REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: NO (2) OF INTEREST TO OTHER JUDGES: YES (3) REVISED **30 JUNE 2022** **FHD VAN OOSTEN**	**CASE NO: 36879/2015**

In the matter between

VAYEKE SIVUKA & 328 OTHERS **PLAINTIFFS**

and

CYRIL RAMAPHOSA **FIRST DEFENDANT**

SIBANYE STILLWATER LTD **SECOND DEFENDANT**

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA **THIRD DEFENDANT**

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] On 16 August 2012 a tactical response unit of the South African Police Service shot and killed 34 striking workers and seriously wounded and arrested many others, who were part of a peaceful gathering on public land near the town of Marikana in

North West Province. The massacre received global attention and outrage. Counsel for the plaintiffs informed the court that the Government of the Republic of South Africa has admitted liability for the calamities which constitute the element of harm, both in public and in the courts.

[2] The plaintiffs are 329 mineworkers who were, during the incident, injured and arrested by the police. On 20 October 2015, the plaintiffs instituted action against Mr Cyril Ramaphosa, as the first defendant, Sibanye Stillwater Ltd (formerly Lonmin plc), as the second defendant, and the Government of the Republic of South Africa, as the third defendant. In the action they seek payment of the amount of R977 319 735.00 from the first and second defendants jointly and severally, in respect of 'patrimonial and compensable loss' suffered as a result of the 'faulty conduct of the first, second and/or third defendants, alternatively, any combination of two or all of the defendants, acting collusively', and/or payment of the amount of R164 500 000.00, from the first second and third defendants, jointly and severally, in respect of 'constitutional /exemplary/punitive damages', together with interest thereon and costs. In addition, the plaintiffs claim as against the first, second and or third defendants, jointly and severally, 'non-patrimonial and non-compensable relief' in the form of a declarator and a number of restitutional orders.

[3] The first and second defendants, in a notice of exception, duly afforded the plaintiffs 15 days to remove the cause of complaint in regard to the vague and embarrassing allegations, and set forth the grounds of exception in regard to the particulars of claim lacking averments to sustain a cause of action. The first defendant relies on 8 separate grounds of exception and the second defendant on 10 grounds.

The legal principles

[4] In the recent judgment of the Supreme Court of Appeal in *Luke M Tembani and Others v President of the Republic of South Africa and Another* (Case no 167/2021) [2022] ZASCA 70 (20 May 2022), the general principles relating to and the approach to be adopted in regard to adjudicating exceptions were summarised as follows (para14):

'Whilst exceptions provide a useful mechanism 'to weed out cases without legal merit', it is nonetheless necessary that they be dealt with sensibly (*Telematrix (Pty) Ltd v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) para 3). It is where pleadings are so vague that it is impossible to determine the nature of the claim, or where pleadings are bad in law in that their contents do not support a discernible and legally recognised cause of action, that an exception is competent (Cilliers *et al Herbstein & Van Winsen The Practice of the High Courts of South Africa* 5ed Vol 1 at 631; *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 899E-F). The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable (*Ocean Echo Properties 327 CC and Another v Old Mutual Life Insurance Company (South Africa) Ltd* [2018] ZASCA 9; 2018 (3) SA 405 (SCA) para 9). The test is whether on all possible readings of the facts no cause of action may be made out; it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts (*Trustees for the Time Being of the Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* [2012] ZASCA 182; 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA); [2013] 1 All SA 648 (SCA) para 36 *(Children's Resource Centre Trust)*).'

[5] In adjudicating this exception, the court is enjoined to accept the facts pleaded by the plaintiffs as true and not to have regard to any other extraneous facts or documents (*Pretorius and Another v Transport Pension Fund and Another* 2019 (2) SA 37 (CC) para 15). Only primary factual allegations that are necessary for the plaintiff to prove (*facta probanda*) in order to support his right to judgment of the court, must be pleaded and a plaintiff is not required to plead secondary allegations (*facta pobantia*) upon which the plaintiff will rely in support of the primary factual allegations (*Trope v South African Reserve Bank and Another and Two Other Cases* 1992 (3) SA 208 (T) 210G-H, quoted with approval in *Jowell*). But, as Vally J pointed out in *Drummond Cable Concepts v Advancenet (Pty) Ltd* (08179/14) [2018] ZAGPJHC 636; 2020 (1) SA 546 (GJ) (para 7):

'The question that arises from this legal requirement is, what facts are necessary to ensure that the cause of action has been disclosed? The answer depends on the nature of the claim - a claim arising from a breach of contract requires different facts from a claim based in delict.'

[6] An exception to a pleading that is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it

is vague In *Trope* (210G-H), the particularity required in pleading was explained as follows:

'It is, of course, a basic of principle that the particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made…'

[7] Vagueness arises from statements which are meaningless (*Venter and others NNO v Barritt Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) para 11), or are capable of more than one meaning, or fail to provide the degree of detail necessary to properly inform the other party of the case being advanced (*Win Twice Properties (Pty) Ltd v Capitulo Entertainment (Pty) Ltd t/a Galaxy World and Others* (33426/2017) [2018] ZAGPJHC 519 (7 September 2018) para 3). The second consideration is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced (*Barloworld Logistics Africa (Pty) Ltd v Ford* 2019 (5) SA 133 (GJ) 141F-H), which is a factual enquiry and a question of degree, influenced by the nature of the allegations, their contents, the nature of the claim and the relationship between the parties (*Win Twice Properties*, para 4).

The plaintiffs' cause of action

As against the first defendant (Section B, paras 8 to 16)

[8] The plaintiffs' cause of action is founded in delict. The elements of a delict are an act or omission, wrongfulness, fault, causation and harm. The plaintiffs are required to plead and thus identify the conduct on the part of the defendant, that is wrongful, the harm suffered by them, how the defendant's conduct caused that harm, and if the delict involves fault, whether the conduct of the defendant was negligent or intentional.

[9] The plaintiffs allege that 'the three defendants were acting in concert among each other and as principal players in the collusion between the state and capital which resulted in the massacre which is at the centre of this action'. The first defendant is

sued in both his personal capacity and/or as a director of the second defendant and in pursuit of his personal interests and those of the second defendant. The second defendant, it is alleged, was acting 'via the agency of its employees, its directors and its business associates'.

[10] The 'liability, culpability and/or responsibility' of the first defendant is premised on the content of email communication exchanged between the first defendant and his colleagues at the then Lonmin, one Roger Phillimore and Albert Jamieson, the chief commercial officer of the second defendant, on 15 August 2012 (the email communication). I will revert to a full discussion hereof in dealing with the first defendant's first exception later in the judgment.

[11] In the alternative the plaintiffs allege that the first defendant acted negligently, more particularly in that in his capacities as 'a director of Lonmin/BEE investor/shareholder, chairperson of the transformation committee, former trade union leader and political leader' he owed certain duties to the plaintiffs, which are listed in seven sub-paragraphs. It is further pleaded that 'in violation of the various duties owed to the plaintiffs', he unlawfully conducted himself in the manner enumerated in seven sub-paragraphs. The first defendant's 'direct interventions' caused the 'pressure exerted by him' to be 'transmitted by the Minister of Police to the top police management generals through the medium of the National Commissioner of Police and/or the Provincial Commissioner of Police and the National Management Forum, after which it was further and foreseeably transmitted to the police forces on the ground at Marikana'. It is further alleged that the first defendant made several telephonic calls to several ministers of state, including the Secretary-General of the ANC, the Minister of Police directly, the Minister of Minerals and Energy directly and the President and other cabinet ministers indirectly at a cabinet meeting held on 15 August 2012, and via the medium of the Minister of Minerals and Energy, in order to exert pressure on them to take violent action with speed.

[12] The plaintiffs further seek to hold the first defendant 'in collusion with the third defendant' responsible for the conduct of senior police management, which is described in more detail in 10 sub-paragraphs, which it is alleged is further supported by first, a transcript of a conversation between the then Provincial Police

Commissioner in the North West, the second defendant's Vice President: Human Capital and others (the conversation transcript), second, relevant portions of the transcript of the proceedings of the Marikana Commission of Enquiry, third, the minutes of a National Management Forum meeting and four, minutes of the final meeting of the Joint Operations Committee, copies of which are likewise annexed. Copies of the first, second and fourth mentioned documents are attached to the particulars of claim, while a copy of the second mentioned has not been attached due to it being too voluminous.

[13] The 'calamities' suffered by the plaintiffs resulting from the pleaded conduct of the first respondent, include, that they were shot at with live ammunition, assaulted and arrested by members of the SAPS, maliciously prosecuted by the National Director of Public Prosecutions, humiliated in the eyes of the public and the international community, incorrectly labelled as criminals and murderers, stripped of their human dignity and deprived of their privacy, right to equal protection before the law and/or their constitutional right to 'bodily psychological integrity'.

As against the second defendant (Section C, paras 17 and 18)

[14] The liability, accountability and/or responsibility of the second respondent is premised on the legal duties it owed to the plaintiffs as their employer, which are enumerated in 6 sub-paragraphs, and include *inter alia*, the duty to protect its employees from physical injury and death, the duty to engage with or negotiate working conditions, including wages, certain fiduciary duties arising from its lawful incorporation in terms of the company laws of the Republic of South African and a variety of constitutional duties.

[15] The plaintiffs allege that the second defendant breached the duties aforesaid, *inter alia*, through its employees and/or directors participating in the email communication with the first defendant and in the conversation, which I have already referred to, unlawfully colluded with the SAPS with the ultimate aim to ending the strike by any means, including fatal violence, failed to take the requisite steps which would have resulted in the avoidance of violent conflict, death, injury and unlawful arrest, was a party to, approved and instigated the actions of the first defendant as pleaded, extensively contributed human, material, physical, and financial resources

to the police and/or army, without which the massacre would not have materialised and instigated the police under false pretences to arrest the strikers and AMCU leaders.

General comments: Particulars of Claim

[16] Before considering the various grounds of exception, it is necessary to comment on a number of aspects in regard to the pleading of facts generally, and in particular the reference to and incorporation of documents in the particulars of claim.

[17] Uniform Rule of Court 18(4) requires every pleading to contain 'a clear and concise statement of the material facts upon which a pleader relies for his claim'. The plaintiff is accordingly required to disclose a cause of action, which means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court.

[18] It follows as a matter of logic that irrelevant and superfluous allegations in regard to the cause of action relied on, are impermissible.

[19] A copy of the summons and particulars of claim in an action instituted on 14 August 2015, by the plaintiffs against the President of the Republic of South Africa, the Minister of Police and the National Director of Public Prosecutions, in the Gauteng Division of this Court, is attached to the particulars of claim. The reason for the reference to and annexing a copy of the summons in that matter, are to be gleaned from the introductory statement in the particulars of claim, that all the plaintiffs are instituting the present action in addition to any claims instituted against other defendants, albeit with a 'few identifiable intersections', arising from the aftermath of the Marikana massacre. The relevance of the reference to the action, either in regard to the plaintiffs' cause of action in the present matter, or, perhaps by way of background, escapes me. In my view, this information is superfluous and except for adding to the volume of documents already having been filed, serves no useful purpose. Although not rendering the particulars of claim excipiable, it remains undesirable to include superfluous matter in a pleading.

[20] The conversation transcript, the extracts from the Marikana Commission of Enquiry proceedings and the two sets of minutes, as I have already alluded to, are referred to, and copies thereof are attached to the particulars of claim, merely to

serve as ‘further support’ for the averments contained in the preceding paragraph (para 14).

[21] Rule 18(4) requires a clear and concise statement of the material facts upon which a pleader relies for his claim. The mere reference to the type of documents we are here concerned with, falls short of this requirement. The identification of the specific portions relied on, in my view, is necessary. The defendants are entitled to be informed of the specific portions relied on by the plaintiffs, in regard to the cause of action. In the absence thereof, as it came to the fore in argument before me, wide ranging inferences and conclusions on the proposed interpretation of the conversation transcript, by counsel for the plaintiffs, were sought to be drawn, without those having been either specifically identified in the particulars of claim, or pleaded. It is not for the defendants nor for the court in reading the documents to conduct a search in order to find possible ‘support’ for the allegations pleaded. That, it needs to be reiterated, remains the duty of the pleader in setting out the cause of action in the particulars of claim. I do not consider this to be a ground of exception but rather of practical importance.

The exception raised by the first defendant

The first ground of exception (paras 8.1 and 8.2 of the plaintiffs’ particulars of claim)

[22] With reference to the email communications, the first respondent contends that the averments contained therein, and the several telephone calls made to several politicians and ministers of state, in order to exert pressure on them to take violent action with speed, do not constitute actionable incitement or other wrongful conduct resulting in the plaintiffs’ claims not disclosing a cause of action.

[23] It is accordingly necessary to juxtapose the contents of the email communication against the plaintiffs’ interpretation thereof. The plaintiffs plead that it was proposed in the email communication that the actions of the strikers, including the plaintiffs, ought to be characterised as criminal and not as part of a labour dispute, that the situation required the intervention of the army and/or the police, that the idea or suggestion of resolving the issue by Lonmin management engaging with dialogue with its employees was to be rejected as repugnant and one to be avoided, that ‘as

the workers were (murderous) criminals, concomitant action was required to be perpetrated against them (*ie* they ought to be similarly murdered in turn)', that pressure should be put to bear upon the politicians who controlled the means of violence, as embodied in the army or police, namely, *inter alios* the Minister of Police, the Minister of Minerals and Energy, the President and other members of the cabinet so that such *concomitant* action could be politically sanctioned.

[24] Due to their importance, the contents of the emails, all exchanged on 15 August 2012, are reproduced in full:

In the email sent to Roger Phillimore, at 00h47, Mr Ramaphosa reported that he had had discussions with Minister Shabangu, and told her that her silence and inaction about what was happening at Lonmin was bad for her and the Government, and suggested to her that they should have a discussion and see what she needs to do. Mr Ramaphosa further mentioned that he had spoken to the President of NUM, Mr Senzeni Zokwana, who told him that he and Frans Baleni wanted to meet with Mr Ramaphosa and the former president of NUM, James Motlatsi, to discuss what they should do as a union going forward. Motlasi had told Mr Ramaphosa that NUM had held a successful meeting where some 500-700 workers had stated that they wanted to work. Mr Ramaphosa further wrote that he would be speaking to Secretary General of the ANC, Mr Gwede Mantashe and suggested that the ANC should intervene, as well as to Mr Mike Teke, the deputy-chairperson of the Chamber of Mines.

At 09h43, Mr Albert Jamieson responded:

'Thanks for your help so far. Thankfully last night was relatively peaceful as is this morning. We have had approaches from NUM Eastern Plats that they would like to return to work if police can offer adequate protection. Two areas of concern.

- The Minister was on radio today saying she'd been briefed that this was a wage dispute and management and unions should sit down and sort it out? Not sure who's briefed her, we are waiting to talk to her (Roger), and although not too damaging it's also not too helpful. I've had two discussions with the DG and in each case have characterised this as NOT an industrial relations issue, but a civil unrest/destabilisation/criminal issue that could not be resolved without political intervention and needs the

situation stabilised by the police/army. I think on both occasions he agreed with me and it reflected what was in our letter but now I'm not sure - I have a call to him this morning.

- We are grateful the police now have c. 800 on site. Our next challenge is sustaining this and ensuring they remain and take appropriate action so we can get people back to work. It would be good to have some independent confirmation the police have plans to sustain a presence for at least a week and numbers don't wane on the weekend.'

At 12h18, Mr Ramaphosa thanked Mr Jamieson for 'the consistent manner in which you are characterising the current difficulties we are going through' and added:

'The terrible events that have unfolded cannot be described as a labour dispute. They are plainly dastardly criminal and must be characterised as such. In line with this characterisation there needs to be concomitant action to address this situation.
You are absolutely correct in insisting that the Minister and indeed all government officials need to understand that we are essentially dealing with a criminal act. I have said as much to the Minister of Safety and Security.
I will stress that Minister Shabangu should have a discussion with Roger.'

At 14h58, in an email addressed to the all involved in the communication, Mr Ramaphosa mentioned that he had had a discussion with Minister Susan Shabangu in Cape Town and added:

'1. She agrees that what we are going through is not a labour dispute but a criminal act. She will correct her characterisation of what we are experiencing.
2. She is going into Cabinet and will brief the President as well and get the Minister of Police, Nathi Mthetwa to act in a more pointed way.
3. She will be in Johannesburg by 5pm and would be able to speak to Roger.'

In his response, 15 minutes later, Mr Jamieson thanked Mr Ramaphosa and added:

'(T)hat is very helpful – have a call into the DG so will reinforce'.

[25] The point of departure is to consider the impact on, and relevance of the emails to the massacre. The crucial words requiring consideration are, that the first respondent described the workers as *(murderous)* criminals and the proposal that *concomitant action* was required to be perpetrated against them, which it is pleaded bear the meaning *'they ought to be similarly murdered in return'.* These words are

not to be found in the text of the emails and were inserted by the pleader in paragraph 8.1.4 of the plaintiffs' particulars of claim. Nothing is pleaded in support of adding those words and attributing that particular meaning to the contents of the emails. It must accordingly be assumed that the connotation of murder was pleaded by way of inference from the contents of the email correspondence as a whole. These not being factual allegations that ought to be accepted as they stand, the question arising is whether the inferences drawn as pleaded, are reasonably, and on any interpretation, reconcilable with the contents of the emails.

[26] Counsel for the plaintiffs contended that the first defendant, in proposing *concomitant action*, was proposing that the workers be murdered. I do not agree. The argument assumes, without proffering the grounds in support thereof, that the proposal was made that the workers be murdered. Having carefully read and considered the email communications, I have not been able to find any support for the inference that the murder of the workers was intended or foreseen. In arriving at this conclusion, I have had regard in particular to all extracts from the emails that are relevant to the enquiry.

[27] The characterisation of the conduct of the workers as criminal, was initiated by Jamieson. He was of the view that it was not an industrial relations issue, but a civil unrest/destabilisation/criminal issue. The assistance of the police/army was considered necessary to stabilise the situation. He continues to mention that the police were on site and that this should be sustained to take *appropriate action so we can get people back to work.* In his response Mr Ramaphosa described the difficulties having arisen, as *terrible events* and *not a labour dispute*, which he characterised as *dastardly criminal requiring concomitant action to address the situation,* which the Minister after discussing it with her, agreed was correct and which she undertook would be taken further *'to act in a more pointed way'*.

[28] Mr Ramaphosa's characterisation of the events as *dastardly criminal* requiring *concomitant action* must be interpreted in the light of the communications as a whole. Whether he was correct in holding and expressing the view, is not of relevance in deciding the issue. To infer from the characterisation and proposal of concomitant action, that the workers were murderous and in turn ought to be murdered, is not only far-fetched but also irreconcilable within the context of the

email communication contents as a whole. Concomitant action in regard to criminal conduct, however benevolently interpreted, does not in any way imply murder, or entail ‘violent killings and/or serious injuries to many human beings, including the plaintiffs’ (para 9.2 of the particulars of claim).

[29] Counsel for the first defendant submitted that in this respect, an inconsistency or contradiction between the allegation pleaded and the emails attached in support thereof, exists, which renders the plaintiffs’ particulars of claim excipiable. I agree. In support of the contention relied on, counsel referred to the judgment of Opperman J in *Meechan and Another v VGA Chartered Accountants Partnership t/a PKF (VGA) Chartered Accountants* (7999/2019) [2020] ZAGPJHC 53; [2020] 2 All SA 510 (GJ) (28 February 2020), paras 16 to 33, where the learned judge, in regard to the plaintiff’s reliance placed on an attached audit report for its claim of a negligent misstatement, which did not in fact contain the representations for which the plaintiff contended, held it to be a ‘classic example of a vague and embarrassing pleading is where there is a contradiction between a document annexed to the pleading and what is pleaded about it’ and that the pleading on that ground, was excipiable.

[30] The plaintiffs further plead in regard to the email communications (paras 8.1.2 and 8.1.3), that it was proposed that the situation required the intervention of the army and/or the police, and that the idea or suggestion of resolving the issue by Lonmin management engaging in dialogue with its employees, was to be rejected as repugnant and one to be avoided. In order to understand the averments on which the inferences pleaded are premised, they must be examined in their proper context. The averments were made by Mr Jamieson in the 09h43 email to Mr Ramaphosa, quoted above. Mr Jamieson said that he had had two discussions with the DG and in each thereof the events were characterised as *NOT an industrial relations issue*, but as a *civil unrest/destabilisation/criminal issue*. On a plain reading of the sentence, it is the civil unrest/destabilisation/criminal issue that he considered could not be resolved without political intervention and required to be stabilised by the police/army. Mr Jamieson in expressing this view, separated and distinguished the industrial issue from the civil unrest/destabilisation/criminal issue. This is confirmed where, in dealing with the presence of police on site, he mentioned that the challenge would be, while the police were still present on site, to take *appropriate*

action so we can get people back to work. The inference pleaded, that the idea or suggestion of resolving the issue by Lonmin management engaging with dialogue with its employees was to be rejected as repugnant and one to be avoided, cannot be reconciled with the content of the email, and is accordingly misconceived and falls to be rejected.

[31] Lastly, in regard to the 'several' telephone calls made by Mr Ramaphosa to several politicians and ministers of state, that are named, in order to exert pressure on them to take violent action with speed (para 8.2), the absence of any detail or particularity in order to enable the first defendant to plead thereto, is significant. The conclusion that the telephone calls were made to exert the alleged pressure is all that is pleaded. Details as to the dates of the telephone calls and the contents thereof, cannot be described as *facta probantia*: these are clearly *facta probanda.* The addition of the words 'with speed' must be a reference to the contents of the telephone calls and the defendants are accordingly entitled to be apprised of the basis for pleading 'violent action with speed'.

[32] The fist defendant's first ground of exception must accordingly be upheld.

The first defendant's second ground of exception (para 11 and 12 of the plaintiffs' particulars of claim)

[33] The second ground excepts to the plaintiffs' alternative claim against the first defendant. It is trite that where the same claim is based on alternative causes of action, an exception can be taken against one or more of the alternatives (*See Du Preez v Boetsap Stores (Pty) Ltd* 1978 (2) SA 177 (NC). I have already alluded to the plaintiffs' alternative claim. This ground of exception relates to the various capacities of the first defendant as pleaded, in that they do not give rise to the duties alleged by the plaintiffs, nor that such duties are legal duties owed by the first defendant to the plaintiffs, resulting in the claim not disclosing a cause of action.

[34] The first defendant, in the capacities referred to, is alleged to have owed the duty to ensure that the management of Lonmin took appropriate measures to protect its employees, including the plaintiffs, from undue physical harm and violence, including state-sponsored violence, the duty to take reasonable steps to ensure that Lonmin should engage and/or negotiate with the strikers so as to avoid or minimise

the temptation on the part of the state and capital to resort to unnecessary violence, as has been his own experience; the duty to ensure that the employees of Lonmin, including the plaintiffs, were fairly remunerated, adequately and not in accordance with the apartheid wage structure, which he had criticised in his earlier life as a trade unionist; the duty to ensure that Lonmin, *inter alia*, provided adequate houses to its employees in compliance with its statutory and regulatory obligations; the duty to take all reasonable steps to eliminate and/or mitigate the devastating effects of the migrant labour system; the duty to ensure that Lonmin was not guilty of committing illicit financial flows, including transfer pricing, base erosion and the shifting of profits to so-called tax havens, such as Bermuda and other such countries, whilst simultaneously neglecting and failing to fulfil its financial, social and economic obligations to its employees and the South African public in general, and the duty to accord them respect as human beings in accordance with the spirit and principles of ubuntu/botho.

[35] Although much can be said about the litany of duties and obligations listed, I confine the enquiry to one single determinative question: whether the first defendant in his personal capacity, as director of Lonmin, as a matter of law, owed any of the duties to the plaintiffs (See *Country Cloud Trading CC v MEC Department of Infrastructure Development* 2015 (1) SA 1 (CC) para 19 [‘The issue is not whether the Department’s conduct was wrongful in some general sense, or wrongful towards iLima. It is whether its conduct was wrongful vis-à-vis Country Cloud’]; *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA) para 13 [‘…conduct must be wrongful, not in some general sense, but vis-à-vis the appellant’]). Section 76 (3) of the Companies Act 71 of 2008, deals with the duties of a director of companies and no reference is made of any duties to employees of the company. Some of the listed duties may be duties the first defendant owed to Lonmin, or that Lonmin owed to the plaintiffs, but the first defendant plainly did not owe the plaintiffs any of the listed duties. Nothing has been advanced in argument before me, in support of the existence of the listed legal duties, allegedly owed to the plaintiffs by the first defendant, in any of his capacities as ‘BEE investor/shareholder, chairperson of the transformation committee, former trade union leader and political leader’.

[36] Next, it is alleged that the first defendant acted in breach of those duties. This allegation likewise, is also unfounded in law, because the first defendant did not owe the plaintiffs those duties.

[37] For these reasons, the second ground of exception must be upheld.

The first defendant's third ground of exception (para 13 of the plaintiffs' particulars of claim)

[38] Paragraph 13 of the particulars of claim is pivotal to the plaintiffs' cause of action against the first defendant, because it seeks to establish the only causal link between his alleged unlawful conduct and the plaintiffs' loss. I have already alluded to the content of the paragraph.

[39] The third ground of exception is directed at para 13, in that insofar as the direct interventions of the first defendant are those referred to in paragraph 8 of the particulars of claim (arising from the email communications and the telephone calls), the pressure exerted by the second respondent is not unlawful and hence discloses no cause of action. Insofar as the direct interventions is a reference to the active enticement set out in para 12, such allegation is vague and embarrassing, containing no specificity to which the defendant might plead.

[40] Paragraph 13 is confined to 'the aforesaid direct interventions' of the first defendant, causing the pressure exerted by him to be transmitted through all the named persons to the police forces on the ground in Marikana. As I read the particulars of claim the *aforesaid* direct interventions can only constitute a reference to the telephone calls, referred to in para 8.2. There it is alleged that telephone calls were made to the Minister of Police *directly* and the Minister of Minerals and Energy *directly.* The email communications and the conduct described in paragraphs 12.2 to 12.7 did not constitute direct interventions, and must accordingly be excluded from having caused the consequences set out in para 13. The first defendant's conduct described in paragraphs 8.1 and 12.2 to 12.7 accordingly, in regard to the cause of action, is irrelevant in that it is not alleged to have caused the plaintiffs' loss.

[41] Counsel for the first defendant submitted that the pressure allegedly exerted and transmitted to ground level, does not satisfy the requirement of legal causation in delict. Causation entails a two-stage test. In regard to factual causation, the plaintiffs

have in paragraph 14, fully set out the steps that senior management would not have taken but for the intentional alternatively negligent conduct of the first defendant in collusion with the third defendant. As counsel for the plaintiffs was at pains to emphasise, whether the plaintiffs will at the trial be able to prove those allegations, is not relevant for present purposes. I am in agreement with counsel for the plaintiffs, the allegations as they stand, do satisfy the test for factual causation.

[42] As regards legal causation, counsel for the first defendant, with reliance on the leading authorities, submitted that the plaintiffs' reliance on a convoluted chain of events, in which the first respondent is far removed from the eventual harm that the plaintiffs suffered, is too remote in relation to the first defendant to found liability in delict. Counsel for the plaintiffs urged for a proper reading and consideration of paragraph 13, especially in view of the pleaded collusion between the three defendants (para 5.8), the allegation that the defendants were acting individually and collectively and the allegation that the first defendant 'participated in, masterminded and championed the toxic collusion between Lonmin and the South African Police Service which resulted in the death, injuries and arrests and detention of Lonmin employees, including the plaintiffs' (para 12.5). I agree and it is accordingly my finding that the plaintiffs have satisfied the test of legal causation.

[43] The third ground of exception must accordingly fail.

The first defendant's fourth ground of exception (para 14 to 16 of the plaintiffs' particulars of claim)

[44] In paragraph 14 of the plaintiffs' particulars of claim, they plead that but for the 'above intentional, alternatively negligent, conduct of the first defendant *in collusion with the third defendant*', the senior police management involved would not have made various critical decisions in regard to the events on 15 August 2012.

[45] This ground of exception addresses the absence of any detail in the preceding paragraphs to afford any factual basis for the alleged collusion. Counsel for the plaintiffs made much of the 'tripartite collusion' alleged to have existed between the defendants, as well as the allegations of incitement or instigation, which counsel submitted speak for themselves and obviate the need to plead particularity in respect of the specific conduct in regard to each of the defendants. Counsel stressed the

allegations pleaded at paragraph 22 of the particulars of claim, that the harm suffered resulted from the 'aforestated faulty conduct of the first, second and/or third defendants, alternatively any combination of two or all of the defendants, acting collusively'. At paragraph 5.8 the plaintiffs plead that the three defendants were acting in concert among each other and as principal players in the collusion between the state and capital, which resulted in the massacre which is at the centre of this action. The all-embracing umbrella term 'collusively', is facts specific, and cannot be elevated to a general rule that by the mere reliance thereon, no further, or less specificity needs to be pleaded. In the present matter the defendants are remote parties to the actual harm that was caused. Collusion, incitement and instigation have been pleaded, but those are not sufficient to properly link each of the defendants to the harm that was caused. The plaintiffs, in my view, in addition to alleging collusion, incitement and instigation, are required the plead the facts on which they rely to properly link the defendants to the harm.

[46] This ground of exception must accordingly be upheld.

The first defendant's fifth ground of exception (para 5 and 6.1 of the plaintiffs' particulars of claim)

[47] In paragraph 5 of the particulars of claim, the various capacities of the first defendant are set forth. These are that Mr Ramaphosa, at all material times, was a non-executive director and in that capacity, a member of the board of directors with portfolio of chairperson of the transformation committee of Lonmin, which is the employer of the plaintiffs; a shareholder and the chairperson of Shanduka which was a 18% shareholder in Lonmin, and a member of the National Executive Committee of the African National Congress.

[48] The plaintiffs then plead in para 6.1 that the first defendant is sued in his personal capacity and/or as a director of Lonmin, and in pursuit of his personal interests and those of Lonmin.

[49] This complaint raised in this ground of exception, is in regard to the legal foundation for holding the first respondent liable as a director of the second defendant.

[50] It is trite that the director of a company owes his or her duties to the company, to act in its interests, being those of the company itself as a corporate entity and those of its members as such as a body. In support of the proposition, counsel for the plaintiff have referred me to the judgment of Unterhalter J, in *De Bruyn v Steinhoff International Holdings NV* 2020 JDR 1405 (GJ) para 151, where the learned judge put it as follows:

'In my view, the case advanced has this difficulty. A case can be pleaded that the conduct of the Steinhoff directors is in breach of the directors' fiduciary duties. But in accordance with the standard account of directors' fiduciary duties, those duties are owed to the company. Any harm suffered as a result of the breach is actionable by the company to whom the duties are owed. The breach may also cause harm to shareholders, and indeed potentially to other classes of persons: creditors, employees, suppliers and customers. The harm does not establish that the duty is owed to all persons who suffer harm. On the contrary, and as the cases show, there must be a special relationship that subsists between the directors and the plaintiffs so as to require that the fiduciary duties owing to the company are also due to other persons. The prospective action fails to make that case. And compounds the problem by alleging that the Steinhoff companies to whom fiduciary duties are owed also owes those duties to the shareholders. I find no basis on the pleaded case, read with the affidavits, that permit me to find that the Steinhoff directors, SIHL or Steinhoff NV owe fiduciary duties to the shareholders. Without such a case, I cannot find that there is a cause of action because, absent wrongfulness, there is no delict.'

[51] Applied to the present ground of exception, the plaintiffs have failed to plead a case that a special relationship subsisted between the first defendant as director of the second defendant, so as to require that the first defendant's fiduciary duties owing to the company are also due to the plaintiffs. The allegations pleaded do not show that the first defendant owed the plaintiffs legal duties, and he therefore cannot in law incur liability to the plaintiffs in delict in his capacity as director of Lonmin, or 'in pursuit of his personal interests and those of Lonmin'.

[52] For these reasons, this ground of exception must be upheld.

The first defendant's sixth, seventh and eighth grounds of exception (paragraphs 12, 25 and 27 read with prayer C of the plaintiffs' particulars of claim)

[53] These grounds of exception are raised in regard to the plaintiffs' entitlement to the relief claimed, having regard to the allegations pleaded in paragraph 12 of the plaintiffs' particulars of claim; the claim for non-pecuniary atonement, aimed at restorative justice; the claim for non-patrimonial and non-compensable relief, and the claim for punitive and/or constitutional and/or exemplary damages.

[54] I do not consider the exception stage of these proceedings as the appropriate time to consider and decide these grounds of exception. In terms of the order concerning the exceptions to the merits of the plaintiffs' claims, appearing at the end of this judgment, the plaintiffs will be afforded the opportunity to amend the particulars of claim to address and correct several substantial and vital issues. A full and sustainable pleaded claim is not presently before this court. A decision on these grounds of exception, in my view, would be premature and accordingly not in the interest of justice (see in regard to the considerations applicable to absolution from the instance, but likewise of application to this matter: *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938(CC); 2001 (1) BCLR 995 (CC) para 80). The factual situation in the present matter is complex and the legal position in regard to such amendments as may be effected pursuant to the order I propose to make, uncertain (*Cf Tembani*, para 15-20). The interests of justice will be better served by the exercise of my discretion in postponing the adjudication of these grounds of exception to a date to be determined after the close of pleadings in the action. At that stage, a decision can be given by the court having considered all the pleadings in which a sustainable cause of action has been set out, together with the defendants' plea thereon. In the meanwhile, the plaintiffs may well cease the opportunity to re-consider the practical considerations I have alluded to as well certain aspects relating to the various exceptions raised, especially at this stage, having been apprised of the arguments by the defendants in regard thereto.

The exception raised by the second defendant

[55] The second defendant (Sibanye) has raised altogether 10 grounds of exception: two of which are directed at the cause of action and the remaining 8 on the basis of vague and embarrassing. Counsel for Sibanye have helpfully grouped the grounds of exception under three main topics. The first category of the grounds of exception addresses whether the plaintiffs have pleaded a link between the conduct that

Sibanye is alleged to have perpetrated and the harm that the plaintiffs have pleaded (the linkages exceptions). The second category of grounds of exception relates to whom Sibanye is alleged to have owed duties of care and through whom Sibanye is alleged to have perpetrated the wrongful conduct (the relationship exceptions). The third category concerns the duties of care pleaded in the particulars of claim (the duties of care exception).

[56] As can be expected, there is some overlap between the first defendant's exception and the second defendant's exception, which I have already dealt with and need not be addressed again.

The vague and embarrassing grounds of exception

The linkages exception: the fourth, sixth, seventh and eighth grounds of exception (paras 18 of the plaintiffs' particulars of claim)

[57] I have already alluded to the plaintiffs' allegations concerning the liability, accountability and responsibility of Sibanye and the various duties of care owed by Sibanye to the plaintiffs. At paragraph 18 of the particulars of claim, Sibanye is alleged to have breached those duties, *inter alia*, having participated in the email communications; participated in an unlawful and inappropriate conversation as reflected in the conversation transcript; unlawfully colluded with the SAPS to end the strike by any means, including fatal violence; instigated the premature use of violence; failed to take necessary steps to prevent violent conflict, death and injury and unlawful arrests; failed to have fulfilled obligations which would have prevented the massacre, such as its housing obligations towards its voters; was a party to and approved and instigated the actions of the first defendant; actively barred or discouraged those who were well-placed to prevent the bloodshed and other calamities; extensively contributed human, material, physical and financial resources to the police and/or the army, without which the massacre would not have materialised; actively refrained from engaging and/or negotiating with the strikers when they were duty-bound to do so; took sides with and was biased against competing trade unions; instigated the police under false pretences to arrest the strikers and AMCU leaders.

[58] The exception raises the issue whether the conduct pleaded has been linked to the harm that the plaintiffs allegedly suffered. Although the linkage in regard to certain conduct has been pleaded (inter alia, the failure to take necessary steps to prevent violent conflict, death and injury and unlawful arrests; unlawfully colluded with the SAPS; instigating the premature use of violence; contribution of resources to the police and/or the army and refraining from negotiating with the strikers), some of the remaining allegations concerning the conduct are not linked to the harm. It has not been pleaded how Sibanye's alleged *housing obligation towards voters* is linked to the massacre or any of the calamities suffered by the plaintiffs, nor why Sibanye was *duty-bound* to engage and negotiate with strikers, nor how Sibanye's alleged failure to *engage and negotiate* resulted in the calamites experienced by the plaintiffs, nor how *taking sides with and being biased against competing trade unions* resulted in the harm.

[59] These exceptions accordingly must be upheld to the extent I have indicated.

The relationships exception: the first and second grounds of exception as well as the first part of the fifth ground of exception (para 5.6 read with para 17 and para 6.2 of the plaintiffs' particulars of claim)

[60] Paragraph 5.6 of the particulars of claim reads as follows:

'[Sibanye] as the employer of the plaintiffs, owed them several duties of care as such, alternatively as persons working for its sub-contractors or simply as fellow human beings'.

[61] In paragraph 17 of the particulars of claim the plaintiffs aver that Sibanye was 'at all times hereto, the employer of the strikers, including the plaintiffs' and owed them the duties listed in paragraphs 17.1 to 17.6, which I have referred to above.

[62] That the duties were owed to persons working for Sibanye's sub-contractors or simply as human beings, is pleaded in the alternative to Sibanye as their employer owing the duties to the plaintiffs. The duties listed are mainly associated with the employer-employee relationship. These are: the duty to protect its employees from physical injury and death; to engage with or negotiate working conditions, including wages; not to incite violence against employees and to adopt a neutral posture amongst competing trade unions.

[63] In *Swinburne v Newbee Investments (Pty) Ltd* 2010 (5) SA 296 (KZD), the court held that wrongfulness is established by considering, whether, based on the *boni mores*, the defendant did indeed have a legal duty to prevent a plaintiff from being in a harmful situation and was reasonably expected to do so, but the defendant failed to do so. The *boni mores* test is common to both an infringement of a subjective right as well as the breach of a legal duty. To answer the question of whether an omission is wrongful, requires simply asking whether the wrongdoer has a legal duty to act positively. Where a defendant has a legal duty to act positively to prevent harm and does not do so, the omission is wrongful. It follows that the mere addition of human beings to the list of persons to whom the duty was allegedly owed, is inadequate, absent the basis upon which Sibanye is alleged to have owed the duty to *simply human beings.*

[64] The plaintiffs plead in paragraph 6.2 of the particulars of claim that Sibanye, in relation to the present action/claims 'was acting via the agency of its employees, its directors, its board of directors, and *its business associates'*. Who the business associates were and on what basis vicarious liability would exist for the conduct of its business associates, has not been pleaded. Counsel for Sibanye has referred me to the judgment in *Minister of Safety and Security v F* 2011 (3) SA 487 (SCA) para 15, where vicarious liability is described as follows:

'Vicarious liability has a long but uncertain pedigree. In essence it may be described as the liability that one person incurs for a delict that is committed by another, by virtue of the relationship that exists between them. There are two features of vicarious liability in its traditional form that are trite, but they bear repetition. The first is that vicarious liability arises by reason of a relationship between the parties and no more - it calls for no duty to be owed by the person who is sought to be held liable, nor for fault on his or her part. The second feature is that it is a secondary liability - it arises only if there is a wrongdoer who is primarily liable for the particular act or omission.'

[65] Except for the words 'through the agency of' appearing immediately before the reference to 'its employees, its directors, its board of directors and its business associates', nothing is pleaded as to the relationship, if any, that would have created vicarious liability. The relationship between a company and its employees, directors and board of directors, differs materially from whatever the relationship between the company and business associates might have been, especially in regard to vicarious

liability. For these reasons, the absence of a description of the relationship between Sibanye and its business associates, to establish vicarious liability, renders the inclusion of business associates in par 6.2 vague and embarrassing. Although this has been pleaded in the alternative, the plaintiffs are notwithstanding required to plead all elements of the delict before delictual liability can arise.

[66] Counsel for the plaintiffs explained that the reference to business associates is superfluous as it was intended to overlap with sub-contractors. I have a difficulty in understanding the overlapping, but it suffices to state that the exception is raised to the paragraph as its stands, which absent an amendment, must be decided.

[67] The first and second exceptions, as well as the first part of the fifth exception must accordingly be upheld.

The duties of care exception (the second part of the fifth ground of exception)

[68] Sibanye is alleged to have owed the plaintiffs the following two duties of care:

‘17.5 certain fiduciary duties arising from its lawful incorporation in terms of the company laws of the Republic of South Africa; and

17.6 constitutional duties arising from the obligations set out in the Constitution of South Africa, more particularly, the rights specified in paragraph (sic) 16 (sic) thereof’.

[69] The plaintiffs have simply referred to *certain* fiduciary duties without pleading which duties are referred to.

[70] In regard to the constitutional duties, counsel for the plaintiffs submitted that the particulars of claim, and in particular the constitutional damages claimed, should be read as a whole, from which it will become clear that the constitutional duties owed by Sibanye to the plaintiffs, as human beings and/or bearers of the specified constitutional rights implicated in the pleaded calamities, are those including bodily integrity, life and reputation. I agree that there indeed are numerous references to the plaintiffs’ human rights in the particulars of claim, but then the plaintiffs are required to clearly and concisely plead their case in lucid and intelligible form and not to expect the defendants to search for the true meaning or relevance of allegations pleaded, or for the court to edit or review the particulars of claim.

[71] The second defendant is clearly embarrassed by the vagueness and insufficiency of the facts averred by the plaintiffs. Sibanye's fifth exception must accordingly be upheld.

The cause of action exceptions: The ninth and tenth grounds of exception (non- pecuniary relief and constitutional damages)

[72] For the reasons already given, these exceptions will be postponed for adjudication on a date to be determined after the close of pleadings in the action.

Costs

[73] I do not consider this the appropriate stage of the proceedings for awarding costs. The court finally adjudicating the exception will be in a better position to consider and award costs.

Order

[74] In the result I make the following order:

1. The first, second, fourth and fifth grounds of the first defendant's exception, are upheld.
2. The third ground of the first defendant's exception is dismissed.
3. The first, second, fourth, fifth, sixth, seventh and eighth grounds of the second defendant's exceptions are upheld.
4. The plaintiffs are granted leave to deliver a notice of amendment of the plaintiffs' particulars of claim, within 6 weeks of the date of this order, failing which the defendants shall be entitled to enrol the matter for further relief.
5. The sixth, seventh and eighth grounds of the first defendant's exception, and the ninth and tenth grounds of the second defendant's exception, are postponed for hearing on a date to be determined after the close of pleadings in the action.
6. The costs of the exception are reserved for determination by the court finally determining this exception.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

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DATES OF HEARING	***2 & 14 JUNE 2022***
DATE OF JUDGMENT	***30 JUNE 2022***