



REPORTABLE

CASE NO: SA 102/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**PAMO TRADING ENTERPRISES CC
CIRCLE HOSPITALITY SERVICES (PTY) LTD
PISCES INVESTMENT HOLDINGS 32 CC**

**First Appellant
Second Appellant
Third Appellant**

and

**TENDER BOARD OF NAMIBIA
PERMANENT SECRETARY OF THE
MINISTRY OF FINANCE
MINISTER OF FINANCE
MINISTER OF EDUCATION
PRIME MINISTER OF THE REPUBLIC OF NAMIBIA**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent**

Coram: SHIVUTE CJ, DAMASEB DCJ and SMUTS JA

Heard: 5 April 2024

Delivered: 14 June 2024

Summary: The first, second and third appellants (plaintiffs *a quo*) were awarded tenders by the Tender Board of Namibia after a competitive bidding process that took place in March 2014 at the behest of the Ministry of Education. The entire tender process was cancelled by the Tender Board (TB) at the direction of the fourth and fifth respondents. The appellants successfully appealed to the Supreme Court the cancellation decision in *Pamo Trading Enterprises CC & another v Chairperson of the tender Board of Namibia & others* 2019 (3) NR 834 (SC). In the review application, the appellants were successful when this Court ordered that the cancellation of the tender award was irrational and unlawful and remitted the matter to the successor of the TB to reconsider the matter.

The appellants were still not offered contracts to perform and as a result allegedly suffered economic loss which they sought to recover in action proceedings which resulted in an exception.

The respondents raised an exception against the appellants' particulars of claim on the basis that the particulars of claim lack averments necessary to sustain an action. The exception raised two grounds: (a) they failed to allege that they had a binding and enforceable contract in terms of the repealed s 16 of the Tender Board Act 16 of 1996 and (b) they failed to allege and explicitly set out acts of bad faith, dishonesty and/or fraud on the part of the respondents in executing their duties and that they also failed to allege facts to sustain their claim for monetary damage and why that claim would be the appropriate and necessary remedy. The court *a quo* upheld the exception.

On appeal, the appellants challenge the judgment and order of the High Court upholding an exception raised against their particulars of claim.

Held that, the default position is that wrongful administrative decision-making must be corrected by means of the review power of the courts under the Constitution and the common law. To succeed, the prospective plaintiff must allege sufficient circumstances which, if proved at the trial, will satisfy the court that the conduct or

omission complained of meet the criteria that would give rise to liability and (not least importantly) that the ordinary remedies for the correction of such conduct or omission are inadequate.

Held that, the particulars of claim are singularly silent on what transpired after the *Pamo* judgment and the manner in which the defendants breached the law and or violated the *Pamo* judgment; and also what steps they as prospective plaintiffs took after that judgment to enforce their rights under the judgment.

Held that, the particulars of claim repeat the grounds on which this Court set aside the cancellation decision in the *Pamo* judgment. After the *Pamo* judgment the cancellation decision was no longer a materially relevant *factum probandum*. The relevant *facta probanda* are the actions and omissions of the defendants relative to the extent to which they did or did not give effect to the Supreme Court's judgment and order. The particulars of claim had to disclose how that conduct was unlawful and what the circumstances are that justify a departure from the default position of administrative law remedies in favour of monetary damages.

Held that, where a party who had been afforded the opportunity at first instance to amend a pleading first appeals and when it fails on appeal is allowed by this Court to amend, that will have the undesirable consequence of potentially prolonged litigation. It is not a fanciful prospect that such a pleading might again be excepted to, be disallowed at first instance and result in a further appeal to this Court. It is a more wholesome practice for the parties to at first instance exhaust all the attendant procedural remedies and come to this Court once and not piecemeal.

The condonation application is granted and the appeal reinstated. The appeal is dismissed with costs.

DAMASEB DCJ (SHIVUTE CJ and SMUTS JA concurring):

Introduction

[1] This appeal is against the judgment and order of the High Court upholding an exception raised against particulars of claim in a combined summons. The appellants were the plaintiffs *a quo* and the respondents the defendants *a quo*. Henceforth I will refer to them as plaintiffs and defendants respectively unless the context requires otherwise. Where the context so requires reference to appellants will be to first to third appellants and reference to respondents will be first to fifth respondents.

[2] On or about 2 October 2014, the plaintiffs were awarded tenders by the Tender Board of Namibia after a competitive bidding process that took place in March 2014 at the behest of the Ministry of Education, only to have the entire tender process cancelled by the Tender Board (TB) at the direction of the of the fourth and fifth respondents.

[3] The plaintiffs then successfully challenged the cancellation decision in court but still were not offered contracts to perform and thus allegedly suffered economic loss which they sought to recover in action proceedings which resulted in the exception.

[4] It is common cause that the inspiration for the claim brought by the plaintiffs in the proceedings that led to the present appeal, is the judgment of this Court in *Pamo Trading Enterprises CC & another v Chairperson of the Tender Board of Namibia & others* 2019 (3) NR 834 (SC) (the review application).

[5] The plaintiffs had brought the review application to challenge the cancellation by the TB of the tenders favourably awarded to them. They were successful when this Court (in an appeal following the review application) ordered (the *Pamo* judgment) that the cancellation of the tender awards was irrational and unlawful and remitted the matter to the successor of the TB to reconsider the matter.

[6] At the time of the invitation to tender and the awarding of the tenders to the plaintiffs, the applicable legislation was the Tender Board Act 16 of 1996 (the 1996 Act) which was repealed and replaced by the Public Procurement Act 15 of 2015 (the 2015 Act).

[7] The plaintiffs had sought the following relief in the review application:

‘1. Reviewing and correcting or setting aside the decision by the Tender Board . . . communicated to the [appellants] on 15 October 2014, to cancel Tender No M9-11/2014 for the provision of catering services to Government school hostels for the period 1 June 2014 to 31 May 2019 (“the Tender”).

2. Directing the [Board] and the [Ministry of Education] to enter into agreements, as contemplated in section 16(2) of the [Tender Act], with the [appellants] in respect of the Khomas and Otjozondjupa catering regions respectively awarded to them on 2 October 2014 by [the Board], within 7 days.

3. Declaring that the agreements entered into by [the Board] and the [Ministry] with service providers, to extend catering contracts originally concluded after the service providers successfully tendered to provide those services, as alluded to in paragraphs 25 and 26 of the answering affidavit . . . on behalf of the [Board, Ministry

and third respondent, Prime Minister of the Republic of Namibia (Prime Minister)] on 10 June 2015, are unlawful as they are *ultra vires* the Board.

4. . . .

5. Costs of suit against those respondents opposing this application, jointly and severally, if more than one opposes.

. . . .’

[8] In the review application, the defendants did not deny that although they were the successful bidders the plaintiffs were neither notified of that fact as required by s 16(1) of the 1996 Act, nor afforded *audi* prior to the cancellation decision. In so far as it is relevant to the present appeal, s 16 of the 1996 Act states:

‘(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 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 the 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’. (My underlining)

[9] This Court then held in the *Pamo* judgment that, as a statutory body, the TB ought to have complied with Art 18 of the Constitution and the preemptory prescripts

of s 16 of the 1996 Act. It was thus held that the TB failed to exercise its power or perform its functions, both under the Constitution and the 1996 Act, in conformity with the constitutional principle of legality.

[10] The court in the *Pamo* judgment made it clear that 'Procurement steps taken by public officials and agencies like the [TB] must . . . be lawful and procedurally fair'. The court also made two further significant findings: That there was denial of *audi* to the plaintiffs before the cancellation decision and that the TB failed to discharge its obligations in terms of s 16 of the 1996 Act. As the court put it: 'In fact, they admit non-compliance with the empowering legislation'. The court made it clear that if the defendants considered the decision to award the tenders to the plaintiffs to have been tainted by corruption, they should have had it reviewed and set aside and not to merely cancel it.

[11] As to the relief to order conclusion of contracts between the plaintiffs and the TB in terms of s 16(2) of the 1996 Act, the court said: 'Essentially, the appellants want this Court to substitute its own decision for that of the Tender Board' and concluded that it would not be just and equitable to do so. Such relief would only be granted in exceptional circumstances such as where the 'functionary concerned has exhibited bias or incompetence to such degree that it would be unfair to require the appellants to submit to the same authority/agency'.

[12] It held (para 64):

'The appellants have not shown that any such exceptional circumstances exist or are shown. . . .'

[13] And granted the following order:

' . . . The order of the Court *a quo* is set aside and the following is substituted in its place:

- '(i) The decision by the Tender Board of Namibia, communicated to the appellants on 15 October 2014, to cancel Tender No M9-11/2014 for the provision of catering services to Government school hostels for the period 1 June 2014 to 31 May 2019, is reviewed and set aside.
- (ii) The matter is referred back to the appropriate functionary – the successor to the Tender Board of Namibia in terms of the Public Procurement Act, 15 of 2015'

[14] It is important to show why and the purpose for which the Court remitted the matter. The Court said at para 59 that: setting aside the cancellation decision will in addition to not being disruptive of the ongoing provision of food to affected learners, 'be fair to those concerned and will be in the interest of justice as the functionary will then be able to afford the appellants *audi*, to safeguard their fair process right; will be able to observe the principle of legality and will also give effect to the extant decision awarding the tender to the successful bidders including the appellants. It is not insignificant that the decision (awarding the tender) has not been reviewed and set aside. Effectively, the decision to award still stands.'

[15] Having sketched the background leading to the plaintiffs' action in the present appeal, I turn to the particulars of claim.

Pleadings a quo

Particulars of claim

[16] The plaintiffs' case, as formulated in the particulars of claim, after identifying the parties refers to the process that led to the award of the tenders to them, the fact that the awards were cancelled without *audi* to them and the unlawfulness thereof. The particulars of claim then allege that, but for that unlawful cancellation, they 'would have been engaged in terms of the provisions of the Invitation to Tender, as read with their tenders [and they] would have earned the income' claimed in the combined summons. Next, the particulars refer to the fact that the plaintiffs took the cancellation decision on review and ultimately succeeded on appeal to this Court – the cancellation being characterised as 'irrational and unlawful' and remitted to the successor decision maker.

[17] Next, the particulars of claim deal with 'unlawfulness and fault' and locate that in the process prior to the cancellation. The allegation is made that when the plaintiffs submitted tenders in response to the invitation to tender, they expected the defendants to act fairly, reasonably and lawfully in the performance of their public (statutory) functions. The defendants, it is said, 'knew or should have been aware that if they willfully and or negligently breached their legal and statutory duties . . . they might infringe on the rights of the Plaintiffs. . . [and] the Plaintiffs might suffer loss of the nature pleaded' in the particulars of claim.

[18] The particulars of claim then quote s 16 of the 1996 Act and its successor, the 2015 Act, in particular the objects of the latter Act, the manner of cancellation of the

bidding process; the award of tenders; briefing of unsuccessful bidders; and the conduct of staff members of public entities involved in procurement decisions.

[19] Next the allegation is made that the TB is a creature of statute 'performing public functions and utilizing public funds'. It is then alleged that the defendants 'were at all material times . . . held to a more stringent standard to ensure, among other things that the plaintiffs' rights, together with those rights of the Namibian citizenry, are not adversely affected and prejudiced.' It is also stated that the defendants have the duty to uphold the rule of law in the exercise of their public power, and to ensure that the exercise of such public power was legitimate and lawful, and to act in accordance with the relevant statutory provisions as pleaded.

[20] The particulars state further that the plaintiffs 'were entitled to rely upon Government decisions and be able to function and plan their lives around such decisions'.

[21] The following allegations are then made before the damages are particularised:

- '32. The Defendants acted wrongfully by participating, interfering and/or involving themselves in the adjudication and/or cancellation of the Plaintiffs' tenders.
33. The relevant Defendants' wrongful, irregular, and unlawful interference in First Defendant's procurement processes, was reported in Namibian newspapers as follows:

33.1 'The *Namibian*' newspaper reported on 9 October 2014 that:

"Prime Minister Hage Geingob ordered that the Namibian N\$3 billion Food Tender of the Ministry of Education be readvertised . . . Geingob issued a statement late on Wednesday stating: 'With regards to the report on a potential conflict of interest with the awarding of the Ministry of Educations Food Tender, I would like to indicate that I have directed the Minister of Education to withdraw the Tender and readvertise it for the process to start afresh.'"

33.2 In the 'New Era' newspaper dated 10 October 2014, it was reported as follows:

"Prime Minister, Dr Hage Geingob, has ordered that the N\$3 billion Food Tender for the Ministry of Education be readvertised. . . . With regard to the report on a potential conflict of interest with the awarding of the Ministry of Education's Food Tender, I would like to indicate that I have directed the Minister of Education to withdraw the Tender and readvertise it for the process to start afresh", Geingob said late last night.

34. The relevant Defendants admitted the import of the above quoted statements in the High Court proceedings.

35. In so doing the Defendants:

35.1 failed to apply the law and

35.2 acted wrongfully by failing to uphold its statutory mandate and procedure (as more fully pleaded and set out hereinbelow),

35.3 were thus complicit in the irregular and unlawful interference of the procurement process, by action upon the insistence and direction of the remaining Defendants to cancel the Plaintiffs' Tenders.

...

- 36.1 they were obliged to protect the utilisation of public funds necessary for the purposes of procurement functions aimed at providing services to the citizens of Namibia by cancelling the Plaintiffs' tenders;
- 36.2 they were obliged to act in accordance with the statutory, Constitutional and common law obligations applicable to them;
- 36.3 their conduct was unlawful,
- 36.4 such conduct would prejudice the Plaintiffs;
- 37. The conduct of the Defendants was, in the circumstances:
 - 37.1 Wrongful; and
 - 37.2 Reckless, alternatively negligent.'

[22] It is alleged that as a result of the TB's breach of the law and its neglect and/or failure to reinstitute or re-award them their tenders, they suffered damages as follows:

- a) 'First Plaintiff – Pamo suffered loss of profits for the financial years ending 30 October 2015 to 2019 in the amount of – N\$19 388 098,00;
- b) Second Plaintiff – Circle suffered loss of profits for the financial years ending 30 October 2015 to 2019 in the amount of – N\$44 684 686,00;
- c) Third Plaintiff – Pisces suffered loss of profits for the financial years ending 30 October 2015 to 2019 in the amount of – N\$79 500 931, 00;
- d) Total loss of profit – N\$143 573 715, 00;

e) Plaintiffs have also incurred and suffered the financial losses of their 'Survey' expenses, and in the following amounts:

- i. First Plaintiff: Pamo: N\$ 16 660, 00
- ii. Second Plaintiff: Circle: N\$ 11 380, 00
- iii. Third Plaintiff: Pisces: N\$ 7 180, 00 39

The exception

[23] The defendants raised an exception against the plaintiffs' particulars of claim on the basis that the particulars of claim lack averments necessary to sustain an action. The exception raised two grounds.

[24] The first reads:

- (a) 'the plaintiffs failed to allege that they had a binding and enforceable procurement contract in terms of s 16(1) of the repealed Tender Board Act or s 55(4)(a) of the Public Procurement Act 15 of 2015.'¹

[25] According to the defendants, the plaintiffs' particulars of claim are excipiable on the basis that while alleging that there was an award on 2 October 2014, and that the Supreme Court referred the matter back to be dealt with by the successor of the TB, the plaintiffs failed to allege that there was notification of an acceptance of their respective tenders and award in terms of s 16(1) of the 1996 Act or s 55(4) (a) of the 2015 Act.

¹ Which states: An accounting officer or the Chairperson of the Board where the Board is procuring on behalf of a public entity must, in the prescribed manner and form, notify (a) the successful bidder of the selection of its bid for award. . .'

[26] The second ground reads:

- (b) 'the plaintiffs failed to allege and explicitly set out acts of bad faith, dishonesty and/or fraud on the part of the respondents in executing their duties which are necessary for delictual or constitutional liability and that they further failed to allege the basis on which monetary damage would be an appropriate and/or necessary remedy'.

[27] The defendants state further in support of this ground, that the plaintiffs' claim does not disclose a cause of action and is bad in law in that 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 – allegations which are necessary to sustain a claim for delictual or monetary constitutional damages.

[28] Finally, the defendants alleged that, similarly, the plaintiffs failed to allege facts to sustain their claim for monetary damage and why that claim would be the appropriate and necessary remedy in the circumstances.

The High Court

[29] The High Court upheld the exception and made the following order:

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 their amended particulars of claim, should they 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.'

[30] As regards the first ground of exception, the court *a quo* observed that it is not clear from the particulars of claim whether s 16(2)(a) or (b) of the 1996 Act is applicable and that in any event 'none of the requirements set out in s 16 (or s 55 of the 2015 Act) were complied with'. The court considered compliance with those provisions as the 'trigger event that is required for a binding and enforceable agreement [which] did not occur'. The court agreed with the defendants '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'.

[31] The learned judge *a quo* concluded on the first ground of exception thus (at para 38):²

'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 the Supreme Court judgment but the Board had the discretion to make one of a numbers (*sic*) of decisions that would be just and equitable under the circumstances. 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.'

[32] As to the second ground of exception, the High Court started the discussion by summarising precedent dealing with circumstances in which the unlawful exercise of administrative decision making may attract liability and entitle affected persons to damages. The learned judge reminded herself (para 43) that the plaintiffs were

² Cited as: *Pamo Trading Enterprises CC v Tender Board of Namibia* (HC-MD-CIV-ACT-DEL-2020/02891) [2020] NAHCMD 599 (09 December 2020).

required 'to plead bad faith on the part of the defendants and failed to plead why monetary damages would be appropriate and necessary'.

[33] Relying on *dicta* from South Africa she concluded (para 43) that: 'In the event that the plaintiffs failed to plead fraud/dishonesty/corruption will cause the plaintiffs' particulars of claim to be excipiable'. The court was satisfied 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'.

[34] According to the learned judge (para 44):

' . . . 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'.

The appeal

[35] The appellants raised eight substantive grounds of appeal. It is stated that the court *a quo* erred and or misdirected itself:

1. By finding that the Appellants' claim should be based primarily, if not exclusively on contract:

2. By finding that the Appellants had failed - and/or were obliged in law - to plead actual or particular acts of fraud/dishonesty/corruption, which therefore rendered the Appellants' Particulars of Claim excipiable.

3. By failing to find that a pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action or defence.
4. By failing to give effect to, uphold, and/or accept that the Respondents contravened Article 18 of the Namibian Constitution.
5. By failing to give effect to, uphold, and/or accept that the Respondents contravened Article 25(2) & (4) of the Namibian Constitution.
6. By failing to uphold and/or give effect to section 78 of the Public Procurement Act No.15 of 2015.
7. By failing to find that the Respondents had been inconsistent with the enforcement of the duties imposed under the Constitution and the statutory framework.
8. By upholding the Exceptions the court a quo failed to enhance the core principles of legality and accountability as enshrined in the Constitution.'

Submissions

The appellants

[36] Mr Heathcote submitted on behalf of the appellants/plaintiffs that the respondent/defendants failed to satisfy the onus resting on an excipient. According to counsel, the possible evidence to be led at the trial include this Court's findings in the *Pamo* judgment and what this court ordered in the *Pamo*, read with the particulars of claim. Counsel submitted that as part of that evidence, the conduct of all the defendants will play an important part in whether the conduct or omission complained of was unlawful, including the defendants' conduct after the *Pamo* judgment.

[37] According to Mr Heathcote, the particulars of claim considered in totality and in the light of the *Pamo* judgment made out a cause of action to support the exceptional remedy. He added that the failure by the defendants to comply with the order in the *Pamo* judgment amounts to contempt of court – an inference allegedly buttressed by the defendants' failure to offer any legal basis for cancellation of the tender without *audi* being afforded to the plaintiffs.

[38] Mr Heathcote added that on the approach adopted in exception proceedings, the plaintiff can at the trial lead evidence to prove that the defendants acted unlawfully and completely beyond the empowering statute.

[39] On a reasonable interpretation of that evidence if proved at the trial, according to Mr Heathcote, a court may find that the defendants acted wilfully, capriciously or outside the scope of their duty under s 16 of the 1996 Act.

The respondents

[40] On behalf of the respondents/defendants, Mr Namandje argued that the defendants' conduct after the *Pamo* judgment must be considered in light of the choices made by the plaintiffs when they brought the review application. These choices, according to counsel are: there was no reference to s 16(1) of the 1996 Act and the plaintiffs chose not to seek an order under s 16(1) of the 1996 Act.

[41] Mr Namandje also argued that the particulars of claim failed to allege the conduct of both the TB and the plaintiffs after the *Pamo* judgment. According to

counsel, the pleaded case relates more to the conduct of officials preceding and resulting in the cancellation of the tender and not the alleged unlawful and harmful conduct after the *Pamo* judgment.

[42] Mr Namandje submits that, similarly, it is not clear from the particulars of claim whose conduct is being faulted. According to counsel, on the pleaded case, the High Court was therefore compelled to grant the exception.

[43] As regards the appellants' reliance on Art 18 of the Constitution, Mr Namandje submitted that, if regard is had to this Court's judgment in *Road Fund Administration v Skorpion Mining Company (Pty) Ltd*³ reliance on that Article is incompetent without exceptional circumstances being pleaded. In that case we said:

'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, 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.'
(Footnotes omitted)

[44] Mr Namandje added that even on their own version, ie that they had an entitlement to a five year contract, the plaintiffs had alternative remedies which would

³ *Road Fund Administration v Skorpion Mining Company (Pty) Ltd* 2018 (3) NR 829 (SC) para 4.

preclude the damages claim. According to counsel, the plaintiffs could have sought an order of enforcement by way of *mandamus*.

[45] As far as the alleged contempt goes, Mr Namandje submitted that reliance is being placed on contempt without it having been pleaded.

Discussion

[46] In the view that I take on the second exception, I find it unnecessary to deal with the appellants' first ground of appeal, in so far it impugns what the court *a quo* found as their failure to rely on s 16(1) read with (2) of the 1996 Act.

[47] This is a case of first impression. It raises a novel issue: In what circumstances can an administrative body be held liable for private law damages arising from the performance of statutory functions? Although our courts have in the past enunciated the general principle on the issue in the abstract that principle has to date not been tested in a real life factual situation.

[48] The following was said by this Court in *Namibia Airports Co Ltd v Fire Tech Systems CC & another*⁴:

'In *Free Namibia Caterers CC v Chairperson of the Tender Board of Namibia and Others*, 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

⁴ *Namibia Airports Co Ltd v Fire Tech Systems CC & another* 2019 (2) NR 541 (SC) para 30.

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.'

[49] Therefore, a delictual claim for damages for economic loss arising from the performance of an administrative function will be granted only in exceptional circumstances.⁵ Another important consideration is the unavailability of alternative remedies.⁶

[50] This Court has recognised that exceptional circumstances may exist where the administrative decision-making is tainted by bad faith or where the administrative functionary acted for ulterior reasons or acted 'extraneous to the empowering statute'.⁷

[51] In South Africa, similarly, the availability of the remedy was recognised where decision-making was tainted by corruption, dishonesty or bad faith.⁸ *Steenkamp*⁹ extended the remedy to where the decision-making is 'completely outside the legitimate scope of the empowering provision'.¹⁰

⁵ *Lisse v Minister of Health & Social Services* 2015 (2) NR 381 (SC) para 21.

⁶ LAWSA 3 ed vol. 15 *Delict* para 6 at 10; *Olitzki Property Holdings v State Tender Board & another* 2001 (3) SA 1247 (SCA) para 36.

⁷ *Namibia Airports Company Ltd v Fire Tech Systems CC & another* 2019 (2) NR 541 (SC).

⁸ *Minister of Finance v Gore NO & Transnet Ltd v Sechaba Photoscan (Pty) Ltd and Steenkamp infra.*

⁹ *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 55.

¹⁰ *Namibia Airports Company Ltd v Fire Tech Systems CC & another* 2019 (2) NR 541 (SC).

[52] In *Esofranki Pipelines (Pty) Ltd v Mopani District Municipality*¹¹, the plaintiff was an unsuccessful tenderer who claimed pure economic losses in the form of loss of profits. The Constitutional Court observed:

[26] This Court is called upon to consider whether delictual liability attaches to an intentional breach of sections 33 and 217 of the Constitution. Plainly, therefore, the application raises a constitutional issue. It also raises an arguable question of law of considerable public import which has not yet been considered by this Court. In *Steenkamp*, this Court considered whether a successful tenderer, whose award was subsequently set aside, could recover in delict the out-of-pocket expenses it incurred in reliance on the award. This Court held that it could not and, further, that “[c]ompelling public considerations require that adjudicators of disputes, as of competing tenders, are immune from damages claims in respect of their incorrect or negligent but honest decisions”. Crucially, however, *Steenkamp* left open the question whether an administrative decision tainted by intentional misconduct might attract delictual liability. It held that “if an administrative or statutory decision is made in bad faith or under corrupt circumstances or completely outside the legitimate scope of the empowering provision, different public policy considerations may well apply”, and this misconduct might therefore attract delictual liability. It is this question which we are now required to resolve.’ (Footnotes omitted).

[53] As Hoexter¹² sums up:

‘. . . a delictual claim for unlawful administrative action causing pure economic loss is generally available only if fraud, dishonesty or corruption is proved (or, perhaps, if the decision is wholly beyond the scope of the empowering provision).’

¹¹ *Esofranki Pipelines (Pty) Ltd v Mopani District Municipality* (CCT 222/21) [2022] ZACC 41; 2023 (2) BCLR 149 (CC); 2023 (2) SA 31 (CC) (30 November 2022).

¹² C Hoexter, *Administrative Law in South Africa*, 1 ed (2007) Juta.

[54] It is apparent from the above that the term 'bad faith or *mala fides*' is a recurrent theme in the judgments of the courts without its meaning or ambit being explained. Bad faith is defined in the Concise Oxford English Dictionary as the 'intent to deceive'.

[55] The Black's Law Dictionary at 171 explains it as 'Dishonesty of belief, purpose, or motive' and adds the following quote from 'Restatement (Second) of Contracts §205 cmt. d (1979) as:

'A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.'

[56] In the administrative law context, I prefer *De Smith's* following characterisation of *mala fides*:

'Intentional usurpation of power, willful partiality, discrimination motivated by considerations which are incompatible with the discharge of public responsibilities.'¹³

[57] In my view, delictual liability for wrongful administrative action will lie if it is established that the harm-causing decision-making was tainted by fraud or corruption, dishonesty, bad faith (*mala fides*), intentionally harmful conduct and the ordinary remedies of administrative law review would not be sufficient to satisfy the harm caused to the affected person.

¹³ H Woolf, J Jowell and A Le Sueur *De Smith's Judicial Review* 6 ed (2007) at 916.

[58] I am skeptical of the notion 'completely beyond the legitimate scope of empowering provision' as adopted in South Africa because that is the kind of conduct curable by ordinary administrative law review remedies. Unless by the introduction of the words 'beyond the legitimate scope of' the intention is to cover *mala fides* in the sense that De Smith characterises it.

[59] It is stating the obvious that it is a remedy of last resort and in my view the default position is that wrongful administrative decision-making must be corrected by means of the review power of the courts under the Constitution and the common law. To succeed, the plaintiff must plead sufficient circumstances which, if proved at trial, will satisfy the court that the conduct or omission complained of meets the criteria that would give rise to liability and (not least importantly) that the ordinary remedies for the correction of such conduct or omission are inadequate.

[60] As the Constitutional Court said in *Esorfranki* para 56:

'This is not to say that compensatory relief will generally be available where remittal or substitution are competent alternatives. Such cases will likely be rare because remittal or substitution will often suitably vindicate all relevant interests. Additionally, though *Steenkamp* was decided in the context of a delictual claim, the considerations of public policy outlined in that case mean that negligent but honest administrative failures will not allow for a claim of compensation. But where the state's misconduct is deliberate and dishonest and where substitution or remittal are not viable forms of relief, or where this relief will not suitably remedy the loss sustained by a party, circumstances may exceptionally require compensatory relief in order to ensure a just and equitable result.' (My underlining)

Did the particulars of claim meet the test to survive an exception?

[61] The test to be applied when an exception to a pleading is taken was approved by this Court in *Brink NO & another v Erongo All Sure Insurance CC & others*¹⁴ Shivute CJ explained the position 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.

¹⁴ *Brink NO & another v Erongo All Sure Insurance CC & others* 2018 (3) NR 641 (SC). Refer also to *Van Straten NO & another v Namibia Financial Institutions Supervisory Authority & another* 2016 (3) NR 747 (SC).

[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.'

[62] In *Gemfarm Investments (Pty) Ltd v Trans Hex Group*¹⁵ the full bench of the High Court adopted *Herbstein and van Winsen's* expatiation of the ambit of an exception by contrasting it with a special plea thus:

'The essential difference between a special plea and an exception is that in the case of the latter the excipient is confined to the four corners of the declaration [also read particulars of claim]. The defence which he raises on exception must appear from the declaration itself; he must accept as true the allegations contained therein and he may not introduce any fresh matter. Special pleas, on the other hand, do not appear *ex facie* the declaration. If they did then the exception procedure would have to be followed. Special pleas have to be established by the introduction of fresh facts from outside the circumference of the declaration and these facts have to be established by evidence in the usual way.'

[63] As my analysis of the particulars of claim demonstrates, after identifying the parties, the plaintiffs' case as formulated in the particulars of claim refers to the process that led to the award of the tenders to them, the fact that the awards were cancelled without *audi* to them and the unlawfulness thereof. All that is common cause if regard is had to the *Pamo* judgment. They then state that but for that unlawful cancellation they 'would have been engaged and earned an income'. Next, the particulars refer to the process leading to the review application and its outcome as reflected in the *Pamo* judgment.

¹⁵ *Gemfarm Investments (Pty) Ltd v Trans Hex Group Ltd & another* 2009 (2) NR 477 (HC) para 36.

[64] The particulars of claim go on to deal with ‘unlawfulness and fault’ and locate that in the process prior to the cancellation and how the defendants acted unlawfully in cancelling the awards made in their favour and the harm allegedly caused to them by such cancellation.

[65] The particulars of claim are singularly silent on what transpired after the *Pamo* judgment and the manner in which the defendants breached the law and or violated the *Pamo* judgment; and also, what steps they as prospective plaintiffs took after that judgment to enforce their rights under the judgment.

[66] It is against that backdrop that Mr Namandje on appeal quite succinctly set out how the plaintiffs’ allegations in the particulars of claim failed to make the averments necessary to sustain a cause of action based on the exceptional remedy. It bears mention that the foundational premise for the claim in the present case is the willful or intentional breach of the law by the board that allegedly caused the harm complained of. Mr Namandje’s helpful analysis of the particulars of claim demonstrates that no specific allegation is made that supports a willful breach or non-compliance with the law post the *Pamo* judgment.

[67] Mr Namandje emphasised that the plaintiffs’ particulars of claim lack particularity and in support of his stance referred this Court to a passage in *Von Abo v President of the Republic of South Africa*¹⁶, which reads:

¹⁶ *Von Abo v President of the Republic of South Africa & others* 2009 (5) SA 345 (CC).

[50] The Constitution carefully apportions powers, duties and obligations to organs of state and its functionaries. It imposes a duty on all who exercise public power to be responsive and accountable and to act in accordance with the law. This implies that a claimant, who seeks to vindicate a constitutional right by impugning the conduct of a state functionary, must identify the functionary and its impugned conduct with reasonable precision. Courts too, in making orders, have to formulate orders with appropriate precision.’ (My underlining for emphasis).

[68] What are the *facta probanda* (averments) the court *a quo* should have taken as capable of being proved at the trial?

[69] It is clear when one has regard to the particulars of claim as I have set them out and in particular paras 32 – 37 thereof that material parts of the particulars of claim are a relitigation of the cancellation decision. That decision had already been subject to the courts’ review power and was already set aside. Therefore, the cause of action ventilated in the action proceedings arose not because of the cancellation decision already corrected by this Court, but because of the failure (if any) by the defendants to comply with the *Pamo* judgment.

[70] As Mr Namandje correctly pointed out in the appeal and as found by the court *a quo*, the particulars of claim are deafeningly silent on what happened after the *Pamo* judgment – yet it is only on that basis that any delictual liability can attach to the defendants.

[71] In other words, what is the unlawful, harm-causing conduct that occurred after the *Pamo* judgment? What did the plaintiffs do to enforce the *Pamo* judgment? If they

did nothing, why could they not enforce the *Pamo* judgment? Answers to these questions, although critical to sustain the cause of action, are not to be found in the particulars of claim.

[72] Besides, nowhere in the particulars of claim do the plaintiffs allege conduct of the quality that would justify the cause of action on the principles that I have elaborated in paras [50], [55], [57], [58], [59] and [60] of this judgment.

[73] With the greatest respect, what the particulars of claim do is to repeat the grounds on which this Court set aside the cancellation decision in the *Pamo* judgment. After the *Pamo* judgment the cancellation decision was no longer a materially relevant *factum probandum*. The materially relevant *facta probanda* are the actions and omissions of the defendants relative to the extent to which they did or did not give effect to the Supreme Court's judgment and order. In that context, the particulars of claim had to demonstrate how that conduct was unlawful on the test stated in this judgment and what the circumstances are that justify a departure from the default position of administrative law remedies in favour of monetary damages.

[74] In rebuttal, Mr Heathcote argued that reliance on exceptional circumstances does not avail the defendants because the exception was not taken on that basis. That is not a good point. What I have set out fully in this judgment shows that the exception meets the test stated in *Gemfarm*: The exception states clearly and the High Court correctly found that the particulars of claim make no averment why

damages instead of the conventional administrative law remedies were pursued on the facts of the case.

[75] In any event, exceptional circumstances constitute the *raison d'etre* of the cause of action pursued by the plaintiffs. Without it there is no cause of action. Whether or not a pleading discloses a cause of action is a matter of mixed law and fact. Even if it is not raised by an opponent it is a matter which the court below could have (and this Court) may raise *mero moto*.

Disposal

[76] In my view, appeal grounds two and three are at the heart of the present appeal and are covered and disposed of in this judgment. Grounds four, five and seven are in effect a relitigation of the cancellation decision and suffer the same fate as grounds two and three. Ground six fails because reliance on s 78¹⁷ of the 2015 Act was not pleaded on the trite principle that, were a provision of a statute is relied on, it must be pleaded.¹⁸ Since the functionaries were not cited in their personal capacities it is not readily apparent to me how the section is relevant to the pleaded case. It would not have been permissible on the *Gemfarm* test for the court *a quo* to have reference to matter not apparent *ex facie* the particulars of claim. Appeal ground eight is quite meaningless and does not show how it relates to anything that was materially relevant to the adjudication of the exception.

¹⁷ Which states: 'A member of the Board, Review Panel, a procurement committee or a bid evaluation committee, a procurement management unit and any staff member thereof is not liable for any loss or damage caused as a result of an act or omission committed in good faith under this Act, unless the loss or damage is attributable to the gross negligence or unlawful conduct of the member or staff member'.

¹⁸ *Denker v Ameib Rhino Sanctuary (Pty) Ltd & others* 2017 (4) NR 1173 (SC) para 40.

[77] I am satisfied that the allegations necessary to satisfy the test for a cause of action on the principles set out in this judgment are singularly lacking in the particulars of claim. A raft of the grounds of appeal are effectively a relitigation of the cancellation decision which had been appropriately dealt with by the courts in the exercise of their review jurisdiction.

[78] The High Court therefore correctly upheld the exception and the appeal against it is without merit and should be dismissed.

[79] It becomes unnecessary for me to consider the first ground of appeal.

Does the invariable rule apply?

[80] Following earlier decisions in *Hallie Investment 142 CC t/a Wimpy Maerua & another v Caterplus Namibia (Pty) Ltd t/a Blue Marine Interfish* 2016 (1) NR 291 (SC) para 53 and *Total Namibia (Pty) Ltd v Van der Merwe t/a Ampies Motors* 1998 NR 176 (HC) (*Total Namibia*), Shivute CJ held in *Minister of Safety and Security & others v Avelinu*¹⁹:

‘It would appear that it has always been the practice that in a successful exception on the ground that the pleading does not disclose a cause of action, a court should not dismiss the action. Instead, it should set aside the impugned pleading and grant the plaintiff leave to amend.’

[81] In all those cases, this Court dealt with the situation where the High Court had not applied the invariable rule after having sustained an exception. The present case

¹⁹ *Minister of Safety and Security & others v Avelinu* 2022 (2) NR 608 (SC) para 15.

is different because the High Court applied the invariable rule and allowed the plaintiffs the opportunity to amend the pleadings. The plaintiffs, instead of amending the pleadings, persisted that the cause of action as pleaded was legally sound and obtained leave to appeal. The order of the High Court granting the plaintiffs the opportunity to amend is not on appeal before us. It could only have been had the respondent cross-appealed. Such a cross-appeal would in any event have had very poor prospect because of the invariable rule.

[82] It follows that this Court cannot grant the appellants' request to make an order to amend. That order was already made *a quo* and remains extant and this Court by its judgment only confirms the correctness of the High Court's order upholding the exception. What the consequences are of the election made by the appellant to first appeal without taking advantage of the opportunity granted by the trial judge to amend the particulars of claim have not been argued before us and that is a matter that they will have to deal with going forward.

[83] I take note that the plaintiffs were afforded the opportunity to amend the pleading within a certain period. That period had since run out and will now be subject to the trial judge's discretionary powers under the Rules of the High Court. The exercise of that power cannot be usurped by this Court by tying the hands of the trial judge with an order allowing an amendment as sought by Mr Heathcote on appeal on behalf of the appellants.

[84] There is another reason why the order sought should not be granted. Where a party who had been afforded the opportunity at first instance to amend a pleading first appeals and when it fails on appeal, is allowed by this Court to amend, that will have the undesirable consequence of potentially prolonged litigation. It is not a fanciful prospect that such a pleading might again be excepted to, be disallowed at first instance and result in a further appeal to this Court. It is a more wholesome practice for the parties to at first instance exhaust all the attendant procedural remedies and come to this Court once and not piecemeal.

Condonation

[85] The appellants seek condonation and reinstatement of the appeal for having lodged the record of appeal before entering into security for costs as contemplated by rule 14(2) of the Rules of the Supreme Court. The application was not opposed.

[86] In the affidavit in support of the condonation application, the legal practitioner of record indicates that he *bona fide* misunderstood rule 14(3) and (4) in that he was of the view that due to the fact that execution of the judgment appealed from was not suspended by the appeal, it being an exception, the appellants did not need to enter into security for the respondents' costs on appeal.

[87] He further explained that after he considered s 18 of the High Court Act 16 of 1990, he was under the impression that the court *a quo* upon granting the leave to appeal failed to make a conditional order for setting security for the respondents' costs on appeal. He explained that as soon as he was made aware of the error he

acted without delay and lodged a condonation application and security was consequently set.

[88] The explanation tendered by the legal practitioner of record is reasonable and satisfactory and I am satisfied that a case has been made out for condoning the lodging of the record before entering into security.

[89] I am satisfied that in the absence of the critical averments which the court *a quo* found to be absent, the particulars of claim did not meet the threshold to survive the second exception taken *a quo* and that the appeal should therefore fail.

Order

[90] In the result, the following order is made:

1. The appellants' application for condonation is granted and the appeal is reinstated.
2. The appeal is dismissed, with costs.

DAMASEB DCJ

SHIVUTE CJ

SMUTS JA

APPEARANCES

APPELLANTS:

R Heathcote (with him J Jacobs)

Instructed by Koep & Partners

RESPONDENTS:

S Namandje

Instructed by the Office of the

Government Attorney