

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
APPLICATION FOR LEAVE TO APPEAL  
RULING

Case No: HC-MD-CIV-ACT-CON-2019/03490

In the matter between:

**WALVIS BAY POWER PLANT (PTY) LTD**

**PLAINTIFF**

and

**NAMIBIA POWER CORPORATION (PTY) LTD**

**DEFENDANT**

**Neutral citation:** *Walvis Bay Power Plant (Pty) Ltd v Namibia Power Corporation (Pty) Ltd* (HC-MD-CIV-ACT-CON-2019/03490) [2021] NAHCMD 336 (7 July 2022)

**CORAM:** NDAUENDAPO J

**Heard:** 31 May 2022

**Delivered:** 7 July 2022

**Flynote:** Civil Practice – Application for leave to appeal against upholding of exception to amended particulars of claim – Court found that amended particulars did not disclose causes of action – Test restated.

**Summary:** This is an application for leave to appeal against the order of this court upholding an exception raised against the amended particulars of claim. The court found that the amended particulars of claim do not disclose causes of action. Disenchanted with the finding, the plaintiff applied for leave to appeal to the Supreme Court.

*Held that:* there is a reasonable possibility that the Supreme Court may come to a different conclusion.

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### ORDER

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1. The application for leave to appeal to the Supreme Court is granted.
2. Costs shall be costs in the appeal.

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### RULING

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NDAUENDAPO J:

Introduction

[1] Before me is an application for leave to appeal against an order of this court, dated 8 March 2022, in terms of which this court upheld grounds 2, 4, 5, 6, 7 and 8 of the exception on the basis that those grounds of exception do not disclose causes of action. The defendant opposes the application. For ease of reference, I will refer to the parties as in the action.

### Submissions by plaintiff

[2] Counsel for the plaintiff submitted that there is a reasonable possibility that another court may come to a different conclusion than that reached by this court.

[3] The principal submission by counsel for the plaintiff is that the present case is distinguishable from the *Free Namibia Caterers CC v Chairperson of the tender Board of Namibia and Others* 2017 (3) NR 989 (SC) at 907 para 36 and *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* (2007) (3) SA 121 (CC) that I relied on in upholding grounds (4 and 7) of the exception. The present case does not deal with the adjudicative process in the award of a tender, it is about what happened after the tender board had already decided to award the tender to the plaintiff. The tender had to be awarded within 30 days after a decision was taken, but the defendant did not do that. It was simply an omission. The defendant failed to inform the plaintiff that it got the tender timeously. It “slipped up” according to counsel. Counsel contended that plaintiff’s claim is not only premised on Article 18 of the Constitution, it is much wider and includes grounds based on the common law.

[4] Counsel further submitted that as far as ground 5 is concerned, special circumstances were pleaded in the amended particulars of claim. Although dishonesty and fraud were not pleaded, ‘wrongfully, negligently, intentionally, maliciously and clear illegality’ were pleaded.

### Submissions by defendant

[5] Counsel argued that the plaintiff asserts that it does not rely exclusively on the publication of the Expression of Interest (Eoi). The plaintiff does not, however, in its amended particulars of claim plead anything else relied on as far as the alternative to its first claim is concerned. It is therefore bound by the manner in which it pleaded. Thus *ex facie* the allegations made by plaintiff and the documents upon which its cause of action is based, the claim is bad in law. The court was therefore correct in its findings.

[6] Counsel argued (in respect of ground 5) that having regard to the facts pleaded in paras 24 and 25 of the amended particulars of claim, they are not sufficient to give rise to the inference of a tacit contract. Counsel argued that in respect of ground 6, the court, having regard to the submissions made in respect of the exception, was correct in upholding the exception.

[7] Counsel further argued (in respect of ground 7) that the principle set out in *Free Namibia Caterers* is that breach of administrative duties ordinarily attracts public law remedies and that it is only in exceptional circumstances where such breach would attract a private law remedy. The plaintiff had to plead exceptional circumstances, which it failed to do. Counsel contended that although the cases relied on by the court in upholding the exception dealt with tender process, the principle applies to any administrative act and the court was correct in finding that the plaintiff's particulars of claim does not disclose causes of action.

[8] Counsel further argued (in respect of ground 8) that it is irrelevant whether this matter concerns tender irregularities or not. It concerns administrative action and the principles extracted from the authorities relied on by the defendant apply equally to claims concerning any kind of administrative act. Counsel further submitted that the plaintiff fails to plead exceptional circumstances.

### Discussion

[9] In *Minister of Finance v Hollard Insurance Company of Namibia Ltd* 2019 (3) NR 605 (SC) at 627 para 109, the court held that the test for granting leave to appeal is whether there is a reasonable possibility that the Supreme Court may come to a different conclusion.

[10] The main submission by counsel for the plaintiff that this case does not concern adjudicative tender process, but it was simply an omission (“a slip up”) to inform the plaintiff timeously that it got the tender and therefore the authorities relied upon by this court to uphold the exceptions are inapplicable to this case, may have some merit.

[11] I am therefore of the considered view that there is a reasonable possibility that the Supreme Court may come to a different conclusion in respect of all the grounds of exception which were upheld.

[12] In the result, I make the following order:

1. The application for leave to appeal to the Supreme Court is granted.
2. Costs shall be costs in the appeal.

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G N NDAUENDAPO

Judge

APPEARANCES:

FOR THE PLAINTIFF:

R Töttemeyer (SC) with him D Obbes  
Instructed by Koep & Partners, Windhoek.

FOR THE DEFENDANT:

A Corbett (SC) with him N Bassingthwaighte  
Instructed by Ellis Shilengudwa Inc, Windhoek.