REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON EXCEPTION

Case No. I 4026/2014

In the matter between:

PURITY MANGANESE (PTY) LIMITED	**FIRST PLAINTIFF**
BORIS BANNAI	**SECOND PLAINTIFF**
ASAF ERETZ	**THIRD PLAINTIFF**

And

MINEWORKERS UNION OF NAMIBIA	**FIRST DEFENDANT**
ISMAEL KASUTO	**SECOND DEFENDANT**
EBBEN ZANDORO	**THIRD DEFENDANT**
ERNELIUS KAROKOHE AND 115 OTHERS	**FOURTH DEFENDANT**

Neutral citation: Purity Manganese (Pty) Ltd v Mineworkers Union of Namibia (I 4026-2014) [2015] NAHCMD 204 (3 September 2015)

Coram: Masuku, AJ

Heard: 17 July 2015

Delivered: 3 September 2015

Flynote: **PRACTICE** – Exceptions – Requirement of making proper averrals on which prayers sought in the body of the pleadings is predicated restated. REMEDIES – interdict, apology and retraction in defamation suits.

Summary: The plaintiffs sued the defendants for damages resulting from alleged defamatory matter having been published. Held that a nexus must be created between the defamatory statements or action alleged and the defendants' actions. All necessary allegations regarding liability and the relief sought must be pleaded specifically in the particulars of claim. Held that the *amende honorable* is not part of the law of Namibia but the court may, in deserving cases, in development of the law in accordance with equitable principles rooted in Roman-Dutch law, order an apology. An apology, at best for a truly contrite defendant may result in reduction of damages awarded.

RULING

MASUKU A.J.;

[1] This is an action for damages claimed by the plaintiffs which damages are alleged to have accrued as a result of alleged defamatory utterances, statements and innuendos allegedly made by the defendants of and concerning the plaintiffs.

[2] There are two separate claims. The first is for an amount of N$ 500 000. for each of the plaintiffs. It is alleged therein that the 1st defendant, acting through the 2nd and 3rd defendants, on or about 22 April 2014, entered the premises of the 1st plaintiff in Okahandja, unlawfully, and there made statements which are defamatory of the plaintiffs and are wrongful and false. I will advert to the actual allegations in respect of this claim, in due course when I consider the question whether the exception raised by the defendants is meritorious and should be upheld.

[3] In respect of the second claim, it is alleged that on 10 May 2014, the 1st defendant, acting through the 2nd and 3rd defendants with other officials of the 1st defendant, whose particulars are unknown to the plaintiffs, acting jointly and severally, led some of the 4th and other defendants in a public demonstration outside the City of Windhoek Municipality, opposite the 1st plaintiff's head office, and there displayed banners, posters and/or placards which carried words and statements which are wrongful, false and defamatory of the plaintiffs individually and collectively. The particular words allegedly uttered and statements made shall be adverted to in due course. In this claim, a sum of N$500 000. is claimed on behalf of the 1st and 2nd defendant, whereas the 3rd defendant claims an amount of N$200 000.

[4] The plaintiffs, it must be mentioned, also claimed interest, costs and additionally sought an order that the defendants be interdicted and restrained from continuing with the conduct complained of in relation to both claims. They are further called upon to tender an unconditional public apology to the 1st to 3rd plaintiffs on the front page of all newspapers and websites within a specified period after delivery of judgment in favour of the plaintiffs.

[5] In response to the claim, the defendants, filed a notice of exception dated 10 March 2015, which is the subject of this Ruling. I will presently articulate the grounds of exception:

(a) as against the 2nd defendant, it is claimed in regard to the claim A that there are no allegations that the 2nd defendant published the defamatory allegations alleged, and thus there is no cause of action that can sustained against him;

(b) as against the 1st to 3rd defendants, in relation to the claim B, the alleged defamatory statements relied upon do not refer to the 3rd plaintiff and if it is found that they do, it is averred that same are not defamatory. It is also alleged that the particulars of claim lack necessary allegations to sustain an action against the defendants for the reason that the publication

alleged is not in respect of the 3rd plaintiff, and if found that it is, that same is not defamatory;

(c) as against the 4th defendant and the other 155 defendants, in claim B, there are allegations that 'some' of the defendants participated in the march, but those who so participated are not identified. Furthermore, the particulars of claim do not identify which of the 4th defendant and other 155 defendants the claim is launched against.

[6] Exception is also taken to the final interdictory relief sought all the defendants in prayer 7 of the particulars of claim. In particular, it is averred that the events, from the particulars of claim, took place on 22 April and 10 May 2014, respectively. There is, however, no allegation that there is a prospect of a repeat of the march and the alleged defamatory statements and utterances by the defendants. It is further alleged that no averral is made by the plaintiffs of them having no other alternative relief to the grant of the final interdict.

[7] In relation to prayer 8, for the defendants to tender an apology, the defendants aver that such relief is not competent in law. Prayer 9 relates to the plaintiffs seeking the defendants to take steps to remove the 'defamatory matter' published in the media. There is, however, no allegation as to which of the defendants published the said defamatory matter alleged in the media. Furthermore, the plaintiffs do not state how the defendants should remove the alleged defamatory matter. Finally, the defendants allege that the relief sought in this leg, is impossible to comply with, in any event.

[8] The general approach of the courts to exceptions can be summarized as follows: in order for an exception to succeed, the pleading in question must lack averments necessary to sustain an action or defence, as the case may well be. The excipient ' . . . must satisfy the court that on all reasonable constructions of the plaintiff's particulars of claim as amplified and amended . . . and all possible evidence that may be led on the pleadings . . . that no cause of action is or can be disclosed.' See *Gemfarm Investments*

v Trans Hex Group[1] and *Namibia Breweries v Seelenbinder, Henning and Partners*[2]. Furthermore, in *July v Motor Vehicle Accident Fund*[3] it was stated that the facts pleaded by the plaintiff must be accepted as correct. I presently deal with the various grounds of exception as indicated in the foregoing paragraphs.

Ground 1 – Claim A – Against the 2nd Defendant

[9] The cause of complaint in this respect, is that the particulars of claim do not contain an averral to the effect that the 2nd defendant published the alleged defamatory material. This is so, it is further contended, notwithstanding that the claim by all the plaintiffs is also against 2nd defendant. In order to return an answer to this ground of exception, it is desirable to briefly visit the particulars of claim in order to ascertain whether there is any merit in this particular ground of exception.

[10] The averrals in respect of claim A are that on 22 April 2014, the 1st defendant, acting through the 2nd defendant and its other officials who are to the plaintiff unknown, acting jointly and/or severally, entered and trespassed the 1st plaintiff's premises in Okahandja. When asked to vacate the said premises, the 3rd defendant allegedly made utterances to the effect that 'the name Asi Eretz will never be respected in Namibia'. And when informed that the 3rd plaintiff will have no other option but to call the Namibian police, the 3rd defendant is alleged to have shouted 'which police, the police are wearing your uniforms Purity police'. When asked by the 3rd plaintiff if the 3rd defendant was accusing the 3rd plaintiff of corruption, the 3rd defendant answered in the affirmative.

[11] It is clear, having regard to the said claim that there are no averrals made by the plaintiffs which touch and concern the 2nd defendant. He is not alleged to have made any statement or common cause with the defamatory utterances allegedly made by the 3rd defendant. In the heads of argument, the plaintiffs claim that the 2nd defendant is the

[1] 2009 (2) NR 477 (HC) at p. 502 E.
[2] 2002 NR 55 (HC) at p. 158 G.
[3] 2010 (1) NR 368 (HC) at 373.

Secretary General of the 1st defendant and was, by virtue of his aforesaid position, empowered to stop such action or conduct but did not do so. It is further argued that he also did not disassociate himself with the actions of the 1st defendant. It is therefore claimed that in view of the foregoing, the 2nd defendant must be taken to have associated himself with the defamatory acts and conduct of the 3rd defendant.

[12] It is apparent to me that the plaintiffs do admit in their heads of argument that no averrals were made regarding the publication of the alleged defamatory statements. It would seem to me that the plaintiffs seek to introduce the doctrine of common purpose in a sense to hold the 2nd defendant liable for the alleged defamatory statements and conduct of the 3rd defendant. I am of the considered view that if the basis of the liability of the 2nd defendant is alleged to lie in his inaction, the particulars of his alleged inaction must be specifically pleaded in the papers, with specific allegations in that regard.

[13] It would preposterous and unfair to hold a defendant liable for damages on bases that are not alleged at all in the particulars of claim. Heads of argument cannot be a substitute for allegations that should ordinarily appear in particulars of claim. If the basis or bases of liability are not included in the particulars of claim, they cannot be allowed through the back door by allowing same to be alleged in the heads of argument and clearly not affording the affected defendant an opportunity to plead specifically thereto. The plaintiffs submit that ‘it must be taken that the second defendant associated himself with the defamatory acts and conduct’ without having made the necessary averrals in the pleadings. To countenance such, would be to authorize ‘pleading by ambush’, which is an anathema to our law. If common purpose is alleged to be the basis of the claim, it must be specifically pleaded with the defendant given a fair opportunity to plead to same.

[14] In the premises, I am of the considered opinion that the defendants’ exception on this score is good and valid. Since the bases of the 2nd defendant’s alleged liability are not disclosed, I have no other option but uphold the exception as I hereby do.

Grounds 2.1 and 2.2 Claim B

[15] The gravamen of the complaint in this ground relates to the plaintiffs' claim in relation to the 3rd plaintiff, it being contended in the first instance that the alleged defamatory allegations relied upon do not make any reference to the 3rd plaintiff. In the alternative, it is averred that should the court incline to the view that some do make reference to the 3rd plaintiff, it is then contended that the said statements are not defamatory. Is there merit in this leg of the exception?

[16] In relation to claim B, the allegations are that the 1st defendant, acting through the 2nd and 3rd defendants and its other officials who are to the plaintiff unknown, acting jointly and severally, led some of the 4th and other defendants in a public demonstration on 10 May 2014. This demonstration, it is alleged, was outside Windhoek Municipality, directly opposite the plaintiff's head office. It is particularly alleged that during the said demonstration, the demonstrators carried and displayed banners, posters and/or placards bearing statements to the following effect:

(a) 'Justice delayed is justice denied';
(b) 'Justice Miller is denying our right to justice';
(c) 'Boris Bannai gets away with everything' and
(d) 'Purity Manganese Boris Bannai seems to be really well connected'.

[17] The question crying out for an answer, in the circumstances, is whether the said statements were made of and concerning the 3rd plaintiff Mr. Asaf Eretz. In order to answer this question, it is necessary to consider closely the averrals in the particulars of claim. In the first instance, a look at paragraph 18.1 to 18.5 of the said particulars is necessary. There the deleterious impact of the statements and the innuendo is alleged and in a nutshell, it is averred that the said statements were understood to mean that the 1st and 2nd plaintiffs influenced Mr. Justice Miller not to hand down judgment; that the 1st and 2nd plaintiffs were corrupt, dishonest and had a scandalous relationship with Mr.

Justice Miller; that the 2nd and 3rd defendants are not fit and proper persons. At paragraph 19, the plaintiffs allege as follows:

'As a result of the defamation, the First to Second Defendants names and reputations has (*sic*) been immensely damaged and each of them has suffered damages calculated as follows:

19.1 The First Plaintiff in the amount of N$500 000.
19.2 The Second Plaintiff in the amount of N$500 000.
19.3 The Third Plaintiff in the amount of N$200 000.00'

[18] What is worthy of note, is that nowhere in the body of the particulars of claim is the 3rd plaintiff mentioned. It is not stated that any statements were made of and concerning him, neither is it alleged how the said statements, properly considered, could have reflected or be perceived to tarnish his good name and reputation. There is simply no nexus between the said plaintiff and the statements allegedly made. He only appears or features at the time of reaping damages as it were, without any allegations being made as to how he was affected at all by the said allegedly defamatory statements, whether in their primary or secondary meaning. It is a law of nature that a person cannot reap where he or she has not sown. The 3rd plaintiff cannot be said to be an exception in this regard.

[19] Having formed the opinion that no mention whatsoever was made to the 3rd plaintiff and how the said statements may have soiled his name and reputation, I find it unnecessary, in the circumstances, to consider the alternative ground, namely, that the said statements were not defamatory. I would have had to do so if I found that the said statements were made of and concerning the said 3rd plaintiff. In the circumstances, the exception must also be upheld as being good.

[20] The only instance where some reference may vaguely be said to have been made to the 3rd plaintiff, and this appears to me to be a matter of conjecture in the circumstances, is in paragraph 14.2, where the following averrals are made:

'Shouted outside the Municipality with reference to the First and Second Plaintiffs, "down Boris", down Purity Manganese" and "down Asi".

The question is whether a reasonable reader would have concluded from the foregoing that reference was also being made to the 3rd plaintiff. What is clear is that reference is made to the 1st and 2nd plaintiffs in unambiguous terms. Would a reasonable reader or one who listened to the chants reasonably conclude that "down Asi" referred to the 3rd plaintiff?

[21] In order to answer this question, two issues must remain in contemplation. First, in the immediately preceding paragraph 14.2, quoted above, it is specifically alleged that the shouts made by the defendants were in 'reference to the First and Second Plaintiffs . . ." No mention whatsoever, is made of the 3rd plaintiff in those averrals. For that reason, there is no magical wand that can be waved to also include the 3rd plaintiff in the circumstances, when his name was never specifically mentioned as being the subject of the shouts at all.

[22] Second, the only other name mentioned in the said paragraph is 'Asi'. There is no allegation for instance, that 'Asi' is the 3rd plaintiff or that 'Asi" is how the 3rd plaintiff is commonly or affectionately known, such that any person who heard the chant 'Asi' would readily associate the name with the 3rd plaintiff. In point of fact, even the spelling of the two names do not readily bear any resemblance. In the summons, the 3rd plaintiff is cited as 'Asaf Eretz', yet in the shouts, the name 'Asi" is used. No reasonable reader would have, in my judgment, connected the word 'Asi' with the 3rd plaintiff in the circumstances. In this regard, the words of Maritz J in *Afshani and Another v Vaatz*[4] resonate resoundingly:

'The standard from which the enquiry should depart, Ponnan AJA more recently said in *Mthembi-Mahanyele v Mail & Guardian* 2004 (6) SA 329 (SCA) at 360H-I "is the ordinary reader

[4] 2006 (1) NR 35 (HC) at 22.

with no legal training or other special discipline, variously described as a 'reasonable', 'right-thinking' individual of 'average education' and 'normal intelligence'. It is through the eyes of such a person who is not 'super-critical' or possessed of a 'morbid or suspicious mind' that I must read the statement.'

[23] In *S. A. Associated Newspapers and Another v Estate Pelser*[5] Wessels J.A. said the following:

'In every defamation action, the plaintiff must allege, and prove, that the defamatory words were published of and concerning him. So too, in a case of the-called class or group libel, the plaintiff can only succeed if it is proved at the trial that the matter complained of, though expressed to be in respect of the class or group of which he is a member, is in fact a publication thereof of and concerning him personally.' See also *Universal Church of the Kingdom of God v Namzim Newspaper (Pty) Ltd*[6]

[24] In relation to the use of the name 'Asi', the poser was stated with clarity by Silungwe A.J. in the *Universal Church of God* case (*supra*) at para [20], where the learned Judge said:

'Hence, in determining whether the element of identification has been established, the only relevant question is: would a reasonable person understand the words to refer to the plaintiff specifically?'

Although the case was dealing with class actions, it is in my view an applicable principle even in cases where there are a few persons. In the instant case, I hold the view that a reasonable reader would not have associated the name 'Asi' with the 3rd plaintiff because there is no nexus between the 3rd plaintiff and 'Asi' covered in the pleadings. In this regard, I find that the particulars of claim make no reference to the 3rd plaintiff and that no reasonable reader would have associated the name Asi with the 3rd plaintiff. I accordingly find that no case is made on the papers for a claim in his favour. The exception is for that reason, good and I so hold.

[5] 1975 (4) SA 797 (AD) at 810 at C-D.
[6] 2009 (1) NR 65 (HC) at p. 70-71.

[25] Notwithstanding my expressed disinclination to deal with this issue captured in para [20] above, I should mention *en passant* that the words 'down Asi', are in my view, on first principles, not *per se* defamatory. To add salt to injury, there is no context or setting pleaded that would seek to render them defamatory in the secondary sense, it being apparent to me that they are not *per se* defamatory. I am therefore fortified in my view that the exception is good on both counts.

Ground 3 – Claim B

[26] In this leg of argument, it is contended by the defendants that the particulars of claim are bad for inexactitude, as it were, for the reason that it is claimed that the 4th defendant and some of the 155 other defendants participated in the march. The bone of contention is that the use of the word 'some' deprives the defendants of the knowledge and of course ability to know the case as to who is alleged to have participated and who is alleged not to have so participated. It is accordingly unclear as to who of the said defendants the claim is against.

[27] In response to this attack, the plaintiffs say the following in their heads of argument:[7]

'It is submitted that the defendants, the fourth and 155 others (*sic*) defendants, inclusive, are faced with the hurdle of disproving their participation individually and/cumulatively when the presenting evidence and presently all the evidence points to all the defendants, the fourth and 155 other defendants inclusive, in particular from the contents of the newspaper articles as well as one of the banners, posters and placards referred to therein. It is therefore apparent that the fourth defendant represented all the other 155 defendants and associated them with such conduct and actions.'

[28] This appears to me to be a novel proposition that the defendants have the reverse onus, to prove that they did not participate. The general rule is that he who

[7] Page 5 para 17.

alleges must prove and it is not for the one merely fingered as having participated, to disprove the alleged participation. Were the law to operate from this perspective, a lot of injustices would inevitably result. The plaintiff would only make an allegation and the onus would rest on the defendant to disprove by evidence their non-participation, based on a mere allegation, devoid of any admissible evidence.

[29] In the instant case, it is for the plaintiffs to state who of the defendants participated in the march and what roles they performed to enable them to respond. Their said actions or utterances must be alleged, in any event, to have been defamatory of the plaintiffs. This would enable those who are not alleged to have participated in the defamation alleged, to go about their normal business and not for them to be tarred with the brush of defamation by mere association in terms of persons, time or place. The blanket manner of association without the individualization of the various defendants' roles in the defamation in specific terms leaves an abiding uncanny feeling, which should not be the case.

[30] Furthermore, it would seem to me, no allegations are made as to what it is the said defendants did save being led in a demonstration. Significantly, no allegations are made in particular, to the effect, for instance, that they individually participated in the publication or conduct that is allegedly defamatory of the plaintiffs. The mere attaching the list of the said defendants, constitutes no magic wand and does not, in my view, of its own serve to cure the defect in the pleading. I accordingly come to the view that the exception on this score is good.

[31] At this juncture, I turn to the last parts of the exception. I must particularly mention that these relate to the prayers sought by the plaintiffs in their particulars of claim. The prayers include a final interdict, an apology and a retraction. I have one basic difficulty with all the above prayers and it is this – a careful and close reading of the particulars of claim does not bear out any allegations or averrals in my view to found the prayers sought. A prayer cannot be granted by the court *in vacuo,* as it were. There must be some basis laid in the particulars of claim for the prayer eventually sought.

Otherwise, people would be allowed to reap where they have not sown as it were and defendants would be suddenly required to deal with relief that is not grounded in the particulars of claim and in respect of which no opportunity has been afforded them to challenge same. That would be grossly unfair and unjust.

Final Interdict

[32] It is clear from the prayers sought that in the first instance, the plaintiffs pray for the court to grant a final interdict against the defendants from 'continuing with the conduct as set out under Claims A and B hereafter'. As intimated above, the facts which support the granting of a final interdict have not been pleaded. The main issue to note is that for the court to grant a final interdict, certain requisites which are contained in the *locus classicus* judgment of *Setlogelo v Setlogelo*[8] must, in my view, be pleaded. For starters, there is no allegation in the particulars of claim that the alleged defamation is continuing and there is therefore need to stop it forthwith. Nor are there allegations from which it can be assumed or inferred that a repeat of the conduct is contemplated, planned or threatened by the defendants or some of them.

[33] In *Conde' Nast Publications Ltd v Jaffe,*[9] the court expressed itself in the following terms on this issue:

'The applicant, on the other hand, has placed nothing before the Court from which the Court can conclude that the respondents assurances are not *bona fide a*nd that he intends in the future again to infringe this copyright of the applicant. As stated in *Maeder v Perm-Us (Pty) Ltd* 1938 C.P.D. 208 and by van der Linde in his *Institutes* 3.4.7, an interdict is not the proper remedy where there is no fear that the wrong formerly committed will be repeated. . . I, am, of (*sic*) opinion that applicant has failed to prove one of the essential requirements for interdict and is therefore not entitled to the interdict claimed.'

[8] 1914 AD 221.
[9] 1951 (1) SA 83 (CPD) at 86-87.

In the premises, I am of the considered view that the exception on this score is well taken and I accordingly uphold it.

Apology

[34] The plaintiffs have also prayed for an order by this court calling upon the defendants to tender an unconditional apology to the 1st to 3rd plaintiffs in relation to both claims. I have considered the matter and have come to the view that although it is suggested, for instance in *Mineworkers Investment Co. (Pty) Ltd v Modibane*[10] that the *amende honorable* i.e. an apology remains part of our law, it would appear that a plaintiff cannot claim both monetary compensation and an apology in the alternative. It would seem it is one or the other. The plaintiffs, it would appear, are claiming both in this action. I make no firm finding of my own in this regard, particularly considering that the court in *Le Roux and Others* (*infra*) per Froneman *et* Cameron J.J. did grant monetary damages and also ordered an apology to be given by the defendants.

[35] My attention was usefully drawn to the case of *Nicolaas Godfried Heyns and Another v Johannes Stephanus Malan*[11]where Marcus A.J. applied the *amende honorable a*nd suggested, after making reference to the *Modibane* case, that, 'in the absence of contrary authority, the statement that the remedy still forms part of the law would equally apply in Namibia.'[12]

[36] It must be noted in the first place that the learned Judge in that case was dealing with what was clearly a family dispute and where the exigencies of the situation, in his judicial opinion, and objectively viewed, called for a restorative order that would seek to mend rather than alienate the close ties of members of a family. There is no indication that such a situation of close family members exists in this case for the application of the remedy. This is not to suggest that in industrial relations, such an order may not be

[10] 2002 (6) SA 512.
[11] (P) I 2210/2005 (HC).
[12] *Ibid* at p26 para [55].

appropriate as there may be cases where such an order may be apt. I note that in the case of *Ernst August Kubirske v Reinhardt Sieberhagen*[13]Smuts J (as he then was), declined to deal with the relief as it had not been properly raised in the pleadings and in cross-examination.

[37] Secondly and most importantly, authority has since been found subsequent to the *Modibane* case that differs and it is that of a higher court, the Constitutional Court of South Africa. This was the case of Le *Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre As Amici Curiae)*[14] per Froneman and Camreon J.J., where the court said:

'The present position in our Roman-Dutch common law is that the only remedy available to a person who has suffered an infringement of a personality right is a claim for damages. One cannot sue for an apology and courts have been unable to order that an apology be made or published, even where it is the most effective method of restoring dignity. A person who is genuinely contrite about infringing another's right cannot raise an immediate apology and retraction as a defence to a claim for damages. At best, it may influence the amount of damages awarded.'[15]

[38] At paragraph [199], the Constitutional Court expressed itself in the following terms:

'Roman-Dutch law provided two remedies for injury to what we now call personality rights, namely the *amende honorable* (profitable amends) and the a*mende profitable* (profitable amends). Something akin to profitable amends for injury to dignity survives in our law as damages, or monetary compensation, for an actionable injury to dignity and reputation, albeit in the guise of the *action injuriarum.* But to make honourable amends is said to have fallen into disuse, although it has come to the fore in academic discussion and case law more recently. . . We are not proposing its reinstatement but the development of the law in accordance with equitable principles also rooted in Roman-Dutch law.' (Emphasis added).

[13] Case No. I 3306/2010.
[14] 2011 (3) SA 274 (CC).
[15] Page 333 at para [195].

[39] This judgment, it would seem to me, puts paid the argument raised by the plaintiffs that the court exercises a discretion in deciding whether to grant an *amende honorable.* I am of the view that the relief sought by the plaintiffs is bad in law, and as stated earlier, is not in any event supported by any relevant and necessary allegations in the particulars of claim. It is well to note that the court did, however order an apology in *Le Roux* case, considering the personal relations at play and noted that the defendants had offered what appeared to be genuine attempts at apologizing to the plaintiff who was advised not to accept same.

[40] It would appear to me that the court ordered the apology not based on the *amende honorable a*s such but in a genuine desire to restore relations which are personal, and in a quest, it would seem, to 'develop the law in accordance with equitable principles also rooted in Roman-Dutch law'. This, to my mind suggests that the court may, in its discretion, in appropriate cases grant an order for an apology in line with the principles of equitable principles which are restorative in nature. In the present case, one doubts whether the relations amongst the protagonists can said to be personal, particularly taking into account the number of the defendants in particular and their relationship to the plaintiffs.

[41] In my view, the order for an apology in circumstances of a case such as this, as prayed for in the instant case, may be precarious for other reasons as well. I am of the considered view that for an apology, to be efficacious and to serve as the balm intended, it should ordinarily come from the defendant out of his or her own free will and volition, following a realization of their foolery and culpability. In that setting, the court can be certain that the apology offered is genuine and *bona fide.* Where the court, on the other hand forces, as it were, an apology down the throat of an unwilling defendant, the words proffered or mumbled in compliance with an order of court, will be empty, mechanical and lacking in *bona fides.* They cannot for that reason, in my view, properly serve to soothe the wounded feelings and reputation of the person injured.

[42] There is, at the moment, no indication whatsoever, that the defendants accept that they defamed the plaintiffs at all and it would appear to me to be presumptuous at this juncture, to include a prayer that the defendants apologise, considering in particular, as indicated elsewhere above, that the necessary averrals supporting such an order are starkly absent. I accordingly uphold the exception on this aspect as meritorious as well.

Removal of Alleged Defamatory Matter

[43] The last prayer by the plaintiffs is that the defendants should take the necessary steps to remove the alleged defamatory matter published on the newspaper websites, the Worldwide Internet Webwithin ten days of the grant of the order. The difficulty with this relief is that as earlier pointed out, no allegations are made in the pleadings as to who of the defendants is alleged to have placed the alleged defamatory matter in the sites mentioned. Furthermore, the alleged defamatory matter sought to be removed has not been identified with any degree of accuracy or precision.

[44] In *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others*[16]the court emphasized the need for clarity in orders of court in the following language:

'It is a basic tenet that a legal obligation must be clear and certain. The rationale for this is that the person who bears the obligation may have no uncertainty about the he or she is required to do in order to discharge the obligation because failure to discharge the obligation may have serious and far-reaching consequences for him or her and, maybe, others. He therefore, must be clear about what he needs to do in order to avoid a breach of then obligation and the consequences that would flow from such a breach. If a document is vague and uncertain or if a statement which is said to give rise to an obligation is vague or uncertain, there can be no legal obligation that arises from it or from the document. An order of court must also be clear and unequivocal so that he person against whom the it is made knows exactly what he or she must do to comply with it if it orders him to do something or what he or she must not do if it orders him or her not to do something.'

[16] 213 (4) SA 262 (CC) p310 para [161] - [162]

[45] For the reasons set out above, I am of the considered view that the exception is well taken and should be upheld. I consequently issue the following order:

1. The exception to the plaintiffs' claim is upheld with costs.
2. The plaintiffs are granted leave to amend their particulars of claim within 15 days from the date of this Order.
3. The matter is postponed to 23 September 2015 at 15:15 hours for a status hearing.

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TS Masuku,

Acting Judge

APPEARANCES

PLAINTIFFS:	Mr Ram
	Instructed by Kopplinger-Boltman
DEFENDANTS:	P Barnard
	Instructed by Tjitemisa & Associates