

REPUBLIC OF SOUTH AFRICA

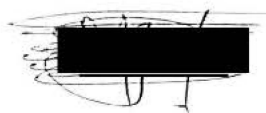


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

CASE NO: 32406/20

26/03/2025
DATE


SIGNATURE

In the matter between:

RONCON CC

Plaintiff

and

**CITY OF TSHWANE
METROPOLITAN MUNICIPALITY**

Defendant

J U D G M E N T

This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploading it to the electronic file of this matter on Caselines. The date and time of hand-down is deemed to be 10:00 on 26 March 2025.

TEFFO, J:

Introduction

[1] Following a claim for damages against the defendant, the defendant delivered a notice of exception to the plaintiff's particulars of claim contending that it lacks averments necessary to sustain a cause of action, does not disclose a cause of action and/or is vague and embarrassing.

[2] Essentially the defendant asserts that the plaintiff's particulars of claim lacks averments necessary to sustain a cause of action, and it would be embarrassed if expected to plead to the plaintiff's particulars of claim in its current form. It sought dismissal of the plaintiff's claim in the event the court upholds the exception. This was abandoned during argument. Ms Manyanye for the defendant submitted that in the event the exception is upheld, the plaintiff should be granted leave to amend its particulars of claim. I will therefore approach the matter on that basis.

[3] The defendant raises seven grounds of exception to the plaintiff's particulars of claim. The defendant is the excipient, and the plaintiff is the respondent. For the sake of convenience in these proceedings, the parties will be referred to as the plaintiff and the defendant.

[4] The plaintiff opposes the application.

Background

[5] Before I deal with the grounds of exception, I would like to give a brief background of this matter.

[6] The plaintiff was awarded a tender by the defendant to render services for the provision of an electricity vending system for the selling of prepaid electricity to customers in the Tshwane electricity supply area. During the

implementation of the award, Cigicell (an unsuccessful tenderer) launched an urgent application to interdict the award of the tender to the plaintiff, the implementation of the contract and the rendering of the services thereof (Part A) pending a review of the decision to award the tender to the plaintiff (Part B).

[7] After being served with the urgent interdict application by Cigicell, the defendant delivered a notice of intention to oppose the application. However, it failed to deliver an answering affidavit. On the eve of the hearing of the application, the defendant withdrew its opposition and indicated that it would abide by the decision of the court. The plaintiff then sued the defendant for damages in the amount of R8 293 500,00 (Eight million two hundred and ninety-three thousand and five hundred rand) for the loss suffered because of the failure by the defendant to implement the award.

[8] As per the particulars of claim, the plaintiff's claim is based on a breach by the defendant of its obligation to act fairly and in good faith, and without bad faith alternatively a legal duty owed to the plaintiff arising from the decision to award the contract to it. The plaintiff alleges that the defendant intentionally, alternatively, negligently, failed to implement the terms of the awarded contract and ought to have known that the failure would cause patrimonial harm to it. It further alleges that it lost-out on a realistic and firm opportunity to earn an income.

[9] Furthermore, the plaintiff avers that the defendant's failure to oppose the urgent interdict and the review applications and file a record in the review application, conveyed an intention to no longer be bound by the decision to

award the contract to it, and thereby repudiated the awarding of the contract to it. It accepted the repudiation.

[10] Moreover, the plaintiff alleges that due to the conduct of Mr Brink, a senior political office-bearer, the defendant breached its legal duty and the constitutional obligations towards it.

The grounds of exception

[11] As the first ground of exception, the defendant contends that the course and origin of the plaintiff's claim, regardless of its cause of action, is a review application and an application for urgent interim relief pending its finalisation, brought against it by an unsuccessful tenderer. The loss causing event pleaded by the plaintiff is the sudden withdrawal by the defendant of its opposition to the urgent interim relief pending the finalisation of the review application and/or, the defendant "*acquiescing with the review and setting aside of the decision*". However, (a) the defendant's withdrawal of the opposition of the urgent interim relief is not wrongful; and (b) the defendant "*acquiescing with the review and setting aside of the decision*" does not constitute a breach of contract; and (c) neither constitute the breach of a statutory or constitutional right or obligation or other common law obligation or right. It contends that in the premises the plaintiff's claim is bad in law; the particulars of claim lacks averments to sustain a cause of action, alternatively, it does not disclose a cause of action.

[12] The second ground of exception is that the negligent acts and/or omissions which the plaintiff avers have caused it loss are amongst those pleaded in paragraphs 28.1, 28.2, 37.1 to 37.4 and the defendant's alleged acquiescence in the review and setting aside the award to the plaintiff. It claims

that none of the alleged acts or omissions are *prima facie* wrongful and the particulars of claim do not allege the basis on which such alleged negligent acts and omissions are actionable in delict. It submits that in the premises the particulars of claim backs averments to sustain a cause of action alternatively, do not disclose a cause of action.

[13] In the third ground of exception, the defendant contends that the plaintiff's pleaded case is that Annexure "R1" to the plaintiff's particulars of claim constituted the defendant's acceptance of its tender (i.e. an offer) and resulted in a contract between the parties. However, the acceptance of the plaintiff's tender, and its appointment as a successful tenderer and service provider, was according to Annexure "R1" conditional upon the plaintiff's successful registration as a vendor within 14 days, and its signing of a service level agreement with the relevant department.

[14] It is further contended that the appointment of the plaintiff was subject to it submitting to the defendant within one month of (10 August 2017) a detailed proposal on the number of jobs created through the project, spin offs to the local economy; and strategy for appointment of locals.

[15] The defendant argues that the plaintiff does not plead that the conditions referred to above were fulfilled resulting in the acceptance of its tender and its appointment as the successful tenderer and service provider nor does it plead that it had complied with its obligations referred to above.

[16] The defendant further submits that the plaintiff pleads that the defendant's alleged acquiescence with the review and setting aside of the decision to award the contract to it constituted a repudiation of the contract.

However, the particulars of claim lacks averments to sustain a contractual claim and in the circumstances no claim based on the defendant's alleged repudiation avails the plaintiff. In the premises the plaintiff's claim is bad in law. The plaintiff's particulars of claim lacks averments to sustain a cause of action.

[17] In the fourth ground of exception, the following contentions are made: In law, a decision by an organ of state to award a tender constitutes administrative action contemplated by PAJA. The words "*a legal duty owed to the plaintiff arising from the decision to award the contract to the plaintiff*" in the heading preceding paragraph 27, especially suggests that the plaintiff's claim for compensation arises from the act of the defendant awarding the tender to the plaintiff. A person aggrieved by administrative action may in proceedings for judicial review claim compensation as a form of a just and equitable order in terms of section 8(1) of PAJA. The plaintiff does not plead that the decision to award the tender to it or the alleged interference by Mr Brink and the defendant's officials has been set aside on review giving rise to a cause of action for compensation and that its case is exceptional and warrants compensation, would constitute a just and equitable order. In the premises, the plaintiff's claim is bad in law. The plaintiff's particulars of claim lacks averments to sustain a cause of action alternatively it does not disclose a cause of action.

[18] In the fifth ground of exception the defendant contends that the plaintiff claims pure economic loss allegedly caused by the defendant's failure to take reasonable steps. Neither an omission nor an act causing pure economic loss is *prima facie* wrongful in the delictual sense. For a negligent act or omission to give rise to an actionable wrong in delict, the act or omission must be wrongful.

The defendant's particulars of claim lacks averments that the defendant's alleged negligent acts or omissions were wrongful; there rested upon the defendant a legal duty to act or not act negligently; policy considerations: render the conduct complained of wrongful; or dictate that the plaintiff should be recompensed by the defendant for the loss suffered. The defendant owed to the plaintiff arising out of a right enjoyed by the plaintiff at law giving rise to a legal duty of care to act, or not to act negligently. In the premises the plaintiff's particulars of claim lacks averments to sustain a cause of action alternatively does not disclose a cause of action. In the premises, the plaintiff's particulars of claim are vague and embarrassing.

[19] In the sixth ground of exception, the following contentions are made: In paragraphs 45 to 53 of the plaintiff's particulars of claim, the plaintiff pleads: constitutional and statutory obligations which rest amongst others on the defendant in terms of the Constitution of the Republic of South Africa, 1996 and the Local Government: Municipal Systems Act, 2000 (*"the Systems Act"*). Acts by the defendant's employees and an office-bearer Mr Brink which allegedly caused it to suffer loss and in this regard the plaintiff pleads as follows: In paragraph 46 a relationship between Mr Brink, a member of the Municipal Council and one Westenraad. In paragraph 47 a relationship between Oeschger, the defendant's Chief Systems Coordinator: Prepaid Electricity Vending, and Westenraad. In paragraph 48 a conspiracy among Mr Brink, Westenraad, Oeschger *"and/or any other officials of the defendant"* to frustrate the implementation of the tender awarded to the plaintiff.

[20] Furthermore, in paragraph 49 acts committed by Mr Brink in the furtherance of the conspiracy to “*bear pressure on the administration of the defendant to desist from opposing Part A of the Cigicell application*”. In paragraph 50 the contents of an email sent by Mr Brink on 22 September 2017 in furtherance of the conspiracy. In paragraph 51 the contents of an email forming Annexure “R5” to the plaintiff’s particulars of claim. In paragraph 52 that “*Mr Brink’s said conduct was unlawful*”. In paragraph 55 that Mr Brink “*unlawfully and fraudulently [brought] pressure to bear on the administration of the defendant to desist from opposing Part A of the Cigicell application*” and that this resulted in the [defendant’s] conduct pleaded in paragraph 56.

[21] There is accordingly no causal connection between the conduct pleaded in paragraphs 54 and 55 and/or pleaded in paragraphs 56 and 57 and the damages suffered by the plaintiff. In the premises, the plaintiff’s particulars of claim lacks averments to sustain a cause of action alternatively it does not disclose a cause of action.

[22] The defendant makes the following assertion in the seventh ground of exception: That the plaintiff pleads that it did not deliver an answering affidavit and withdrew its opposition to Part A of the application, the interlocutory relief (“*interim interdict*”) sought by Cigicell the day before the hearing. In paragraph 28 the plaintiff pleads the defendant’s omissions. The plaintiff does not allege that Cigicell failed to make out a case that it was entitled to an interim interdict. The plaintiff does not plead that: the award of the tender was unimpeachable; and/or but for this omission, the plaintiff would not have incurred any loss. A

claim for damages is sustainable only if the loss suffered would not have been suffered but for the conduct of the defendant.

[23] The defendant further contends that the plaintiff does not plead that the loss allegedly suffered would not have been suffered but for the defendant's alleged illegal conduct. In the premises the plaintiff's claim is bad in law. The plaintiff's particulars of claim lacks averments to sustain a cause of action alternatively, it does not disclose a cause of action.

[24] In rebuttal thereof the plaintiff contends that the facts as pleaded make up an actionable cause of action.

Applicable legal principles

[25] Rule 18(4)¹ provides that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, with sufficient particularity to enable the opposite party to reply thereto. In the same vein the Court in *Trope v South African Reserve Bank and Another and two other cases*² had this to say:

"It is trite that a party must plead with sufficient clarity and particularity the material facts upon which he relied for the conclusion of law he wishes the court to draw from those facts (Mabaso v Felix 1981 (3) SA 865 (A) at 875A-H; Rule 18(4)). It is not sufficient thereto, to plead a conclusion of law without pleading the material facts giving rise to it.

¹ Of the Uniform Rules of Court (High Court)

² [1993] ZASCA 54; 1993 (3) SA 264 (A) at 273A-B

(Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 792J-793G).”

For a claim to disclose a cause of action, a plaintiff’s pleading must set out “... every fact (material fact) which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court”.³

[26] In *Jowell v Bramwell-Jones and Others*⁴ the Court explained the requirements to be set out in the pleading as follows:

“... The plaintiff is required to furnish an outline of its case. This does not mean that the defendant is entitled to a framework like a crossword puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make a cause of action intelligible, the plaintiff will have satisfied the requirements.”⁵

[27] A party’s non-compliance with the requirements of Rule 18 may give rise to a successful exception where such non-compliance results in a pleading being vague and embarrassing.⁶ With regard to “*the material facts relied upon*”, the pleader must set out the *facta probanda* upon which it relies for its cause of action.⁷ There is no exhaustive test of what constitutes “*sufficient particularity*”,

³ *McKenzie v Farmers Co-operative Meat Industries Ltd* 1922 AD 16 at 23

⁴ 1998 (1) SA 836 (W)

⁵ At 913B-G

⁶ *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a LH Marthinusen* 1992 (4) SA 466 (W) at 469J, *Jowell (supra)* at 902E

⁷ *McKenzie v Farmers’ Co-operative Meat Industries Ltd supra*; *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239T at 245D-E

and the question will be answered in relation to the circumstances of each case.⁸

[28] A distinction should be drawn between the facts which must be proved to disclose a cause of action (*facta probanda*) and the facts or evidence which prove the *facta probanda* (the *facta probantia*). The latter should not be pleaded at all, whereas the former must be pleaded together with the necessary particularity.⁹

[29] In *Tembani v President of the Republic of South Africa and Another*¹⁰ the Supreme Court of Appeal (SCA) summarised the general principles and the approach to be adopted when dealing with exceptions as follows:

“Whilst exceptions provide a useful mechanism ‘to weed out cases without legal merit’, it is nonetheless necessary that they be dealt with sensibly. It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law, in that their contents do not support a discernible and a legally recognised cause of action, that an exception is competent. The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable. The test is whether on all possible readings of the facts no cause of action may be made out, it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every

⁸ *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C-H

⁹ *Deltamune (Pty) Ltd and Others v Tiger Brands Limited and Others* 2022 (3) SA 339 (SCA) at para 25

¹⁰ 2023 (1) SA 432 (SCA) at para 14; *Picbel Group Voorsorgfonds (in liquidation) v Somerville and other related matters* 2013 (5) SA 496 (SCA) at para 7

interpretation that can be put upon the facts.” (Footnotes omitted, emphasis added.)

[30] An exception is a legal objection to the opponent's pleading and a defect inherent in the pleading. The allegations in the pleading that form the subject of the exception are accepted to be correct for purposes of adjudicating the exception. Although a cause of action appears from the pleading, the objection is aimed at some defect or incompleteness in the way the claim is set out which results in embarrassment to the defendant.¹¹

[31] The full bench appeal court in *Michael v Carlone's Frozen Yoghurt Parlour (Pty) Ltd*¹² discussed the principles applicable to exceptions on the ground that the pleading lacks averments to sustain a cause of action. Reference was made to the decision of the Appellate Division in *Barclays National Bank Ltd v Thompson*¹³ where the court had this to say:

“It has also been said that the main purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at the trial: Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700 (A) at 706. Save for exceptional cases, such as those where a defendant admits the plaintiff's allegations but pleads that as a matter of law the plaintiff is not entitled to the relief claimed by him (cf Welgemoed en Andere v Sauer 1974 (4) SA 1 (A)) an exception to a plea should consequently also not be allowed unless, if upheld, it would obviate the leading of ‘unnecessary’ evidence.”

¹¹ *Trope (supra)* at 268F

¹² 1999 (1) SA 624 (W)

¹³ 1989 (1) SA 547 (A) at 553F-I

[32] The full bench went on to say the following:

“When an exception is taken to a pleading, the excipient proceeds on the assumption that each and every averment in the pleading to which the exception is taken is true, but nevertheless contends that, as a matter of law, the pleadings do not disclose a cause of action or defence, as the case may be (see, for example, Makgae v Sentraboer (Kooperatief) Bpk 1981 (4) SA 239 (T) at 244B-245E and Amalgamated Footwear & Leather Industries v Jordan & Co Ltd 1948 (2) SA 891 (C)). An exception will not succeed unless no cause of action or defence is disclosed on all reasonable constructions of the pleadings in question (Callender-Easby and Another v Grahamstown Municipality and others 1981 (2) SA 810 (E) at 812H-813A).”

[33] A plaintiff is required to plead its cause of action in an intelligible and lucid manner that identifies the issues relied on and in respect of which evidence will be led.¹⁴ Thus in a claim based on delict, the plaintiff must plead all the elements of a delict, viz, conduct, negligence, wrongfulness, causation and the loss suffered. The particulars of claim that does not disclose a cause of action is excipiable.

[34] In determining whether a pleading is vague and embarrassing, the enquiry is twofold.¹⁵ The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced.¹⁶ The

¹⁴ *Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality Ltd* 2006 (2) SA 25 (T)

¹⁵ *Trope supra* at 221A-E

¹⁶ *Trope supra* at 211B; *Quinlan v MacGregor* 1960 (4) SA 383 (D) at 393E-H

exception that a pleading is vague and embarrassing, is intended to cover the case where, although a cause of action appears in the summons there is some defect or incompleteness in the manner in which it is set out, which results in embarrassment to the defendant.¹⁷

[35] An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity.¹⁸ Particulars of claim have been held to be vague and embarrassing where: (i) it is not clear whether the plaintiff sues in contract or in delict;¹⁹ (ii) the admission of one of two sets of contradictory allegations in the plaintiff's particulars of claim or declaration would destroy the plaintiff's cause of action;²⁰ (iii) a pleading contains averments which are contradictory, and which are not pleaded in the alternative.²¹

[36] Where a pleader would be seriously embarrassed if the offending allegations were not expunged, an exception should be taken. Prejudice must ultimately lie in an inability to prepare to meet the opponent's case.²² Where it is clear that no cause of action or defence has been pleaded, it is the duty of a litigant to take the most expeditious course to bring the litigation to a conclusion so as to dispose of the dispute or to bring the proceedings instituted to a conclusion.²³

¹⁷ *Lockhat v Minister of the Interior* 1960 (3) SA 765 (D) at 777E; *Trope* at 268F

¹⁸ *Trope* at 269I; *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) at 643I-644A

¹⁹ *Gerber v Naude* 1971 (3) SA 55 (T)

²⁰ *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298J and 300G

²¹ *Trope* at 211E

²² *Francis v Sharp* 2004 (3) SA 230 (C) at 240

²³ *Allen & Others NNO v Gibbs & Others* 1977 (3) SA 212 (SECLD) at 215H to 216C; *Scheepers and Nolte v Pate* 1909 TS 353 at 360 per Wessels J (as he then was)

[37] If a party is unable to distil a clear, single meaning from an allegation in a pleading, that will render the pleading vague and embarrassing.²⁴

[38] The Court in *Lockhat and Others v The Minister of Interior*²⁵ sets out the legal principles applicable to exceptions on the ground that a pleading is vague and embarrassing as follows:

*“In the first place when a question of insufficient particularity is raised on exception, the excipient undertakes the burden of satisfying the court that the declaration as it stands, does not state the nature, extent, and grounds of the cause of action. In other words, he must make out a case of embarrassment by reference to the pleadings alone, Deane v Deane, 1955 (3) SA 86 (N). If an exception on the ground that certain allegations are vague and embarrassing is to succeed, then it must be shown that the defendant, at any rate for the purposes of his plea, is substantially embarrassed by the vagueness or lack of particularity. Jooste v Jooste, 1927 NPD 305 at p. 307; International Tobacco Company of SA Ltd v Wollheim and Others, 1953 (2) SA 603 (AD). The object of all pleadings is that a succinct statement of the grounds upon which a claim is made or resisted shall be set forth shortly and concisely; and where such statement is vague, it is either meaningless or capable of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied on by the pleader. *Leathern v Tredoux*, 1911 NPD 346, per Dove-Wilson J.P., at p. 348. If a declaration reasonably states the nature, extent and grounds of the cause of action, the court will not as a*

²⁴ *Erasmus Superior Courts Practice, Commentary on Rule 23* at RS 6, 2018, D1-299

²⁵ 1960 (3) SA 765 (D) at 777A-E

rule, strike out paragraphs as vague and embarrassing, provided the information given is reasonably sufficient and provided it does not appear to the court that the paragraphs cannot be pleaded to by the defendant.”

Discussion

The first, second and fifth grounds of exception

[39] In rebuttal thereof the plaintiff contends that the defendant ignores what it pleads in its particulars of claim. It asserts that its case is that the commencement, defence and conduct of litigation by state organs such as the defendant is an exercise of public power. The enabling instrument in relation thereto is legislation, be it the Local Government: Municipal Finance Management Act, 56 of 2003 (“*the MFMA*”) or the Local Government: Municipal Systems Act, 32 of 2000 (“*Municipal Systems Act*”).

[40] Relying on the decision in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others*²⁶, the plaintiff submitted that any decision of state institutions relating to litigation must be reasonable and rational. Further that the decision must be fair. The decision, so it was contended, must satisfy the requirements of legality. It must be *intra vires* and must not be made for an improper purpose (*Masetlha v President of the Republic of South Africa and Another*²⁷).

²⁶ 2000 (2) SA 674 (CC)

²⁷ 2008 (1) SA 566 (CC)

[41] The plaintiff further contended that the defendant being a public organ, cannot act like any other contracting party. In the management of a contractual relationship, it must ensure that it satisfies the requirements of administrative justice and fairness. It cannot for unjustifiable reasons or improper motives decide to cancel a contract when such impacts on the rights of others. Placing reliance on the decision in the *MEC, Department of Education, Northwest v KC Productions CC*²⁸, Mr Manala for the plaintiff submitted that for this application, it is accepted that the decision to withdraw opposition to the review proceedings was taken for the ulterior purpose and improper motive advanced by Mr Brink. Any conduct in the form of a positive act causing damage or diminution of property of another is *prima facie* wrongful.

[42] As regards the test for determining the wrongfulness of omissions in delictual actions for damages, reliance was placed on various cases which include amongst others, *Carmichele v Minister of Safety and Security and Another*²⁹ where the court held that the existence of the legal duty to avoid or prevent loss is a conclusion of law depending upon a consideration of all the circumstances of each particular case and on the interplay of many factors which have to be considered. The issue, in essence, is one of reasonableness, determined with reference to the legal perceptions of the community as assessed by the court.

[43] Mr Manala then submitted that having regard to what has been pleaded in the plaintiff's particulars of claim, the defendant's decision to withdraw from litigation on the basis of the undue influence of Mr Brink, was taken in breach

²⁸ [2009] ZANWHC 10 (05 March 2009) at para 20

²⁹ 2001 (1) SA 489 (SCA) at para 7

of section 1(c) of the Constitution, and the inherent obligation flowing from the MFMA, and/or Municipal Systems Act, to act reasonably, rationally and without improper motive.

[44] I have looked at the decisions relied upon by Mr Manala for the plaintiff to support his argument that the allegations referred to in the plaintiff's particulars of claim are sufficient to disclose a cause of action. In my view all the case law relied upon do not assist the plaintiff in that the particulars of claim lacks averments to indicate in what respect the withdrawal of the defendant's opposition to the urgent interim relief and the review application is wrongful if it is wrongful as alluded to in his argument. Furthermore, in what respect does the defendant's acquiescence with the review and the setting aside of the decision constitute a breach of contract if that is the case of the plaintiff. The same applies to the fifth exception. The particulars of claim lacks averments that the defendant's negligent acts or omissions were wrongful and that there rested upon the defendant a legal duty to act, or not to act negligently. The pleading is so vague that it is impossible to determine the nature of the claim. Under the circumstances I agree with the defendant that the plaintiff's particulars of claim in this regard lacks averments to sustain a cause of action and or is vague and embarrassing.

Third ground of exception

[45] In rebuttal of the third ground of exception, the plaintiff claims that as per Annexure "RA3", the email from the defendant dated 21 September 2017 the conditions referred to in the letter of award (Annexure "R1") dated 10 August 2017 were fulfilled.

[46] Annexure “R1” is an email from the defendant to the plaintiff. It reads as follows:

“TENDER TO APPOINT SERVICE PROVIDER(S) TO PROVIDE THIRD PARTY ELECTRICITY VENDING SYSTEM/TECHNOLOGY FOR SELLING PREPAID ELECTRICITY TO CUSTOMERS IN THE TSHWANE ELECTRICITY SUPPLY AREA: AS AND WHEN REQUIRED: 3 PERIODS WITH EFFECT FROM 01 SEPTEMBER 2017 OR NEAREST DATE.

I have the pleasure to inform you that, subject to the following:

- the successful registration as a vendor with the City of Tshwane within 14 days and*
- the signing of the service level agreement (SLA) with the relevant Department prior to the commencement to your contract.*

Your tender has been accepted by the City Manager on 14 June 2017, to provide third party electricity vending system/technology for selling pre-paid electricity to customers in the Tshwane electricity supply area, over a period of three (3) years, as and when required, with effect from 01 September 2017 or nearest date.

...

all in accordance with the Municipality’s Specification and Conditions of Tender and our tender.

Your appointment is also subject to your company submitting a detailed proposal within one month on the following:

- *No. of jobs to be created through this project.*
- *Spin offs to the Local Economy.*
- *Strategy for appointment of Locals.*

The third-party electricity vending system/technology must be executed in strict accordance with the Municipality's Specification and Conditions of Tender and your tender."

[47] Annexure "RA3" is also an email from the defendant to the plaintiff and it reads as follows:

" ...

Please be advised that the test sessions with Roncon have been completed, the tests were successful without any deviation. Roncon is now complying as per the tender specification."

[48] In its heads of argument, it is submitted on behalf of the plaintiff that the construction which arises from Annexure "RA3" is clear and that the evidentiary burden that besieged the plaintiff, on this score, has been discharged. Further that the counterproof is required of the Municipality.

[49] I do not agree. For a claim to disclose a cause of action, a plaintiff's pleading must set out every material fact which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the court³⁰.

[50] Annexure "RA3" only refers to the tests that have been conducted. Even then it was incumbent on the plaintiff to allege in its particulars of claim that it has complied with the conditions of the tender as contained in Annexure "R1" and/or that the conditions thereof have been fulfilled.

[51] The third ground of exception also relates to paragraph 39 of the particulars of claim. It is contended that in paragraph 39 the plaintiff pleads that the defendant's alleged acquiescence with the review and setting aside of the decision to award the contract to the plaintiff constituted a repudiation of the contract. However, the particulars of claim lacks averments to sustain a contractual claim and in the circumstances no claim based on the defendant's alleged repudiation avails the plaintiff.

[52] The plaintiff fails to deal with that aspect in its heads of argument save to say that Mr Manala for the plaintiff submitted in oral argument and relying on the decision in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another*³¹ that a claim for loss of profit like contract price adjustment that is subject to negotiation after the procurement process has been completed, ought to fall squarely within the domain of private law. In other words, once the procurement process is completed, the relationship between the parties is governed by the law of

³⁰ *McKenzie v Farmers Co-operative Meat Industries Ltd supra* at 23

³¹ 2015 (5) SA 245 (CC) at para 75

contract. Mr Manala and Ms Manyanye correctly agreed on the law relating to this aspect.

[53] Although I agree with the law as set out in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited*³², I agree with the defendant that the particulars of claim lacks averments to sustain a contractual claim. That contract as referred to in *Trencon* has not been pleaded. Therefore, no claim based on the defendant's alleged repudiation avails the plaintiff.

Fourth exception

[54] As alluded to *supra*, the plaintiff contends that after the completion of the procurement process, the relationship between the parties is regulated by the law of contract. The plaintiff thereof disagrees that its claim should proceed under the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"). Having looked at the authorities relied upon by the plaintiff, I am persuaded that there is merit in its argument. However, as alluded to *supra* I am concerned about the lack of averments in the plaintiff's particulars of claim to sustain a contractual claim for damages. In my view the way the claim is set out, it is defective or incomplete and this results in an embarrassment to the defendant.

Sixth and seventh grounds of exception

[55] In rebuttal of these grounds of exception, the plaintiff contends that the defendant's decision to withdraw from the urgent interim application and the review application, and not even file the record of the decision it took to award

³² *Supra*

the tender to it, was wrongful because of the unlawful conduct of Mr Brink. If the defendant disputes that the decision to withdraw was not influenced by the unlawful conduct of Mr Brink, the defendant must present evidence to dispute the averments made by the plaintiff.

[56] The plaintiff submits that a fact that obtains is that the defendant withdrew from the review application because of the conduct of Mr Brink and that suffices to establish unlawfulness and wrongfulness. Furthermore, there is no doubt that a defence can be raised that notwithstanding the defendant's participation in the review proceedings, the review would have been upheld. It is further asserted that whether that defence holds, to frustrate the claim advanced by the plaintiff, is not an issue that has to be determined in these proceedings.

[57] I do not agree with the plaintiff's submission in this regard. Plaintiff is required to plead its cause of action in an intelligible and lucid manner that identifies the issues relied upon and in respect of which evidence will be led. In a claim based on delict, the plaintiff must plead all the elements of delict, namely, conduct, negligence, wrongfulness, causation and the loss suffered. If any of these requisites is missing, a cause of action will not be disclosed. Therefore, the pleading will be excipiable.

[58] Having considered the matter and the law on pleadings and exceptions, I am persuaded that there is merit in the exception by the defendant on these grounds.

Conclusion

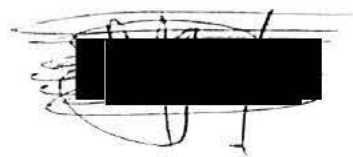
[59] In the circumstances, the exception is upheld, and the plaintiff's particulars of claim is struck out.

Costs

[60] Counsel on both sides requested costs including costs of two counsel on Scale C. Having considered the matter, I am not persuaded to grant costs on Scale C. I find it appropriate to award costs which include costs of two counsel on Scale B.

[61] Consequently, the following order is made:

1. The Exception is upheld, and the plaintiff's particulars of claim is struck out.
2. The plaintiff is granted leave to amend its particulars of claim within 20 (twenty) days from the date of this order.
3. The plaintiff is to pay the costs of this application which costs include the costs of two counsel on Scale B.

A handwritten signature in black ink, appearing to read 'M J Teffo', is written over a black rectangular redaction box.

M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the defendant (Excipient)	J M Motepe SC (<i>in absentia</i>) and M S Manyanye
Instructed by	Rambevha Morobane Attorneys
For the plaintiff (Respondent)	M E Manala M Rasekgala
Instructed by	Manala Inc
Heard on	15 August 2024
Handed down on	26 March 2025