

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-CON-2022/03295

In the matter between:

DTE INVESTMENTS CC

PLAINTIFF

And

**HARDAP REGIONAL COUNCIL
MINISTER OF FINANCE**

**FIRST DEFENDANT
SECOND DEFENDANT**

Neutral citation: *DTE Investment CC v Hardap Regional Council* (HC-MD-CIV-ACT-CON-2022/03295) [2022] NAHCMD 646 (29 November 2022)

Coram: PRINSLOO J

Heard: 9 November 2022

Delivered: 29 November 2022

Flynote: Civil Practice — Rule 57 — Exception — Exception raised that particulars of claim failed to set out a proper cause of action — Plaintiff 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 — Plaintiff did not plead facts to demonstrate exceptional

circumstances entitling it to rely on private remedies for breach of a public law right — Pleading excipiable if no cause of action is disclosed — The exceptions raised by the defendants are upheld.

Summary: The plaintiff instituted a claim in terms whereby in 2020 the first defendant called for the submission of quotations in terms of s 32 of the Public Procurement Act 15 of 2015 (the Act), for the construction of six standard classrooms in Aimablaagte, Mariental. In the request for quotations, the first defendant indicated that the said bids' closing date would be 31 December 2020. The plaintiff submitted its quotation in terms of the request for quotations, and on 21 April 2021, the first defendant published a notice of selection wherein it recorded that (a) the plaintiff had been selected for the award, and (b) the bidders who applied for the quotation and were not satisfied with the selection for the award may, within seven days of the notice, apply for a review, (c) in the absence of a request for review, the accounting officer of the first defendant would award the contract to the plaintiff.

The unsuccessful bidders filed no review, and as a result, after seven days lapsed, the first defendant was obligated in terms of s 55(5) of the Act to award the contract to the plaintiff. The plaintiff pleads that after the expiry of the seven days, the first defendant failed to award the contract despite numerous demands.

The plaintiff pleads that the first defendant violated s 55(5) of the Act and Article 18 of the Constitution by unfairly and unreasonably not awarding the contract to the plaintiff. The plaintiff further pleads that in November 2021, it became aware that another contractor was carrying out the work as was outlined in the Request for Quotation. Upon enquiries as to why the first defendant failed to award the contract to the plaintiff and why another contractor was carrying out the work concerned, the first defendant remained mute.

The plaintiff pleads that in April 2022, it submitted a review application to the review panel seeking to challenge the first defendant's decision not to award the contract to the plaintiff. The review panel referred the plaintiff to the Procurement Policy Unit, which in

turn responded that it was not obligated to receive instructions from any other person besides the second defendant, and is not able to provide the plaintiff with a remedy. The plaintiff concluded by pleading that as a result of the first defendant's violation of s 55(5) of the Act and the second defendant's inability to offer any remedy the plaintiff suffered damages in the amount of N\$368 587,62.

The defendants raised an exception to the plaintiff's particulars of claim on the basis that the particulars of claim failed to set out a proper cause of action.

Held that: none of the averments set out in the *Telematrix* matter is contained in the plaintiff's particulars of claim.

Held further: the court is of the view that the plaintiff failed to plead why its case is exceptional and why it should be allowed to pursue a private remedy in the form of individual damages for the alleged breach of its right in the public domain over and above his common-law entitlement of the remedy of review

Held further that: the exceptions raised by the defendants, in my view, are good in law and must be upheld.

The exceptions raised by the defendants are upheld with costs.

ORDER

1. The exceptions raised by the defendants are upheld with costs. The particulars of claim of the plaintiff is struck. The plaintiff is granted leave to file amended particular of claim within 20 days from date of judgment, if so advised.
2. The matter is postponed to 19 January 2023 at 15h00 for a status hearing (Reason: to determine the further conduct of the matter).

JUDGMENT

PRINSLOO J:

The parties

[1] The plaintiff is DTE Investment CC, a close corporation duly registered and incorporated in terms of the applicable laws of Namibia.

[2] The first defendant is the Hardap Regional Council, a regional council duly constituted in terms of s 2(1) of the Regional Councils Act, 22 of 1992, read with Articles 105 and 106 of the Namibian Constitution.

[3] The second defendant is the Minister of Finance, duly appointed as such in terms of Article 32(3)(i)(bb) of the Namibian Constitution.

The plaintiff's particulars claim

[4] In 2020 the first defendant called for the submission of quotations in terms of s 32 of the Public Procurement Act 15 of 2015 (the Act), for the construction of six standard classrooms in Aimablaagte, Mariental. In the request for quotations, the first defendant indicated that the said bids' closing date would be 31 December 2020.

[5] The plaintiff submitted its quotation in terms of the request for quotations, and on 21 April 2021, the first defendant published a notice of selection wherein it recorded that:

- a) The plaintiff had been selected for the award, and

- b) That the bidders who applied for the quotation and were not satisfied with the selection for the award may, within seven days of the notice, apply for a review,
- c) In the absence of a request for review, the accounting officer of the first defendant would award the contract to the plaintiff.

[6] The unsuccessful bidders filed no review, and as a result, after seven days lapsed, the first defendant was obligated in terms of s 55(5) of the Act to award the contract to the plaintiff.

[7] The plaintiff pleads that after the expiry of the seven days, the first defendant failed to award the contract despite numerous demands.

[8] The plaintiff pleads that the first defendant violated s 55(5) of the Act and Article 18 of the Constitution by unfairly and unreasonably not awarding the contract to the plaintiff.

[9] The plaintiff further pleads that in November 2021, it became aware that another contractor was carrying out the work as was outlined in the Request for Quotation.

[10] Upon enquiries as to why the first defendant failed to award the contract to the plaintiff and why another contractor was carrying out the work concerned, the first defendant remained mute.

[11] The plaintiff pleads that in April 2022, it submitted a review application to the review panel seeking to challenge the first defendant's decision not to award the contract to the plaintiff. The review panel referred the plaintiff to the Procurement Policy Unit, which in turn responded that it was not obligated to receive instructions from any other person besides the second defendant, and is not able to provide the plaintiff with a remedy.

[12] The plaintiff concluded by pleading that as a result of the first defendant's violation of s 55(5) of the Act and the second defendant's inability to offer any remedy, the plaintiff suffered damages in the amount of N\$368 587,62.

The notice of exception

[13] The defendants raised three different exceptions to the plaintiff's particulars of claim, which can be summarised as follows:

- a) That the plaintiff's particulars of claim lack the necessary averments to sustain a cause of action as the plaintiff failed to allege and or explicitly set out the 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;
- b) That any improper performance of an administrative function attracts the application of Article 18 of the Constitution in the form of a review.
- c) That it is only in exceptional cases where private law remedies will be granted to a party for breach of a right in the public domain and the current matter does not fall within the exceptions as the plaintiff did not plead any facts to demonstrate that the present case is exceptionally entitling it to rely on the private law remedies for a breach of a right in the public law domain.

[14] As a result, the defendants pray that their exceptions are upheld and that the plaintiff's particulars of claim be struck out.

Arguments advanced by the parties

On behalf of the excipients

[15] Ms van der Smit, arguing on behalf of the excipients, contended that the plaintiff conflated and misapplied the legal principles by losing sight of two general principles, ie:

- a) Public law acts for the public good rather than for the furtherance of private interests;
- b) Delictual claims in the context of public procurement bring into focus the intersection and uneasy relationship between public and private law.

[16] In support of the submissions made Ms van der Smit referred the court to a number of cases where the Supreme Court held that improper performance of an administrative function attracts the application of Article 18 of the Namibian Constitution and 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 the public domain¹.

[17] Ms van der Smit submitted that the operative principles are firstly that in delictual parlance everyone has to bear the loss he or she suffers. Only *aquillian* liability, as an exception to the general rule, provides that in order for a party to be liable for the loss of another, the act or omission of such a party must have been wrongful and negligent, and in addition, must have (through causal nexus) cause the loss. Secondly, an incorrect administrative decision is not per se wrongful unless one clearly investigates its nature and the motive behind it for purposes of determining wrongfulness.

[18] Ms van der Smit argued with reference to *Esofranki Pipelines (Pty) Ltd v Mopanie District Municipality*² that the Constitution does not create a right to claim damages for loss of profit in the arena of procurement administrative law. In this regard, it is submitted that the constitutional guarantee of fair tender does not provide the basis for imposing legal duty to compensate the loss arising from the guarantee.

¹ *Pamo Trading Enterprises CC and Another v Chairperson of the Tender Board of Namibia and Others* 2019 (3) NR 834 (SC); *Free Namibia Caterers CC v Chairperson of the Tender Board of Namibia and Others* 2017 (3) NR 898 (SC) para 36; *Namibia Airports Co Ltd v Fire Tech Systems Cc and Another* 2019 (2) NR 541 (SC).

² *Esofranki Pipelines (Pty) Ltd v Mopanie District Municipality* [2021] 3 All SA 686 (SCA) at para 95.

[19] Ms van der Smit submits that it then follows that the plaintiff's case is palpably bad and the court is entitled to uphold the defendants' exception.

On behalf of the plaintiff

[20] In response, Ms Kauta argued that the current matter is distinguishable from the matters that the excipients referred the court to. This, according to counsel, is clear when the court considers the surrounding circumstances of the matter.

[21] In the current matter the first defendant duly published that the plaintiff was the successful bidder and after a period of seven days, allowed for the unsatisfied bidders within which to apply that the award is reviewed, the award was due to be awarded to the plaintiff. There was no review filed, and therefore s 55(5) of the Act would immediately apply, and the accounting officer of the first defendant was obliged to award the contract to the plaintiff.

[22] Ms Kauta argued that despite the obligatory provisions of s 55(5) of the Act the first defendant neglected or refused to award the contract to the plaintiff for no apparent reason. It only came to the attention of the plaintiff in November 2021 that the work, as outlined by the Request for Quotation, was being carried out by another contractor.

[23] Ms Kauta submitted that despite various inquiries by the plaintiff the first defendant failed to advance reasons for awarding the contract to a third party, and by failing to carry out the mandatory obligation in terms of the Act, the first defendant acted unfairly and unreasonably and thus violated Article 18 of the Constitution.

[24] Ms Kauta argued that the redress that the plaintiff may seek in terms of Article 18 of the Constitution is not limited to a review application. In this regard the court was referred to the Supreme Court judgment of *Namibia Financial Exchange (Pty) v Chief Officer of Namfisa and Others*³, wherein the court held that an applicant should not be

³ *Namibia Financial Exchange (Pty) v Chief Officer of Namfisa and Others* (SA 43 of 2017) [2019] NASC 590 (31 July 2019).

straightjacket to use the review rule as there may be a good reason why other procedural avenues are preferable, for example where the dispute of fact is unavoidable, or where the applicant needs the testimony of a person who does not want to depose to an affidavit and requires to be compelled by the way of subpoena to give the relevant evidence in action proceedings.

[25] In the current circumstance, so argued Ms Kauta, the first defendant will have to explain why the plaintiff was not awarded the contract and how and why another contractor was appointed.

[26] In response to the exceptions raised by the defendants, Ms Kauta replied as follows:

a) The plaintiff's particulars of claim do not sustain a cause of action:

Ms Kauta submits that paras 10 to 17 of the plaintiff's particulars of claim sets out explicitly the first defendant's conduct, which depicts the bad faith and dishonesty on the part of the first defendant. Counsel specifically refers to para 10 and 11 that the first defendant failed and/or refused and/or neglected to award the contract to the plaintiff after the plaintiff was selected as the successful bidder⁴. Further, the dishonest conduct of the first defendant is set out in para 12 of the particulars of claim⁵.

b) Failure to plead any facts to demonstrate that the present case is exceptional

Ms Kauta submitted that the courts have held that with advent of our constitutional dispensation, a breach of the right to administrative justice entitles an aggrieved party to 'appropriate relief' as contemplated by Article 25 of the Constitution. What the court will

⁴ '10. Subsequent to the expiry of the 7 days period, the Plaintiff on numerous occasions demand for the First Defendant to award the contract, however the First Defendant refused/neglected and/or failed to award the contract to the Plaintiff.

11. The First Defendant violated section 55(5) of the Act and Article 18 of the Namibian Constitution in that: the First Defendant failed to award the contract to the Plaintiff; and the First Defendant did not act fairly and reasonably in not awarding the contract to the Plaintiff.'

⁵ '12. During November 2021, it came to the Plaintiff's attention that the works outlined in the Request for Quotation, at Erf 1298 Ext 1 Aimablaagte Mariental, was carried out by another contractor.'

consider as an appropriate remedy will depend on the peculiar facts of each case. Ms Kauta concedes that the plaintiff is alive to the fact that only in exceptional cases would private law remedies be granted to a party for the breach of a right in the public law domain but submits that the current matter falls within the category of 'exceptional cases' because unlike in other tender matters where the award was cancelled or not lawfully awarded to the applicant, the plaintiff was the successful bidder and the administrator simply failed to act in accordance with the procurement procedure and administrative law. The first defendant carried out the tender for which the plaintiff was selected as a successful bidder with a different contractor without following due process.

The applicable legal principles

[27] In *Van Straten NO v Namibia Financial Institutions Supervisory Authority & another*⁶, Smuts JA summarised the legal principles relating to exceptions to pleadings on the ground that they lack averments necessary to sustain a cause of action. At para 18 the learned judge set out the following:

'[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.'

[28] Hoexter C in *Administrative Law in South Africa*⁷ is of the view that judicial review whether in common law or in the South African context, in terms of the Promotion of the Administration of Justice Act 3 of 2000 (as amended), is generally an inappropriate remedy for an individual who has suffered loss as a result of administrative action as it

⁶ *Van Straten NO v Namibia Financial Institutions Supervisory Authority & another* 2016 (3) NR 747 (SC).

⁷ Cora Hoexter *Administrative Law in South Africa* at 467 1st Ed 2007 Juta & Co.

is primarily designed for the setting aside of unlawful action rather than for compensating people who have been affected adversely by that action. The learned author surmised that the better remedy would usually lie in the law of delict, which is designed to compensate people by way of damages for the harm caused by the wrongful and culpable acts and omissions of others, or alternatively in the law of contract. The author proceeds to state that because the court would inevitably be drawn into a consideration of the statutory powers of the administrator and the legality of their exercise, suing an administrative body in delict or contract amounts to an indirect or collateral way of obtaining review of its decision.

[29] Therefore it is clear that administrators may be liable in delict for damages caused during the performance of their statutory functions, but such administrators can avoid liability by showing that their actions were authorised by statute or were otherwise lawful.

[30] Hoexter C states the following in this regard:

‘Statutory authority is not the only basis on which an administrator may escape liability, however. In the administrative-law context it is important to appreciate that the element of wrongfulness cannot simply be assumed in the presence of illegality or unlawfulness. In other words, an administrator will not automatically have acted wrongfully simply because it has acted ultra vires or breached a statutory duty- particularly where pure economic loss is concerned.’⁸

[31] Our Apex Court, in the *Van Straten NO v Namfisa*⁹ considered an exception wherein the defendant averred that the delictual element of wrongfulness has not been established on the pleadings in the claim against it. Smuts JA stated that:

‘[83] It has been emphasised that the starting point in the law of delict is that negligent conduct giving rise to loss is not actionable unless it is also wrongful. Aquilian liability provides an exception to this rule. Liability for the loss arises if the act or omission of the defendant had

⁸ Cora Hoexter *Administrative Law in South Africa* at 468 1st Ed 2007 Juta & Co.

⁹ Supra at footnote 6.

been wrongful and negligent and caused the loss in question. Where the negligent conduct manifests itself in a positive act which causes physical harm to the person or damage to property of another, the culpable conduct is prima facie wrongful.

[84] With negligent omissions causing pure economic loss, the position is different. Wrongfulness is not presumed and would depend upon the existence of a duty not to act negligently. Whether such a duty exists is a matter of judicial determination according to criteria of public and legal policy consistent with the norms articulated in the Namibian Constitution. Stated differently, whether the legal convictions of the community in the light of constitutional norms require that the omission to act be regarded as wrongful.

[85] Where negligent conduct which causes pure economic loss is however not wrongful, public and legal policy considerations would determine that there should be no liability for a potential defendant, despite the presence of negligence. That defendant would enjoy immunity for that conduct, whether negligent or not.'

[32] Although the Van Straten matter was decided in a context other than that of procurement, the Court found the contention that as far as organs of state are concerned, the law has not evolved into a general liability for damages for imperfect administrative actions as sound.

[33] In *Chico/Octogon Join Venture v Roads Authority*¹⁰ this court held as follows:

'[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. It must be accepted that an incorrect administrative decision is not *per se* wrongful. 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.

[41] In *Minister of Finance and Others v Gore NO, Steenkamp NO v Provincial Tender Board, Eastern Cape and South African Post Office v De Lacy and Another* the respective

¹⁰ *Chico/Octogon Join Venture v Roads Authority* (HC-MD-CIV-ACT-DEL 3647 of 2018) [2019] NAHCMD 172 (23 April 2019).

courts held that irregularities in a tender process falling short of dishonesty, or that merely amounts 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.' [Footnotes excluded)

[34] Although the facts in the *Chico/Octogon* matter are different the principles remain the same.

[35] Ms Kauta also argued that the conduct of the first defendant is unreasonable, arbitrary and irregular. In considering whether unreasonable, arbitrary and irregular conduct in allocating a tender would constitute a civil wrong actionable at a plaintiff's instance for loss of profits by an unsuccessful tenderer, the South African Supreme Court of Appeal in *Olitzki Property Holdings v State Tender Board and Another*¹¹ framed the nature of the enquiry as follows:

'[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. The imposition of delictual liability (as Prof Honoré has pointed out) thus requires the court to assess not broad or even abstract questions of responsibility, but the defendant's liability for conduct described in categories fixed by the law. This process involves the court applying a general criterion of reasonableness, based on considerations of morality and policy, and taking into account its assessment of the legal convictions of the community and now also taking into account the norms, values and principles contained in the Constitution. Overall, the existence of the legal duty to prevent loss is a conclusion of law depending on a consideration of all the circumstances of the case.

¹¹ *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA).

[12] Where the legal duty the plaintiff invokes derives from breach of a statutory provision, the jurisprudence of this Court has developed a supple test. The focal question remains one of statutory interpretation, since the statute may on a proper construction by implication itself confer a right of action, or alternatively provide the basis for inferring that a legal duty exists at common law. The process in either case requires a consideration of the statute as a whole, its objects and provisions, the circumstances in which it was enacted, and the kind of mischief it was designed to prevent. But where a common-law duty is at issue, the answer now depends less on the application of formulaic approaches to statutory construction than on a broad assessment by the court whether it is just and reasonable that a civil claim for damages should be accorded. 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 determined also in the light of the Constitution and the impact upon them that the grant or refusal of the remedy the plaintiff seeks will entail.' [Footnotes excluded.]

[36] In *Steenkamp NO v Provincial Tender Board, Eastern Cape*¹² the court followed *Olitzki* and Moseneke DCJ, writing for the majority, summarised the considerations to be taken into account in an enquiry into wrongfulness in the following way:

'Our Courts — *Faircape, Knop, Du Plessis and Duivenboden* — and courts in other common-law jurisdictions readily recognise that factors that go to wrongfulness would include whether the operative statute anticipates, directly or by inference, compensation of damages for the aggrieved party; whether there are alternative remedies such as an interdict, review or appeal; whether the object of the statutory scheme is mainly to protect individuals or advance public good; whether the statutory power conferred grants the public functionary a discretion in decision-making; whether an imposition of liability for damages is likely to have a chilling effect on performance of administrative or statutory function; whether the party bearing the loss is the

¹² *Steenkamp NO v Provincial Tender Board of the Eastern Cape* (CCT71/05) [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) (28 September 2006) at para 42 .

author of its misfortune; whether the harm that ensued was foreseeable. It should be kept in mind that in the determination of wrongfulness foreseeability of harm, although ordinarily a standard for negligence, is not irrelevant. The ultimate question is whether on a conspectus of all relevant facts and considerations, public policy and public interest favour holding the conduct unlawful and susceptible to a remedy in damages.'

[37] The plaintiff is not claiming for its out-of-pocket expenses, which is irrecoverable whatever the fate of the tender is. It claims loss of profit which is a pure economic loss. It is clear from the relevant case law that in order for the plaintiff to succeed with its delictual claim based on pure economic loss, the plaintiff must clearly plead (a) conduct, (b) wrongfulness, (c) fault, (d) causation and (e) damages.

[38] In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*¹³ 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. 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 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 wrongful although foreseeability of damage may be a factor in establishing whether or not a particular act was wrongful. 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.

[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. Policy considerations must dictate that the plaintiff should be entitled to be recompensed by the defendant for the loss suffered (and not the converse as Goldstone J once implied 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,

¹³ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [2005] ZASCA 73; SA 2006 (1) SA 461 (SCA); [2006] 1 All SA 6 (SCA) para 12.

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. It is then that can be said that the legal convictions of society regard the conduct as wrongful, something akin to and perhaps derived from the modern Dutch test 'in strijd . . . met het geen volgens ongeschreven recht in het maatschappelijk verkeer betaamt' (contrary to what is acceptable in social relations according to unwritten law).' [Footnotes omitted]

[39] Ms Kauta, in her spirited argument, maintains that the plaintiff sets out explicitly the first defendant's conduct, which depicts bad faith and dishonesty on the part of the first defendant. She further argues that the dishonest conduct of the first defendant is set out in the particulars of claim. However, if one reads the specific paragraphs Ms Kauta refers the court to, I will be hard-pressed to find anything remotely supporting the contentions of bad faith and dishonesty allegedly pleaded in the plaintiff's particulars of claim.

[40] None of the aforementioned averments set out in the *Telematrix* matter is contained in the plaintiff's particulars of claim.

[41] On behalf of the defendants, it was argued that the plaintiff was required to plead exceptional circumstances entitling it to rely on private remedies for breach of a public law right. This argument is in line with *Free Namibia Caterers CC v Chairperson of the Tender Board of Namibia and Others*¹⁴ wherein 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 domain'.

[42] Ms Kauta conceded this fact and submitted that the facts of the current matter place it squarely within the category of exceptional cases and the exceptionality lies in the fact that the plaintiff was successful in its tender and thereby drawing a distinction between a tenderer that is initially successful and an unsuccessful tenderer. In

¹⁴ *Free Namibia Caterers Cc v Chairperson of the Tender Board of Namibia and Others* 2017 (3) NR 898 (SC) at para 35. Also see *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) (2007 (3) BCLR 300; [2006] ZACC 16) para 29.

Steenkamp NO the court held that to do so is to allot different legal rights to parties to the same tender process. The court further held that there is no justification for this distinction particularly because ordinarily both classes of tenderers are free to tender again should the initial tender be set aside¹⁵.

[43] I am of the view that the plaintiff failed to plead why its case is exceptional and why it should be allowed to pursue a private remedy in the form of individual damages for the alleged breach of its right in the public domain over and above his common-law entitlement of the remedy of review.

[44] The exceptions raised by the defendants, in my view, are good in law and must be upheld.

[45] My order is therefor as follows:

1. The exceptions raised by the defendants are upheld with costs. The particulars of claim of the plaintiff is struck. The plaintiff is granted leave to file amended particular of claim within 20 days from date of judgment, if so advised.
2. The matter is postponed to 19 January 2023 at 15h00 for a status hearing (Reason: to determine the further conduct of the matter).

JS PRINSLOO
Judge

APPEARANCES

¹⁵ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) (2007 (3) BCLR 300; [2006] ZACC 16) para 54.

PLAINTIFF:

V Kauta

Instructed by Ndaitwah Legal Practitioner,
Windhoek

FIRST and SECOND DEFENDANTS:

C Van Der Smit

Of the Office of the Government Attorney,
Windhoek