

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**RULING ON EXCEPTION**

Case No.: HC-MD-CIV-ACT-DEL-2020/02891

In the matter between:

<b>PAMO TRADING ENTERPRISES CC</b>	<b>1<sup>ST</sup> PLAINTIFF</b>
<b>CIRCLE HOSPITALITY SERVICES (PTY) LTD</b>	<b>2<sup>ND</sup> PLAINTIFF</b>
<b>PISCES INVESTMENT HOLDINGS NO. 32 CC</b>	<b>3<sup>RD</sup> PLAINTIFF</b>

and

<b>TENDER BOARD OF NAMIBIA</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>PERMANENT SECRETARY OF THE MINISTRY OF FINANCE</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>THE MINISTER OF FINANCE</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>THE MINISTER OF EDUCATION</b>	<b>4<sup>TH</sup> DEFENDANT</b>
<b>THE PRIME MINISTER OF THE REPUBLIC OF NAMIBIA</b>	<b>5<sup>TH</sup> DEFENDANT</b>

**Neutral Citation:** *Pamo Trading Enterprises CC v Tender Board of Namibia* (HC-MD-CIV-ACT-DEL-2020/02891) [2020] NAHCMD 599 (09 December 2020)

Coram: **PRINSLOO J**  
Heard: 18 November 2020  
Delivered: 9 December 2020

Reasons: 15 December 2020

**Flynote:** Practice and Procedure – Pleadings – Rule 57 – Exception – Plaintiffs' particulars of claim does not disclose a cause of action and is bad in law – Pleadings excipiable.

**Summary:** The matter before me concerns an exception taken against particulars of claim exacting constitutional damages. During or about March 2014, the first defendant invited tenders for the provision of catering services for Government Schools in each of the Seven (7) Regions of Namibia, and in terms of and/or under Tender Number M9-11/2014, for the period 1 June 2014 to 31 May 2019.

The plaintiffs, separately submitted in terms of the said tender and consequent thereto a representative of the fourth defendant conducted site visits and inspections of the respective plaintiffs' catering premises, which the plaintiffs considered as indicative of being awarded the tenders. Then on or about 2 October 2014 the first defendant, during a board meeting, resolved to award the contract to the three plaintiffs in respect of the regions tendered for. The plaintiffs were not notified of the acceptance of their respective tenders.

During October 2014, before the plaintiffs were notified of the outcome of the tenders certain allegations surfaced in the local newspapers, which allegations were that Permanent Secretary in the Ministry was involved in the allocation of one of the tenders in respect of the regions. The fourth and/or fifth defendants apparently then requested that first defendant cancel the award of the tenders. The entire tender was cancelled and the plaintiffs were advised/informed by facsimile on or about 15 October 2014 that the tender process had been cancelled. The plaintiffs were not given the opportunity to be heard nor were they notified in terms of s 16(1) (a) of the repealed Tender Board Act.

The first and second plaintiffs, not happy with the unfortunate turn of events then turned to this court and brought a review application before this court on 12 December 2014 seeking inter alia the review of the cancellation of their tenders together with interdictory relief. The plaintiffs unsuccessfully challenged the

lawfulness of the administrative decision to cancel the tender in this court. This decision was appealed and the appeal was determined by the judgment of the Supreme Court, delivered on 3 July 2019, in which Court found and ordered that the cancellation of the Plaintiffs' tenders was irrational and unlawful.

Following the judgment of the Supreme court the plaintiffs issued the current summons on 23 July 2020 claiming damages for the loss of profit which totals in the amount of N\$143 573 715,00 in respect of all the defendants. The plaintiffs' further claim the financial losses it incurred and suffered as a result of their 'survey' expenses, which amounted to N\$ 35 220, as well as interest and costs.

The defendants filed an exception principally on the basis that the plaintiffs having neither been notified of an award in terms of section 16 of the repealed Tender Board Act, nor in terms of section 55(4) (a) of the Public Procurement Act, No. 15 of 2015, failed to allege that there was an acceptance of their bids and a successful tender award which would have resulted in a binding and enforceable procurement contract.

*Held that* 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.

*Held that* it is not clear from the particulars of claim whether s 16(2) (a) or (b) is applicable but either way none of the requirements set out in s 16 (or s 55 of the Public Procurement Act) were complied with. In other words, the trigger event that is required for a binding and enforceable agreement did not occur.

*Held further* that the plaintiffs did not plead that there was an acceptance of their bids and a successful tender, which resulted in a binding and enforceable procurement contract, which causes its particulars of claim to be excipiable.

*Held furthermore that* any improper performance of an administrative function attracts the application of Art 18 of the Namibian Constitution, and notwithstanding that ‘a breach of the right to administrative justice entitles an aggrieved party to ‘appropriate relief’ as contemplated in Art 25 of the Constitution’, it remains essential that a crucial point is made, and that is that, 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 public domain’.

*Held that* the plaintiffs are entitled to proper administrative legal proceedings but it does not mean that the breach of the administrative duties necessarily translated into private law duties giving rise to delictual claims.

*Held accordingly that* the plaintiff did not plead any facts to demonstrate that the present case is exceptionally entitling it to rely on private law remedies for a breach of a right in the public law domain and therefore the exceptions as raised by the defendants are upheld.

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## ORDER

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1. The exceptions raised by the defendants are upheld with costs.
2. The plaintiffs’ particulars of claim are struck and the plaintiffs are granted leave to file its amended particulars of claim, should it be so advised, within 30 days from date of release of reasons.
3. Cost shall not be limited to Rule 32(11).
4. The matter is postponed to **11 February 2021** at **15:00** for Status Hearing.
5. A joint status report must be filed on or before 8 February 2021 regarding the further conduct of the matter.

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## JUDGMENT

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PRINSLOO J

### Introduction

[1] The matter before me concerns an exception taken against particulars of claim exacting constitutional damages.

[2] The opponents are as follows:

- a) The First Plaintiff is Pamo Trading Enterprises CC (“PAMO”), a Close Corporation duly incorporated in terms of the Close Corporations Act of 1988, with registration number CC/2010/3344.
- b) The Second Plaintiff is Circle Hospitality Services (Pty) Ltd (“CIRCLE”), a company duly registered in terms of the Companies Act of 2004 with registration number 2012/0368.
- c) The Third Plaintiff is Pisces Investment Holdings No.32 CC (“PISCES”) a Close Corporation duly incorporated in terms of the Close Corporation Act of 1988, with registration number CC/2007/3603.
- d) The First Defendant is the Tender Board of Namibia (established in terms of Section 2 of Act 16 of 1996) (“the Act”) (“the Tender Board”), an independent body and/or entity cited herein as the relevant body who, at all relevant and material times, was responsible for the procurement of goods and services for the Government of the Republic of Namibia, by inviting tenders and concluding agreements<sup>1</sup>. The Tender Board is cited herein in terms of section 81(1) Act 15 of 2015, on the basis that should

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<sup>1</sup> The Tender Board has since been replaced by the Central Procurement Board of Namibia (in terms of Section 80(1) of Act 15 of 2015) (“the Act”) (“the Procurement Board”).

any tender exist at the date of commencement of the Procurement Board, it shall continue to be administered in terms of and governed by the Tender Board Act 16 of 1996, as if Act 15 of 2015 had never been enacted.

- e) The Second Defendant is the Permanent Secretary of the Ministry of Finance, who at the relevant time was the Chairperson and/or Administrative Head of First Defendant, and whose statutory duty and obligations included notifying of successful tenderers in writing of the acceptance of their tenders.
- f) The Third Defendant is the Minister of Finance, who is cited herein as the relevant/responsible Minister under whose authority both the Tender Board and Procurement Board was established/legislated and who may make regulations in terms of the relevant Acts, and who appoints/appointed members to the Tender Board.
- g) The Fourth Defendant is the Minister of Education who is cited herein as the relevant/responsible Minister, and whose Ministry, at the material and relevant time, required and/or called for the provision of catering services for Government Schools and thereby invited tenders for the provision of such services through the First Defendant.
- h) The Fifth Defendant is the Prime Minister of the Republic of Namibia cited herein in his/her official capacity as Head of Cabinet and under whose responsibility the actions and conduct of all Ministries and Ministers fall.

[3] For purposes of this ruling I will refer to the parties as they are in the main action.

### Background

[4] During or about March 2014, the First Defendant invited tenders for the provision of catering services for Government Schools in each of the Seven (7) Regions of Namibia, and in terms of and/or under Tender Number M9-11/2014, for the period 1 June 2014 to 31 May 2019.

[5] The plaintiffs, separately submitted in terms of the said tender and consequent thereto a representative of the fourth defendant conducted visits and inspections of the respective plaintiffs' catering premises, which the plaintiffs considered as indicative of being awarded the tenders.

[6] Then on or about 2 October 2014 the first defendant, during a board meeting, resolved to award the contract to the three plaintiffs in respect of the regions tendered for<sup>2</sup>. The plaintiffs were not notified of the acceptance of their respective tenders.

[7] During October 2014, before the plaintiffs were notified of the outcome of the tenders certain allegations surfaced in the local newspapers, which allegations were that Permanent Secretary in the Ministry was involved in the allocation of one of the tenders in respect of the regions. The fourth and/or fifth defendants apparently then requested that first defendant cancel the award of the tenders. The entire tender was cancelled and the plaintiffs were advised/informed by facsimile on or about 15 October 2014 that the tender process had been cancelled. The plaintiffs were not given the opportunity to be heard nor were the plaintiffs notified in terms of s 16(1) (a) of the repealed Tender Board Act.

[8] The first and second plaintiffs, not happy with the unfortunate turn of events then turned to this court and brought a review application<sup>3</sup> before this court on 12 December 2014, seeking inter alia the review of the cancellation of their tenders together with interdictory relief. The plaintiffs unsuccessfully challenged the lawfulness of the administrative decision to cancel the tender in this court. This decision was appealed and the appeal was determined by the judgment of the

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<sup>2</sup> First Plaintiff (Pamo), the Khomas Region, Second Plaintiff (Circle), the Otjozondjupa Region, Third Plaintiff (Pisces), the Kavango and Zambezi Regions.

<sup>3</sup> Main Division-Windhoek, Case No: A349/2014.

Supreme Court, delivered on 3 July 2019, in which Court found and ordered that the cancellation of the Plaintiffs' tenders was irrational and unlawful<sup>4</sup>.

[9] Following the judgment of the Supreme court the plaintiffs issued the current summons on 23 July 2020 claiming damages for the loss of profit which totals in the amount of N\$143 573 715,00 in respect of all the defendants. The plaintiffs' further claim the financial losses it incurred and suffered as a result of their 'survey' expenses, which amounted to N\$ 35 220, as well as interest and costs.

#### The exception

[10] The defendants filed an exception principally on the basis that the plaintiffs having neither been notified of an award in terms of section 16 of the repealed Tender Board Act, nor in terms of section 55(4) (a) of the Public Procurement Act, No. 15 of 2015, failed to allege that there was an acceptance of their bids and a successful tender award which would have resulted in a binding and enforceable procurement contract.

[11] Furthermore, the defendants further attacked the plaintiffs' particulars of claim on the ground that the plaintiffs' claim does not disclose a cause of action and is bad in law in that the plaintiffs fail to allege and explicitly set out acts of bad faith, dishonesty or fraud on the part of the Defendants in executing, or failing to execute, their duties and the Plaintiffs further failed to allege facts on the basis of which monetary damages will be the appropriate and necessary remedy.

[12] The Defendants two grounds of exception, can be summarised, as follows:

1.1. First, they contend that the Plaintiffs' Particulars of Claim lack averments necessary to sustain an action, or that they are legally unsustainable, and are accordingly excipiable because "the 2 Plaintiffs fail to allege that there was an acceptance and a successful tender award resulting in a binding and enforceable procurement contract."

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<sup>4</sup> SA 2/2017 delivered 3 July 2019 at para 55.



1.2. Second, the Defendants contend that the Plaintiffs' Particulars of Claim lack averments necessary to sustain an action, or are legally unsustainable, and accordingly excipiable, on the basis that the Plaintiffs have failed to allege and/or explicitly set out "acts of bad faith, dishonesty and/or fraud on the part of the Defendants in executing their duties which are necessary for delictual or constitutional liability."

Arguments advanced on behalf of the parties

[13] Both counsels advanced very able arguments not only in their written heads of arguments but also in their supplementary oral arguments. These arguments were comprehensive and I will not attempt to replicate them. If in the course of this judgment I use the words 'submit' and 'argue' and their derivatives, they must be understood to encompass both the heads of arguments and the oral submissions made in court.

*On behalf of the excipients*

[14] Mr Namandje, arguing on behalf of the excipients, submitted from the onset that the Plaintiffs' claim is bad in law and that it does not need to get to trial stage as it is legally meritless. In support of this contention Mr Namandje argued that the plaintiffs' case can only go as far alleging that the defendants invited a tender during 2014 and the plaintiffs separately submitted bids. At some point the first defendant considered the bids and made a decision to award the tender, amongst others, to the

plaintiffs. However, the first defendant did not proceed and notify the plaintiffs of the tender award as required under s 16<sup>5</sup> of the repealed Tender Board Act<sup>6</sup>.

[15] Mr Namandje argued that the defendants caused the whole tender process to be cancelled prior to the plaintiffs being notified in terms of the above referred to statutory provisions. Hence no enforceable award was made in law.

[16] Mr Namandje contended that the plaintiffs took the matter to the High Court, and lost and hereafter the plaintiffs appealed to the Supreme Court, and the Supreme Court delivered judgment and referred the matter back to the first defendant's successor, the Central Public Procurement Board, for its consideration.

[17] Mr Namandje submitted that if one considers the particulars of claim, the plaintiffs do not allege that the Central Public Procurement Board subsequent to the Supreme Court judgment considered the matter and acted either in terms of section 16(1) (a) of the repealed Tender Board Act, or in terms of the section 55(4) (a)<sup>7</sup> of the Public Procurement Act<sup>8</sup>.

[18] Counsel therefore submits that on this basis the plaintiffs failed to make out the necessary averments on the basis of which the plaintiffs would have acquired

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<sup>5</sup> "Acceptance of tenders, and entry into force of agreements

16.(1) The Board shall in every particular case -

(a) notify the tenderers concerned in writing of the acceptance or rejection of their tenders, as the case may be, and the name of the tenderer whose tender has been accepted by the Board shall be made known to all the other tenderers;

(b) on the written request of a tenderer, give reasons for the acceptance or rejection of his or her tender.

(2) Where in terms of a title of tender -

(a) a written agreement is required to be concluded after the acceptance of a tender, the Board and the tenderer concerned shall, within 30 days from the date on which that tenderer was notified accordingly in terms of subsection (1)(a) or within such extended period as the Board may determine, enter into such an agreement;

(b) a written agreement is not required to be so concluded, an agreement shall come into force on the date on which the tenderer concerned is notified in terms of subsection (1)(a) of the acceptance of his or her tender."

<sup>6</sup> Act 16 of 1996.

<sup>7</sup> 'Award of procurement contracts

55. (4) An accounting officer must, in the prescribed manner and form, notify -

(a) the successful bidder of the selection of its bid for award;'

<sup>8</sup> Act 15 of 2015.

either contractual or public law rights from a finding and enforceable procurement contract. In this regard Mr Namandje referred the court to *Lepogo Construction (Pty) Ltd v Govan Mbeki Municipality*<sup>9</sup> wherein the court stated that it is trite that where, in a proposed contract, the mode of acceptance is stipulated, it is the mode that must be followed before the contract is concluded. Mr Namandje pointed out that the mode of bid acceptance in the repealed Act is set out in s 16(1) (a) which section provides that where in terms of a title of a tender a written agreement is required to be concluded after the acceptance of the tender, the Tender Board and the successful tenderer would be required to enter into the required written agreement within 30 days from the date that the tenderer was notified in terms of s 16(1) (a) of the Act. Counsel argues that in such circumstances (where in terms of a title of a tender a written agreement is required) the Procurement Agreement would as a matter of law only come into force on the date of the Tender Board and the tenderer enter into such agreement within the prescribed period.

[19] On the other hand, where in terms of the tender title a written agreement is not required to be concluded, a tender agreement would come into force on the date on which the tenderer concerned was notified in terms of s 16(1) (a) of the Act of acceptance of his or her tender.

[20] In respect of the second exception Mr Namandje argued that the plaintiffs' claim is bad on account of failure to plead the necessary allegations to sustain a claim against the alleged failure of public officials to carry out their statutory duties lawfully. The court was referred to *Namibia Airports Co. Ltd v Firetech Systems and Another*<sup>10</sup> in this regard.

[21] Mr Namandje argued that in that case as in the current matter no *mala fides* were pleaded, a breach of administrative justice attracts public law remedies and not private law remedies and only in exceptional cases that private law remedies will be granted to a party for breach of a right in public domain and submitted that the exceptions should be upheld.

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<sup>9</sup> 2015 (1) All SA 152 at para 44.

<sup>10</sup> 2019 (2) NR 540 para. 27.

*On behalf of the plaintiffs*

[22] Mr Eia argued that the thrust of the exception appears to be the assertion, or assumption, that the cause of action is viable only if a contract was actually concluded.

[23] Mr Eia argued that the plaintiffs submitted tenders in response to invitations and the first defendant resolved to award the tenders to the plaintiffs. The first defendant was obliged, by statute, to communicate the acceptance of the tenders to the plaintiffs however the tender process was cancelled and the cancellation was unlawful for various reasons. Counsel argued that but for the unlawful conduct of the Defendants:

- a) The plaintiffs would have been engaged in terms of the provisions of the Invitation to Tender, as read with their tenders;
- b) The plaintiffs would have earned the income pleaded in the particulars of claim;
- c) The conduct was wrongful and the defendants were at fault;
- d) The plaintiffs suffered loss, as a result, being both loss of profits and out of pocket expenses.

[24] Mr Eia contended that for the purposes of this ground of exception, the two crucial allegations are those in POC paras 14 and 19, which are to the effect that:

- a) the first defendant was obliged to communicate the acceptance of the tenders to the plaintiffs; and
- b) but for the conduct complained of, the plaintiffs would have been engaged and would have earned the income, the loss of which is alleged.

[25] Mr Eia further contended that in the light of those allegations, the first ground of exception is misconceived. The unlawful conduct, the particulars alleged, prevented a contract from being concluded, which would have been concluded had there been no unlawfulness and this ground of exception lacks merit as it is demonstrably incorrect.

[26] Mr Eia argued that this demonstrably incorrect as the particulars of claim sets out at length the facts and circumstances that the plaintiffs rely upon, which was paraphrased in para 9 of the particulars of claim. In any event the particulars of claim sets out in substantial detail each averment, including references to the Supreme Court judgment, whose findings are to be taken as included as part of the cause of action and the relevant statutory prescripts

[27] In respect of the second ground of exception Mr Eia argued that the essence of this ground appears in paras 8 and 9 of the exception, where it is alleged that: a). the plaintiffs failed to allege and explicitly set out acts of bad faith, dishonesty and/or fraud on the part of the defendants in executing their duties which are necessary for delictual or constitutional liability; and b) the plaintiffs failed to allege facts on the basis of which monetary damage would be an appropriate and necessary remedy in the circumstances.

[28] Counsel highlighted the following regarding the duties of the defendants that were pleaded as follows:

- a) The first defendant and its members were subject to statutory and constitutional obligations (read with article 18 of the Namibian Constitution), which include the obligations under the Tender Board Act, 16 of 1996;
- b) Similar obligations arose under the Public Procurement Act, 15 of 2015. The Public Procurement Act stipulates the circumstances in which a tender process could be cancelled;
- c) They were entrusted with the administration of public money;
- d) The plaintiffs were entitled to rely on the defendants to perform their functions lawfully;
- e) The defendants knew that if they breached their duties the plaintiffs might suffer loss of the nature pleaded;

- f) The defendants were held to a higher standard of compliance with their obligations.

[29] Regarding the impugned conduct and the breach of duties the particulars of claim makes the following averments:

- a) The wrongful conduct was reported as having included that the Prime Minister gave a 'direction' to cancel the process, and allegation which was admitted in the High Court papers.
- b) It is trite (and was so found by the Supreme Court) that the Prime Minister did not have that authority.
- c) The Defendants had failed to apply the law, had acted wrongfully by failing to apply the law, and were complicit in the unlawful conduct. Relevant to the nature of the fault of the Defendants, the Particulars allege further that the Defendants were aware (this is the primary allegation in POC 36) inter alia that:
  - i. They were obliged to comply with the applicable statutory and Constitutional provisions;
  - ii. Their conduct was unlawful;
  - iii. Such conduct would prejudice the Plaintiffs;

[30] Counsel submitted that the words in para 36.3 are significant. The allegation that the defendants were actually aware (that they ought to have been aware is alleged in the alternative) of the unlawfulness of their conduct carries with it significant consequences and is reasonably capable of carrying with it the connotation of serious and conscious wrongdoing.

[31] Counsel submitted that the crux of the issue for the second ground of exception is whether, if those facts are established at a trial, the cause of action may in law be establish, which he contended is indeed the case.

[32] Mr Eia submitted that the second exception raised, as with the first one, holds no merit and the particulars of claim of the plaintiffs should stand and the exceptions should be dismissed with costs.

[33] Mr Eia referred the court to a multitude of authority which he discussed individually in the plaintiffs heads of argument and I thank him for his industry herein but in the interest of brevity I will not refer to all these cases for purposes of this ruling.

#### Legal principles relating to exceptions

[34] In *Fire Tech Systems CC v Namibia Airports Company Ltd*<sup>11</sup> this court sets out the principles relating to exceptions as follows:

[39] The principles applicable to exceptions are trite and I can do no better than to refer to *Van Straten NO and Another v Namibia Financial Institutions Supervisory Authority and Another*<sup>12</sup> wherein 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.'

[40] Our law recognizes several grounds which a party may rely on when taking an exception. These grounds may be technical in nature when 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

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<sup>11</sup> (HC-MD-CIV-ACT-DEL-2017/00697) [2020] NAHCMD 135 (24 April 2020).

<sup>12</sup> 2016 (3) NR 747 (SC).

support of the exception all on the basis that the particulars of claim lack averments necessary to sustain a cause of action.

[41] In *Brink NO and Another v Erongo All Sure Insurance CC and Others*<sup>13</sup> 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."

### Application to the facts

#### *(a) First ground of exception*

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<sup>13</sup> 2018 (3) NR 641 (SC).



[35] It is common cause that the plaintiffs were never notified neither in terms of the repealed Tender Board Act nor in terms of the Public Procurement Act. If one has regard to the operative sections of the respective Acts the mode of bid acceptance is clearly prescribed. S. 16(2)(a) of the repealed Act provided that where in terms of a title of a tender a written agreement is required to conclude after the acceptance of the tender within 30 days from the date on which the tenderer was notified in terms of s. 16(1)(a) of the Act. Where in terms of a title of a tender a written agreement is required it would appear that the procurement agreement only comes into force on the date that the Tender Board and tenderer entered into the required agreement within the prescribed 30 day period. Alternatively, in terms of s 16(2)(b), where in terms of a tender a written agreement is not required to be concluded, the tender agreement would come into force on the date on which the tenderer concerned was notified in terms of s 16(1)(a) of the Act of the acceptance of the tender.

[36] It is not clear from the particulars of claim whether s 16(2) (a) or (b) is applicable but either way none of the requirements set out in s 16 (or s 55 of the Public Procurement Act) were complied with. In other words, the trigger event that is required for a binding and enforceable agreement did not occur. I agree with Mr Namandje that the plaintiffs did not plead that there was an acceptance of their bids and a successful tender, which resulted in a binding and enforceable procurement contract, which causes its particulars of claim to be excipiable.

[37] The Supreme Court in deciding the appeal declined to make a mandatory order for the parties to enter into an agreement but simply referred the matter back to the Tender Board or its successor, the Central Public Procurement Board (the 'Board'), to reconsider and make a decision.

[38] The plaintiffs do not plead if the matter was reconsidered or what the result was of the referral back to the Board. I find it interesting that the plaintiffs do not plead what the outcome of the referral back to the Board was. Although not pleaded by any of the parties it would appear that the tender period was about to run out at the time of Supreme Court judgment but the Board had the discretion to make one of a numbers of decisions that would be just and equitable under the circumstance. It is

not clear if the plaintiffs indeed returned to the Board as directed by the Supreme Court and they elected to litigate without following the route as directed.

*(b) Second ground of exception*

[39] The law in Namibia has been clearly crystallised by the Supreme Court in respect of breach of administrative justice.

[40] The position in respect of claims in matters as is before the court, which falls within the realm of public law is made quite clear by our Supreme Court in *Fire Tech Systems CC*<sup>14</sup> in the following terms:

[29] The general principle is that a court is only competent to grant orders which were asked for by the litigants. The approach to allocating an appropriate remedy in administrative applications was authoritatively established by this court in a number of decisions:

In *Lisse v Minister of Health and Social Services*<sup>15</sup>, it was reiterated that:

‘Courts have often stressed that unlawful administrative action does not automatically give rise to delictual liability.’

Damages are thus not ordinarily awarded.

[30] In *Free Namibia Caterers CC v Chairperson of the Tender Board of Namibia & others*<sup>16</sup>, this court concluded that the principles are clear; namely, whereas any ‘improper performance of an administrative function attracts the application of Art 18 of the Namibian Constitution’, and notwithstanding that ‘a breach of the right to administrative justice entitles an aggrieved party to ‘appropriate relief’ as contemplated in Art 25 of the Constitution’, it remains essential that a crucial point is made, and that is that, 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 public domain’.

<sup>14</sup> Supra at footnote 11.

<sup>15</sup> 2015 (2) NR 381 (SC) para 21. This court referred with approval to a number of authorities eg *Knop v Johannesburg City Council* 1995 (2) SA 1 A at 33B-E; *Olitzki Property Holdings v State Tender Board & another* 2001 (3) SA 1247 (SCA); *Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others* 2005 (2) SA 359 (CC); and *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC).

<sup>16</sup> 2017 (3) NR 898 (SC) para 36 (This judgment post-dates the judgment of the court a quo).

[31] A claim for damages is a private law remedy which primarily invokes the common law. The first respondent never sought damages in the court *a quo* therefore damages were not the appropriate remedy.'

[41] Further to the above this court dealt with a similar issue in *Chico/Octagon Joint Venture v Roads Authority*<sup>17</sup> where I said the following:

[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 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 case<sup>18</sup>. 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*<sup>19</sup> the South African Supreme Court of Appeal held:

<sup>17</sup> (HC-MD-CIV-ACT-DEL-2018/3647) [2019] NAHCMD 172 (23 April 2019).

<sup>18</sup> *Free Namibia Caterers Cc v Chairperson of the Tender Board of Namibia and Others* 2017 (3) NR 898 (SC).

<sup>19</sup> 2001 (3) SA 1247 (SCA).

'[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'.

[42] DCJ Damaseb clearly stated the following in para 4 of *Road Fund Administration v Skorpion Mining Co. (Pty) Ltd*<sup>20</sup>:

'[4] As will become apparent from the summary of the pleadings below, the High Court had allowed Art 18 of the Namibian Constitution (administrative justice) to be used as a cause of action and to grant constitutional damages in respect of what is otherwise a private law action for damages. It found a violation of Art 18 of the Constitution by the appellant (an administrative body) and instead of referring the matter back to that body to reconsider the matter as would ordinarily be the case<sup>21</sup> it granted compensation to the aggrieved claimant under the Constitution. That is a significant development in our law. If the High Court's judgement is allowed to stand it will set a precedent. Mr Coleman for the respondent accepted as much during oral argument. For that reason, we are of the view that this is not a proper case to refuse condonation out of hand without considering the prospects of success.'

[43] In addition to the aforementioned there is also the issue of the plaintiffs' failure to plead bad faith on the part of the defendants and failed to plead why monetary damages would be appropriate and necessary. In the event that the plaintiffs failed to plead fraud/dishonesty/corruption will cause the plaintiffs particulars of claim to be excipiable. Support for this contention is found in *Minister of Finance and Others v Gore NO*<sup>22</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape*<sup>23</sup> and *South African Post Office v De Lacy and Another*<sup>24</sup> 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.

<sup>20</sup> 2018 (3) NR 829 at para 4.

<sup>21</sup> *Waterberg Big Game Hunting Lodge v Minister of Environment* 2010 (1) NR 1 (SC) at 31F-G; *Minister of Education & others v Free Namibia Caterers (Pty) Ltd* 2013 (4) NR 1061 (SC) at 1083C-J and 1084A-E.

<sup>22</sup> 2007 (1) SA 111 (SCA).

<sup>23</sup> Supra Footnote 15.

<sup>24</sup> 2009 (5) SA 255 (SCA)

[44] In conclusion, I reiterate what I said in *Chico/Octagon* the plaintiffs are entitled to proper administrative legal proceedings but it does not mean that the breach of the administrative duties necessarily translated into private law duties giving rise to delictual claims<sup>25</sup>. The plaintiff did not plead any facts to demonstrate that the present case is exceptionally entitling it to rely on private law remedies for a breach of a right in the public law domain and therefore the exceptions as raised by the defendants are upheld.

### Costs

[45] The parties are in agreement that due to the complexity of this matter the cost should not be capped in terms of rule 32(11).

### Order

[46] My order is therefore as follows:

1. The exceptions raised by the defendants are upheld with costs.
2. The plaintiffs' particulars of claim are struck and the plaintiffs are granted leave to file its amended particulars of claim, should it be so advised, within 30 days from date of release of reasons.
3. Cost shall not be limited to Rule 32(11).
4. The matter is postponed to **11 February 2021** at **15:00** for Status Hearing.
5. A joint status report must be filed on or before 8 February 2021 regarding the further conduct of the matter.

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J S Prinsloo

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<sup>25</sup> *Home Talk v Ekurhuleni Metropolitan Municipality* (225/2016) [2017] ZASCA 77 (2 June 2017); Steenkamp para 30.



## APPEARANCES

PLAINTIFF:

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Instructed by Koep and Partners

Windhoek

DEFENDANT:

S Namandje

Instructed by Government Attorney