vague and embarrassing. They might be irrelevant. If so, the defendants may apply in terms of rule 23(2) to have them struck out.

Sixth ground of exception (the fraud scheme)

[52] The sixth ground of exception complains that the particulars fail to allege facts to sustain the conclusion that the fake news campaign and character assassination plot enabled and facilitated the fraud scheme and served as a cover-up mechanism for the fraud scheme, alternatively that the particulars of vague and embarrassing in this respect.

[53] I agree. It was not the inevitable or natural consequence of publishing the defamatory articles that a fraud scheme of the kind Mr Paulsmeier alleges would be enabled, facilitated or covered up. It is a very serious matter to allege of Media24 that it published defamatory articles which enabled and facilitated a fraud scheme involving the theft of R1 billion and which served as a mechanism to cover up the fraud scheme. And to judge by what Mr Paulsmeier has pleaded regarding the Callister report, there is an assertion that Media24, Mr Pelser and Mr van Rooyen were directly involved in the misappropriation of the SNB Bonds worth more than R1 billion.[18] Allegations of fraudulent conduct must be clearly and precisely pleaded – sweeping generalisations do not suffice.[19] The defendants are entitled to know what the fraud scheme is alleged to have been. It is not enough to say merely that it resulted in the misappropriation of R1 billion. Mr Paulsmeier will need to plead the content of the fraud scheme, and when, how and by whom it was implemented, and how the fake news campaign and character assassination plot enabled, facilitated and covered up the scheme. If the scheme was a conspiracy between two or more persons, the participants in the conspiracy should be identified, and particulars furnished as to when and where the conspiracy was entered into. The persons who represented corporate entities, including Media24, would also need to be alleged.

[54] It is unclear whether the alleged fraud scheme is an essential element of either of Mr Paulsmeier's causes of action. If it is, the absence of the requisite allegations would justify a conclusion that he has alleged insufficient facts to sustain the cause of action.[20] At this stage, however, it

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[18] In his written submissions, Mr Paulsmeier foreshadows evidence that (in addition to Media24) Mr Pelser and Mr van Rooyen were among those directly or indirectly involved in the fraud scheme (paras 55, 117 and 118.3), and he also includes Naspers in the list at para 117.

[19] *Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality* [2017] ZASCA 77; 2018 (1) SA 391 (SCA) at paras 28-31. See also *Clulee v McArthur Atkins & Co* (1907) 28 NLR 487 at 488. In *Home Talk Developments*, Ponnan JA cited (id at note 30) several English cases, including *Wallingford v Mutual Society* (1880) 5 App Cas 685 at 697 (see also at 701 and 709). An English case to similar effect is *Lawrance v Norreys* (1890) 15 App Cas 210 at 221.

[20] From para 2 of Mr Paulsmeier's written submissions, it seems that he regards his cause of action as resting inter alia on the defendants' "direct and indirect involvement in" the fraud scheme.

suffices to say that the allegations about the fraud scheme are vague and embarrassing. The allegations may be irrelevant, but for as long as they remain in the particulars, the defendants will need to plead to them, and they should not be forced to do so when they are so inadequately set out.

[55] In *Jowell v Bramwell-Jones*,[21] Heher J said that an exception that a pleading is vague and embarrassing cannot be directed at particular paragraphs within a cause of action, but must go to the "whole", or the "root", of the cause of action; and that complaints of insufficient particularity, directed only at particular paragraphs, should be attacked by way of rule 30.[22] Although this statement of the legal position has quite often been repeated, in practice rule 23(1) continues to be widely used where individual paragraphs lack particularity.[23]

[56] The cases cited in *Jowell* for the proposition just mentioned[24] were decided with reference to rules governing the procedure in magistrates' courts where a defendant could request further particulars before pleading. The foundation of these cases was that, because individual instances of vagueness could be cured by a request for further particulars, an exception on the grounds of vagueness and embarrassment should be confined to instances where the cause of action as a whole was unintelligible. The claims with which those cases were concerned were terse summaries, much as a plaintiff now might use in the High Court in a simple summons. The defendants could get the necessary details by way of further

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[21] *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) (*Jowell*).

[22] Id at 899G and 902F-H. Mr Paulsmeier referred to this proposition in para 14 of his written submissions, in dealing with the legal principles applicable to exceptions.

[23] An example, pre-dating *Jowell*, is *Trope v South African Reserve Bank* 1993 (3) SA 264 (A), where exceptions were upheld to some paragraphs but rejected in relation to others. The approach formulated by McCreath J at 211B-E, which does not include a requirement that the entire cause of action should be vague and embarrassing, has often been cited. In the ensuing appeal, *Trope v South African Reserve Bank* 1993 (3) SA 264 (A), no criticism was expressed of McCreath J's approach, although in the event his order was held not to be appealable.

For examples in this Division, see *Reiter Foods and Services CC v Cattle Baron Steak Franchising (Pty) Ltd* [2010] ZAWCHC 642; *Vest Sources 2 (Pty) Ltd v Dennis Moss Planners & Architects (Pty) Ltd t/a Dennis Moss Partnership* [2011] ZAWCHC 206; *Steinhoff International Holdings (Pty) Ltd v Jooste* [2021] ZAWCHC 222.

[24] *Jowell* above note 21 at 899G-J.

particulars. In the High Court, the details in amplification of a simple summons would follow in a declaration.

[57] Further particulars before pleading are no longer part of the Uniform Rules. Claims pleaded in the way which passed muster in the cases cited in *Jowell v Bramwell-Jones* could not now, if contained in particulars of claim in a combined summons, escape a complaint that they were vague and embarrassing. Rule 23(1) does not state that an exception on the grounds of vagueness and embarrassment is confined to cases where the whole cause of action, or its root, is vague and embarrassing.

[58] There also does not seem to me to be much to be said for the proposition that vagueness and embarrassment in relation to individual paragraphs can only be attacked by way of rule 30. Without wishing to suggest that rule 30 cannot apply to individual paragraphs that are vague and embarrassing, such an attack would have to based on a complaint that the paragraph is a departure from rule 18(4), which requires a "clear and concise statement" of the material facts. Rule 30 does not in terms address the problem of a pleading that is vague and embarrassing. Not every instance of vagueness and embarrassment could be fitted into the mould of a deviation from rule 18(4). Is a defendant who cannot succeed with a rule 30 attack forced, despite prejudice, to plead to particulars containing averments which are vague and embarrassing? Must such a defendant put up with the prejudice and content itself with post-pleading particulars for purposes of trial? I do not think so, and to the extent that *Jowell v Bramwell-Jones* suggests otherwise, I respectfully disagree.

[59] Importantly, there is no great difference between the procedures laid down in rule 23(1) and rule 30, such as might justify confining a defendant to only one of those procedures. In each instance, a defendant would need to give notice to remove the cause of complaint; in each instance, the defendant would have to follow this up with a formal process (an exception or an application) if the cause of complaint was not removed; and in each instance, a court would have regard to the extent of any prejudice which

the vagueness and embarrassment causes the defendant. Allowing rule 23(1) to be used in the way I think is permissible avoids having to undertake what may, at times, be the difficult task of deciding whether the vagueness and embarrassment infects the whole cause of action or only particular paragraphs.

[60] What I have said is not meant to encourage nitpicking complaints of insufficient particularity. A defendant must be genuinely embarrassed and prejudiced by having to plead to deficient particulars, and this is unlikely to be the case where the lack of particularity is insubstantial. Here, the alleged fraud scheme is not an insubstantial matter nor is the lack of particularity insubstantial. The defendants will be prejudiced by having to plead to particulars which rely *inter alia* on the inadequately particularised fraud scheme.

[61] The sixth ground of exception thus succeeds.

Seventh ground of exception (SA Press Council).

[62] This complaint is to the effect that although Mr Paulsmeier has alleged that the impugned articles do not meet the standards and requirements of the SA Press Council, he has not identified the particular standards and requirements on which he relies.

[63] It does not appear that Mr Paulsmeier seeks any relief on the strength of his allegation that the articles did not meet the standards and requirements of the SA Press Council. His allegations in that respect might be irrelevant, and be liable to be struck out. However, he has not tendered to delete them, and perhaps he intends to rely on them as a factor to be weighed in the awarding of punitive damages. The defendants cannot be compelled to bring an application to strike out. They are entitled to say that if Mr Paulsmeier wants to keep these allegations in his particulars, he must not make them in a way that is vague and embarrassing. I agree that the allegations are vague and embarrassing in the absence of particulars as to

the particular prescripts of the SA Press Council on which Mr Paulsmeier relies and how the articles violated these prescripts.

[64] The seventh ground of exception thus succeeds.

Conclusion and order

[65] The first ground of exception fails in relation to Mr Pelser. The third and fifth grounds of exception also fail. Save as aforesaid, the exception succeeds. The grounds on which the exception succeeds are sufficient to justify setting aside the particulars, with the usual leave granted to Mr Paulsmeier to deliver amended particulars of claim.

[66] The defendants have achieved substantial success and are entitled to costs. Although senior counsel appeared on his own at the hearing, he was assisted by junior counsel in drafting the exception and heads of argument. Given the nature of the issues and the size of the claims, the employment of two counsel was a prudent precaution.

[67] I make the following order:

1. The particulars of claim are set aside.
2. The plaintiff is granted leave to deliver amended particulars of claim within one month from the date of this order.
3. The plaintiff must pay the defendants' costs on exception, including the costs of two counsel where employed.

O L ROGERS
Judge of the High Court

For the Plaintiff/Respondent : J Themane (the heads of argument having been prepared by the plaintiff in

	person), instructed by Stegmanns Inc, Pretoria
For the Defendants/Excipients:	J Butler SC (the heads of argument having been prepared by J Butler SC and N Ferreira), instructed by Webber Wentzel