



**IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF S2 (1) OF THE
SPECIAL INVESTIGATING UNIT AND
SPECIAL TRIBUNALS ACT 74 OF 1996
(REPUBLIC OF SOUTH AFRICA)**

Case No. LP/01/2020

In the matter between:

C SCHMAHL

First Excipient

JC KILIAN

Second Excipient

and

SPECIAL INVESTIGATING UNIT

Respondent

In re:

SPECIAL INVESTIGATING UNIT

Plaintiff

and

PK LEGODI

First Defendant

C SCHMAHL

Second Defendant

JC KILIAN

Third Defendant

JUDGMENT

Summary

Exception – whether the plaintiff’s particulars of claim fail to disclose a cause of action and/or are vague and embarrassing – whether the exception stands to be upheld if an alternative claim(s) are not properly pleaded.

MODIBA J:

[1] This is an opposed exception. Carel Schmal (“Mr Schmal”) is the first excipient. Johan Christiaan Kilian (“Mr Kilian”) is the second excipient. In the main action, they are the second and third defendants respectively. Phineas Legodi (“Mr Legodi”) is the first defendant. He has taken no interest in this exception. The Special Investigating Unit (“SIU”) is the plaintiff in the main action and the respondent in the exception. I conveniently refer to it as the plaintiff. I refer to the excipients individually by their names and jointly as excipients. When necessary, I jointly refer to Mr Schmal, Mr Killian and Mr Legodi as the defendants.

[2] The excipients except to the plaintiff’s particulars of claim on the basis that they fail to disclose a cause of action and/ or are vague and embarrassing. They rely on elaborate grounds. I consider their grounds of exception at the relevant point in this judgment. If the exception is upheld, the excipients seek the plaintiff’s claims in the main action struck out with punitive costs.

[3] The plaintiff opposes the exception. It contends that the exception is ill considered, baseless, reliant on overly technical grounds and the excipients have not discharged their onus in terms of principles distilled from case law. It further contends that the exception was brought merely to delay the outcome of the main action and thus constitutes an abuse of process. For these reasons, the plaintiff contends that the exception should be dismissed with punitive costs.

[4] I firstly set out the facts as alleged in the plaintiff’s particulars of claim. I then set out legal principles applicable to exceptions. In the section that follows, I

consider the excipients grounds of exception against the applicable legal principles and the plaintiff's grounds of opposition. I then determine the costs of the exception. An order concludes the judgment.

BACKGROUND FACTS

[5] The plaintiff is an investigative body established in terms of section 2(1)(a) of the Special Investigating Units and Special Tribunals Act ("the Act").¹ It derives authority to investigate incidents of maladministration, corruption, and wasteful and fruitless expenditure as a result of which the state has suffered loss from Proclamations the President of the Republic of South Africa issues in terms of section 2 of the Act. It derives locus standi to institute civil proceedings in the Tribunal or High Court in respect of causes of action arising from the findings from its investigations. In such proceedings, it is entitled to any relief to which a state institution is entitled.²

[6] On 15 April 2016, the President issued proclamation R.22 of 2016 for the investigation of maladministration, corruption, wasteful and fruitless expenditure, and improper conduct on the part of Lepelle Northern Water Board ("LNW") employees and other like conduct and incidents arising from the affairs of the LNW. The investigation would cover events which took place between 1 February 2014 and 15 April 2016 or after the latter date if the events are incidental, relevant or ancillary to matters that fall within the terms of reference set out in the Proclamation.

[7] The proclamation expressly mentions, as conduct and incidents that fall within its scope, the appointment of LTE to render services in respect of the Mopani Water and Waste Water Emergency Intervention ("MWWW"), including the Giyani Water and Waste Water Schemes ("GWWW") on a turnkey basis and payments made by LNW to LTE in breach of the applicable constitutional, statutory and regulatory

¹ Act 74 of 1996.

² S4(1)(c) read with s5(5) of the Act.

provisions. The plaintiff instituted the main action on the basis of its findings in this investigation.

[8] When the plaintiff's cause of action arose, Mr Legodi was the Acting Chief Executive Officer of the LNW. Mr Killian was its Chief Financial Officer ("CFO") and Mr Schmal General Manager: Operations ("GMO"), Chairman of the LNW, and Chairman of the LNW Bid Adjudicating Committee. LNW is a water board established in terms of section 28 of the Water Services Act.³ It is also a national government business enterprise in terms of Schedule 3, Part B of the Public Finance Management Act⁴ ("PFMA"). In terms of section 3(1)(b) of the PFMA, LNW is subject to the PFMA. In terms of section 49 of the PFMA read with section 36 of the Water Services Act, Mr Legodi is deemed to be LNW's Chief Executive Officer ("CEO") when the plaintiff's cause of action arose.

[9] The plaintiff has set out 5 claims in its particulars of claim. Claim 1 lies against Mr Legodi and in the alternative and further alternative Mr Schmal and Mr Killian respectively. Claim 2 lies against Mr Legodi and in the alternative and further alternative, Mr Killian. Claim 3 is an alternative claim to claims 1 and 2. It lies against Mr Legodi and Mr Killian respectively. Against both excipients, alternative claims to claim 3 are also brought. A further alternative claim to claim 3 in which the plaintiff seeks to hold Mr Legodi and Mr Killian jointly and severally liable is also brought. Claim 4 is an alternative claim to all these preceding claims. It is brought against Mr Legodi and Mr Killian. Against both excipients, alternative and further alternative claims to claim 4 are also brought. Claim 5 is brought against all the defendants. In the alternative, it is brought against Mr Legodi and Mr Killian.

APPLICABLE LEGAL PRINCIPLES

[10] The plaintiff has referenced the statutory and regulatory provisions it relies on in its particulars of claim. In the plaintiff's heads of argument, its counsel set out the applicable legal principles elaborately. I found this account extremely valuable in determining the exception. Save for arguing with reference to various judicial

³ 108 of 1997.

⁴ 1 of 1999.

authorities that the exception ought to be upheld, the excipients took no issue with the general principles on exceptions as cited by counsel for the plaintiff. Regrettably, the authorities the excipients rely on do not support their grounds of exception.

[11] It is convenient to summarise the applicable legal principles upfront.

[12] To determine the exception, all allegations of fact in the particulars of claim are accepted as true without having regard to any other extraneous facts or documents. The exception stands to be upheld if the excipient has satisfied the Tribunal that the cause of action or conclusions of law in the pleading cannot be supported on every interpretation that can be put to the facts. The excipients bear the onus in that regard.⁵

[13] Cause of action means every fact which it would be necessary for the plaintiff to prove, if traversed, to support its right to judgment of the Tribunal. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.⁶ The facts necessary for the plaintiff to prove are not to be confused with the evidence required to prove the facts.⁷

[14] The key question is whether the excipients can plead to the plaintiff's particulars of claim. If not, the requisite prejudice would have been shown.

[15] The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect the excipient against an embarrassment which is so serious as to merit the costs even of an exception. An exception may also be

⁵ *Pretorius & Another v Transport Pension Fund & Others* 2019 (2) SA 37 (CC).

⁶ *McKenzie v Farmers' Co-Operative Meat Industries Ltd* 1922 AD 16, approved by the Constitutional Court in *Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation & Others*, 2020 (1) SA 327 (CC) para [50];

⁷ *Ascendis* at paragraph 52.

brought to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.

[16] An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed. An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.

[17] Pleadings must be read as a whole. An exception cannot be taken to a paragraph or a part of a pleading that is not self-contained. Minor blemishes and irrelevant embarrassments caused by a pleading can and should be cured by further particulars.

[18] The excipients except to some of the claims brought in the alternative or further alternative on various grounds. It is convenient to lay out the applicable legal principle in this regard. The plaintiff's contended that on the authority in *Dharumpal*⁸, the alternative claims are not excipiable for the reason(s) contended by the excipients. The excipients sought an opportunity to consider this authority. I directed them to file supplementary heads in necessary. I also gave the plaintiff an opportunity to answer to the excipients' supplementary heads.

[19] As contended by the plaintiff's counsel, the excipients have abused the opportunity afforded them by rearguing their exception. They have not addressed the principle in *Dharumpal* relied on by the plaintiff, probably because the plaintiff's reliance on the principle is unassailable. In *Dharumpal*, the court stated the relevant principle as follows:

⁸ *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 at 706 D-G.

“The first claim, to which I shall refer as the major claim, is just as much part of the action as the second, to which I shall refer as the minor claim. It follows that if the averments in the declaration are sufficient to sustain the major claim, then, even if they are not sufficient to sustain the minor claim, they are sufficient to sustain the action *in part*. The excipient is not entitled to have the declaration set aside because it is not sufficient to sustain both the major and the minor claims in the action. That is nevertheless what the excipient asks the Court to do in his first exception. He excepts to the whole declaration on the ground that the averments therein do not sustain merely the minor claim.”

[20] In the present case, the excipients are not entitled to the exception being upheld simply because the averments in the particulars of claim do not sustain a cause of action in respect of alternative and further alternative claims. As contended by counsel for the plaintiff, this case is on fours with *Dharumpal* in that the plaintiff, as described in paragraph 9 of this judgment, has set out one cause of action out of which it raised 5 claims. Most of the claims are in the alternative. Therefore, above principle in *Dharumpal* applies in the plaintiff's favour. If the plaintiff's main claims are not excipiable, it matters not the alternative claims are.

[21] In the next section, I consider the excipients' grounds of exception against the applicable legal principles and the plaintiff's grounds of opposition.

Ad Claim 1

[22] The excipients claim that the allegations against Mr Schmahl as set out in paragraphs 31 to 33 of the particulars of claim are vague and embarrassing, alternatively fail to set out a cause of action. They contend that:

22.1 it is incorrect that the mere submission of a deviation by Mr Schmahl to Mr Legodi is sufficient to establish his liability.

22.2 a broad generalised reference is made to Regulation 16A of the Treasury Regulations and Treasury Practice Notes, Note 8 of 2007/2008 and Note 6 of

2007/2008 and unspecified circulars. It is accordingly unclear which clauses or paragraphs of the aforesaid Treasury notes are relied upon. Given the voluminous nature of these documents, the contents of these paragraphs are vague and embarrassing.

22.3 it is unclear which 'circulars' are referred to, by whom and when they were issued, and what status or bearing, if any, and which parts of the LNW supply chain manual is relied upon and what conduct of Mr Schmahl is implicated.

22.4 it is unclear on what basis does the plaintiff allege that when he submitted the motivation, Mr Schmahl acted recklessly and on what grounds is it alleged that he departed from the standard expected of a reasonable administrator in his position. Further, the duty of care owed to LNW is also not pleaded. So are the facts giving rise to it, the existence of a reasonable apprehension of harm, that the harm was foreseeable, and that same could be prevented by taking reasonable steps, which Mr Schmahl has allegedly failed to do.

22.5 It is further alleged that Schmahl failed to comply with or ignored standing instructions, which led to loss or damage in the amount of R 90,950,000.00 yet, the source, nature and ambit of the alleged "*standing instructions*" is not alleged. The plaintiff has also failed to allege what "*effective and appropriate steps*" should have been taken.

22.6 The plaintiff alleges that Schmahl failed to prevent the abuse of the supply chain management system. Yet, it has not described how or in what respect the supply chain management system was abused.

22.7 The allegation that Mr Schmahl failed to "*prevent unauthorised, irregular and fruitless and wasteful expenditure*" is a legal conclusion which is not supported by the material allegations necessary.

[23] The excipients also contend that:

23.1 The allegations in paragraphs 34-36 against Mr Killian are also vague and embarrassing on the grounds stated above in respect of Mr Schmahl.

23.2 The offending particulars of claim do not disclose how or why the amount of R 90,950,000.00 allegedly paid by "the Department, Municipality and/or LNW" which

was supposedly paid to the Minister's favoured company LTE, actually constitutes damages.

23.3 Claim 1 is delictual in nature. The material facts underlying the plaintiff's quantum are lacking. The SIU ought to have alleged the means of quantifying its damages. It implies that the entire amount paid favoured LTE and subcontractors constitutes and damages, in which case the particulars of claim lack averments that would establish that the entire amount paid was wasted and no value was received in exchange therefore.

23.4 It was incumbent upon the SIU to plead with the precision and particularity necessary to satisfy the requirements of uniform rule 18(10), the extent to which the works were deficient, or the true value thereof.

[24] The above complaints relate to the alternative claim against Mr Schmal. There is thus no merit to them. The plaintiff contends that the excipients impermissibly cherry pick paragraphs 31 to 33 of the particulars of claim. When read as a whole, the particulars of claim do not render claim one expiable. I agree.

[25] The plaintiff alleges that on 18 August 2014, Mr Legodi made a submission to the then Minister of Water Affairs, Ms Nomvula Mokonyane ("the Minister") regarding the MWWW and GWWW requesting her to make funding available for two the projects. He submitted that costs associated with the projects are R55,279,000 for the GWWW Project and R41,128,000 for the MWWW. He further submitted that two service providers have been appointed for the projects.

[26] On 19 August 2014, Mr Schmahl addressed an internal memorandum to Mr Legodi, requesting permission to deviate from normal procurement procedures to appoint LTE as a service provider. He stated that the cost of LTE engagement is R96,407,000. Mr Killian supported the deviation. Mr Legodi approved it on the same date. Without following any procurement procedures in terms of the applicable statutory and regulatory provisions, LNW issued an appointment letter to LTE for an estimated amount of R52,150,000 for the GWWW and R38,800,000 for the MWWW.

The tender period for the GWWW was 4 years. For MWWW, it was for a period of 13 months and 2 weeks.

[27] On 29 August 2014, the Director General of the Department of Water and Sanitation (“DG, Department”) submitted a directive titled ‘Directive to LNW: Emergency Intervention on Water and Sanitation Challenges in the Mopani District Municipality’ (“the directive”). He made the below recommendations and sought the Minister’s approval:

27.1 LNW to intervene in the Mopani Municipality to address the water and sanitation challenges.

27.2 LNW to be appointed as the implementing agent for the Department.

27.3 The estimated cost of R100,000,000 to be paid for the project.

27.4 A directive to be addressed to inter alia Mr Legodi as the accounting authority for the LNW in terms of s4(1)(ii) of the Water Services Act.

[28] On 25 August 2014, the Minister issued the directive. Its effective date is 18 August 2014. The directive stated that the LNW should intervene as recommended.

[29] The plaintiff alleges that the applicable statutory and regulatory provisions were not met. It cites various basis for this conclusion. It contends that Mr Legodi’s appointment of LTE was unlawful because he did not invite as many bidder as possible to bid for the tender or solicit quotations from at least three suppliers. He did not select the preferred suppliers under the competitive bid committee system. He failed to establish that urgent circumstances prevailed, preventing him from following the competitive bidding process. He failed to comply with standing instructions. He failed to take effective and appropriate steps to prevent unauthorised, irregular, and fruitless and wasteful expenditure. He failed to ensure effective, efficient, economical, and transparent use of state resources.

[30] The plaintiff further alleges that by not following the prescribed procurement processes, Mr Legodi failed to prevent abuse of the procurement system and acted recklessly and/ or intentionally exceeded the powers the applicable statutory and regulatory procurement provisions conferred on him. As a result, he caused the state to incur a loss of R90, 950, 000.00. He is therefore liable in terms of section 49, 50, 51, 57, 76 and 83 of the PFMA together with unstated Treasury Regulations issued in terms thereof, to pay this amount.

[31] In the alternative and further alternative, the plaintiff seeks to impute the same liability to Mr Schmal and Mr Killian for their specific roles in the impugned procurement process. It alleges that in breach of their statutory and regulatory obligations as pleaded in respect of Mr Legodi, Mr Schmal prepared and submitted a motivation for deviation from the prescribed procurement process dated 19 August 2014 and Mr Killian approved it.

[32] The latter allegation is made in paragraph 32 of the particulars of claim. When reading the preceding paragraphs from paragraph 22, it is very clear that it is to Mr Legodi that Mr Schmal submitted the motivation for deviation. The alternative claim against Mr Schmal is that when he submitted the motivation for deviation, he failed to comply with the applicable procurement statutory provisions and regulations in the following respects:

32.1 he failed to invite as many suppliers as possible and select the preferred suppliers using the competitive bidding system;

32.2 he did not invite quotes from many suppliers, or at least three suppliers;

32.3 failed to show that urgent circumstances prevented him from calling for bids from many suppliers prior to making a single supplier award on the basis of emergency.

[33] The statutory provisions relied on are cited in paragraphs 32.4 and 33 of the particulars of claim.

[34] The SIU further alleges that in doing so, Mr Schmal acted recklessly and intentionally. He failed to take the appropriate steps to prevent unauthorised, irregular, fruitless and wasteful expenditure. He failed to prevent the abuse of the supply chain management system and is liable in terms of sections 57 and 83 of the PFMA read with the treasury instructions issued in terms thereof, to make payment in the amount claimed.

[35] The excipients have clearly misconstrued the plaintiff cause of action. It is not founded in delict. Plaintiff did not have to plead any of the elements of delictual damages that grounds the excipients complaints in respect of claim 1. The plaintiff's claim is for damages occasioned by fruitless and wasteful expenditure incurred as a result of failure to follow the prescribed procurement processes and to fulfil employee duties set out in section 45 read with section 83 of the PFMA. It is properly pleaded. They plaintiff did not have to plead the law. Complaints relating to circulars and standing instructions lack merit as these instruments are some of several statutory and regulatory instruments the plaintiff rely on. I am satisfied that if the pleaded facts are proved at the trial, the alleged liability on the part of the excipients will be established.

[36] There is a clear typographical error in paragraph 15 of the particulars of claim. The fact that it is repeated at paragraph 59 of the particulars of claim does not purge the error. The excipients did not refute the plaintiff's contention that the relevant sentences should read as follows:

"Had it not been for the actions, or omissions, by the first, second and third defendants LTE would not have been unlawfully appointed in the amount of R 90,950,000.00".

[37] I find that there is no merit to the excipients' complaints. When the particulars of claim are read as a whole, they are not excipiable. No demonstrable prejudice

prevents the excipients from pleading to these allegations. Therefore, this ground of exception falls to be dismissed.

CLAIM 2

[38] Claim 2 lies against Mr Legodi and Mr Killian. It is pleaded at paragraphs 41 to 56 of the particulars of claim. In these paragraphs, the plaintiffs allege that Mr Legodi amended LTE's appointment letter by varying the initial project scope and amount from R90m to R2,2 billion without following the applicable statutory and regulatory provisions. It further alleges that when he reported the variation to National Treasury on 15 December 2015, Mr Legodi wrongly or misleadingly represented that the Minister authorised the emergency procurement for the relevant amount. The statutory and regulatory provisions offended by Mr Legodi's conduct are cited in paragraph 47.

[39] Paragraphs 57 to 61 set out an alternative claim against Mr Killian and Mr Legodi. Mr Killian is alleged to have breached his duties in terms of section 57 of the PFMA and stands to be held liable in terms of sections 57 and 83 of the PFMA for the amount claimed in respect of claim 2. In the alternative, the SIU seeks to hold Mr Killian liable for an amount of R3,3 billion for damages the department suffered as a result of breach of the cited statutory duties.

[40] The excipients complain that claim 2 is not an alternative to claim 1 but rather duplicates it. The plaintiff's contended that on the authority in *Dharumpal*, the alternative claim is not excipiable for the reason contended by the excipients. If a claim is duplicated, it does not follow that the particulars of claim fail to disclose a cause of action and/ or are vague and embarrassing. If the claim is duplicated, it is unclear why the excipients are unable to plead accordingly.

[41] The excipients also complain that it is unclear which tender, contract or "arrangement" (sic) with an initial scope of R90 million is being referred to.

[42] When the particulars of claim are read as a whole, the lack of clarity complained of does not arise. This is the tender amount pleaded in claim 1.

[43] The excipients also complain that in paragraph 57 of the particulars of claim, the plaintiff alleges that as a result of Mr Killian's failure to comply with his statutory and regulatory duties as alleged, the department, alternatively the municipality, further alternatively the LNW suffered damages in the amount of R3,351,339,95 for which it seeks to hold Mr Killian liable. Yet, paragraph 59 refers to a lesser amount of R2,2 billion.

[44] There is no merit to this complaint. Read as a whole, it is clear from the particulars of claim that the initial tender was for an amount of R90 million, later varied to R2 billion. Yet, pursuant to the tender, LNW made payment to LTE and its service providers in the amount of R3,3 million, thus paying R1,1 billion in excess of the contracted amount.

[45] For the reasons set out above, the excipients' grounds of exception in respect of claim 2 are also unsustainable and stand to be dismissed.

CLAIM 3

[46] This claim lies against Mr Legodi and Mr Killian as an alternative claim to claims 1 and 2. The plaintiff alleges that payments in the amount of R3,3 billion were made to LTE and its contractors as a result of the procurement process from in LNW appointed it. Given that the contract amount had been varied to R2,2 billion, LTE was overpaid. The plaintiff further allege that Mr Legodi exceeded his delegated authority for variation of contract amounts in terms of paragraph 9.1 of Treasury instruction Note 3 of 2016/2017 and failed to obtain approval from National treasury for the variation.

[47] The specific allegations against Mr Killian are set out in paragraph 76 to 79 of the particulars of claim. Paragraph 79 to 81 sets out an alternative claim against Mr Killian.

[48] Paragraphs 81 to 83 set out joint and several liability claims against Mr Legodi and Mr Killian in the alternative.

[49] The excipients complain that the monetary claims are duplicated. The plaintiff also failed to allege:

49.1 “why normal circumstances are applicable to this case, when in fact it is common cause, and the court will take judicial notice of, the fact that there was an emergency water crisis situation prevailing in Giyani at the time.”

49.2 that the amounts paid to subcontractors are irrecoverable from them renders the claim vague and embarrassing.

49.3 in what respect Killian acted recklessly as alleged in paragraph 81.2.

49.4 when Mr Killian became aware of the breach alleged in paragraph 78.3.

49.5 facts that would establish a case of joint and several liability are lacking, thereby failing to disclose a cause of action for such a case.

49.6 how Mr Killian abused the supply chain management system.

[50] There is no merit to the above complaints. When the particulars of claim are read as a whole with reference to the statutory and regulatory provisions relied upon by the plaintiff, the basis for its claim is properly pleaded. The particulars of claim in respect of claim 3 are not excipiable. Further, on the authority on *Dharumpal*, claim 3 does not render the particulars of claim excipiable.

CLAIM 4

[51] Claim 4 relates to damages the department suffered as a result of inflated payments made in respect of construction, engineering and project management costs in terms of various deliverables of the project implementation plan which are specifically pleaded.

[52] The excipients complain that the SIU has not alleged:

52.1 To whom the inflated costs were paid.

52.2 Why the inflated costs are recoverable.

52.3 The manner in which the reasonable costs were calculated and by whom.

52.4 Facts supporting the conclusion that the facts are inflated.

52.5 Who benefited from the inflated costs.

52.6 Material facts establishing delictual liability for negligent omission on the part of Killian.

[53] The excipients further contents of paragraph 96.1, 97, to 98, 99-100 and 101 are incomprehensible and therefore vague and embarrassing.

[54] Again there is no merit to these complaints. The excipients misconstrue the plaintiff's claims. As already stated, they are not delictual but statutory. Negligent omission is not a requirement for the statutory claims based on sections 57 and 83 of the PFMA. Neither is it necessary for the plaintiff to plead the omissions complained of. The *facta probanda* in relation to the SIU claim are properly pleaded. The excipients complaint regarding facts not pleaded relate to *facta probantia*, in respect of which the plaintiff bears no duty to plead as they are a matter for evidence.

[55] I also find that there is no ambiguity in paragraph 96.1 of the particulars of claim. This paragraph simply sets out the basis on which the plaintiff alleges that by failing to prevent these excessive payments, Mr Killian as the CFO failed to fulfil his statutory duty to LNW in terms of section 57 of the PFMA and as a result, LNW

incurred irregular, fruitless and/ or wasteful expenditure in terms of section 83(1)(a) and (b) of the PFMA. The same applies to the allegations in paragraph 97, to 98, 99-100 and 101 of the particulars of claim.

[56] Therefore, the grounds of exception in respect of claim 4 also fall to be dismissed.

CLAIM 5

[57] In claim 5, the SIU alleges LNW charged the department management fees which the department, alternatively the municipality paid. Since this payment arises from the excipients' failure to prevent fruitless and wasteful expenditure in terms of section 57 and 83 of the PFMA read together with the applicable regulations and treasury notes, the excipients are liable to the plaintiff in respect thereof. The claims against the excipients are an alternative to the main claim against Mr Legodi.

[58] The excipients complain that the SIU failed to allege any material facts:

58.1 That support the legal conclusion of joint and several liability as alleged.

58.2 As to why the payment of "*implementation fees*" was in any way unnecessary, unlawful or constituted unnecessary fruitless or wasteful expenditure thereby rendering the offending particulars of claim excipiable.

[59] The excipients further complain that the plaintiff aims to recover damages suffered by "alternatively the Municipality" (ad paragraphs 31, 37, 53, 57, 75, 78, 83, 89, 91.1, 95, 101, 106, 108 and 110). The particulars of "the Municipality" does not appear *ex facie* the particulars of claim or any annexures thereto, leaving the impugned amendment vague and embarrassing and it lacks the necessary averments to sustain a cause of action.

[60] There is no merit to this complaint as the main claims to these alternatives are properly pleaded. Therefore, the excipients grounds of exception in respect of claim 5 also fall to be dismissed.

COSTS

[61] The SIU seeks punitive costs against the excipients. It contends that there is no merit to the exception, the excipients have mainly raised technical issues simply to delay the outcome of the action. They have not discharged their onus in terms of case law and have not shown that they will be prejudiced if the offending pleading was allowed to stand. Therefore, it constitutes an abuse of process. Further, the excipients took a year to set it down.

[62] I am not satisfied that the present circumstances warrant the exercise of my discretion to grant a punitive cost order against the excipients. The particulars of claim are set out in a complex manner and not well drafted. They require an extensive examination to understand the SIU's claims. Nothing prevented the SIU to set the exception down for hearing. As the party who is dominus litis, it should conduct the action and take expeditious steps to remove any impediments to its conclusion. It has failed to do so. I am not persuaded that the exception constitutes and abuse of process.

ORDER

1. The exception is dismissed with costs.
2. Considering that the Tribunal goes on recess on 4 December 2023 until 19 January 2024, and that in terms of the Uniform Rules, the recess period constitutes dies non, the excipients shall file their plea by 26 February 2024.
3. The SIU shall file its replication if any by 18 March 2023.

4. The SIU shall make discovery and file its witness statements by 15 April 2024.
5. The defendants shall make discovery and file their witness statements by 15 April 2024.
6. The parties shall hold a pre-trial conference no later than 30 April 2024.
7. Within 5 days of the excipients filing their plea or 22 January 2024, whichever comes last, the Tribunal Registrar shall arrange a trial date with the parties in the second term of 2024.

JUDGE L.T. MODIBA

PRESIDENT OF THE SPECIAL TRIBUNAL

APPEARANCES

Attorney for the Excipients: Izak J. Croukamp, Attorneys Incorporated

Counsel for the Excipients: S.W. Davies assisted by C.P.J Strydom

Attorney for the Respondent: Ms S Zondi, State Attorney, Pretoria

Counsel for the Respondent: CE Puckrin SC assisted by HC Janse Van Rensburg

Date of hearing: 20 November 2023

Date of Judgement: 18 December 2024

Mode of delivery: this judgment is handed down by sending it by email to the parties' legal representatives, loading on Caselines and release to SAFLII and AFRICANLII. The date and time for delivery is deemed to be 10 a.m.

