IN THE HIGH COURT OF NAMIBIA

CASE NO:(P) I 3268/2010

In the matter between:

TRUSTCO CAPITAL (PTY) LTD **PLAINTIFF/RESPONDENT**

and

ATLANTA CINEMA CC **1ST DEFENDANT/EXCIPIENT**
JOSEPH JOHANNES BECKER **2ND DEFENDANT/EXCIPIENT**
PETRUS LODEWIKUS LUDWIG **3RD DEFENDANT/EXCIPIENT**
DAMON IAN VAN DER MERWE **4TH DEFENDANT/EXCIPIENT**

SUMMARY

Practice - Pleadings - Exception - On ground that pleading vague and embarrassing - Basic requirements restated – Pleading is vague and embarrassing if either meaningless of capable of more than one meaning – it is embarrassing if it cannot be gathered therefrom what grounds are relied upon which results in an insufficiency in law to support the whole or part of the action or defence - An exception that a pleading is vague and embarrassing strikes at the formulation of the cause and action and not its legal validity -

Practice - Pleadings - Exception - On ground that pleading vague and embarrassing – Will not be allowed unless excipient seriously prejudiced if offending allegations would not be expunged –

Practice - Pleadings - Exception - On ground that pleading vague and embarrassing –

court in deciding exception to apply step by step approach – In each case the court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness - Where a statement is vague it is either meaningless or capable of more than one meaning - The reader must be unable to distil from the statement a clear, single meaning -If there is vagueness in this sense the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him or her by the vagueness complained of - In each case an ad hoc ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he or she is compelled to plead to the pleading in the form to which he or she objects - The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced -The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice -The excipient must make out his or her case for embarrassment by reference to the pleadings alone-

Practice - Pleadings - Exception - On ground that pleading vague and embarrassing – General underlying requirement to non-objectionable pleading set by Rules 18(4) of the Rules of High Court – and in cases of a contractual nature by sub-rule 18(6) of the Rules-

Practice - Pleadings - Exception - On ground that pleading vague and embarrassing – Plaintiff/respondent – in addition to annexing and pleading terms of written loan agreement – pleading - that the loan was advanced to first excipient - that respondent complied with its obligations in terms of the agreement relied upon already prior to the conclusion of the agreement - that the respondent became entitled to demand immediate repayment of all amounts owing in terms of the loan in the event of the first excipient failing to comply with any terms of the loan agreement -that first excipient failed to comply with its obligations in terms of the loan agreement in that it failed to pay the instalments for May, June and July 2010 -that repayment of all due amounts was demanded -that second, third and fourth excipients - who bound themselves - jointly and severally - as sureties and co-principal debtors - in favour of the respondent - in respect of the first excipient's liability arising from the loan agreement relied upon - in such premises– became - jointly and severally liable - with first excipient – for repayment of all due amounts to respondent -

Held – that this was a clear and concise statement of the material facts relied upon by the pleader of the respondent's claim as required by Rules 18(4) and (6) – that such statement was neither meaningless nor capable of more than one meaning – which also disclosed an intelligible cause of action –

Held – If any vagueness created by the complained of allegation that moneys were apparently advanced before the loan agreement was concluded - the court –upon undertaking a quantitative analysis of such embarrassment - findingthat the offending

claim particulars also not embarrassing - as the grounds relied upon by the pleader - for the respondent's claim – could clearly be gathered therefrom -

Held –as excipients unable to show any vagueness amounting to embarrassment and as there was no embarrassment on the pleadings there can also be no prejudice if the excipients would be required to plead to the claim formulation in this instance -

Held – that excipients failed to discharge their onus - exception dismissed with costs -

IN THE HIGH COURT OF NAMIBIA CASE NO:(P) I 3268/2010

In the matter between:

TRUSTCO CAPITAL (PTY) LTD **PLAINTIFF/RESPONDENT**

and

ATLANTA CINEMA CC — **1ST DEFENDANT/EXCIPIENT**
JOSEPH JOHANNES BECKER — **2ND DEFENDANT/EXCIPIENT**
PETRUS LODEWIKUS LUDWIG — **3RD DEFENDANT/EXCIPIENT**
DAMON IAN VAN DER MERWE — **4TH DEFENDANT/EXCIPIENT**

CORAM: GEIER, J

Heard: 12 June 2012
Delivered: 12July2012

JUDGMENT:

GEIER,J: [1] By way of a series of exceptions - the defendant's - to thisaction - have managed to place a number of obstacles in the plaintiff's way to reclaim repayment of a loan of N$12 000 000.00.

[2] The action herein was instituted during September 2010. By June 2012 the defendants had not yet pleaded.

[3] It should also be mentioned that the plaintiff - in response to an earlier exception – did for the first time amend its claim particulars during March 2011.

[4] During August 2011 the defendants raised a further exception thereto in response to which the plaintiff amended its particulars of claim further during November 2011.

[5] The defendants nevertheless continued to contend that this further amendment did also not address their cause for complaint and hence this exception was taken further and now forms the subject matter of this hearing.

THE HISTORY OF THE PLEADINGS

[6] The offending pleadings were initially styled as follows :

> " *The plaintiff's claim against the first defendant is for specific performance, and is based on a loan agreement entered into and between the plaintiff and the first defendant. The written memorandum containing the terms and conditions of the loan agreement, also makes provision for surety by the second, third and fourth defendants for the loan to the first defendant.*
>
> *The written agreement is annexure POC1 to the plaintiff's particulars of claim."*

[7] Upon amendment the plaintiff the relied upon particulars of claim now read :

> " *On 18th May 2009 and at Windhoek, the plaintiff (as "lender") entered into a written loan agreement with the first defendant (as "borrower"), the material terms whereof were the following –*
>
> *7.1 the plaintiff lend(t) and advanced to the first defendant the amount of N$12 million (twelve million Namibian dollar);*
>
> *7.2 the loan would be repayable over a period of 240 (two hundred and fourty) months in equal instalments, the first of which would be made on 30 September 2009 and subsequently on the 30th day of each month hereafter, until the full amount of capital and interest would be paid;*

[8] In respect of the advancement of the monies, the plaintiff pleaded:

> "*6A. On 24 March 2009, the plaintiff advanced to the first defendant the monies, being the amount of N$12 million as per the aforesaid loan agreement in that it paid on behalf of the first defendant, to Trustco Group International (Pty) Ltd, the amount of N$12 million, by virtue of the provisions of clauses 4.7 and 4.8 of the written loan agreement,*

which provides as follows:

> "*it is specifically recorded that the loan amount is to be utilized to purchase the Itumba Restaurant and other moveable assets and that the loan amount may not be used otherwise. If the Borrower fails to make any payment on due date or is otherwise in breach of this Agreement or at any stage alienates the business or transfers its membership, to any person without the prior written consent of the Lender or falls behind with any payment the whole amount then will become payable."*

[9] The plaintiff then pleaded that the first defendant failed to comply with the obligations in terms of the loan, in that it failed to make repayments for the months May 2010, June 2010 and July 2010.

[10] Ultimately the plaintiff claimed payment of the amount of N$13,636,862-52 together with other ancillary relief from the defendants, jointly and severally.

[11] To these amended particulars of claim, and during August 2011, the defendant raised a further exception on the basis that same were vague, embarrassing and hence excipiable.

[12] Pursuant to such exception the plaintiff amended its particulars of claim further during November 2011. The impact of this amendment is not relevant for purposes of this decision.

[13] As the excipient however took the view that also this further amendment did not remedy all the causes of the complaint raised by the defendants in their exception,in that it was now contended that certain grounds of the objection, raised by the excipients, remained which would further sustain the exception.

THE EXCIPIENTS' ARGUMENT

[14] The crux of the exception that remainedwas :

1. "*thatthe relied upon annexure "POC1" was -ex facie the pleadings - and the document itself - only concluded on 18 May 2009;*

2. *clause A of the agreement annexed as "**POC1**" expressly provides that 'the lender hereby lends to the borrower the sum of N$ 12 million';*

3. *the amended paragraph 6A of the amended particulars of claim dated 22 November 2011 do not address the ... central concern … in that the allegation remains that on 24 March – and before the loan agreement was concluded – the plaintiff advanced to the defendant "the monies" being the amount of N$ 12 million, "as per the aforesaid loan agreement";*

4. *it was thus contended on behalf of the excipients that the plaintiff's current pleading even as amended read with the annexure thereto failed to state -*

    '*Whether the monies referred to in paragraph 6A of the amended particulars of claim dated 22 November 2011were advanced by the plaintiff in terms of the written agreement relied upon in paragraph 6 of the plaintiff's amended particulars of claim dated 22 November 2011 and if so, on what basis (if any) the said amount was "advanced" prior to the date of conclusion of POC1 (moreover considering the wording of clause A thereof);*

    If not, on what basis (if any), the plaintiff allegedly advanced to the first defendant the amount of N$ 12 million. No basis is disclosed in the pleadings for the "advance" of the aforementioned amount during March 2009, and the plaintiff's most recent (futile) attempt to cure the grounds of concern raised in the August exception have simply lent credence to the February exception. In so far as the plaintiff relies on an agreement regarding the alleged advance (which, in any event, does not appear from the pleadings as they presently stand), the plaintiff has materially failed to comply with the peremptory provisions of Rule 18(6)."

[15] It was on these grounds contended that in the result the excipients are and remain prejudiced by the vague and embarrassing nature of the plaintiff's pleadings, '*same meriting the raising and pursuance of the present exception*'.

THE APPLICABLE LAW

[16] In support of this conclusion the court was referred to '*Beck's Theory and Principles of Pleadings in Civil Actions*' where the following is stated:

> "*A pleading may disclose a cause of action or defence but may be worded in such a way that the opposite party is prevented from clearly understanding the case he or she is called upon to meet. In such a case the pleading may be attacked on the ground that it is vague and embarrassing. "A man who has an excipiable cause of action is in the same position as one who has no cause of action at all."*
>
> *and further –*
>
> *In any case an exception on the ground that the pleading is vague and embarrassing will not normally be upheld unless it is clear that the opposite party would be prejudiced in his defence or action as the case might be.*
>
> *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 the grounds of the cause of action. In other words he must make out a case of embarrassment by reference to the pleadings alone . . . 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.*
>
> *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.

[W]here a statement is vague, it is either meaningless, or capable of more than one meaning. It is embarrassing in that it cannot be gathered there from 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."[1]

[17] The court was also referred to '*Erasmus Superior Court Practice'* from which the following relevant extracts were quoted:

"*An exception that a pleading is vague and embarrassing is not directed to a particular paragraph within a cause of action: it goes to whole cause of action, which must be demonstrated to be vague and embarrassing. The exception 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 result in embarrassment to the defendant. An exception that a pleading is vague and embarrassing strikes at the formulation of the cause and action and not its legal validity.*

An exception that a pleading is vague and embarrassing will not be allowed unless the excipient will be seriously prejudiced if the offending allegations will not be expunged... The test applicable in deciding anexception based on vagueness and embarrassment arising out of lack of particularity can be summed up as follows[2]*:*

1. *In each case the court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. Where a statement is vague it is either meaningless or capable of more than one meaning. To put it at its simplest: the reader must be unable to distil from the statement a clear, single meaning.*

2. *If there is vagueness in this sense the court is then obliged to undertake a*

1 At paragraph 8.1 page 132 ff and the authorities referred to there – see also the judgment by Parker J in *Classic Engines cc v Ngihikofa* reported at http://www.saflii.org/na/cases/NAHC/2011/229.html at para [5]

2 At p B1 -154 (Service 37,2011)

quantitative analysis of such embarrassment as the excipient can show is caused to him or her by the vagueness complained of.

3. *In each case an ad hoc ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he or she is compelled to plead to the pleading in the form to which he or she objects. A point may be of the utmost importance in one case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail.*

4. *The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.*

5. *The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.*

6. *The excipient must make out his or her case for embarrassment by reference to the pleadings alone.*

7. *The court would not decide by way of exception the validity of an agreement relied upon or whether a purported contract may be void for vagueness."*[3]

[18] It was thus in conclusion submitted that the plaintiff's pleadings read with annexure "POC1" even after amendment:

1. "*remained inherently defective;*

2. *taint the Plaintiff's whole cause of action;*

3. *contain inconsistent, ambiguous and vague allegation;*

4. *are vague and embarrassing;*

5. *seriously prejudice defendants (also detracting from their rights in terms of Article 12 of the Namibian Constitution)inter alia inthat it remains unclear as to*

3 See *Erasmus Superior Court Practice* at pages B1-153 to B1-154 A (service 37-11)

the case which the Defendants are required to plead to and meet and as to the full and proper basis on which the plaintiff purports to pursue its actions against the defendants'; and

6. *therefore areexcipiable."*

THE RESPONDENT'S ARGUMENT

[19] Respondent's counsel submitted that the grounds of the exception, in their analysis, seemed to be that:

"a) *That the written loan agreement (annexure POC1) was concluded on 18 May 2009;*

b) that POC1 provides that the lender "hereby lends" to the borrower the amount of N$12 million;

c) that the plaintiff pleads that the monies were advanced on 24 March 2009 – thus before the written agreement was concluded.

The written agreement, in clause 11.3 thereof, provides:

"*This Agreement supersedes the Agreement entered into and between Trustco Capital (Pty) Ltd and Joseph Becker, PetrusLodewikus Ludwig and Damon Ian Van der Merwe acting on behalf of a Close Corporation to be formed and signed on 24 March 2009."*

It is clear that the sequence of events herein were that –

a) on 24 March 2009, the plaintiff advanced an amount of N$12 million;

b) on 18 May 2009, the parties agreed that the monies so advanced were advanced as a loan to the first defendant and that the second, third and fourth defendants are sureties in respect of the loan.

The aforesaid might be an unusual sequence of events, but there is nothing about it which can be said to be "meaningless" or vague and/or embarrassing. An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity.[4]

The test applicable in deciding an exception based on vagueness and embarrassment arising out of lack of particularity, is whether the reader is unable to distill from the statements/ averments in the pleading a clear and single meaning.[5]"

[20] It was submitted further that the question to be answered was whether the Defendants could actually sensibly plead to the amended Particulars of Claim. The following possible ways in which the Defendants might formulate a plea were suggested by way of example :

"*that the monies were advanced, but that it was not a loan;*

that the monies were not advanced / that they are not sureties;

that the loan agreement was a simulated agreement;

that the substratum of the agreement has since fallen away;

that there was misrepresentation when the agreement was entered into…".

[21] It was thus submitted that '*the plaintiff's case was clear that it was a plain claim for specific performance in respect of monies lend and advanced, and on which ... the first defendant had defaulted in its repayment - this default lies in the fact that the first defendant stopped to paying back the loan after having made only some repayments - the second, third and fourth defendants as sureties, are simply jointly and severally liable with the first defendant –that it was therefore more than abundantly clear what*

4 *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 268F

5 *Quinlan v MacGregor* 1960 (4) SA 383 (D) at 393 E-H

case the excipients needed to meet and that there was thus no merit in the defendant's exception and that it therefore stood to be dismissed with costs'.

[22] For purposes of deciding this exception I will now turn to - and apply - the step by step approach to deciding exceptions - based on vagueness and embarrassment, arising out of lack of particularity –as conveniently summarised in *Erasmus Superior Practice*[6] - as set out above.

DO THE PLEADINGS LACK PARTICULARITY TO AN EXTENT AMOUNTING TO VAGUENESS

[23] In this regard it must firstly be kept in mind thata statement is vague if is either meaningless or capable of more than one meaning ie.the reader must be unable to distil from the statement a clear, single meaning. In this regard the requirements of Sub-Rule 18(4) of the Rules of High Court would be of application.[7]

[24] Secondly it is also clear from the pleadings that the respondent relies on an agreement. In this regard the requirements of Sub- Rule(6)[8] of Rule 18 of the High Court would – as a minimum requirement –also come into play.

[25] It appears immediately that the entire agreement relied upon by respondent was annexed to the complained of pleading. It thus appeared further that the agreement relied upon was written, that it was entered into at Windhoek and that it states by whom it was concluded. The requirements set by Rule 18(6) were therefore substantially complied with.

[26] It appears also from the claim formulation that the material facts, upon which the pleader relied – are - in addition to pleading and annexing the contract –and the terms relied upon - :

1. that the money - being N$ 12 000 000.00 - was advanced to first excipient on 24 March 2009; ie. that respondent complied with its obligations in terms of the agreement relied upon already on that date;

6 At p B1 -154 (service 37/2011) to pB1-154A (Service 35/2010)

7 '*Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim … with sufficient particularity to enable the opposite party to reply thereto'.*

8 '*A party who in his pleading relies upon a contract shall state whether the contract is written or oral, where and by whom it was concluded, and if the contract is written a true copy thereof or the part relied on in the pleadings shall be annexed to the pleading'.*

2. that the respondent became entitled to demand immediate repayment of all amounts owing in terms of the loan in the event of the first excipient failing to comply with any terms of the loan agreement;

3. that first excipient failed to comply with its obligations in terms of the loan agreement in that it failed to pay the instalments for May, June and July 2010;

4. that repayment of all due amounts– being N$ 13 636,862.52 - was demanded;

5. that second, third and fourth excipients - who bound themselves - jointly and severally - as sureties and co-principal debtors - in favour of the respondent - in respect of the first excipient's liability arising from the loan agreement relied upon - in such premises– became liable - jointly and severally - with first excipient – for repayment of all due amounts – being N$ 13 636,862.52 - to respondent.

[27] This seems to be a clear and concise statement of the material facts relied upon by the pleader of the respondent's claim as required by Rule 18(4).

[28] It also cannot be said that such statement is meaningless or capable of more than one meaning.

[29] In my view a reader is able to distil from the claim formulation that the claim instituted by respondent against the excipients relates to the enforcement of the terms of a written loan agreement – entered into between the parties – at Windhoek - due to the non-compliance with its terms by the other party, the excipients. That to me seems to be the clear and single meaning which must be assigned to the claim particulars relied upon, which therefore disclose an intelligible cause of action.[9]

IS THERE ANY EMBARRASSMENT

[30] The high- watermark of the exception arises from the unusual facet of this case in that – in this instance – moneys were apparently advanced before the loan agreement was concluded.

9 See also:*Keeley v Heller* 1904 TS 101 at 103 and *Factory Investments (Pty) Ltd v Record Industries Ltd* 1957 (2) SA 306 (T) at p310 B - C

[31] If there is any vagueness created by this – which I doubt - the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show his cause to him or her by the vagueness complained of.

[32] I have already found that the offending claim particulars are not vague, in the sense that they are meaningless or because more than one meaning can be ascribed to them. They are also not embarrassing in that it can – quite clearly - be gathered - from them - what grounds are relied on by the pleader. The grounds are clear –

> "… *I have loaned you moneys - and you - the defendant are in breach of our agreement – in terms of which you now have to repay me … ". Does it matter in such scenario when the moneys were advanced? Surely not!*[10]

[33] Thus even if the first question would be answered in the excipients favour - they must fail on the second leg - ie.on the quantitative analysis of the embarrassment - and in terms of which no real embarrassment can be shown by them.

IS THERE PREJUDICE

[34] Can there be prejudice to the excipients if they would be compelled to plead to the pleading in the form to which they object?

[35] The onus was always on the excipients to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.

[36] The excipients had to make out their case for embarrassment with reference to

10 *Without deciding this issue I take into account here also that the parties 'freedom to contract' maybe limited in certain instances by the operation of limiting rules which may flow from non-statutory- or statutory law - (see generally' The Principles of the Law of Contract', 6th Ed by Prof AJ Kerr at p130) –that counsel for the Excipients did not point out that any such limitations would apply in this instance where the claim relates to a so-called 'loan for consumption' (see for instance' Wille's Principles of South African Law' - 9th Ed - at p948 – 950) and in respect of which all the essential allegations to be made in claim particulars have been pleaded – ie. a) the loan agreement; b) that money was advanced in terms of the agreement; and c) that the loan is repayable, (see for instance' Amler's Precedents of Pleadings' – 7th Ed – by LTC Harms)*

the pleadings alone.

[37] I have already found that they were unable to show any vagueness amounting to embarrassment. As there is thus no embarrassmenton the pleadings there can also be no prejudice if the excipients would be required to plead to a straight forward claim formulation.

[38] The excipients have thus failed to discharge their onus.It follows that the exception cannot be upheld.

COSTS

[39] Both parties sought a costs order, which follows the result, such costs to include the costs of two instructed- and one instructing counsel.

[40] While I have no quarrel with awarding a costs order that will follow the result I fail to understand – save for the factor of the claim amount - on which other basis such costs should include the costs of two instructed- and one instructing counsel? The nature of the subject matter of this exception was not complex, or one which required the special forensic skills of senior counsel. In my view any practising legal practitioner – should have been able to argue this matter. Accordingly I decline to exercise my discretion in this regard.

[41] In the result the exception is dismissed with costs. The excipients are directed to file their further pleadings within 15 days of this order.

_____

GEIER, J

ON BEHALF OF THE APPLICANT: Adv. R Heathcote, SC

Adv. H Schneider

Instructed by: Van der Merwe-Greef Inc.

ON BEHALF OF THE RESPONDENT :Adv. N Graves, SC

Adv. D Obbes

Instructed by:LorentzAngula Inc.