'Not Reportable'

CASE NO.: I 887/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CLASSIC ENGINES CC **Plaintiff**

and

REINHOLD HASHETU NGHIKOFA **Defendant**

***CORAM*:** **PARKER J**

Heard on: 2011 July 19

Delivered on: 2011 July 29

JUDGMENT

PARKER J: [1] The plaintiff instituted action against the defendant by combined summons. In the particulars of claim, the plaintiff claims the relief on the grounds set out therein. From the pleadings, it seems to me clear that the ground relied on for relief is primarily the defendant's breach of the contract in that the defendant acted –

> 'in bad faith and/or by breaching the fiduciary relationship between the plaintiff and defendant in that he, during or about the period March 2009 to July 2009 and at Oshikango and/or Ondangwa unlawfully and/or alternatively in a fraudulent manner made secret profits from plaintiff's clients and/or caused plaintiff to suffer prejudice, alternatively competed with plaintiff and/or unlawfully appropriated, alternatively stole, alternatively fraudulently handled and misappropriated certain amounts, sums of money and/or stock belonging to plaintiff.

[2] It appears to me to be lucid and intelligible from the statements quoted from the particulars of claim that the plaintiff's claim is based primarily on the said contract.

[3] The defendant has raised exception that the plaintiff's particulars of claim are 'vague and embarrassing'. And why does the defendant so contend? On behalf of the defendant, Mr. Grobler says, 'The particulars of claim in the present instance consist of general accusations pleaded in the alternative, resulting in damages for specific amounts for claims that are not specified with any particulars;' and so the particulars are 'vague and embarrassing' on the ground essentially that the plaintiff neglected and/or refused to furnish the necessary further particulars as requested in respect of paras 7, 8.3, and 8.4 and that the defendant 'is embarrassed to be able to plead thereto.'

[4] I accept Mr. Van Zyl's submission that a party is free to frame his or her exception in any way he or she chooses but the party is bound by the terms in which it is framed and by the issues which the party raises (*Herbstein and Van Winsen. The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5gh edn; p. 642 and the case law and textual authority there cited). That being the case, I should test the exception as framed against the law in order to determine whether the particulars of claim as they stand are excipiable.

[5] For my present purposes, I respectfully distil and apply the following general principles relating to an exception taken on the ground that a pleading is vague and embarrassing (see *Herbstein and Van Winsen*, ibid: pp 634-8):

(1) It is incumbent upon a plaintiff only to plead a complete cause of action which identifies the issues upon which he seeks to rely and on which evidence will be led, in intelligible and lucid form and which allows the defendant to plead to it.

(2) An attack on the pleading as being vague and embarrassing cannot be found on the mere averment of lack of particularity, although a lack of particularity might allow an application in terms of rule 30, which is an entirely different proceeding.

(3) Where a 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, and therefore it is also something which is insufficient in law to support in whole or in part the action or defence.

(4) The test whether a pleading is vague and embarrassing has also been stated to be whether an intelligible cause of action (or defence) can be ascertained.

(5) An exception that a pleading is vague and embarrassing may only be taken when the vagueness and embarrassment strike at the root of the cause of action or the defence.

(6) An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action (or defence) and not its legal validity.

(7) Whether a pleading is vague and embarrassing on the ground of lack of particularity depends on whether it complies with rule 28(4), which requires every pleading to contain a clear and concise statement of the material facts on which the pleader relies, with sufficient

> particularity to enable the opposite party to plead to it. It has been held that it is sufficient if a defendant knows 'adequately' what a plaintiff's case is or 'sufficiently' shows the defendant the case which he is called upon to meet.

[6] I have given considerable thought to the grounds on which the defendant bases the exception and I have considered them against the backdrop of the principles and holdings aforementioned. Having done these, I come to the following reasonable and inevitable conclusions. The plaintiff has pleaded a complete cause of action and the pleading identify the issues on which the plaintiff seeks to rely and the plaintiff has done so in intelligible and clear form and it is those issues that evidence will be led. In these proceedings it is not part of the enquiry whether the plaintiff will succeed in proving the allegations in due course during the trial of the action; that is, the legal validity of the cause of action. (See *July v Motor Vehicle Accident Fund* 2010 (1) NR 368 at 373I-J.) It follows inevitably that I also find that an intelligible cause of action can be ascertained clearly from the particulars of claim (*Factory Investments (Pty) Ltd v Record Industries Ltd* 1957 (2) SA 306 (T) following *Keeley v Heller* 1904 TS 104). I have no doubt in my mind that with the pleadings as they stand, the defendant knows adequately what the plaintiff's case and they sufficiently show the case the defendant is called upon to meet it cannot be seriously argued that the defendant is a stranger to the allegations stated in the particulars of claim.

[7] What are the reasons for the conclusions I have made? They are as follows. The plaintiff sues on a partly written and partly oral agreement made between the plaintiff and the defendant, and the relevant part of the written agreement is annexed to the particulars of claim and marked 'A' in terms of rule 18(6) of the Rules of Court. In paras 5 to 6 the plaintiff sets out allegations of fact

it relies on. In para 7, the plaintiff sets out intelligibly and clearly the reasons why the plaintiff alleges the defendant has breached the contract and the manner in which the plaintiff alleges the defendant breached the said contract. Then in paras 8.1, and 8.3 and 8.4, the plaintiff sets out quantum of damages that have been occasioned as a result. Thus, the plaintiff alleges the quantum of damages suffered; it bears the onus of proving the loss and quantum of damages in due course during the trial. There is nothing vague and embarrassing in the allegations of fact thereanent, including the alleged quantum of damages. It is the burden of the Court to undertake an assessment of the compensation for the alleged breach of the contract. (See Christie, *The Law of Contract in South Africa*, 5th edn: pp 543-5. Whether the plaintiff will succeed in proving the quantum of damages claimed is of no moment in these pleadings. But the fact remains irrefragably that the issues of damages are clearly and intelligibly set out on which evidence will be led.

[8] It follows that in my view the defendant has not established that the statements in the pleadings are capable of one meaning. The presence in a pleading of contradictory averments can give rise to substantial embarrassment only when the averments are not expressed to be in the alternative. (*Herbstein and Van Winsen*, ibid, at p. 636, and the cases there cited). But in the instant proceedings the contradictory averments have been clearly expressed to be in the alternative.

[9] In this regard, in the present proceedings, I hold that it does not carry more than one meaning where the plaintiff alleges, for example, that the defendant breached the contract (1) by acting in bad faith, (2) by acting in bad faith and breaching the fiduciary relationship between the plaintiff and defendant, or (3) by

breaching the fiduciary relationship between plaintiff and defendant. By a parity of reasoning, I also hold that it does not carry more than one meaning for the plaintiff to claim damages on the allegation that it suffered loss in the amount of, for example, N$63,326.65, resulting from (1) cash shortages and cash not banked, (2) cash shortages, or (3) on cash not banked, caused by the defendant. Additionally, from what I have said previously, I find that the statements in the particulars of claim are not embarrassing: the defendant has not established that it cannot be gathered from the statements in the particulars of claim what grounds are relied on. The grounds are clearly and intelligibly stated; and they are comprehensive.

[10] In this regard, I accept Mr. Van Zyl's submission that the defendant's attack on the pleading as 'being vague and embarrassing' is also founded on the averment of lack of particularity. But, as aforesaid, an attack on a pleading as being vague and embarrassing cannot be founded on the mere averment of lack of particularity, although a lack of particularity might allow an application in terms of rule 30, which is an entirely different procedure (*Absa Bank Ltd v Boksbury Transitional Local Council* 1997 (2) SA 415 (W)).

[11] From the aforegoing, I find that it has not been established that statements in the pleadings referred to in the exception are vague and embarrassing within the meaning of rule 23(1) of the Rules. Whereupon, the exception is dismissed with costs; such costs to include costs occasioned by the employment of one instructing counsel and one instructed counsel.

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PARKER J

COUNSEL ON BEHALF OF THE PLAINTIFF:

Adv. Van Zyl

Instructed by: GF Köpplinger Legal Practitioners

COUNSEL ON BEHALF OF THE DEFENDANT:

Mr Grobler

Instructed by: Grobler & Co.