

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-ACT-DEL-2018/03647

CHICO/OCTAGON JOINT VENTURE

PLAINTIFF

and

ROADS AUTHORITY

DEFENDANT

Neutral citation: *Chico/Octagon Joint Venture v Roads Authority* (HC-MD-CIV-ACT-DEL-2018/03647) [2019] NAHCMD 172 (23 April 2019)

Coram: PRINSLOO J

Heard: 29 April 2019

Delivered: 23 May 2019

Reasons: 29 May 2019

Flynote: Civil Practice — Rule 57 — Exception — Exception raised that particulars of claim failed to set out a proper cause of action — Pleading excipiable if no cause of action is disclosed.

Summary: During 2016 the defendant published a notice inviting bids for the construction of the dual carriageway between Swakopmund and Walvis Bay. The tender was subsequently awarded to UNIK/Thohi Joint Venture. The plaintiff then launched a judicial review of the tender process. The High Court dismissed the review application. The plaintiff appealed against the dismissal of the review application. Ultimately the Supreme Court found on appeal that the award of the tender to UNIK/Thohi Joint Venture amounted to unlawful administrative action, however refused to set aside the award of the tender to UNIK/Thohi Joint Venture and allowed the contract to continue. Pursuant to the Supreme Court judgment, on 10 September 2018 the plaintiff instituted action against the defendant claiming constitutional damages alternatively damages under delict and on 01 February 2019 the defendant delivered an exception to the plaintiff's particulars of claim consisting of eight grounds of exception. In all instances the defendant maintains that the plaintiff's particulars of claim failed to set out a proper cause of action. The court dismissed the first exception and upheld the second to eighth exception.

ORDER

1. The first exception is dismissed.
 2. The second to eighth exceptions are upheld with costs and the plaintiff is granted leave to file its amended particulars of claim, should it be so advised, within 21 days from date of release of reasons.
 3. The matter is postponed to **27 June 2019 at 15:00** for Status Hearing.
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JUDGMENT

PRINSLOO J

The parties

[1] The plaintiff is CHICO/Octagon Joint Venture, a company in a form of a joint venture between two incorporated companies, namely China Henan International Cooperation Group and Octagon, both companies of which are registered in terms of the laws of the Republic of Namibia.

[2] The defendant is Roads Authority, a public entity which carries out its public duties in terms of the Roads Authority Act 17 of 1999.

Background – The Supreme Court decision

[3] During 2016 the defendant published a notice inviting bids, particularly from civil engineering contractors with adequate experience in highway construction, for the construction of the dual carriageway between Swakopmund and Walvis Bay. The tender closed on 2 March 2016 and was subsequently awarded to UNIK/Thohi Joint Venture (hereinafter referred to as the “UNIK”).

[4] The plaintiff then launched a judicial review of the tender process. The High Court dismissed the review application with costs¹. At this point it is necessary to pause and add that this application was coupled with an application for an urgent interdict preventing the implementation of the tender pending the review application. The parties however agreed to expedite the proceedings in the review application and the urgent application was abandoned by plaintiff despite neither the Roads Authority nor the third respondent (in the review application) giving any undertaking that they would not implement the award.

[5] The plaintiff appealed against the dismissal of the review application of this Court.

¹ *Chico/Octagon Joint Venture Africa v Roads Authority* (HC-MD-CIV-MOT-GEN-2016/00210) [2016] NAHCMD 385 (8 December 2016).

[6] Ultimately the Supreme Court found in *Octagon Joint Venture v Roads Authority*² that the award of the tender to UNIK/Thohi Joint Venture amounted to unlawful administrative action, however refused to set aside the award of the tender to UNIK/Thohi Joint Venture and allowed the contract to continue.

[7] The court further found that the plaintiff was deprived of a fair process but the court could not find any evidence in support of allegations that the defendant(s) were biased and acted for an ulterior purpose and further found that the defendant acted in good faith in awarding the tender, albeit not in the manner required in respect of administrative action³.

[8] Pursuant to the Supreme Court judgment, on 10 September 2018 the plaintiff instituted action against the defendant claiming constitutional damages alternatively damages under delict.

Particulars of claim

[9] The plaintiff in terms of the current action claims N\$ 900 million from the defendant and pleaded the following, in summary, in its particulars of claim:

- (a) That the defendant is a public entity and one of its functions was to procure construction services in respect of which it was required to act fairly and transparently in terms of common law, Article 18 of the Namibian Constitution and in terms of fair and lawful procedure.
- (b) That in that respect the defendant further owes a duty of care to bidders, including the plaintiff not to cause damages and/or losses through wrongful conduct in its adjudication of bids.

² (SA 81-2016) [2017] NASC (21 August 2017).

³ [39] It thus follows that in respect of both the above concerns the appellant was deprived of a fair process.

[40] It needs to be stated that despite references to the respondents being biased and acting for ulterior purposes there is no evidence to support these allegations. It is clear that the Board acted in good faith when awarding the tender albeit not in the manner required in respect of administrative action'.

- (c) That during February 2016 the defendant published a notice inviting bids from companies, such as the plaintiff, to submit tenders for the construction of a dual carriage way between Swakopmund and Walvis Bay.
- (d) That, relying on the terms and conditions of the tender invitation and or the expectation and requirements and that the defendant in adjudication of the tender will act fairly, transparently and lawfully, plaintiff submitted its bid.
- (e) That it was in that respect that the defendant owed a duty of care to the plaintiff not to cause it damages and/or economic losses through unlawful and wrongful conduct.
- (f) That defendant's tender had a fixed formula, which was designed in terms of which any tenderer that achieved the highest bidder index with regards to the fixed formula, was automatically deemed to be the preferred tenderer.
- (g) That in accordance with the defendant's own set criteria and requirements the plaintiff achieved the highest tender index as prescribed and was thus, in law, entitled to be awarded the tender by the defendant.
- (h) That the Supreme Court found that the defendant has unlawfully awarded the tender to another party⁴.
- (i) That, it having been determined to be the preferred bidder upon proper application of the pre-determined criteria sanctioned by the defendant's Board, and had it not been for the wrongful and unlawful action, it was a given that it would have carried out the work and made profit.
- (j) That as a direct result of the defendant's unfair, unreasonable and unconstitutional acts pleaded, the plaintiff suffered damages in the form of loss of profit.

⁴ [34] The Board had to make the decision to whom to award the tender. As mentioned above, this does not mean it could ignore the evaluation it stipulated in the tender requirements. All bidders were informed as to the criteria for such evaluation and that the outcome of this evaluation would determine the preferred bidder. The Board by publishing the fact of the evaluation and the valuation criteria fettered its own discretion when it came to awarding the tender and was bound to endorse the outcome of the evaluation unless it was satisfied that the evaluation was flawed and hence did not reflect the correct outcome with reference to the laid down criteria. In other words the Board in the present matter was bound by the outcome of the evaluation unless there was good reason for regarding the evaluation as flawed. None of the parties to this matter have questioned the outcome of the evaluation process and it must be accepted that the appellant was determined to be the preferred bidder by a proper application of the pre-determined criteria sanctioned by the Board. In these circumstances there was no basis for the Board not to award the tender to applicant'.

- (k) The plaintiff in its main claim claims compensation under Article 25(4) of the Namibian Constitution, alternatively compensation on the basis of delict because of the unlawful and wrongful conduct of the defendant as pleaded.

The exceptions

[10] The defendant entered its notice of intention to defend on 5 November 2018 and on 01 February 2019 delivered an exception to the plaintiff's particulars of claim consisting of eight grounds of exception. In all instances the defendant maintains that the plaintiff's particulars of claim failed to set out a proper cause of action, ie:

- (a) The first exception relates to the fact that the Supreme Court already exercised its discretion to grant a just and equitable remedy by ordering that the decision and contract not be set aside and thus the High Court is not entitled to exercise that discretion again to include a claim of constitutional damages. In addition thereto the defendant maintains that plaintiff was obliged to pursue any claim for constitutional /public law damages as part of the relief sought in the review application and not to do so in a separate action proceedings.
- (b) The second exception relates to failure to plead fraud/dishonesty/corruption. The defendant maintains that courts have found that compelling public considerations requires that adjudicators of disputes, as of competing tenders, are immune from damages claims in respect of their incorrect or negligent but honest decisions. Against this background the plaintiff did not plead that the decision by the defendant to award the tender to UNIK was caused by negligent; and/or fraudulent or dishonest conduct, or made in bad faith or in corrupt circumstances.
- (c) The third exception the defendant maintained that plaintiff failed to plead why the relief sought is just and equitable as the plaintiff's main claim against the defendant is framed as one of constitutional damages based on the violation of its right to a fair and reasonable administrative action as contained in article 18 of

the Namibian Constitution. The plaintiff failed to aver that the violation of rights was unjustified and/or reckless or that the award of the tender to it was appropriate in the circumstances of the case.

- (d) The fourth exception relates to the defendant's failure to plead exceptional circumstances to rely on the remedy sought. The plaintiff pleads in the alternative that the defendant owed it a duty of care not to cause it damages and economic loss through unlawful and wrongful conduct. The plaintiff was required to plead exceptional circumstances entitling it to rely on private law remedies for the breach of a public law right and that it renders it unnecessary and inappropriate to develop the common law delict beyond its traditional limits. Therefore the plaintiff's particulars of claim failed to frame a proper cause of action.
- (e) The fifth exception relates to paragraph 4 of the particulars of claim wherein the defendant pleads in the alternative to the main claim for constitutional damages, that the defendant owed it a duty of care not to cause damages and/or economic loss through unlawful and wrongful conduct. The conduct is only wrongful if public policy consideration demand that, in the circumstances, the plaintiff has to be compensated for the loss caused by the alleged negligent act or omission by the defendant. The defendant maintains that the plaintiff failed to properly plead any of these elements and the plaintiff only refers to the term 'wrongful' without any further explanation, ie it failed to plead any facts or basis regarding why the conduct was wrongful.
- (f) The sixth exception also relates to the duty of care referred to in the fifth exception. In this regard defendant maintains that the plaintiff failed to define the duty and/or aver the basis for the existence of such duty.
- (g) The seventh exception also relates to paragraph 4 of the particulars of claim, which seeks to frame a case made out in delict. In paragraph 4 of the particulars of claim the plaintiff alleges that it relies on the terms and conditions of the tender

invitation and on the expectation and requirement that the defendant would act fairly, transparently and lawfully. Paragraph 4 thus seeks to frame a cause of action on the basis of a contractual or quasi-contractual obligation on the part of the plaintiff. The plaintiff failed to plead the elements necessary to sustain a contractual or quasi-contractual cause of action.

(h) The eighth exception relates to the plaintiff's failure to plead fault and that fault caused the loss. With reference to the alternative claim the defendant maintains that it is trite that the plaintiff in framing a delictual cause of action must plead:

- i. The defendant was at fault (either dolus or negligence) and, at the very least was negligent in one or more respect; and
- ii. The defendant's negligence cause the damage suffered by it.

[11] Defendant maintains that the plaintiff fails to allege that the defendant was negligent in one or more respects and further fails to allege any causal connection between any negligent act by the defendant and the damages suffered by the plaintiff, accordingly the plaintiff failed to set out a proper cause of action.

Arguments on behalf of the Defendant

[12] Mr Kauta argued that the plaintiff located its cause of action in Article 25⁵ of the Namibian Constitution and the question that arises is whether a private remedy can come to the aid of the plaintiff. He acknowledged that the defendant does not take any issue with the fact that the plaintiff locate its cause of action in Article 25 but argues that this article confers only three things on the plaintiff, ie:

- (a) The right to approach the court;
- (b) To seek and for the court to give a just and equitable remedy once it is done; and
- (c) That the court when it considered the issue of just and equitable remedy that it is permitted to grant damages.

[13] Mr Kauta further argues that the parties *in casu* have previously been before court. They litigated a review application which found its way to the Supreme Court,

⁵ (1) Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that:

(a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid;

(b) any law which was in force immediately before the date of Independence shall remain in force until amended, repealed or declared unconstitutional. If a competent Court is of the opinion that such law is unconstitutional, it may either set aside the law, or allow Parliament to correct any defect in such law, in which event the provisions of Sub-Article (a) hereof shall apply.

(2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

(3) Subject to the provisions of this Constitution, the Court referred to in Sub-Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.

(4) The power of the Court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases.

where the apex court made certain findings of fact and issued, on the facts presented to it, a just and equitable remedy.

[14] From the findings made by the Supreme Court it was clear that the court found that the defendant acted in good faith⁶ although it made administrative mistakes.

[15] Mr Kauta argued that the issue before court is whether the plaintiff is entitled in law, to sue for constitutional or delictual damages in subsequent action proceedings, when it expressly restricted the relief it sought to substitution and thereby formally recording that it did not seek or desire damages. He argued that the court's answer in this regard should be emphatically no.

[16] Mr Kauta underscored the fact that the key to the exceptions filed by the defendant is that the plaintiff's particulars of claim lacks the averments necessary to sustain a cognizable cause of action.

[17] The position of the defendant is that the Supreme Court already made certain pertinent findings in the *Octagon Joint Venture v Roads Authority*⁷ matter which cannot be disregarded in the current matter and which can be listed as follows:

- (a) although the Supreme Court found that the tender awarded to UNIK amounted to unlawful administrative action, the Supreme Court also found that there was no evidence to support the plaintiff's averments of bias or acting for ulterior purpose on the part of the defendant;
- (b) and in this regard it was clear that the defendant acted in good faith when the tender was awarded to UNIK.

⁶ [40] It needs to be stated that despite references to the respondents being biased and acting for ulterior purposes there is no evidence to support these allegations. It is clear that the Board acted in good faith when awarding the tender albeit not in the manner required in respect of administrative action'.

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Chico/Octagon Joint Venture Africa v Roads Authority (HC-MD-CIV-MOT-GEN-2016/00210) [2016]

NAHCMD 385 (8 December 2016).

[18] Mr Kauta further advanced an argument that the plaintiff did not seek the relief it now seeks in the judicial review application. It is submitted that the Supreme Court already exercised its constitutional discretion to grant a just and equitable remedy by ordering that the decision and contract not be set aside. In conclusion Mr Kauta argued that the High Court is not entitled to exercise that discretion again to include a claim for constitutional damages.

Arguments on behalf of the Plaintiff

[19] It is the plaintiff's position that the plaintiff's case is simple and uncomplicated but that the defendant is complicating the matter by obscuring the issues.

[20] Mr Namandje argued that the plaintiff's case is clearly set out in its particulars of claim, and the facts are simply this: The plaintiff reacted to a public invitation to tender. This invitation contained a designed formula from which it was clear that if you come out as the overall performer then in terms of the overall tender index you are deemed to be the successful tenderer and therefore the tender should have been awarded to the plaintiff without any further determination.

[21] The plaintiff pleaded that its constitutional rights, including Article 18 were infringed and in terms of this claim the plaintiff only needs to prove two things, ie:

- (a) That there was an infringement of a right, in this case Article 18, and once the plaintiff prove that the action of an administrator was unreasonable or unfair the plaintiff would have proven an infringement of under Article 18.
- (b) Secondly, whether, once the plaintiff has proven the infringement, a damages claim is appropriate.

[22] Mr Namandje submitted that in terms of Article 25(4) the plaintiff claims monetary compensation, alternatively a delictual claim and as for the defendants contention that the plaintiff failed to plead the necessary averments required to sustain a damages

claim in delict, the defendant argues by contending that all that the plaintiff needs to plead and prove in respect of the delictual claim is at the very minimum negligence and wrongfulness. However, he argued, in the context of administrative realm that that is something that only the trial court, after hearing the evidence, will decide on whether or not such a claim has been made out. In this regard the court was referred to *Van Straten NO and Another v Namibia Financial Institutions Supervisory Authority and Another*⁸.

General legal principles related to exceptions

[23] In *Van Straten*⁹ Smuts JA summarized the legal principles relating to exceptions to pleadings on the ground that they lack averments necessary to sustain a cause of action as follows:

'[18] Where an exception is taken on the grounds that no cause of action is disclosed or is sustainable on the particulars of claim, two aspects are to be emphasised. Firstly, for the purpose of deciding the exception, the facts as alleged in the plaintiff's pleadings are taken as correct. In the second place, it is incumbent upon an excipient to persuade this court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed. Stated otherwise, only if no possible evidence led on the pleadings can disclose a cause of action, will the particulars of claim be found to be excipiable.'

[24] Our law recognizes several grounds which a party may rely on when taking an exception. These grounds may be technical in nature where they go beyond what is in the pleadings. An exception may aim at disposing of the matter in its entirety or, in effect, delaying its disposal. The defendant filed an exception and advanced several grounds in support of the exception all on the basis that it lacks averments necessary to sustain a cause of action.

⁸ 2016 (3) NR 747 (SC) paras 137, 149 and 150.

⁹ Supra footnote 8.

[25] In *Brink NO and Another v Erongo All Sure Insurance CC and Others*¹⁰ Shivute CJ discussed the position regarding 'no cause of action' as follows:

[52] The correct position of our law in the determination of whether the pleadings are excipiable on the ground that they lack sufficient averments to sustain a cause of action is illustrated through rule 45(5) of the Rules of the High Court and the principles developed through case law. The requirement of clear and concise statement of the material facts upon which the pleader relies for his claim is fundamental to alert the other party to the conduct complained of and to enable it to plead. This means that a pleader is only required to plead what is material. Facts that are not material need not be pleaded.

[53] As stated above, this court adopted the definition of 'cause of action' in *McKenzie v Farmers' Co-operative Meat Industries Ltd*, to determine whether the particulars of claim meet the criteria as stated by the then South African Appellate Division. Paragraphs 9 to 12 of the particulars of claim in this matter appear to me to contain material facts sufficient to disclose a cause of action. On this point, I agree with counsel for the appellants that the pleadings disclosed the *facta probanda*. It seems to me that counsel for the first respondent was asking for more than what is required by rule 45(5). It is therefore necessary to emphasise that the requirement of clear and concise statement of material facts relied on would be met if the pleader discloses only material facts necessary to be proved and not every fact.

[54] As noted in [16] above, the approach to be followed in the determination of exceptions taken on the ground that no cause of action is disclosed was recently restated by this court. However, it is necessary to emphasise that it is incumbent upon an excipient to persuade the court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed.'

[26] Having set out the applicable principles relating to exception I will proceed to consider the enumerated grounds of exception. It would appear that a number of the grounds overlap and where necessary will be discussed together in order to avoid being unduly prolix.

¹⁰ 2018 (3) NR 641 (SC)

First exception: The Supreme Court already exercised its discretion

[27] Mr Kauta advances his argument that the plaintiff was obliged to pursue any claim of constitutional/ public damages as part of the relief sought in the review application and cannot do so in these separate action proceedings.

[28] The defendant wishes to bolster its point by referring to the recent judgment of *Namibia Airports Company v Fire Tech Systems CC and Others*¹¹.

[29] The defendant interpreted this judgment to say that if the plaintiff sought damages under Article 18 read with Article 25 of the Constitution it was obliged as part of the relief sought in the review application to seek leave to claim the damages suffered as a result of the infringement of its rights in terms of the Constitution.

[30] Mr Kauta also argue in furtherance of this contention that the subsequent action instituted by the plaintiff undermines the critical basis for the Supreme Court's decision, namely the need to avoid duplicating costs to the public purse¹².

[31] Mr Namandje argued very strongly against these submissions and contended that the judgment does not support the submissions of the defendant. He pointed out that nowhere in the said judgment does the court say or imply that one should seek leave to claim damages as part of the relief sought in a review application. Further to that he submitted that the plaintiff's constitutional claim is guaranteed under Art 25(4) of the Constitution and is not dependent on a court granting leave as a condition.

¹¹ Case No. SA 49/2016 delivered on 12 April 2019.

¹² Para 52 '[O]ne simply does not know what the impact of this would be on the project and the pricing. Certain costs, such as site establishment costs, will be duplicated'.

[32] In turn I was referred to *Lisse v Minister of Health and Social Services*¹³ in support of the plaintiff's argument.

[33] I must agree with Mr Namandje in this regard. The Supreme Court firmly held that a court is only competent to grant orders which were asked for by the litigant and as the applicant in the *Firetech* matter never sought damages in the court *a quo* damages were not the appropriate remedy.

[34] The court in the *Lisse* matter found the opposite to what was contended by Mr Kauta. In paragraph 38 of that judgment Strydom JA (as he then was) discussed the exact issue that arose in the matter *in casu*, ie after the court decided on the review matter the plaintiff instituted action for damages:

[38] As in *Allianz*, it might be argued that the fact that the plaintiff launched two sets of proceedings is in conflict with the 'once and for all' rule. However, that rule has particularly little purchase in the circumstances of this case, given the fact that damages claims are ordinarily pursued by way of summons, whereas judicial review is ordinarily pursued by way of notice of motion. There are long-established principles that underpin that practice. Thus, in most cases where a litigant seeks a remedy of judicial review as well as damages, it is likely that that litigant will have to pursue two separate sets of proceedings.'

[35] Mr Namandje further argued that the possible duplication of cost¹⁴ as referred by the Supreme Court in the review matter has little to do with a monetary claim. It refers to possible costs should the plaintiff be allowed to step into the shoes of UNIK, to whom the tender was awarded and it appears to be one of the deciding reasons why the Supreme Court declined to grant the substitution prayed for by the plaintiff, in spite of the finding in favor of the plaintiff in respect of unlawful administrative action. This issue^s pronounced upon by the Supreme Court does not preclude the plaintiff from instituting an action for damages.

¹³ 2015 (2) NR 381 (SC).

¹⁴ *Supra* at footnote 12.

[36] This exception appears to be without merit.

Second Exception: Failure to plead fraud/ dishonesty/ corruption

[37] The remainder of the exceptions are based on the fact that the plaintiff's main claim against the defendant is framed as one of constitutional damages based on the violation of rights to fair and reasonable administrative action as contained in article 18 of the Namibian Constitution.

[38] The grounds for the second exception is rooted in the fact that the plaintiff did not plea that the decision made by the defendant was either dishonest, made in bad faith or in corrupt circumstances. Mr Kauta argued that the law has not evolved into general liability for damages for imperfect exercise of the taking of administrative action (in procurement context).

[39] In the *Van Straten* matter the court found this contention as being sound¹⁵.

[40] The plaintiff was entitled to proper administrative legal proceedings. But, that did not mean that the breach of the administrative duties as set out in the particulars of claim necessarily translated into private law duties giving rise to delictual claims.¹⁶ It must be accepted that an incorrect administrative decision is not *per se* wrongful.¹⁷ It is thus unhelpful to call every administrative error 'unlawful', thereby implying that it is wrongful in the delictual sense, unless one is clear about its nature and the motive behind it.¹⁸

¹⁵ '[89] Mr Maleka argued that as far as organs of State are concerned, the law has not evolved into general liability for damages for imperfect administrative actions, relying on *Olitzki*. That contention is sound.'

¹⁶ *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC) para 30.

¹⁷ *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA); [2006] 1 All SA 6 (SCA) para 23.

¹⁸ *Steenkamp* para 24.

[41] In *Minister of Finance and Others v Gore NO*¹⁹, *Steenkamp NO v Provincial Tender Board, Eastern Cape*²⁰ and *South African Post Office v De Lacy and Another*²¹ the respective courts held that irregularities in a tender process falling short of dishonesty, or that merely amount to incompetence or negligence on the part of those awarding a tender, will not found a claim for damages by an unsuccessful tenderer.

[42] Having regard to the aforementioned matters it would appear that a claim will lie only if the award to a competing tenderer resulted from dishonest or fraudulent conduct.

[43] As a result it would appear that failure to plead fraud/dishonesty/ corruption will cause the plaintiff's particulars of claim to be excipiable and this exception is upheld.

The third exception: The failure to plead why relief is just and equitable

[44] The defendant argued further that the plaintiff failed to plead any facts to support an averment that the violation of the right was unjustified and/or reckless or that the award was appropriate in the circumstances of the case *in casu*.

[45] It would appear that the prevailing legal policy has been summed up correctly in Joubert el (eds) *LAWSA* 3rd ed. vol. 15, §Delict, para 6, at 10:

'A constitutional remedy does not aim to compensate and such an award should be considered in only the most exceptional circumstances, when compelling reasons so dictate, and only if there is no other compensatory remedy available in law. In delict, an award for damages is the primary remedy; in constitutional law, an award for damages is a secondary remedy, to be made only in appropriate cases when other remedies would not be effective'.

[46] Counsel on behalf of the defendant argued that the plaintiff could have removed any loss or potential loss by launching interdict proceedings timeously. The plaintiff by

¹⁹ 2007 (1) SA 111 (SCA).

²⁰ Supra Footnote 16.

²¹ 2009 (5) SA 255 (SCA).

virtue of its particulars of claim is seeking to convince the Court that an award of the profit lost (pure economic loss) through the non-award of the tender could constitute 'appropriate relief'.

[47] The issue of appropriate remedy and principles regulating administrative law are clear. Any improper performance of an administrative function attracts the application of article 18 of the Namibian Constitution. Breach of the right to administrative justice entitles an aggrieved party to 'appropriate relief' as contemplated by art 25 of the Constitution. What the court will consider an appropriate remedy depends on the facts and circumstances of each case²². These facts must be set out clearly pleaded with sufficient particularity to enable the opposite party to identify the case that the pleading requires him or her to meet, especially in light of the fact that the plaintiff base its claim on the constitution, alternatively delict.

[48] In *Olitzki Property Holdings v State Tender Board and Another*²³ the South African Supreme Court of Appeal held:

'[I]n all the circumstances of this particular case, including the availability to the plaintiff of alternative remedies - by way of interdict before the award of the impugned tender and, thereafter, for at least a time, by way of review - I conclude that the lost profit the plaintiff claims would not be an appropriate constitutional remedy'.

[49] The exception is upheld.

Fourth exception: Failure to plead exceptional circumstance to rely on private remedy

[50] It is common cause that the plaintiff's alternative claim is framed in delict. The defendant argued that the plaintiff was required to plead exceptional circumstances entitling it to rely on private remedies for breach of a public law right. It was further argued that the courts have made it clear that the existence of a constitutionally-based

²² *Free Namibia Caterers Cc v Chairperson of the Tender Board of Namibia and Others* 2017 (3) NR 898 (SC).

²³ 2001 (3) SA 1247 (SCA).

public remedy by the review court, renders it unnecessary and inappropriate to develop the common law of delict beyond the traditional limits.

[51] In *Free Namibia Caterers Cc v Chairperson of the Tender Board of Namibia*²⁴ and Others 2017 (3) NR 898 (SC) Shivute CJ stated as follows:

‘Ordinarily, a breach of administrative justice attracts public law remedies and not private law remedies. Thus it is only in exceptional cases that private law remedies will be granted to a party for a breach of a right in the public law domain²⁵’.

[52] As already pointed out earlier in this judgment the plaintiff is entitled to proper administrative legal proceedings. It must be reiterated what I already stated early in this regard that it did not mean that the breach of the administrative duties necessarily translated into private law duties giving rise to delictual claims²⁶. The plaintiff has not pleaded any facts to demonstrate that the present case is exceptional entitling it to rely on private law remedies for a breach of a right in the public law domain; therefore the exception is upheld.

The fifth exception: Plaintiff has failed to properly plead wrongfulness and eight exception: Failure to plead fault & fault caused the loss

[53] As with some of the other grounds of exception the said ground overlap as is the case with the second, fifth and eighth ground.

[54] In respect of the alternative claim under the law of delict, the defendant maintains that the negligent causation of pure economic loss due to an act or omission is not *prima facie* wrongful (fifth ground). Defendant further maintained that policy consideration must dictate that the plaintiff should be entitled to be recompensed by the defendant for the loss suffered and that the conduct is only wrongful if public policy

²⁴ Supra Footnote 22.

²⁵ *Steenkamp* para 29.

²⁶ *Home Talk v Ekurhuleni Metropolitan Municipality* (225/2016) [2017] ZASCA 77 (2 June 2017); *Steenkamp* para 30.

considerations demand that, in the circumstances, the plaintiff has to be compensated for the loss caused by the alleged negligent act or omission by the defendant.

[55] The further issue taken by the defendant (eighth ground) is that the plaintiff in framing a delictual cause of action must plead that:

- (a) The defendant was at fault (either dolus or negligence) and, at the very least was negligent in one or more respects; and
- (b) The defendant's negligence caused the damages suffered by it.

[56] The defendant maintains that the plaintiff failed to allege any causal connection between any negligence by the defendant and the damages suffered by it.

[57] It is common cause that the plaintiff's alternative claim is a delictual claim based on pure economic loss. For the plaintiff to succeed with its alternative claim, it must prove: (a) conduct, (b) wrongfulness, (c) fault, (d) causation and (e) damages.

[58] In the *Steenkamp* matter the Constitutional Court held at para 37 that:

'However, a concession that the tender board acted inconsistently with the tenets of administrative justice is neither decisive of the existence of a duty of care nor is it of any avail to the applicant's case. In our constitutional dispensation, every failure of administrative justice amounts to a breach of a constitutional duty. But the breach is not an equivalent of unlawfulness in a delictual liability sense'.

[59] And further at para 40:

'Cameron JA, in *Olitzki*, correctly observes that the focal point in determining whether a tender board may be liable to a tenderer in the course of exercising its function is a question of the interpretation of the empowering constitutional and statutory provisions. However where a common law duty is at issue the court has to engage in a broad assessment of whether it is "just and reasonable" that a civil claim for damages should be accorded. He elaborates that:

“The conduct is wrongful, not because of the breach of the statutory duty *per se*, but because it is reasonable in the circumstances to compensate the plaintiff for the infringement of his legal right. The determination of reasonableness here in turn depends on whether affording the plaintiff a remedy is congruent with the court’s appreciation of the sense of justice of the community. This appreciation must unavoidably include the application of broad considerations of public policy also determined in the light of the Constitution”²⁷.

[60] The plaintiff does not plead any facts or basis regarding why the conduct of the defendant was wrongful, the plaintiff simply refers to the term “wrongful”. This is clearly not sufficient that wrongfulness is pleaded without any further explanation.

[61] Closer to home, in the *Van Straten* matter the Supreme Court endorsed the proposition that imperfect administrative action does not amount to liability for damage or civil wrongfulness²⁸.

[62] On the issue of fault, and more specifically negligence, I wish to remark as follows: Negligence, although separated and distinct from wrongfulness, is important in the current context to determine liability for the loss of someone else. The act or omission of the defendant must have been wrongful and negligent and caused a loss. This is clear from *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*²⁹ where Harms JA stated as follows:

‘[12] The first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject, is, as the Dutch author Asser points out, that everyone has to bear the loss he or she suffers.³⁰ The Afrikaans aphorism is that ‘skade rus waar dit val.’ Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of

²⁷ At para 12. This statement has been approved in the subsequent cases of *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA) at para 33; *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) at para 18; *Premier Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA) at para 33.

²⁸ 2016 (3) NR 747 (SC).

²⁹ [2005] ZASCA 73; SA 2006 (1) SA 461 (SCA); [2006] 1 All SA 6 (SCA) para 12.

³⁰ C Asser *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht: Verbintenissenrecht* 9 ed (1994) part III p 12: ‘In beginsel moet ieder de door hem zelf geleden schade dragen.’

someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that an act is negligent does not make it wrongful³¹ although foreseeability of damage may be a factor in establishing whether or not a particular act was wrongful.³² To elevate negligence to the determining factor confuses wrongfulness with negligence and leads to the absorption of the English law tort of negligence into our law, thereby distorting it.³³

[13] When dealing with the negligent causation of pure economic loss it is well to remember that the act or omission is not prima facie wrongful ('unlawful' is the synonym and is less of a euphemism) and that more is needed.³⁴ Policy considerations must dictate that the plaintiff should be entitled to be recompensed by the defendant for the loss suffered³⁵ (and not the converse as Goldstone J once implied³⁶ unless it is a case of prima facie wrongfulness, such as where the loss was due to damage caused to the person or property of the plaintiff). In other words, conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant.³⁷ It is then that it can be said that the legal convictions of society regard the conduct as wrongful,³⁸ something akin to and perhaps derived from the modern Dutch test 'in strijd . . . met hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt' (contrary to what is acceptable in social relations according to unwritten law).³⁹

[63] None of the above mentioned averments were made in the plaintiff's particulars of claim and thus exception is sound and is upheld.

³¹ *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) 793I-J; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para [12].

³² *Government of the RSA v Basdeo & another* 1996 (1) SA 355 (A) 368H.

³³ There are a number of informative articles dealing with wrongfulness that have been helpful by Francois du Bois, Anton Fagan, Johan Potgieter, JR Midgley, Jonathan Burchell and Dale Hutchison in TJ Scott & Daniel Visser (ed) *Developing Delict: Essays in Honour of Robert Feenstra* also published in the 2000 edition of *Acta Juridica*.

³⁴ *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) para [12]-[13].

³⁵ *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) 501G-H.

³⁶ Quoted in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 694F-G. So, too, Davis J in *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2002 (6) SA 180 (C) 191 in fine.

³⁷ *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597A-B: 'dat die gelede skade vergoed behoort te word'. Cf *Olitzki Property Holdings v State Tender Board & another* 2001 (3) SA 1247 (SCA) para [12]; *Pretorius en andere v McCallum* 2002 (2) SA 423 (C) 427E. See for a full treatment of the proposition: Anton Fagan 'Rethinking wrongfulness in the law of delict' 2005 SALJ 90 at 107-108.

³⁸ *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597A-B.

³⁹ Asser op cit p 36-37.

Sixth exception: Plaintiff failed to plead the basis for any duty of care

[64] The plaintiff pleaded in its alternative to the main claim for constitutional damages that the defendant owed it a duty of care not to cause it damages and/or economic loss through unlawful and wrongful conduct. The defendant however maintains that the plaintiff failed to define the duty and/or aver the basis for such duty.

[65] The Supreme Court of Appeal in *Olitzki* framed the nature of the enquiry as follows⁴⁰:

[10] . . . In other words, did the section impose a legal duty on the defendants to refrain from causing the plaintiff the kind of loss it claims it suffered?

[11] It is well established that in general terms the question whether there is a legal duty to prevent loss depends on a value judgment by the court as to whether the plaintiff's invaded interest is worthy of protection against interference by culpable conduct of the kind perpetrated by the defendant.

[66] The question whether a legal duty exists in a particular case is a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered. However, it is not sufficient to plead a conclusion of law without pleading the material facts giving rise to it.

[67] If the duty of care that the plaintiff relies on is a general one owed to the public as a whole, it need not be pleaded specifically. However, if it is a specific breach of duty relied on, as alleged in paragraph 4 of the particulars of claim, then the nature of the duty must be stated⁴¹.

[68] From the plaintiff's particulars of claim it is not clear whether the duty of care as relied on has a constitutional or statutory premise and is therefore expiable.

⁴⁰ 2001 (3) SA 1247 (SCA).

⁴¹ Ambler's Precedent of Pleadings Seventh Edition at 259.

[69] The exception is upheld.

Seventh exception: No cause of action in either delict or contract

[70] The basis of this ground for exception raised by the defendant is based on the fact that the plaintiff relied on the tender invitation and on the expectation and requirement that the defendant would act fairly, transparently and lawfully.

[71] The defendant further maintains that paragraph 4⁴² of the plaintiff's particulars of claim also seeks to frame a cause of action on the basis of contractual or quasi-contractual obligation on the part of the defendant. The defendant pointed out that the general rule is that plaintiff's particulars (either in contract and or delict) are mutually destructive since it is well established that contracting parties contemplate that their contract should lay down the ambit of their reciprocal rights and obligations. Thus policy considerations, do not require that delictual liability may be imposed for breach of a contract.

[72] The issue in my opinion is not so much regarding a contractual or quasi-contractual cause of action but rather whether or not delictual liability ought to attach to the defendant which will be dependent on the factual context and relevant policy considerations and if it would be appropriate to develop common law beyond the traditional limits.

[73] In *Steenkamp NO v Provincial Tender Board, Eastern Cape*⁴³ the Supreme Court of Appeal preferred to decide this matter on the footing that the claim of the applicant is for pure economic loss and that policy considerations precluded a tender board from delictual liability for pure economic damages, sustained merely because of a

⁴² '4. The Plaintiff, relying on the terms and conditions of the tender invitation and on the expectation and requirement that the Defendant in adjudication of the tender will act fairly, transparently and lawfully, timeously submitted its bid. In this respect the Defendant owed a duty of care to the Plaintiff not to cause damages and/or economic losses through unlawful and wrongful conduct.'

⁴³ 2006 (3) SA 151 (SCA).

negligent but *bona fide* award of a tender. Relying on *Telematrix*⁴⁴ and *Faircape*⁴⁵ the Supreme Court of Appeal observed that:

'Subject to the duty of courts to develop the common law in accordance with constitutional principles, the general approach of our law towards the extension of the boundaries of delictual liability remains conservative'.⁵⁴

[74] There is no call for the law to be extended when the existing law provide adequate means for the plaintiff to protect itself against loss.

[75] The exception is therefor upheld.

Costs

[76] The only remaining issue to consider is the issue of costs. The general rule is that costs of suit shall be allowed to the prevailing party as a matter of course. In the present matter, there are no good reasons why the costs should not follow the result. It will accordingly be so ordered.

[77] In conclusion, my order is as follows:

1. The first exception is dismissed.
2. The second to eighth exceptions are upheld with costs and the plaintiff is granted leave to file its amended particulars of claim, should it be so advised, within 21 days from date of release of reasons.
3. The matter is postponed to **27 June 2019** at **15:00** for Status Hearing.

⁴⁴ Supra foot note 29.

⁴⁵ *Premier Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA) para 33.

J S Prinsloo

Judge

APPEARANCES

PLAINTIFF:

S Namandje
Sis Namandje &

co. inc.

DEFENDANT:

P Kauta
Dr Weder, Kauta & Hoveka Inc.