IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF GAUTENG HELD AT JOHANNESBURG

CASE NO: 1585/20

In the matter between:-

MICHELLE PARKER	**PLAINTIFF**

and

AMANDA FORSYTH N.O.	**1ST DEFENDANT**
TREVOR PULEY N. O.	**2ND DEFENDANT**
DANIEL VAN DER MERWE N.O.	**3RD DEFENDANT**
SIBYLLE KAMMERER N.O.	**4TH DEFENDANT**
ANGUS MOIR N.O.	**5TH DEFENDANT**
VERONICA VURGARELLIS N.O.	**6TH DEFENDANT**

This judgment was handed down electronically by circulation to the parties legal representatives without an original signature. The date of the judgment is deemed to be 29 June 2023 at 08:45.

JUDGMENT
ON DEFENDANTS' EXCEPTION
AND
APPLICATION TO STRIKE-OUT

Introduction and Background:

[1] Bodies Corporate of Sectional Title Schemes appear to have become a fertile field for the germination of seeds of confrontation among the humans who occur there. Every owner of a Sectional Title Scheme is a member of its Body Corporate, a handful of whom are elected as trustees who voluntarily control and manage the affairs of the Body Corporate. The power-plays inherent in these intimate working relationships, coupled with the frailties of human nature, create an environment where confrontation thrives. This case is one such instance.

[2] The Plaintiff has sued the Defendants for defamation and iniuria. The two interlocutory matters before the court, almost unsurprisingly, are, firstly, an application by the First Defendant to strike-out certain allegations in the particulars of claim, and secondly, an exception by the Defendants that the particulars of claim fail to disclose a cause of action, alternatively are vague and embarrassing. The Defendants, accordingly, seek a dismissal of the Plaintiff's action with costs.

[3] The litigation has a chequered history, the action having initially been instituted against only the first three defendants, the three defendants having pleaded, the other Defendants having been subsequently joined to the proceedings, the summons having been amended on multiple occasions, the action against the First Defendant (the alleged main antagonist) having subsequently been withdrawn, the Defendants being sued in their so-called official capacities as trustees and not in their personal capacities, and now the application to strike-out and the exception. Despite this distractive backdrop, the court will focus on the issues that the parties have placed before it for a decision.

[4] The Plaintiff and the Defendants were all trustees of the body corporate of the Dorset Sectional Title Scheme (the Body Corporate), situated in

Parkwood, Johannesburg. There were no other trustees. The Plaintiff sued the First Defendant in her representative capacity, alternatively in her personal capacity for defamation and iniuria. The Plaintiff sued the Second to Sixth Defendants only in their representative capacities for the same acts of defamation and iniuria allegedly committed by the First Defendant.

[5] It is curious that the Plaintiff cited the Defendants in their so-called representative capacities. In seeking to hold the Body Corporate liable for the alleged defamatory statements of the First Defendant, and for iniuria, on the assumption that the Body Corporate could be sued for relief on these claims, it would have been acceptable for the Plaintiff to have merely pleaded that the Defendants had acted in their representative capacities without necessarily citing them by name. A body corporate may be cited in its own name for litigation purposes. Its trustees need not all be cited as is required of a Trust, as defined in the Trust Property Control Act, 57 of 1988. In the circumstances, citing the Defendants by name tended to blur the line between their personal liability from that of their representative liability, as may be observed from the general tenor of the exception and the application to strike-out. The wisdom of having done so, accordingly, escapes the court. Nevertheless, no issue was taken with the citation, and the matter was understood by all, at least for most times, to be a claim for damages on both causes of action by the Plaintiff against the Body Corporate.

The Facts:

[6] The key facts and relevant chronology of events are the following:

[6.1] The Plaintiff pleaded the following in paragraph 7 of her particulars of claim:

"On 20 June 2020 and at 65 Dorset Road, Parkwood, Johannesburg, and in reply to the plaintiff's written request pertaining to the value of

fringe benefits of employees of the Dorset Body Corporate, the first defendant distributed an email pertaining to the plaintiff to all the trustees of the Body Corporate."

At that time the Fifth and Sixth Defendants had not yet been elected as trustees. Therefore, the email had not been sent to them.

[6.2] In paragraph 15 of the particulars of claim, the Plaintiff pleads that the email was also sent to her hence her claim for iniuria as well.

[6.3] The contents of the email in question are faily lengthy and it is not necessary to repeat its contents here, suffice to say that it contained statements relating to the Plaintiff that the Plaintiff alleges were defamatory of and insulting to her. The Defendants have impugned the statements.

[6.4] The Plaintiff alleges that the First Defendant made the statements in her capacity as a trustee of the Body Corporate.

[6.5] The Plaintiff alleges that the Second to Fourth defendants failed to address the contents of the email, as they were obliged to, and thereby associated themselves with the contents of the email;

[6.6] The Plaintiff alleges that she extended an opportunity to the First to Fourth defendants to retract the statements and/or to distance themselves from the statements. Only the Fourth Defendant accepted the invitation, recording that she disagreed with the First Defendant's statements.

[6.7] The Plaintiff pleads that the Second and Third defendants, in their capacity as trustees, therefore, agreed with and associated themselves with the statements of the First Defendant;

[6.8] In relation to publication, the Plaintiff pleads that on 24 November

2020, the Body Corporate *"in preparation for the Annual General Meeting (AGM) due to be held on 09 December 2022,...attached a copy of the defamatory statement...to the pack of documents to be distributed to all the owners and Administrators of the Managing Agent, to wit Whitfield Property Management (Pty) Ltd, and in doing so, re-published the defamatory remarks of the first defendant"*;

[6.9] At the AGM of 09 December 2020, the Second, Third, and Fourth Defendants were re-elected as trustees. The Fifth and Sixth Defendants were newly elected as trustees on that day. It appears that the First Defendant was not re-elected as a trustee. The reason for this was not pleaded or stated by the parties;

[6.10] The Plaintiff pleads that despite a ruling by the chairperson at the AGM that the issue was not to be discussed, *"the individual members present at the AGM disregarded the ruling and discussed the matter at length, in doing so publishing, and re-publishing and perpetuating the defamatory statement made by the first defendant"*. The Plaintiff contends that the Body Corporate, thereby, associated itself with, and re-published the defamatory statement;

[6.11] The court understands the Plaintiff to have cited the Fifth and Sixth Defendants in their capacity as trustees on the basis that subsequent to their election as trustees, they aligned themselves with the defamatory statements by failing to address or distance themselves from the statements when they were obliged to do so;

[6.12] The Plaintiff concludes by pleading that all six Defendants are liable in their official capacities as trustees of the Body Corporate for payment of R350 000-00 for the defamation, and R250 000-00 for the iniuria, *"jointly and severally, the one paying the other to be absolved"*. In the alternative, the Plaintiff prayed that the First Defendant be held liable in her personal capacity. The reference to the joint and several liability is

but once instance of the Plaintiff blurring the line between the personal liability of the Second to Sixth Defendants and that of the Body Corporate. There cannot be joint and several liability if the claim was only against the Body Corporate. In any event, nothing turns on this issue at this point.

[7] The First Defendant launched the application to strike-out certain parts of the particulars of claim pertaining to her, whilst the Second to Sixth Defendants launched the exception.

The First Defendant's Application to Strike-Out:

[8] Regarding the First Defendant's application to strike out certain paragraphs of the Plaintiff's particulars of claim, the following twist in the tale is relevant:

[8.1] The Plaintiff instituted her action on 13 August 2020;

[8.2] The Plaintiff withdrew her action against the First Defendant in both her personal and representative capacities on 30 March 2021. It appears that the First Defendant had apologised for her actions and the Plaintiff had accepted her apology. The Plaintiff, nevertheless, persisted with her action against the Body Corporate;

[8.3] The Plaintiff amended her summons on two occasions thereafter, namely on 15 August 2022 and 29 November 2022;

[8.4] In these amendments, the Plaintiff retained all references to the First Defendant including her prayer in terms of which she sought judgment against the First Defendant.

[9] The First Defendant does not take issue with her continued citation as

the First Defendant, but she is aggrieved by certain allegations against her that persist in the latest version of the particulars of claim and seeks to have them struck out. These are paragraphs 18, 20A, 21A, and the prayer against her in her personal capacity.

[10] Paragraph 18 reads as follows:

"*Plaintiff afforded the Ist Defendant two separate opportunities to apologise and retract the statements made against the plaintiff, via email on 24 June 2020 marked Annexure 'A' and letter served via sheriff on 01 July 2020, attached hereto, marked Annexure 'B', whereby the 1st defendant failed and/or refused and/or neglected to retract the statements made*".

[11] Paragraph 20A reads as follows:

"*Alternatively and in the event that it is found that the 1st, 2nd, 3rd, 4th, 5th, and 6th Defendants are not liable to the plaintiff in their official capacities, the plaintiff pleads that the 1st Defendant is liable to the Plaintiff in her personal capacity*".

[12] Paragraph 21A reads as follows:

"*The Plaintiff pleads that the 1st, 2nd, 3rd, 4th, 5th, and 6th Defendants are liable in their official capacities as trustees of the Body Corporate, jointly and severally, the one paying the other to be absolved, for payment to the plaintiff in the amounts aforesaid, alternatively, the first defendant is liable in her personal capacity to the plaintiff for payment of the amounts*".

[13] The Plaintiff seeks relief against the First Defendant for both the defamation and the iniuria, jointly and severally with the other Defendants in their representative capacity, and in the alternative, only against the First Defendant in her personal capacity in respect of both claims.

[14] The First Defendant contends that in the light of the Plaintiff's withdrawal of the action against her in both her capacities, these allegations in the latest version of her summons are irrelevant and vexatious as they lack good faith and are hopeless. As a result, the allegations are "*simply intended to harass and annoy the First defendant as it requires her ongoing involvement in the matter (and consequent costs) despite her no longer being a party to the matter*". The first defendant, therefore, contends that these allegations ought to be struck out.

The Court's Assessment of the Application to Strike-Out:

[15] At the outset, the Plaintiff's counsel pursued the preliminary point that as the action against the First Defendant had been withdrawn, she lacked locus standi to have brought the application to strike-out as she was no longer a party to the action. According to counsel, therefore, the application ought to be dismissed for that reason alone.

[16] The court cannot agree. It is the plaintiff who introduced the First Defendant to the action and elected to retain all references to her in amendments that were effected to the summons after the withdrawal of the action against the First Defendant. The allegations against the First Defendant are serious. The Plaintiff cannot have it both ways. If the Plaintiff persists in retaining such references to the First Defendant, the First Defendant must be equally entitled to enter the fray of the proceedings when the need arises. The First Defendant is entitled to observe a 'watching brief' of sorts over the further conduct of the matter in so far as allegations continue to be made against her. She is entitled to intervene in the matter to advance and protect her rights. Whether she is ultimately successful in what she attempts to do is a separate question. At this point, the Plaintiff's preliminary challenge would fall to be dismissed.

[17] Regarding the merits of the application to strike-out, the allegations that the First Defendant complains of were already in the summons prior to the withdrawal of the action against the First Defendant. They were not new allegations that were introduced in the amendments that came after the withdrawal of the action. Ordinarily, when a plaintiff withdraws the action against one or more of multiple defendants, the plaintiff is not required to amend the summons to bring it in line with the consequences of the withdrawal. The action would usually simply continue against the remaining defendants as originally pleaded. At times the continued reference to the defendants against whom an action has been withdrawn may be relevant to set out the factual sequence of events in establishing the cause of action against the remaining defendants. This is probably the reason for the First Defendant not having objected to her continued citation in the action and to other references to her that are alleged for the logical completion of the sequence of events that the Plaintiff relies upon.

[18] However, if the court understands the First Defendant correctly, the parts that she complains of are irrelevant in establishing the Plaintiff's cause of action against the remaining Defendants, and the prayer against the First Defendant, as expressed, is no longer applicable. The court agrees with the First Defendant's sentiments in this regard. The First Defendant's counsel, correctly, cited **Jacob and Goldrein** in their work, ***Pleadings: Principles and Practice***, that a pleading is vexatious when *"it lacks bona fides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense"*. A cursory examination of the history of this matter suggests that the Plaintiff consistently attempted to bring her particulars of claim in line with the unfolding developments in the matter, which, by itself, is perfectly acceptable. Yet, when the offending allegations against the First Defendant became irrelevant and the plaintiff had the opportunity of removing them on two separate occassioins, she, curiously, did not.

[19] The court is satisfied that the continued retention of the references to

the First Defendant in her personal capacity in the paragraphs and prayers complained of are irrelevant, vexatious, unnecessary, and prejudicial to the First Defendant. They ought to be struck out.

The Exceptions:

[20] The Second to Sixth Defendants raised the following five grounds of exception:

[20.1] First, the Sectional Titles Schemes Management Act, 8 of 2011 (the STSM Act) prescribes when a body corporate may be sued. The Plaintiff's claims do not fall within the permitted claims against a body corporate. As such, the particulars of claim fail to disclose a cause of action against the Body Corporate. Alternatively the particulars of claim are vague and embarassing;

[20.2] Second, the Plaintiff failed to allege that the Second and Third Defendants published the alleged defamatory statements. They are sought to be held liable on the basis of their refusal/failure to address the alleged defamatory/hurtful statements and that they are deemed to have agreed with/associated themselves with it. There is no legal basis pleaded for holding the Second and Third Defendants liable for the publication of the impugned statements. Alternatively these allegations against the Second and Third Defendants are vague and embarrassing;

[20.3] Third, the Plaintiff alleges that the second act of "*publication of the impugned statements occurred on 24 November 2020 when the Body Corporate attached the impugned statement to the pack of documents to be distributed to all the owners and to the administrators of the managing agent in preparation for the Body Corporate's Annual General Meeting*", for which the Plaintiff seeks to hold the Second to Sixth Defendants liable. As the Fifth and Sixth Defendants were

appointed as trustees only at the AGM on 09 December 2020, they could not have published the impugned statements of 24 November 2020. Therefore, no cause of action has been established against the Fifth and Sixth Defendants for want of publication. Alternatively, the allegations are vague and embarrassing;

[20.4] Fourth, the Plaintiff alleges that the third act of publication occurred on 09 Decmber 2020 at the AGM when the "*individual members present at the AGM*" discussed the Plaintiff's action against the Body Corporate at length and "*in doing so publishing, alternatively re-publishing and perpetuating the defamatory statement made by the first defendant*". The Plaintiff failed to plead that it was the Second to Sixth Defendants who published or re-published the impugned statements on 09 December 2020. Except for the Fourth Defendant, who distanced herself from the statements, the Plaintiff seeks to hold the Second, Third, Fifth, and Sixth defendants liable for the publication and/or re-publication of the impugned statements on 09 December 2020 on the basis that they associated themselves with the publication by virtue of their behaviour at the AGM. There is no legal basis for holding them liable for the publication or re-publication of the impugned statements on 09 December 2020. Accordingly, no cause of action has been disclosed against the Second, Third, Fifth, and Sixth Defendants. Alternatively, the allegations are vague and embarrassing;

[20.5] Fifth, the Plaintiff does not allege that the Fourth Defendant published the impugned statements, nor that the Fourth defendant associated herself with the statements. The Plaintiff pleaded that the Fourth Defendant, in fact, distanced herself from the statements on two separate occasions. There is, accordingly, no factual or legal basis for holding the Fourth Defendant liable for the publication of the statement by the First Defendant. In the circumstances, no cause of action has been disclosed against the Fourth Defendant, alternatively the allegations are vague and embarrassing.

The Court's Assessment of the Various Grounds of Exception:

[21] The court will first address what it considers to be the less-vexing grounds of exception. These are the second to fifth grounds. The court will thereafter return to the first ground.

The Second, Third, Fourth, and Fifth Grounds of Exception:

[22] In the court's view, all four of these grounds of exception raise the same general complaint, namely that the Plaintiff fails to plead the crucial element of publication of the alleged defamatory statements by the Second to Sixth Defendants in their representative capacities, and that the particulars of claim, therefore, do not disclose a cause of action. The court understood that these exceptions did not relate to the iniuria claim as publication is not a requirement for an iniuria claim. These four grounds of exception will, accordingly, be addressed together, and on the assumption that the Body Corporate may be held liable on the defamation claim.

[23] As alluded to earlier, it appears to the court that these grounds of exception have been exploited due to the manner in which the Body Corporate has been cited. To re-iterate, the Plaintiff has cited the Defendants specifically by name but in their so-called representative capacities as trustees of the Body Corporate. In other words, the Plaintiff's position is that the named trustees acted as instruments of the Body Corporate. As such, the Plaintiff's case is that the actions of the trustees constituted the actions of the Body Corporate. The cited Defendants also seem to have conflated the point in that wheras their exception contends that the Plaintiff failed to plead publication by certain specific trustees, their heads of argument contend that there was a failure to plead publication by the Body Corporate. In the court's view, the point relating to the publication is a proverbial storm in a teacup.

[24] The cited Defendants, not having taken any issue with this manner of citation, cannot now be heard to say that the Plaintiff failed to plead publication by the Body Corporate. The Plaintiff requires just one act of publication, not multiple acts, and neither would each and every trustee be required to have individually fulfilled every element of the cause of action. These grounds of exception seem to lose sight of the fact that the cited Defendants are not being sued in their personal capacities.

[25] In relation to the first alleged publication, the Plaintiff seems to distinguish the Body Corporate as a legal entity from its trustees as natural persons. In other words, if the court understood the Plaintiff's position correctly, the First Defendant published the statements in her capacity as trustee on behalf of the Body Corporate, to the other trustees in their representative and personal capacities.

[26] In relation to the second alleged publication of 24 November 2020, the plaintiff alleges that it was the Body Corporate that published the statements by distributing the document to the owners of the units in the Scheme, and to the administrators of the managing agent. First, the managing agents are not organs of the Body Corporate, they are employees of the Body Corporate, and second, it does not matter that the individual owners are all members of the Body Corporate. The point is that the statements were apparently placed in the public domain in this fashion. The court cannot agree with the Defendants' counsel's submission that it was necessary to allege that the Second to Sixth Defendants published the statements on this occassion.

[27] In relation to the third alleged publication of 09 December 2020, the court's sentiments are the same as those in relation to the second alleged publication. The statements were alleged to have been perpetuated in the public domain.

[28] The grounds of publication that the plaintiff relies upon have been adequately pleaded for present purposes, and are not vague and embarassing.

[29] In relation to the additional point that the Defendants raised under this ground of exception, namely that there is no basis in law for seeking to hold the Second, Third, Fifth, and Sixth Defendants liable on the strength of the Plaintiff's allegation that they are deemed to have agreed and associated themselves with the remarks of the First Defendant by refusing to address, comment or distance themselves from the remarks when they were under an obligation to do so:

This point is a non-starter. The parties continually seem to forget that the defendants are not sued in their personal capacities. It was not strictly necessary for the Plaintiff to have pleaded this. Either the First Defendant had been representing the Body Corporate when the statements were made, or she had not been. At worst for the Plaintiff, the attitude of the First Defendant's co-trustees may serve to corroborate the Plaintiff's claim against the Body Corporate or, as in the case of the Fourth Defendant, a retraction by one or more of the trustees may serve to mitigate the Plaintiff's damages. Either way, the allegation was not necessary in the Plaintiff's summons. Therefore, the exception is without merit as well. The question whether the Body Corporate would be legally liable on the grounds that some of the trustees associated themselves with the alleged defamatory statements by virtue of their conduct does not arise.

[30] The complaint of the Fourth Defendant is first, that the plaintiff has not pleaded that she (the Fourth Defendant) published the statement in question, and second, that she (the Fourth Defendant) had in fact distanced herself from the statements of the First Defendant. In the circumstances, the Fourth Defendant contends that no cause of action has been disclosed against her. The court re-iterates its sentiments above regarding the publication issue. The Defendants' counsel, correctly, conceded during address that a retraction of or apology for a

defamatory statement would not non-suit a plaintiff. At best for such a defendant, the apology or retraction would serve as a mitigating factor in the assessment of a plaintiff's quantum of damages. In any event, again, the Fourth Defendant is not being sued in her personal capacity.

[31] There is no merit to these grounds of exception, and they fall to be dismissed.

The First Ground of Exception:

[32] To reiterate, the Defendants' exception is that the Plaintiff's claims do not fall within the permitted ambit of claims that may lawfully lie against a body corporate. Although the focus of the arguments pertained to the defamation claim, the court understood that the challenge related to the iniuria claim as well. The Defendants add that the particulars of claim lack the averments necessary to sustain a cause of action and that the claim should, therefore, be dismissed. It was expressed as follows in the Defendants' heads of argument: *"...there is no legal basis pleaded for holding the Body Corporate liable in a dispute concerning two individuals and which does not concern the functions or duties of the Body Corporate"*.

[33] The parties seemed to agree, and the point was argued accordingly, that the question turned mainly on an interpretation of Section 2(7), and more specifically, Section 2(7)(d), of the STSM Act. It is necessary to quote the provisions of Section 2(7). They read as follows:

"***The Body Corporate has perpetual succession and is capable of suing and being sued in its corporate name in respect of—***

(a) ***any contract entered into by the body corporate;***

(b) ***any damage to the common property;***

(c) ***any matter in connection with the land or building for which the body corporate is liable or for which the owners are jointly liable;***

(d) ***any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under this Act or any rule; and***

(e) ***any claim against the developer in respect of the scheme if so determined by special resolution***".

(the court's emphasis)

[34] It appears that the exception is two-pronged: First, the STSM Act does not permit these actions, and, second, if they are permitted, appropriate facts must be pleaded (which the Defendants contend has not been done here) to bring the claim within the ambit of the apparent qualifications of Section 2(7)(d). However, the parties focused their arguments mainly on the first prong of attack. The court will do likewise.

[35] The Defendants' counsel, correctly, submitted that the question whether or not a Body Corporate may be sued for defamation is a legal question, not a factual one. Therefore, no amount of evidence at trial will resolve this question. Expressed differently, the challenge goes to the construction of the cause of action in the summons, not to a factual dispute that could be addressed at the trial. This is the essence of the difference between an exception and a special plea. If the exception is upheld it will spell the end of the Plaintiff's case. Apparently there is no reported case-law authority that addresses the issue directly. The parties were unable to locate any such authorities and so was the court.

[36] The Defendants submit that Section 2(7)(d) "*limits the scope for a Body Corporate to sue and be sued to its functions and duties. Since a Body Corporate manages and maintains the common property of the sectional title scheme as well as the funds connected therewith, claims*

instituted by and against bodies corporate are limited to those listed in the provision. Defamation is not such a claim."

[37] The Defendants argue that "*to permit a claim for defamation against the Body Corporate would be contrary to the purpose of the STSM Act and…of bodies corporate, as it would result in the funds held by the Body Corporate benefitting one owner as a result of the conduct of another owner (which conduct does not concern the functions and duties of the Body Corporate) instead of benefitting all home owners comprising the Body Corporate as intended in the STSM Act*".

[38] In relation to the second prong of attack, the Defendants submit that the summons does "*not allege that the impugned statement concerns the management or administration of the common property or sectional title scheme or the performance or non-performance of any duties under the STSM Act*".

[39] In the circumstances, the Defendants seek the dismissal of the Plaintiff's claim.

[40] The Plaintiff submitted that the court ought to consider the history of the matter, as pleaded in the particulars of claim, in deciding whether the matter falls within the ambit of Section 2(7)(d). According to the Plaintiff, the peculiar facts of the matter justifies its inclusion under Section 2(7)(d).

[41] These peculiar facts, although not pleaded, were submitted to be that the alleged defamatory statement was made in the context of a discussion by the trustees at the time relating to "*the value of fringe benefits of employees of the Dorset Body Corporate, and in the context of certain gardening problems experienced by the Body Corporate,* [and] *therefore during the exercise of their powers as trustees in accordance with the provisions of the Act.*" The Plaintiff continues to

state that the other trustees were invited to disavow the alleged defamatory statements by the First Defendant, and, except for the Fourth Defendant, the other trustees failed to do so and, in fact, seemed to support the First Defendant's statements by their subsequent actions. If the court understands the Plaintiff's argument correctly, this response by the rest of the trustees bound the Body Corporate as the trustees were acting in their official capacities. The Plaintiff contends that the Body Corporate should, therefore, be liable.

[42] The Plaintiff's counsel submitted, further, that the legisature's use of the phrase "*any matter*" in Section 2(7)(d) must be given its ordinary meaning and must be interpreted to include as many causes of action that could be classified under the Section instead of restricting them. The Plaintiff's counsel relied on ***Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd*** **[1983] 1 ALL SA 139 (A)** for the limited purposes of the interpretation to be placed on the use of the word "*any*".

[43] It is not necessary to repeat the facts of that case for present purposes suffice to say that it related to a conditional clause in an agreement between the litigants there setting out the conditions under which the payment of certain promissory notes would be met. The court was called-upon to interpret the use of the word 'any' in the context of that matter. The court embarked on a valuable excursus on the meaning of the word 'any' as used in legal contexts. Quoting ***R v Hugo*** **1926 AD 268** at 271, the court stated that the word 'any' is "*upon the face of it, a word of wide and unqualified generality. It may be restricted by the subject matter or the context, but prima facie it is unlimited*". Further, quoting ***S v Wood*** **1976 (1) SA 703 (A)** at 706, the court stated that *"[T]he word 'any' is, according to the* Oxford Dictionary, *the indeterminate derivative of ONE, AN, or A, and means 'whichever, of whatever kind, of whatever quantity'. Quantitatively it means a quantity or number however large or small....Judicially the word 'any' has been defined as a word of very wide import, and prima facie the use of it excludes limitation*".

[44] According to the Plaintiff's counsel, therefore, claims for defamation must be included in the interpretation of the ambit of Section 2(7)(d)..

[45] Both counsel alerted the court to a number of decided cases where the Higher Courts concerned made comments alluding to a certain stance on the question whether a Body Corporate may be sued for defamation. The court will address the material parts of some of these cases that the parties referred to which the court considers comes close to addressing the issue.

[46] The following cases were relied-upon in support of the Plaintiff's contentions:

[46.1] ***Body Corporate-Montpark Drakens and others v Michiel Smuts* (22380/05) [2006] ZAGPHC 38 (26 April 2006)**

[46.1.1] The Body Corporate here sought an order, among other orders, "*interdicting the respondent from defaming any trustee or group of trustees...and...any managing agent...and any service provider...and from behaving in a manner which is injurious to the dignity of any such trustee or group of trustees...and managing agent...and service provider*".

[46.1.2] The court did not grant the interdictory relief in the context of the matter mainly because that would have unduly limited the respondent's rights to freedom of speech. However, the court stated that the respondent's *"...utterances would have been actionable, yet no claims for defamation were instituted. The subject matter of Smuts' attacks is varied. While they broadly concern the administration of the sectional title scheme, the individuals and events involved are different....He should know, however, that he faces the risk of an action for damages for his defamatory utterances".*

[46.1.3] It is apparent that the court in ***Body Corporate-Montpark Drakens*** was not called upon to address the provisions of Section 2(7)(d), and quite frankly, in this court's view, the court there did not imply that it would be the Body Corporate that would have an action for damages for defamation, but the individual persons who were so defamed.

[46.2] ***Wiechers and Another v Spruitsig Park Body Corporate* (15747/19) ZAGPPHC 1026 (18 December 2019)**

Here, the trustees of the body corporate had apparently made certain defamatory statements against the applicants at an annual general meeting of the body corporate. The applicants then approached the court for an order that the body corporate remove certain words from the minutes of the annual general meeting, and for an interdict prohibiting the trustees of the Body Corporate from making and publishing any further defamatory remarks towards them. The court refused the order for lack of evidence. It is not clear why the body corporate was cited in relation to the interdictory relief for the actions of the trustees. Although the court seems to have dealt with the matter as though the order could competently be obtained, the focus of the court's judgment was the admissibility of certain evidence. The court was, apparently, not alerted-to and did not address the applicability of Section 2(7)(d). In this court's view, the judgment is not really authority for the Plaintiff's contentions in the present matter.

[46.3] ***Lechinzo v Bridgetown Body Corporate* [2012] ZAGPJHC 272 (12 October 2012)**

[46.3.1] It was the Defendants' counsel who alerted the court to this case in the course of her address in an effort to assist the court

despite the fact that the case, at face value, seems to support the Plaintiff. In an application for the appointment of an administrator to manage the sectional title scheme in circumstances where it was alleged that the management had become dysfunctional, the court remarked as follows regarding one of the trustees:

"...in my view it is implicit in the Sectional Titles Act that trustees are required to act rationally. Apart from the fact that Lebo Segole exposed the body corporate to potential proceedings for defamation in her letter, ignoring the advice that was given in taking the resolution was irrational. Both letters reflect manifest irrationality, apart from a serious lack of courtesy and professionalism."

[46.3.2] The defendants' counsel submitted, however, that this was merely stated in passing, the court having apparently neither been alerted-to the provisions of Section 36(6) (the court was dealing with the now-repealed Sectional Titles Act, 95 of 1986 (the STA) which is equivalent to Section 2(7) of the current STSM Act), nor being required to pronounce on the meaning of its provisions, as the matter before it was unrelated to Section 36(6). This court accepts that the ***Lechinzo*** court's remarks do not constitute authority for the Plaintiff's proposition.

[47] The following case was sourced by the court:

Mandlbaur v Papenfus **(38297/2011) [2014] ZAGPPHC 945 (8 October 2014)**

[47.1] Here, the plaintiff sued for defamation, among other relief, arising from the defendant having laid a criminal charge against him with the police which resulted in his arrest and detention. Although the defendant's precise status was hazy, it appears that he was a trustee of the body corporate and an employee of an owner of certain units of that

sectional title scheme, and the criminal charge related to certain damage that the plaintiff had allegedly caused to the common property of that scheme. Among other defences, the defendant pleaded that the criminal charge was laid at the behest of the body corporate of that scheme, and that the plaintiff's damages were, therefore, directly or indirectly caused by the body corporate. As the body corporate had not been included in the action, the defendant raised the plea of non-joinder. His argument was that he must be regarded as a "*corporative representative*" and that it was the body corporate that should have been sued *or* joined.

[47.2] In dismissing the plea of non-joinder, the court found that any order made against the defendant will not be prejudicial to the interests of the body corporate. For present purposes, however, the court added the following: *"[T]he fact that the body corporate may be vicariously liable as an additional party to be sued does not make it a necessary party in the action against the defendant. By citing the body corporate the plaintiff could have just increased the number of people against whom the judgment could have been enforced, but the delict and the wrongdoer stays the same whether or not the body corporate is joined*".

[47.3] The judgment seems to suggest that it would have been competent for the body corporate to have been a party to the action.

[47.4] Again, as with the other cases above, it seems that the court was not alerted to the provisions of Section 36(6) of the STA (the applicable equivalent to Section 2(7) at that time), and the court was not required to pronounce on the question that is now before this court. It seems that the court assumed that a body corporate could competently be held liable under those circumstances. In this court's respectful view, those statements by the court were made in passing.

[48] The following cases were relied-upon in support of the Defendants' contentions:

[48.1] ***Spilhaus Property Holdings (Pty) Ltd and Others v Mobile Telephone Networks (Pty) Ltd and Another*** **2019 (4) SA (CC)**

[48.1.1] The issue that presented before the Constitutional Court here related to the application of Section 41, read with Section 36(6) of the the STA as that was the Act that was applicable to the dispute at that time. These provisions have been substantially repeated in the STSM Act in Section 9 and Section 2(7) respectively.

[48.1.2] It is not necessary to re-state all of the fine details of the case, suffice to say that the issue was whether individual owners in a sectional title scheme had standing to apply for the removal of an antenna erected on common property in contravention of the local zoning scheme regulations, or whether the owners were compelled to apply to court for the appointment of a curator ad litem in terms of the procedure outlined in Section 41 in order to launch such proceedings on behalf of the body corporate for want of the body corporate to do so by itself. In terms of Section 41 (and now Section 9 of the STSM Act), an owner may invoke this procedure if he and the body corporate have suffered damages but the body corporate fails to act.

[48.1.3] As the application in terms of Section 41 for the appointment of the curator ad litem applied only in respect of matters arising under Section 36(6), the enquiry entailed an assessment of whether non-compliance with the local zoning regulations was such a matter.

[48.1.4] The court found that, as the cause of action was expressed, this

was not a matter that fell within the ambit of Section 36(6), and, therefore, the provisions of Section 41 did not apply. Therefore, the owners were entitled to institute the proceedings in their own names in order to enforce their property rights as opposed to needing to have a curator ad litem appointed for that purpose.

[48.1.5] In the course of its judgment, the court stated the following:

"...the body corporate here could not initiate proceedings in pursuit of the cause of action advanced by the applicants. The body corporate had no authority to institute proceedings in relation to a cause of action based on the common law."

[48.1.6] The Defendants' counsel in the present matter relied significantly on this statement in submitting that as a claim for defamation was also based on the common law, the Plaintiff was non-suited. She submitted that a body corporate's power to litigate must be found in the STSM Act, failing which the body corporate will not have locus standi.

[48.1.7] When viewed in isolation, the statement by the Constitutional Court is potent and persuasive. However, it must be considered in context. The court was dealing specifically with owners' common-law rights to enforce the zoning regulations that pertained to their property. In that context, the Constitutional Court concluded that the body corporate would have "*no direct and substantial interest in those proceedings*" hence the provisions of Section 41 of the STA could not be invoked. This court doubts that the Constitutional Court intended that its single sentence on that issue was to serve as a general statement of the law pertaining to the question whether a body corporate may sue or be sued on a common-law claim that it had an interest in. Therefore, the enquiry whether the Plaintiff's claim for defamation against the Body Corporate is competent in law needs to be considered further.

[48.2] ***Oribel Properties 13 (Pty) Ltd v Blue Dot Properties 271 (Pty) Ltd* [2010] 4 ALL SA 282 SCA**

[48.2.1] Here the court stated the following at para 24:

"A body corporate has perpetual succession and is capable of suing or suing [sic] *in its own corporate name in respect of the five matters referred to".*

This was a reference to Section 36(6) of the STA (now Section 2(7) of the STSM Act).

[48.2.2] The court goes on to add:

"Some of the powers, such as the one in paragraph (a), are only declaratory but the power granted in paragraph (b) – and in some circumstances in paragraph (c) as well – gives it an entitlement it would otherwise not have had. Under normal circumstances only all the owners of the common property, ie the owners of the sections, would have been able to do so jointly as the common property is owned by them jointly..."

[48.2.3] The court appears to suggest that a body corporate may sue or be sued in respect of only the matters that may be brought within the ambit of Section 36(6) of the STA (now Section 2(7) of the STSM Act). The Defendants' counsel suggested that, by implication, the common-law claim of defamation was excluded from the ambit of this Section.

[48.3] The Defendants' counsel, further, relied on ***Central Developments Tshwane (Pty) Ltd and Another v Body Corporate, Twee Riviere Aftree Oord* [2020] ZASCA 107**, which reiterated and endorsed the sentiments of ***Oribel Properties***, and on ***Wimbledon Lodge (Pty) Ltd v Gore NO and Others* 2003 (5) SA 315 SCA** which suggests that legal

proceedings initiated by a body corporate ought to be only those contemplated in Section 36(6) of the STA (the court was, again, dealing with the earlier version of the Act in relation to a Section 41 assessment).

The Court's Assessment of the 1st Ground of Exception:

[49] Society in general, and lawyers in particular, appear to have become so accustomed to a body corporate of a sectional title scheme having legal personality that they easily associate and conflate its legal personality with other forms of legal entities especially in relation to legal proceedings that may be initiated and defended by such bodies corporate. Perhaps it has something to do with the word 'corporate' in its name, the fact that it has perpetual succession, and the fact that it may sue and be sued in its own name.

[50] It will be instructive to take a moment to reflect on the nature and purpose of a body corporate.

[51] In view of the country's heritage of the Roman-Dutch legal system, sectional ownership was not originally recognised in South African law. The sale of land was registered in terms of the Deeds Registries Act, 47 of 1937 without any reference to the improvements thereon. The law was expressed in terms of the Latin maxim *superficies solo cedit* (the surface yields to the ground). The idea of sectional ownership in South Africa appears to have been first mooted in the early 1950's. Sectional ownership in South Africa was eventually born in the first Sectional Titles Act, 66 of 1971. That Act underwent multiple amendments and was eventually wholly repealed by the Sectional Titles Act, 95 of 1986. This Act underwent a similar journey and was effectively replaced with the Sectional Titles Schemes Management Act, 8 of 2011, which reflects the current law on the

subject. (See generally ***Sectional Titles Share Blocks and Time-sharing*, CG van der Merwe and DW Butler, 1985**)

[52] The advent of sectional title ownership introduced the concept of composite ownership, namely the individual ownership of a particular section, coupled with joint ownership of certain common property. The pro rata ownership of common property and the participation of owners in making key decisions relating to the sectional title scheme is further determined by their participation quota, as defined in the STA. In its simplest terms, the participation quota is effectively the size of the unit expressed as a percentage in comparison with the size of other units in the scheme.

[53] As may well be imagined, a community of strangers living in close proximity with each other in such circumstances would inevitably result in disputes of various sorts. The legislature seems to have been acutely aware of this and legislated a framework for the proper functioning of the scheme for legal and inter-personal relations.

[54] For instance, in terms of Section 13 of the STSM Act, a myriad of conditions, which would generally not be applicable to owners of free-standing property, were imposed upon owners of sectional title units, including:

(i) allowing certain authorised people to access their property for the purposes of inspection and repairs;

(ii) carrying out work ordered by a competent authority at the owner's own cost;

(iii) repairing and maintaining his section and keeping it in a clean and neat condition;

(iv) using and enjoying the common property so as not to unreasonably interfere with its use and enjoyment by others;

(v) not causing a nuisance to others;

(vi) notifying the body corporate of the change of any occupancy or

ownership and of any mortgage pertaining to his unit; and

(vii) not using the common property for purposes that were not intended for it to be used, except with the written consent of all owners of the scheme, and if the owner is of the opinion that their refusal is unfairly prejudicial, unjust, or inequitable to him, he may apply for relief to an ombud.

[55] In terms of Section 10 of the STSM Act, all sectional title schemes must be regulated and managed by rules. These rules "*must provide for the regulation, management, use and enjoyment of sections and common property, and* [must] *comprise* [of] *management rules... and conduct rules*". Regulation 9 of the Regulations promulgated in terms of the STSM Act provides that the management rules and conduct rules prescribed in Annexure 1 and Annexure 2 respectively of those Regulations "*must be considered to be and interpreted as laws made by and for the body corporate of that scheme*". Annexure 1 and Annexure 2 of the Regulations go on to prescribe a myriad of rules that owners of units are bound by. In addition to the prescribed rules, the body corporate is empowered to make further rules.

[56] The upshot of all of this is that in view of the historical development and creation of this type of ownership, appropriate measures needed to be implemented to make the system legally and practically workable. That is what the STSM Act and Reguations attempt to achieve with their multitude of rules, practices, and procedures. The entity tasked with the responsibility of ensuring that the purposes of the Act and Regulations are fulfilled is the Body Corporate. This much is clear from the long title of the STSM Act. Section 2(1) creates the existence of the body corporate. Sections 3, 4, and 5 are replete with detailed functions, powers and duties of the body corporate. The absence of such a central controlling and administrative body would result in practical and legal chaos. For instance, in respect of legal proceedings, every unit owner would have

had to be joined in or to an action pertaining to the common property. In the circumstances, the body corporate's management role is plain to see.

[57] As a body corporate is a legal person, it requires natural persons to physically give effect to its obligations. This role is undertaken by volunteers from the body of membership of the body corporate, namely the owners or their nominees. These volunteers are called trustees. Whilst they represent the body corporate in carrying out its duties, they are not employees of the body corporate. Their actions do bind the body corporate but within the defined parameters of Section 2(7). There will, accordingly, be a point when the trustees will not have personal protection for civil wrongs that they may commit apparently in the name of the body corporate.

[58] To reiterate, the question before the court is whether the body corporate, as an entity, attracts liability for the actions of the trustees in relation to a claim for defamation and/or iniuria. This brings us back to the provisions of Section 2(7) of the STSM Act. Quaere: Whether a body corporate may sue for defamation, and for that matter, for iniuria?

[59] If the court understood both counsel correctly, they were of the view that Section 2(7) related to both, actions that were competent by and against, the body corporate. There is unlikely to be much opposition to the suggestion that an action for iniuria is available only to a natural person, not a legal person. Impairment of a legal person's reputation is actionable under the law of defamation or under the law of injurious falsehood.

[60] However, the absence of an entitlement of certain entities to sue for defamation is not foreign to our law. The most obvious are State entities and the State itself. The common law does not afford an

organ of State the right to sue for defamation in view of the peculiar nature of the relationship between the State and its subjects. In ***Bitou Municipality and Another v Booysen and Another* 2011 (5) SA 31 (WCC)**, the court, quoted ***Die Spoorbond & Another v South African Railways; Van Heerden & Others v South African Railways* 1946 AD 999**, where that court stated that the State's *"...main function is that of Government and its reputation or good name is not a frail thing connected with or attached to the actions of the individuals who temporarily direct or manage some particular one of the many activities in which the Government engages...it is not something which can suffer injury by reason of the publication...of defamatory statements as to the manner in which one of its activities is carried on. Its reputation is a far more robust and universal thing which seems to me to be invulnerable to attacks of this nature...".*

[61] In a similar vein, the peculiar nature of a body corporate places it in a category of its own in relation to other legal entities. There is no other legal entity that resembles the nature of a body corporate. Although a body corporate strives to maintain liquidity for the benefit of all the owners of the scheme, and may, itself, own property, it's primary objective is not to turn a profit. It's primary objective is to maintain good governance. This is what distinguishes it from a trading and, for that matter, a non-trading entity. A body corporate would not ordinarily have a business status, reputation or goodwill to protect. In the event that a body corporate is unable to pay its debts, each member of the body corporate (namely, each owner) becomes personally liable for the debt in accordance with their participation quota.

[62] A body corporate could possibly be likened to an entity akin to a voluntary association but it differs significantly from the nature of a voluntary association in that, among other respects, membership of a body corporate by the owners is compulsory, not voluntary; their membership includes collective ownership of common property; no

other person may be a member, except the owner; membership of owners cannot be revoked; membership comes to an end only upon transfer of ownership or the dissolution of the body corporate by order of court.

[63] The defendants' counsel, correctly, described a body corporate as an entity of a sui generis nature.

[64] Bodies Corporate were created by statute to serve a peculiar purpose. Their existence is inextricably linked to, and dependent upon, the existence of sectional title ownership in South African law. The laws governing other legal entities, like the Company's Act, 71 of 2008, do not apply to bodies corporate. The life of a body corporate is regulated by the four corners of the STSM Act and Regulations, together with the Rules prescribed or made therunder.

[65] As such, the provisions of Section 2(7) are instructive as to the powers of a body corporate to sue and be sued. Any litigation by or against a body corporate must able to be brought within the ambit of Section 2(7) in order to be competent. To reiterate, the Plaintiff's counsel contended that the use of the word "any" in Section 2(7)(d) must, by itself, be interpreted to include actions for defamation and iniuria. This cannot be correct. Such actions, by or against a body corporate, are inconsistent with its peculiar nature and purpose. The wide meaning of the word "any", as may be contemplated in other laws or legal documents, therefore, cannot apply here.

[66] If the court is wrong in this regard, Section 2(7)(d), in any event, contains the built-in qualification that "*any matter*" that the Body Corporate may sue or be sued for must be a matter "*arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under this Act or any rule*". The Defendants' counsel, correctly, submitted that appropriate facts must be pleaded in

this regard in order to invoke the application of this provision.

[67] The only context that the Plaintiff had pleaded in her summons in fulfilment of this requirement is her allegation in paragraph 7 of her particulars of claim that the alleged defamatory statements were made *"in reply to the plaintiff's written request pertaining to the value of fringe benefits of employees of the Dorset Body Corporate...."* The Plaintiff's written request was not attached to the summons. The Plaintiff, in paragraph 17 of her heads of argument, submitted that *"[T]he background and setting within which the letter was sent was that the trustees were at the time, discussing the value of fringe benefits of employees of the Dorset Body Corporat, and in the context of certain gardening problems experienced by the Body Corporate, therefore during the exercise of their powers as Trustees in accordance with the provisions of the Act"*.

[68] The Defendants' counsel, however, submitted that "[T]*he plaintiff does not identify which power or duty under the STMS Act the Body Corporate was exercising or performing*". None of the powers, functions, and duties of the body corporate set out in Sections 3, 4, and 5 have been pleaded.

[69] The Defendants' counsel suggested that the closest that the Plaintiff comes to fulfilling this requirement is to rely on Section 4(a) of the STSM Act which lists one of the powers of the Body Corporate as being *"to appoint such agents and employees as the Body Corporate may consider fit"*. To paraphrase, she submitted that the claim against the Body Corporate concerned neither the exercise of its power to appoint an employee, nor any matter arising out of the exercise of that power, but from a mere discussion pertaining to the value of an employee's fringe benefits, and that a discussion of the exercise of a power did not translate into the actual exercise of that power nor the performance of a duty. It is difficult to argue with counsel's logic in this regard.

[70] The Defendants' counsel, however, went on to submit the following:

"[F]*or a claim for defamation to fall within this provision, the Plaintiff would, therefore, need to establish that the act of defaming...was a matter that arises from the exercise of a power or the performance of a function. The act of defaming a person cannot be said to fall within the scope of exercising a power or function under the STMS Act. The act of defaming is distinct, and is premised on the common law rather than a statutary power*".

[71] It seems to the court that the argument became conflated at some point. On the one hand, the argument appeared to be that provided appropriate facts were pleaded, a cause of action could possibly have arisen for defamation, and that it was the absence of the pleaded facts that rendered the summons excipiable. On the other hand, the argument appeared to be that no amount of pleaded facts could justify a cause of action for defamation against a body corporate. The Plaintiff's counsel seemed to pick up on this apparent inconsistency in his Heads of Argument.

[72] In the court's view, however, it does not matter as the Defendants are correct on either score.

[73] There were inadequate facts pleaded in order to bring the Plaintiff's claim within the purview of Section 2(7)(d). It seems to the court that the Plaintiff had missed the need to plead these facts as her particulars of claim were focused on meeting the requirements for a defamation action, probably on the assumption that such a cause of action was available against the Body Corporate.

[74] Even if these facts had been pleaded, they would not have sustained a cause of action for defamation against the Body Corporate as the claim would have been inconsistent with the nature, purpose, and functions of a Body Corporate. The status of a body corporate is

probably best summed-up as follows: *"A body corporate is a legal entity made up of all the owners in the sectional title scheme. The body corporate exists to represent the owners and manage and control the building/complex by making sure that its financial, administrative and physical needs are taken care of*". (**A Guide to Sectional Title in South Africa – Wits University**)

[75] In the court's view, ultimately, a body corporate may neither sue, nor be sued for defamation. As suggested above, this was the gravamen of the Defendants' complaints as it results in the Plaintiff's claim falling to be dismissed.

Costs:

[76] In these proceedings, the Plaintiff was represented by counsel, assisted by an attorney, and the Defendants were represented by senior counsel, assisted by an attorney, except that on the final day of the hearing the Defendants' senior counsel was also assisted by junior counsel.

[77] The Defendants seek ordinary costs, including the costs of counsel, except that they seek punitive costs on the attorney and client scale for the period 28 March 2023 to 22 May 2023.

[78] The facts relating to the costs request are the following:

The exception and application to strike-out were heard on 28 March 2023. At that hearing, the court understood the Plaintiff's counsel to suggest that there was authority in the form of case-law in terms of which the question whether a body corporate could be sued for defamation had been decided. Indeed the Plaintiff had submitted the following in paragraph 30 of her Heads of Argument:

"[T]he views of the courts are that a Body Corporate is a legal person in accordance with the South African law of entities, that is capable of

suing and being sued without limitation. There are several authorities relating to matters where a Body Corporate was allowed to sue natural and legal persons for defamation of the Body Corporate".

The Plaintiff's counsel submitted, however, that neither he nor his attorney could access the relevant case law by the time of the hearing. The Defendants' counsel was not aware of any such authority.

[79] As the question appeared to be a novel one that could be dispositive of the entire action, the court requested that both parties make a concerted effort to source the suggested authorities. The matter was postponed until 22 May 2023 for the results of their research.

[80] On 22 May 2023 the Plaintiff's counsel conceded that the authorities could not be sourced. Ordinarily this could very well have been forgiven, except for the following: During the period 28 March 2023 and 22 May 2023 the respective parties' attorneys communicated with each other at length regarding the case authorities that the Plaintiff's legal team had suggested existed. This was evidenced by a bundle of papers consisting of the relevant email exchanges that was handed to the court in support of the punitive costs order. Understandably, the Defendants' legal team were anxious to access the case law that the Plaintiff relied upon.

[81] At some point during this period the Plaintiff's attorneys forwarded the following list of cases, together with the accompanying synopsis of the cases, to the Defendants' attorneys as constituting the authorities in question:

[82] In relation to a Body Corporate's entitlement to sue for defamation:

[82.1] ***The Body Corporate of the Brompton Court v Weenen*** **[2012] ZAGP JHC 133**

"[Here] *the Body Corporate sued a unit owner for defamatory comments made in an email to other owners in the scheme*".

[82.2] ***The Body Corporate of Bela Vista v C & C Group Properties CC* [2009] ZAGPPHC 54**

"[Here] *the Body Corporate sued a Close Corporation for defamation subsequent to a defamatory letter sent to the Body Corporate by the Close Corporation*".

[83] In relation to others suing a Body Corporate for defamation:

[83.1] ***Dolphin Whisper Trading 21 (Pty) Ltd v The Body Corporate of La Mer* [2015] ZAKZPHC 23**

"[Here] *a company succeeded with a claim for defamation after the Body Corporate made defamatory statements of the Company's business operations*".

[83.2] ***Bingham v City View Shopping Centre Body Corporate* [2013] ZAGPJHC 77**

"[Here] *the plaintiff, being a natural person, successfully sued the Body Corporate for defamatory remarks contained in a letter sent by the Body Corporate to other owners, wherein defamatory remarks were made about the plaintiff's business*".

[84] Generally, where a Body Corporate sued/was sued for defamation:

[84.1] ***Body Corporate of Pinewood Park v Behrens* [2013] ZASCA 89**

[84.2] ***Body Corporate of Empire Gardens v Sithole and Others* [2017] ZAGPJHC 23**

[84.3] ***Body Corporate of the Island Club v Cosy Creations CC*** **[2016] ZAWCHC 182**

[84.4] ***Body Corporate of Fisherman's Cove v Van Rooyen*** **[2013] ZAGPHC 43**

[85] Despite their best efforts, however, the Defendants' attorneys were unable to access any of these cases. The Plaintiff's attorneys were unable to furnish them with copies of the cases either.

[86] At the hearing on 22 May 2023, the Plaintiff's counsel explained that his attorney had sourced the cases through the medium of ChatGPT. According to the website, www.techtarget.com, ChatGPT is "*an artificial intelligence chatbot that uses natural language processing to create humanlike conversational dialogue. The language model can respond to questions and compose various written content, including articles, social media posts, essays, code and email*". A chatbot is a "*computer program designed to simulate conversation with human users, especially over the internet*". The GPT in ChatGPT means "*Generative Pre-trained Transformer*".

[87] The Plaintiff's attorneys used this artificial intelligence medium to conduct legal research and accepted the results that it generated without satisfying themselves as to its accuracy. As it turned out, the cases listed above do not exist. The names and citations are fictitious, the facts are fictitious, and the decisions are fictitious. The Plaintiff's counsel was constrained to concede as much.

[88] The Defendants' counsel submitted that this type of attempt to mislead the court must be met with an appropriate punitive costs order.

[89] However, the Plaintiffs' legal team did not submit these cases to the court as binding authorities, they submitted them to the Defendants'

attorneys as being the cases that they would rely on prior to realising the error of their proposed actions. It seems to the court that they placed undue faith in the veracity of the legal research generated by artificial intelligence and lazily omitted to verify the research. Ordinarily, if the court was satisfied that the attorneys had attempted to mislead the court, the consequences would have been far more grave. Not only would it have attracted a costs order de bonis propriis against the relevant attorney, but the court would have been compelled to report the attorney's conduct to the Legal Practice Council. As it happens, the court is quite confident that neither the Plaintiff's attorney nor her counsel attempted to mislead the court. It seems that the attorneys were simultaneously simply overzealous and careless.

[90] In this age of instant gratification, this incident serves as a timely reminder to, at least, the lawyers involved in this matter that when it comes to legal research, the efficiency of modern technology still needs to be infused with a dose of good old-fashioned independent reading. Courts expect lawyers to bring a legally-independent and questioning mind to bear on, especially, novel legal matters, and certainly not to merely repeat in parrot-fashion, the unverified research of a chatbot.

[91] Although the plaintiff's attorneys did not intend to mislead anyone, the inevitable result of this debacle was that the Defendants' attorneys were indeed misled into thinking that these authorities were real. As a result, they would have invested a significant amount of time and effort in their futile attempts at tracking down these cases. The hearing of the 22nd of May 2023 was intended for the specific purpose of receiving the relevant case-law authority that turned out not to exist. The costs order sought by the Defendants in this regard is not unreasonable. Indeed, the court does not even consider it to be punitive. It is simply appropriate. The embarrassment associated with this incident is probably sufficient punishment for the Plaintiff's attorneys.

[92] To sum up:

[92.1] the court is inclined to grant the First Defendant's application to strike-out;

[92.2] the court is inclined to dismiss the Defendants' 2nd, 3rd, 4th, and 5th grounds of exception;

[92.3] as indicated elsewhere in this judgment, a pronouncement on these issues becomes moot in the light of the Defendants' 1st ground of

exception being upheld and being dispositive of the matter. However, as these findings impact on the issue of costs, and, possibly, on the further conduct of the matter beyond this court, the court will express the order for purposes of completeness;

[92.4] the costs order that the court considers appropriate in relation to the exceptions takes into account the fact that the Plaintiff has been partially successful. Ordinarily, the Plaintiff ought to be awarded a measure of costs for those parts of the matter for which she succeeds. However, the court did not record separate times for the hearing of each point. The time was recorded merely for the hearing as a whole. It will be virtually impossible to resolve any disputes of fact that may arise in relation to the time that was spent on those aspects that the Plaintiff is successful with as compared with those that the Defendants are successful with, together with the division of the efforts taken in the drafting of the papers, the heads of argument, and so forth. This will pose a rather difficult task for the taxing master. The court, accordingly, considers that the costs order below will be appropriate.

[93] In all the circumstances, the court makes the following order:

[93.1] The First Defendant's application to strike-out is granted with costs, including the costs of counsel. The following parts of the Plaintiff's particulars of claim are struck out:

(i) Paragraph 18

(ii) The reference to the First Defendant in her personal capacity in paragraph 20A

(iii) The reference to the First Defendant in her personal capacity in paragraph 21A

(iv) The prayer against the First Defendant in her personal capacity.

[93.2] The Defendants' 1st ground of exception is upheld;

[93.3] The Defendants' 2nd, 3rd, 4th, and 5th grounds of exception are dismissed;

[93.4] The Plaintiff is to pay 60% of the Defendants' costs, including the costs of counsel up to and including the hearing of 27 March 2023;

[93.5] The Plaintiff is to pay the Defendants' costs on the attorney and client scale for the period after 27 March 2023 up to and including the hearing of 22 May 2023, including counsel's fees for the appearance on 22 May 2023 in an amount in excess of that allowed in the magistrates court tariff, within the parameters of the appropriate bar council, but in the taxing master's discretion;

[93.6] The Plaintiff's claim is dismissed with costs.

Dated at Johannesburg on this 29TH day of June 2023.

"TRANSMITTED ELECTRONICALLY
WITHOUT AN ORIGINAL SIGNATURE"

A CHAITRAM
REGIONAL MAGISTRATE
JOHANNESBURG