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**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

Case Number: 2024-032979

(1) Reportable: No  
(2) Of interest to other judges: No  
(3) Revised: Yes  
Date: 30 May 2025

In the matter between:

**CITY OF TSHWANE METROPOLITAN MUNICIPALITY**

Plaintiff/Respondent

and

**NAMADZAVHO CALIFORNIA PHANYANE**

First Defendant

**STEPHENS NOTOANE**

Second Defendant

**FRANCOIS PIERRE COETZEE**

Third Defendant/Excipient

**FAIEK ALEXANDER**

Fourth Defendant

*This judgment was handed down electronically by circulation to the parties and/or their legal representatives by email and by being uploaded onto CaseLines. The hand-down date is deemed to be 30 May 2029.*

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## **JUDGMENT**

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**DU PREEZ, AJ**

### **INTRODUCTION**

1. The plaintiff sued the defendants, among other things, for a declaratory order that the defendants breached section 32 of the Municipal Finance Management Act [*the main claim*] and their respective employment contracts [*the alternative claim*], and payment of R21,645,090.00 for irregular expenditure.
2. The third defendant excepted to the alternative claim under Rule 23(1) on the basis that the plaintiff's particulars of claim lack averments necessary to sustain a cause of action.

### **THE ALLEGATIONS IN THE PARTICULARS OF CLAIM REGARDING THE PLAINTIFF'S MAIN CLAIM**

3. In the particulars of claim, the plaintiff bases its main claim on the defendants' breach of section 78 (read with section 32) of the Municipal Finance Management Act 56 of 2003 [*the MFMA*] by failing to take all reasonable steps to prevent irregular expenditure as defined in the MFMA and the damages in the amount of R21,645,000.00 as a result thereof.
4. The plaintiff alleges, among other things, that:
  - 4.1 The defendants, who were members of the Bid Evaluation Committee [*the BEC*] that evaluated Tender U[...] [*the tender*], failed to fulfil their function and duty properly by:

- 4.1.1 Not excluding the winning bidder by disqualification for failure to meet the functionality test;
  - 4.1.2 Not complying with the requirements of the Broad-Based Black Economic Empowerment Act 53 of 2003;
  - 4.1.3 Not enforcing the requirements of the tender document; and
  - 4.1.4 Failing to evaluate the bid under the specifications for a specific procurement under regulation 28 of the Municipal Supply Chain Management Regulations and subparagraph 8.8 of the Supply Chain Management Policy [*the defendants' conduct*].
- 4.2 The defendants breached section 78 (read with section 32) of the MFMA because they failed to take all reasonable steps to prevent the resultant irregular expenditure;
- 4.3 The Auditor General determined the irregular expenditure to be R21,645,000.00; and
- 4.4 The plaintiff thus suffered "harm" with the financial consequences befalling the plaintiff.

5. The third defendant did not except to the plaintiff's main claim.

## **THE ALLEGATIONS IN THE PARTICULARS OF CLAIM REGARDING THE PLAINTIFF'S ALTERNATIVE CLAIM**

6. The plaintiff bases its alternative claim on the following allegations:

- 6.1 The plaintiff and the defendants (respectively and each representing himself, separately) concluded a contract of employment [*the contract*];
- 6.2 The material express, alternatively implied, further alternatively tacit terms of the contract were:
  - 6.2.1 The defendants would be employed within the plaintiff as senior employees and within management;

- 6.2.2 The defendants would serve the plaintiff, as and when, within its procurement processes and, in particular, serve as members of the BEC;
- 6.2.3 The defendants would acquaint themselves with all processes relating to the plaintiff's procurement processes and execute their duties and functions in accordance with law and the requirements of the plaintiff's Supply Chain Management Policy;
- 6.2.4 The defendants would ensure and maintain a culture of fairness, equitability, competitiveness, cost-effectiveness, and transparency;
- 6.2.5 The defendants would evaluate the bids in accordance with the specifications for a specific procurement;
- 6.2.6 The defendants would exercise due care in respect of evaluating the bids in accordance with the specification for the specific procurement; and
- 6.2.7 The plaintiff would afford training and remuneration to the defendants.
- 6.3 The plaintiff has duly complied with its obligations under the contract.
- 6.4 The defendant, in breach of their obligations under the contract, failed to:
  - 6.4.1 Ensure that the procurement process under the tender was fair, transparent, equitable, and competitive because the defendants failed to disqualify the winning bidder when they ought to have;
  - 6.4.2 Awarded and allocated B-BBEE points when the winning bidder did not meet the requirements of the tender, in that the winning bidder is an unincorporated joint venture and ought to have submitted a consolidated B-BBEE scorecard, the defendants accepted and allocated B-BBEE points on an individual basis;
  - 6.4.3 The defendants awarded the winning bidder functionality points as follows:

- (1) In respect of the criterion, proof of experience in the supply, installation, testing and commissioning of Meter Data Management System, bidders were to submit authentic letters of recent successfully completed projects with contact details, and a maximum of 25 points were to be allocated;
- (2) Whereas the defendants scored the bidder a maximum of 25 points even though the winning bidder provided only two letters which complied with the criteria and consequently, ought to have been scored no more than 15 points;
- (3) In respect of the criterion, proof of experience in supply, installation, testing, and commissioning of Head End System and requirement to submit authentic signed letters with a maximum of 20 available for allocation, the winning bidder was appropriately scored by the defendants and allocated the full complement of 20 points;
- (4) In respect of the criterion of proof of experience in supply, installation, testing, and commissioning of the Online Vending System, the tender document required the submission of three authentic, signed letters of a recently successfully completed project with contact details for a maximum points tally of 25;
- (5) Whereas the defendants scored the winning bidder 25 points despite the winning bidder submitting only one authentic signed letter (alternatively, reference letter) and thus should only have obtained an allocation of no more than five points;
- (6) In respect of the criterion for the Team Leader with experience in the development of the Meter Data management System, the Head End System and the Online Vending System, bidders were required to submit a curriculum vitae with relevant ICT

- qualification, together with reference letters of successfully completed projects for a maximum points tally of 15 points;
- (7) Whereas the defendants scored the winning bidder the full points complement of 15 points despite the winning bidder's curriculum vitae showing the staff member with only a BSc Industrial Engineering without any relevant ICT qualification as required per the functionality evaluation criterion, and further, the winning bidder failed to provide any reference letter of successfully completed projects and must have been a score of zero;
  - (8) In respect of the criterion for Team Members with experience in the development of the Meter Data Management System, the Head End System and the Online Vending System, bidders were required to submit a curriculum vitae with relevant ICT qualification and four reference letters of successfully projects with a maximum points tally of 15 points to be allocated;
  - (9) Whereas the winning bidder submitted two curriculum vitae for a trainer with a software engineering qualification and a solution architect with a BSc in Computer and Software Engineering, and while these curriculum vitae did have the relevant qualification, no accompanying reference letters were submitted and for that reason, the bidder ought to have been allocated zero points;
  - (10) In the result, the defendants properly fulfilled their function and duty; they would have scored the winning bidder no more than 40 points instead of the 100 points they scored and allocated to the winning bidder; and

(11) Consequently, the winning bidder ought to have been excluded by disqualification for failure to meet the functionality test.

6.4.4 The above scoring was in breach of the defendants' duties and obligations towards the plaintiff under their contract.

6.5 Due to this breach, the plaintiff has suffered damages in that its process received a negative report and/or audit finding from the Auditor General, South Africa, in which the procurement was found to be irregular and the resultant expenditure was irregular.

6.6 The defendants knew, alternatively ought to have known, that failing to carry out their duties in line with the contract's requirements would affect the plaintiff's outlook within government and, in particular, result in negative audit findings.

6.7 The defendants knew, alternatively ought to have known, that negative audit findings by the Auditor-General South Africa have financial implications on and in relation to the plaintiff's budget and future allocations.

6.8 As a result, the plaintiff suffered irregular expenditures of R21,646,000.00, and the defendants are jointly and severally liable therefor, the one paying and the others being absolved.

6.9 Despite demand, alternatively, the combined summons constituting demand, the defendants have failed to make payment of the irregular expenditure.

## **THE RELIEF CLAIMED BY THE PLAINTIFF**

7. The plaintiff then claims judgment against the defendants, jointly and severally (in respect of money judgment, the one paying the others being absolved) for an order:

7.1 Declaring that the defendants breached the MFMA and the plaintiff's procurement processes;

7.2 Declaring that the plaintiff is entitled to recover a penalty from the defendants under section 32 of the MFMA;

- 7.3 Declaring that the defendants are in breach of the MFMA and their respective employment contracts and ordered to pay R21,1645,000.00 in respect of the irregular expenditure;
- 7.4 Directing, to the extent that the defendants fail to make full and timely payment before their retirement and/or resignation (as the case may be), the plaintiff is entitled and authorised to approach and endorse the defendants' pension/provident fund accordingly; and
- 7.5 Ancillary relief.

### **THE THIRD DEFENDANT'S EXCEPTION**

- 8. The third defendant's exception is based on:

- 8.1 The plaintiff's alternative claim not complying with Rules 18(4), 18(10), and 20(2) [*the first exception*]; and
- 8.2 The plaintiff's failure to allege, insofar as the alternative claim is concerned, that it had suffered "*any loss or damage because of the deliberate or negligent unlawful actions*" of any of the defendants, including the third defendant [*the second exception*].

- 9. The third defendant alleges that he is thus prejudiced because:

- 9.1 The alternative claim does not contain a clear and concise statement of the material facts upon which the plaintiff relies for such claim, with sufficient particularity to enable the third defendant to reply thereto; and does not set out the damages purportedly claimed by the plaintiff in a manner that enables the third defendant to assess the quantum thereof reasonably;
- 9.2 The facts stated by the plaintiff in the alternative claim do not support the conclusion of law which the plaintiff seeks to deduce from such facts; and
- 9.3 The third defendant is, as far as the alternative claim is concerned, unable to determine what case it is called upon to meet.



10. The third defendant seeks an order that the exception be upheld with costs and the plaintiff's alternative be set aside.

## DISCUSSION

### GENERAL REMARKS

11. When a plaintiff pleads a cause of action, the particulars of claim must contain every fact which would be necessary for the plaintiff to prove, if traversed, to support the plaintiff's right to judgment. It does not comprise every piece of evidence needed to prove each fact, but every fact necessary to be proved.<sup>1</sup>
12. On a proper reading of the amended particulars of claim, it appears that the plaintiff's alternative claim is based on a breach of contract, as may be gleaned from the following:
  - 12.1 It bears the heading "*ALTERNATIVELY – BREACH OF CONTRACT*"; and
  - 12.2 The plaintiff alleges that:
    - 12.2.1 The conclusion of employment contracts with the defendant and their terms and conditions;
    - 12.2.2 The plaintiff complied with its obligations under the employment contracts;
    - 12.2.3 The defendants breached their employment contracts for the reasons stated above; and
    - 12.2.4 The plaintiff suffered damages because the defendants breached their employment contracts.

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<sup>1</sup> *Living Hands (Pty) Limited and Another v Ditz and Others* 2013 (2) SA 368 (GSJ) [15]; *Merb (Pty) Ltd and Others v Matthews and Others* (2020/15069) [2021] ZAGPJHC 693 (16 November 2021) [12].

13. A party wishing to claim damages resulting from a breach must allege and prove:<sup>2</sup>
- 13.1 The contract;
  - 13.2 The breach of the contract;
  - 13.3 Damages;
  - 13.4 A causal link between the breach and damages; and
  - 13.5 That the loss was not too remote, i.e., general or special damages.
14. As the plaintiff's claim is based on alternative causes, the third defendant is entitled to except to one or more of the alternatives.<sup>3</sup>
15. The third defendant has excepted to the plaintiff's alternative claim on the basis that it lacks averments necessary to sustain a cause of action, and accordingly, he must:
- 15.1 Confine his complaint to the stated grounds of his exception;<sup>4</sup> and
  - 15.2 Show that upon every interpretation the alternative claim can reasonably bear, no cause of action is disclosed.<sup>5</sup>

## THE FIRST EXCEPTION

16. The third defendant's first exception is premised on the mere allegation that the alternative claim does not comply with the provisions of Rules 18(4), 18(10), and 20(2) of the Uniform Rules of Court. He does not state in which respect the alternative claim does not comply with the provisions of these Rules.

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<sup>2</sup> *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T) 348; *Combined Business Solutions CC v Courier & Freight Group (Pty) Ltd t/a XPS* [2011] 1 All SA 10 (SCA); *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) 687.

<sup>3</sup> *Du Preez v Boetsap Stores (Pty) Ltd* 1978 (2) SA 177 (NC) 181F.

<sup>4</sup> *Feldman NO v EMI MusicSA (Pty) Ltd; Feldman NO v EMI Music Publishing SA (Pty) Ltd* 2010 (1) (SCA) 5A.

<sup>5</sup> *Trustees for the time being of the Burmilla Trust v President of the RSA* [2022] 2 All SA 412 (SCA) [7].

17. During argument, the third defendant's counsel argued that:
- 17.1 The consequences of the plaintiff's non-compliance are, among others, that the plaintiff does not allege a causal link between the breach of contract and the damages allegedly suffered.
  - 17.2 The plaintiff claims damages in an amount equal to the amount of the penalty imposed by the Auditor-General (and relied on in the main claim).
  - 17.3 This penalty does not necessarily equate to the contractual damages suffered by the plaintiff, and the plaintiff had to plead something more to link the penalty amount to the breach of contract [*'the argued exception'*].
18. The argued exception is not one of the grounds upon which the third defendant's first exception is based. The third defendant is bound by the grounds stated in the first exception, namely that the mere non-compliance with Rule 18(4), 18(10), and 20(2) renders the alternative claim excipiable. He cannot, in argument, expand the grounds of the first exception. He should have expressly stated the argued exception to have relied on it as a ground for his first exception.
19. Even if the court is wrong in this regard, there is an alternative interpretation, namely that the penalty indeed constitutes the plaintiff's contractual damages. The plaintiff may prove these damages at trial.
20. Although the alternative claim can be read in two or more ways because of the omission of a necessary allegation, one of these readings discloses a cause of action, and the pleading is thus not excipiable.<sup>6</sup>
21. The third defendant's first exception stands to be dismissed with costs.

## THE SECOND EXCEPTION

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<sup>6</sup> *Fairlands (Pty) Ltd v Inter-Continental Motors (Pty) Ltd* 1972 (2) SA 270 (A).

22. The third defendant's second exception is based on the plaintiff's failure to allege, insofar as the alternative claim is concerned, that it had suffered "*any loss or damage because of the deliberate or negligent unlawful actions*" of any of the defendants, including the third defendant.
23. A contract gives rise to obligations, which means the parties to the contract are subject to duties which they must comply with.<sup>7</sup>
24. Contractual autonomy must be respected. When parties conclude a contract, their rights and obligations must be found in the contract, subject to the obligations imposed and rights created by law.<sup>8</sup>
25. A breach of contract occurs when a party to a contract fails to fulfil a contractual obligation, whereas delict relates to other forms of wrongful conduct.<sup>9</sup>
26. Although some commentators claim that breach of contract entails wrongful conduct and is a delict,<sup>10</sup> if a breach of contract were only a particular form of delict, the requirements for breach of contract and delict would have been the same.
27. A plaintiff claiming damages based on a breach of contract does not have to allege fault, i.e., the defendant acted intentionally or negligently. However, a party claiming damages because of a delict must allege and prove fault.
28. The conduct that constitutes the breach of contract may also constitute a delict (i.e., it may infringe rights of the other party that exist independently of

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<sup>7</sup> Van der Merwe (*et al*) *Contract General Principles* Third Edition p 328.

<sup>8</sup> *Devland Cash & Carry (Pty) Ltd v G4S Cash Solutions SA (Pty) Ltd (GJ)* (2020/19610) [2023] ZAGPJHC (3 July 2023) [17].

<sup>9</sup> Van der Merwe (*et al*) (*supra*) p 332 with reference to Van Aswegen *Die sameloop van aksies om skadevergoeding uit kontrakbreuk en delik* Thesis (1991) 300 – 3008; Van Aswegen 1992 *THRHR* 271 273.

<sup>10</sup> Van der Merwe 1978 *SALJ* 317; Van der Merwe & Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 479.

the contract).<sup>11</sup> In such an instance, the plaintiff may claim either on breach of contract or delict, or in the alternative.<sup>12</sup>

29. Nevertheless, no claim is maintainable in delict where the negligence relied on consists in the breach of a contract term.<sup>13</sup>
30. The plaintiff, whose alternative claim for damages is based on a breach of contract, does not have to allege that the damages were caused by “*the deliberate or negligent unlawful actions*” of any defendants.
31. The third defendant’s second exception is thus without merit and must be dismissed with costs.

## CONCLUSION

32. The court grants the following order:

*The third defendant’s exception is dismissed with costs on Scale A.*

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**DB DU PREEZ**

Acting Judge of the High Court  
Gauteng Division, Pretoria

Date of Hearing: 26 May 2025

Date of Judgment: 30 May 2025

## Appearances

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<sup>11</sup> Hutchison (*et al*) *The Law of Contract in South Africa* Third Edition 326.

<sup>12</sup> *Lillycrap, Wassenaar & Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 (1) SA 475 (A); *Holtzhausen v Absa Bank Ltd* 2008 (5) SA 630 (SCA).

<sup>13</sup> *Lillycrap, Wassenaar & Partners v Pilkington Bros (SA) (Pty) Ltd* (*supra*) 499A-501H; *Holtzhausen v Absa Bank Ltd* (*supra*) [6].

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