



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

Case Number: **69751/2019**

**DELETE WHICHEVER IS NOT APPLICABLE**

- (1) REPORTABLE: YES/NO  
 (2) OF INTEREST TO OTHER JUDGES: YES/NO  
 (3) REVISED: YES/NO  
 DATE:  
 SIGNATURE: **JANSE VAN NIEUWENHUIZEN J**

In the matter between:

**SIGNATURE      BUSINESS      COMMUNICATIONS      (PTY)      LTD**

Plaintiff

and

**ESKOM                      HOLDINGS                      SOC                      LTD**

Defendant

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**JUDGMENT**

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**JANSE VAN NIEUWENHUIZEN J:**

- [1] This is an exception taken by the defendant to the plaintiff's particulars of claim on the basis that the particulars, *inter alia*, does not disclose a cause of action.

### **Cause of action**

- [2] The plaintiff's cause of action arises from a tender that was issued by the defendant in respect of civil industrial cleaning services at Majuba Power Station. The plaintiff submitted a tender and the events that unfolded after submission of the tender is set out in the plaintiff's particulars of claim, as follows:

“ 5.

*The plaintiff duly submitted the tender and was 1[one] of the top 6[six] shortlisted bidders who successfully passed the evaluation criteria with a minimum score of 75% of technical requirements required in order to proceed for further evaluation.*

6.

*The plaintiff was ultimately amongst two shortlisted companies and was duly informed telephonically by one Londi Ndila an Eskom procurement officer acting in her scope of employment and duly authorized to communicate with plaintiff through Mr. Setlogelo that;*

- 6.1 *Signature business' bid is the cheapest and scored highest in terms of bid price and BEE scoring.*
- 6.2 *Signature business scored 100% and its nearest competitor scored just under 85%.*
- 6.3 *That an appointment letter will be issued to plaintiff not later than 26 October 2016.*
- 6.4 *The appointment will be issued subject to the plaintiff complying successfully with a number of requirements furnished to the plaintiff referred to in annexure "PS1".*

7.

*The plaintiff duly complied with all further requirements as communicated to him telephonically up to 25 October 2016.*

8.

*The procurement officer, Ms L Ndila and/or unknown bid officials of defendant maliciously failed to act in terms of the preferential procurement policy framework Act 5 of 2000 and fraudulently misrepresented facts intentionally to deprive appointment of plaintiff as a successful bidder as follows:*

- 8.1 *She failed to inform the tender panel that the plaintiff has rectified and confirmed the arithmetic error calculation in writing and that they were in constant telephonic conversations at all material times.*

8.2 *Full and further other requirements in particular the following were requested and submitted:*

8.2.1 *Quality management system*

8.2.2 *Contract quality plan section B1, quality representative*

8.2.3 *Section B8, customer satisfaction survey.*

8. (sic)

*The plaintiff through Mr Setlogelo and the defendant through L Ndila were in constant communication about further defendant's requirements which were supposed to be met and were duly met.*

9.

*The plaintiff failed to appoint a bidder which tendered the lowest price when they could and should have done so.*

10.

*The defendant improperly concluded the assessment of the tender prematurely long before their self-imposed 2 months tender validity extension.*

11.

*As the result of the aforesaid incorrect and fraudulent bid points calculation, the plaintiff was not awarded a tender which had it not been of fraudulent misrepresentation it could have been appointed.*

## 12.

*The plaintiff was unlawfully not awarded a tender on improper and illegitimate grounds.”*

**Point in *limine***

- [3] The defendant raised as a point in *limine*, the inordinate delay in the setting down of the exception. The point is premised on the facts set out *infra*.
- [4] On 7 November 2019 the defendant served its notice in terms of rule 23(1)(a) on the plaintiff. The plaintiff did not remove the cause of complaint and the defendant delivered its exception on 14 January 2020.
- [5] The defendant's exception was delivered out of time and on 25 February 2020, the plaintiff served an application in terms of rule 30 for the setting aside of the exception as an irregular step. In response, the defendant brought an application for the condonation of the late delivery of the exception and on 15 December 2020, Thlapi J granted condonation.
- [6] It is not clear from the pleadings when the defendant applied to the registrar for the set down of the exception. The notice of set down for the hearing of the matter on 20 February 2023, was, however, served on the plaintiff on 7 February 2022. The plaintiff maintains that the exception should be dismissed on the ground that there was an inordinate delay in the setting down of the matter.

- [7] Rule 23(1) provides that once an exception in terms of the rule has been delivered, the party delivering the exception “*may apply to the registrar to set it down for hearing within 15 days after the delivery of such exception....*”
- [8] Mr Gwabeni attorney for the plaintiff, pointed out that the exception was delivered on 13 January 2020 and that the matter was only enrolled on 24 October 2022, some two year and nine months after the exception was delivered. The date of 24 October 2022 is incorrect and should be 7 February 2022. The incorrect date is, however, of no consequence as the delay in the setting down of the matter is still more than two years.
- [9] Mr Gwabeni relying on the authorities in *Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA) and *Tracy Hill N.O. and another v Brown* ZAWCHC 61, submitted that the inordinate delay in the prosecution of the exception constitutes an abuse of process and warrants the dismissal of the exception.
- [10] In *Cassimjee v Minister of Finance*, the matter was dormant for a period of approximately 32 years. The Supreme Court of Appeal upheld the court a *quo*'s decision to dismiss the plaintiff's claim for want of prosecution. The court took into account that the plaintiff had failed dismally to explain the inordinate delay. The court, furthermore, held that the defendant would be prejudiced if the action is reinstated, in that there is a substantial risk, due to time delay, that the defendant will not have a fair trial. The time delay in *casu* differs vastly from the time delay in *Cassimjee* and does not, in my view, support the plaintiff's submission that the exception should be dismissed due to a time delay of over two years.

- [11] In *Tracy Hill N.O. and Another v Brown* the court considered the provisions of rule 23(1)(a) and (b). Rule 23(1)(a) provides that a notice of exception shall be filed within 10 days of receipt of a pleading. The party delivering the pleading has 15 days to remove the complaint.
- [12] In terms of rule 23(1)(b), the excepting party shall, within 10 days from receipt of the reply to its exception, or within 15 days from the date on which such reply is due, deliver the exception.
- [13] In *casu* the point in *limine* does not pertain to the time periods in rule 23(1)(a) and (b), but to the time period contained in rule 23(1). Rule 23(1) provides that the excepting party may within 15 days after delivery of the exception, apply to the registrar to set the exception down for hearing. The wording in rule 23(1), therefore, differs from the mandatory “*shall*” in rule 23(1)(a) and (b).
- [14] The words “*may set the matter down*” are similar than the wording of rule 6(5) (f) that regulates the set down of opposed motions. In terms of rule 6(5)(f)(iii) a respondent may immediately upon the expiry of the period in which the applicant could apply for the allocation of a date for the hearing of the matter, apply for the allocation of a date.
- [15] In my view, a respondent in an exception application has the same procedural remedy. To hold otherwise, would entail that a plaintiff faced with an exception to its pleadings, is left without any remedy to advance its case. Such an approach will be non-sensible.

[16] The plaintiff was, therefore, entitled to set the exception down for hearing upon expiry of the period of 15 day period contained in rule 23(1). The plaintiff did not do so. In the premises, both parties are to be blamed for the delay in the hearing of the matter.

[17] In circumstances where both parties have filed heads of argument and the matter has been fully ventilated during the hearing, the plaintiff will, at this stage, not suffer any prejudice if the matter proceed.

[18] In the result, the point in *limine* is dismissed.

### **Exception**

[19] Although the defendant raised three grounds of exception in its notice of exception, Mr Mrwebi indicated at the commencement of the hearing that the defendant only persists with the ground that the particulars fails to disclose a cause of action.

[20] In order to appreciate the nature of the exception at the time it was delivered, it is incisive to have regard to the heads of argument filed on behalf of the defendant on 24 October 2022. The ground for the exception is articulated as follows:

*“22.2.1 The plaintiff’s claim does not set out the nature of the cause of action and valid basis in law. The plaintiff’s particulars of claim does not disclose a cause of action in that its claim is fundamentally based on an improper exercise of a discretion. No allegation of fraud or corruption is made. In the circumstances*



*the plaintiff's cause of action should have been a review in terms of the Promotion of Administrative Justice Act 3 of 2000. Its remedy therefore lies not in a claim for damages."*

[21] I pause to mention, that the defendant did not rely on any authorities for this ground of exception.

[22] The exception ignored the clear allegations of fraud in the particulars of claim and was, at the time, not supported by the prevailing legal position. The Supreme Court of Appeal considered a similar claim in *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA). Although the claim was also in delict and based on a fraudulent tender process, the correct cause of action was not in issue in the appeal. The issue in dispute was whether the plaintiff could claim loss of prospective profits in a delictual claim based on a fraudulent tender process..

[23] The Supreme Court of Appeal held that the plaintiff could claim loss of prospective profits, which finding confirms by implication that a plaintiff does have a claim in delict based on a fraudulent tender process.

[24] At the commencement of the hearing of the matter, Mr Mrwebi appeared as counsel for the defendant. I pause to mention, that Mr Mrwebi was not the author of the heads of arguments filed on behalf of the defendant during October 2022.

[25] Mr Mrwebi relied on the recent judgment of the Constitutional Court in *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* 2023 (2) SA 31 CC, which judgment was delivered on 30 November 2022. The Constitutional

Court considered the question whether a tenderer, who is deprived of success in a tender by the state's intentional misconduct, can claim damages in delict for loss of profit., afresh.

[26] The court dealt in detail with the provisions of section 217 of the Constitution and with the remedies provided in section 8 of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA), and held that just compensation in fraudulent tender matters can be achieved by means of PAJA.

[27] Due to the aforesaid finding, the court concluded at paragraph [57], as follows:

*".., it is both constitutionally impermissible and unnecessary for us to extend the common law in order to allow for the applicant's claim. The appropriate avenue for a claim for compensation for loss sustained as a result of a breach of the precepts of administrative justice is PAJA."*

[28] In view of the Constitutional Court's recent finding, the exception must be upheld.

### **Costs**

[29] The defendant's exception was bad in law until the *Esorfranki Pipelines* judgment, *supra*, was delivered on 30 November 2022. The defendant did not timeously file supplementary heads to alert the plaintiff that it will rely on the *Esorfranki Pipelines* judgment and as indicted only referred to the matter at the commencement of the hearing.

[30] As a result, the plaintiff did not have an opportunity to reconsider its position and the matter proceeded on the opposed roll on the papers as they stood. Consequently, precious court time was wasted and unnecessary costs incurred.

[31] To show my displeasure with the defendant's conduct, an order that the defendant pays the costs of the action will follow.

### **ORDER**

In the result, I make the following order:

1. The exception is upheld and the plaintiff's claim is dismissed.
2. The defendant is ordered to pay the costs of suit.

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**N. JANSE VAN NIEUWENHUIZEN**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, PRETORIA**

### **DATE HEARD:**

21 February 2023

### **DATE DELIVERED:**

### **APPEARANCES**

For the Applicant:	Advocate SL Mrwebi
Instructed by:	Renqe FY Incorporated
For the Respondent:	Mr SM Gwabeni
Instructed by:	Gwabeni Incorporated