REPUBLIC OF NAMIBIA NOT / REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 553/2009

In the matter between:

1.1.1.1. **ARDEA INVESTMENTS (PTY) LTD**

PLAINTIFF

and

NAMIBIA PORTS AUTHORITY **DEFENDANT**

Neutral citation: *Ardea Investments (Pty) Ltd v Namibia Ports Authority (I 553/2009*) [2013] NAHCMD 107 (19 April 2013)

Coram: Schimming-Chase, AJ
Heard: 9 April 2013
Delivered: 19 April 2013

Flynote: Practice – Exception – On ground that pleading is vague and embarrassing – Basic requirements restated – Pleading is vague and embarrassing if either meaningless or 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 based on the fact that a pleading is vague and embarrassing strikes at the formulation of the cause and action and not its legal

validity and an excipient will therefore only succeed if he or she can show serious prejudice in the event that the allegations are not expunged - The court will in deciding exception apply a step by step approach.

Summary: The plaintiff in its particulars of claim relied on a partly oral and partly written agreement. In relation to the oral portion of the agreement the plaintiff set out a cause of action based on a contract of deposit (*depositum*). The written portion of the agreement annexed to the particulars of claim did not support the cause of action pleaded in the particulars of claim because it related to a contract for the provision of berthing space by the defendant. The defendant delivered a request for further particulars with a notice in terms of Rule 23(1) calling for the removal of the cause of complaint. The plaintiff sought to remove the cause of complaint in the further particulars by annexing the correct written portion of the agreement. The plaintiff specifically stated in its further particulars that the incorrect written portion of the agreement had been initially annexed. The defendant then proceeded to set the exception down. Four grounds of exception were raised. The first ground of exception related to the incorrect agreement initially attached. The fourth ground of exception was that the correct agreement had been impermissibly attached in the further particulars contrary to the provisions of Rule 28 which required the plaintiff to amend the particulars of claim. The third exception related to the 'correct' agreement attached to the further particulars in particular to a provision in that agreement that the rates to be charged by the defendant for the storage of the plaintiff's goods should be confirmed in writing and that the defendant intended that there be no consensus between the parties until written acceptance of the offer was received, which was not dealt with in the particulars of claim. The second ground of exception was that the plaintiff purported to rely on a different agreement relating to different transactions. It was further argued that the parties to the agreement were also different.

Held: In respect of the first ground of exception, it was clear that the agreement initially attached to the particulars of claim did not support the plaintiff's claim as pleaded. However, the plaintiff sought to attach the correct written portion of the agreement. The contention that the particulars of claim were vague and

embarrassing because the correct written portion of the agreement was impermissibly attached to the further particulars as the procedure in Rule 28 was not followed cannot be sustained. That was a purely procedural objection that should have been raised as an irregular proceeding in terms of Rule 30. This the defendant did not do. In any event the attachment of the correct agreement to the further particulars created no prejudice to the defendant. Not every non-compliance with a rule of court automatically creates prejudice. The dictum in China State Construction Engineering Corporation (Pty) Ltd v Pro Joinery CC[1] and Gariseb v Bayerl[2] in relation to applications in terms of Rule 30 applied.

Held: With regard to the third ground of exception, the failure to indicate in the particulars of claim whether the rate had been confirmed in writing did not render the pleading vague and embarrassing. It did not render the particulars meaningless or capable of more than one meaning nor could it be said that it could not be gathered what grounds were relied upon by the plaintiff is support of its claim. It could also not be said that the lack of written confirmation of storage rates meant that the defendant intended that there be no consensus between the parties until a written acceptance of the 'offer' is received. The issue related merely to acceptance of rates. In any event, it can be implied from paragraph 4.3 of the particulars of claim together with the correct written portion that the rate was agreed, and if not, this aspect could be dealt with in the defendant's plea. Again there was no prejudice to the defendant.

Held: As regards the second ground of exception, bearing in mind that the court found that the correct agreement was permissibly attached, the written portion of the agreement together with the particulars of claim did not create a different agreement or a different transaction. *Ex facie* the pleadings are the fact that a partly oral and partly written agreement is pleaded, there is sufficient correlation between the particulars of claim and the written portion that can be clarified in evidence. However, as regards the parties to the agreement, it is clear from the written portion that the document was addressed to the same person alleged to

[1]2007 (2) NR 675 (HC) at para [14] and [15].

[2]2003 NR 118 (HC) at 121I-122B.

have represented the plaintiff in the conclusion of the agreement in the further particulars. But the document was addressed to the same person as the managing director of a different entity and not the plaintiff. It was accordingly not clear with which entity the plaintiff concluded the agreement. The pleading was clearly capable of more than one meaning and the defendant was prejudiced as a result. Thus the second ground of exception succeed in this aspect only and the plaintiff was directed to remove the cause of complaint within 14 days.

ORDER

(a) The second ground of exception succeeds and the particulars of claim are vague and embarrassing insofar as it is unclear whether the plaintiff or another entity concluded the agreement with the defendant.

(b) The plaintiff is directed to remove the cause of complaint within 14 days.

(c) The plaintiff is ordered to pay costs, such costs to include the costs of one instructing and two instructed counsel.

JUDGMENT

SCHIMMING-CHASE, AJ

(b) This matter concerns four exceptions raised by the defendant to the plaintiff's particulars of claim on the grounds that they do not disclose a cause of action, alternatively are vague and embarrassing. The exceptions were raised subsequent to the delivery on behalf of the defendant of a request for further particulars incorporating a notice in terms of Rule 23(1). It is common cause that the particulars of claim were not amended and that the plaintiff sought to remove the causes of complaint through the delivery of further particulars, which

led to the set down of the plaintiff's exceptions.

(c) In dealing with each of the exceptions raised, it is necessary to provide a short background relating to the plaintiff's cause of action as well as the sequence of events leading to the exception.

(d) The plaintiff's claim against the defendant is based on a partly oral and partly written agreement concluded during June 2005 in terms of which the defendant stored the plaintiff's imported cement at its premises in Walvis Bay. The plaintiff's allegations are in essence that it delivered cement to the defendant for purposes of safe custody and further that the cement was to be restored upon demand. It is common cause that the terms of the agreement relate to a contract of *depositum.* The written portion of the agreement containing *inter alia* the names of the persons who represented the parties was attached to the particulars of claim as annexure "A".

(e) However, annexure "A" to the particulars of claim, namely the written portion of the agreement, did not contain the terms as pleaded in the particulars of claim. This written document, titled "commercial agreement" concluded during August 2005 related to the provision by the defendant to the plaintiff of berthing space for the plaintiff's vessels at the port of Walvis Bay.

(f) In a request for further particulars incorporating the Rule 23(1) notice the defendant raised *inter alia* the following aspects:

(a)

(a) The written portion of the agreement was concluded during August 2005 and not during June 2005 as alleged in the particulars of claim. The plaintiff was informed that its particulars of claim were vague and embarrassing and was afforded the requisite time to rectify this aspect.

(b) It was pointed out that the written portion of the agreement contained a clause providing that the agreement constituted the whole agreement between the parties and that no "change and/or

alteration of this agreement is binding on either of the parties, unless done in writing and signed by both parties". Insofar as reliance was placed on any oral term of the agreement, the plaintiff was given notice that its particulars of claim were vague and embarrassing, alternatively did not disclose a cause of action, and was afforded the opportunity to remove the cause of complaint.

(c) The plaintiff was further requested to indicate who represented the parties when the written agreement (annexure "A") was concluded, and who represented the parties when the oral agreement was concluded.

(g) The plaintiff in its further particulars annexed a different "agreement", as annexure "A1". It was specifically stated in the further particulars that "the incorrect annexure "A" " was attached to the particulars of claim and that "the correct annexure is annexed hereto and marked "A1", and substitutes annexure "A" to the plaintiff's particulars of claim. The defendant is requested to plead to annexure "A1" ". The plaintiff also provided the names of the persons who represented the parties in the conclusion of the agreement.

(h) For ease of reference, the contents of annexure "A1" to the further particulars are set out in full:

"Mr Z Gowaseb
Managing Director
CP Whalerock Cement
PO Box 10899
WINDHOEK
NAMIBIA

RATES: CEMENT IMPORTS IN BREAKBULK

Dear Sir

Your request for the rate of imports of cement in bags of 1,5 ton bags

through the Port of Walvis Bay as per our discussion is noted:

The rate is based on your indication of shipments of 20,000-30,000 tonnes via the Port of Walvis Bay.

The charges for the port services include an all inclusive rate:

All inclusive rate	N$50.00 per ton
Storage	N$12.95 per square metre, per month

The rate includes landing, base tariff, haulage, handling, crane hire, but excludes VAT and overtime.

The validation of this rate is until 31 December 2005 and validity depends on your written confirmation thereof.

Yours sincerely
(signature)
JOHNY M. SMITH
MANAGER: SALES & SERVICE"

(i) In the result, the defendant raised four exceptions to the plaintiff's particulars of claim on the grounds that they do not disclose a cause of action, alternatively are vague and embarrassing. They are summarised below.

(b)

(a) First ground

The terms set forth in paragraph 4 of the plaintiff's particulars of claim [3] do not correspond with the contents of annexure "A" to the particulars of claim, which *ex facie* its contents, is a commercial agreement and does not contain any of the terms set forth in that paragraph.

[3]The contract of *depositum*.

(b) Second ground

In the further particulars provided by the plaintiff, the plaintiff purports to rely, in support of its claim against the defendant on a different agreement, a copy of which is impermissibly attached to the further particulars. The two annexures ("A" to the particulars of claim and "A1" to the further particulars) relate to two different transactions and subject matters. Thus, as the pleadings stand, the plaintiff relies on annexure "A" to the particulars of claim for its cause of action, yet in the further particulars the plaintiff seeks to rely on a different agreement.

(c) Third ground

Insofar as reliance may be placed on annexure "A1" to the further particulars (which is disputed by virtue of the first and second grounds above), the document *ex facie* its contents, does not constitute an agreement. The last sentence of the document provides that:

> "the validation of the rate is until 31 December 2005 and validity depends on your written confirmation thereof."

The exception further stated that:

> "Annexure "A1" to the further particulars therefore, in law, does not constitute an agreement. It is apparent from annexure "A1" to the further particulars that the defendant intended that there be no consensus between the parties until a written acceptance of the offer that is set out in annexure "A1" to the further particulars is received. No written confirmation is attached to the particulars of claim or the further particulars, nor is any allegation made of the written acceptance of annexure "A1" to the further particulars."

The plaintiff was informed that as a consequence the particulars of claim were vague and embarrassing, alternatively lacked the necessary averments to sustain a cause of action.

(d) Fourth ground

Rules 28(1) and (2) of the Rules of Court, require from any party deciding to amend any pleading filed in connection with any proceeding, to give notice to all other parties to the proceedings of his or her intention to so amend and to in the notice state that unless objection in writing to the proposed amendment is made within 10 days, the party giving notice will amend the pleading in question accordingly. The plaintiff has by way of the further particulars provided through the purported introduction of annexure "A1" to the further particulars impermissibly sought to amend its particulars of claim without following the procedure prescribed by Rule 28.

(j) It is apparent from the pleadings including the further particulars that a cause of action is set out in the particulars of claim. It remains to be determined whether the particulars are vague and embarrassing. The test for determining whether a pleading is vague and embarrassing was succinctly set out in Nasionale Aartappel Koöperasie Bpk v PricewaterhouseCoopers Ingelyf en Andere [4]. A pleading is vague and embarrassing if it is capable of more than one meaning or if it is not reasonably clear what the pleading means. The necessity to plead was emphasised and it was stated that particulars of claim should be phrased so that a defendant may reasonably be required to plead thereto.

(k) In Trope v South African Reserve Bank and Another[5] the relevant considerations to be applied in determining whether a pleading was vague and embarrassing were set out as follows:

[4]2001 (2) SA 790 (T) at 797J–798A.

[5]1992 (3) SA 208 (T) at 211B-C.

"An exception to a pleading on the ground that it is vague and embarrassing involves a two fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced. (Quinlan v MacGregor 1960(4) SA 383 D at 393 E-H). As to whether there is prejudice, the ability of the excipient to produce an exception – proof plea is not the only, nor indeed the most important, test – see the remarks of Conradie J in Levitan v Newhaven Holiday Enterprises CC. 1991(2) SA 297 (C) at 298 G-H. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not be taken by surprise may well be defeated".

(l) In a recent judgment of this court, in Trustco Capital (Pty) Ltd v Atlanta Cinema CC and 3 Others, [6] Geier J summarised the legal principles relating to exceptions to pleadings on the grounds that they are vague and embarrassing as well as the onus on the excipient and relied in the main on "Beck's Theory and Principles of Pleadings and Civil Actions" [7] and "Erasmus Superior Court Practice". [8] At paragraphs [16]-[17] the following was set out:

(m)

(n) "[16] 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.

(o)

(p) 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.

(q)

(r) In the first place when a question of insufficient particularity is

[6]Unreported delivered on 12 July 2012 in case number I 3628/2010.

[7]6th Ed Butterworths at para 8.1 p 332 ff.

[8]At B1-154 (Service 37, 2011).

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.

(s)

(t) The object of 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 pleading.

(u)

(v) [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.

[17] An exception that a pleading is vague and embarrassing is not directed to a particular paragraph within a cause of action: it goes to the 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 of 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 an exception based on vagueness and embarrassment arising out of lack of

particularity can be summed up as follows:

(a) 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.

(b) 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.

(c) 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.

(d) The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.

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

(f) The excipient must make out his or her case for embarrassment by reference to the pleadings alone.

(g) 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."

(w) Having set out the applicable legal principles I deal with the exceptions

raised. I propose for purposes of this judgment and the ultimate finding on the exceptions to firstly deal with the first and fourth grounds and thereafter I will deal with the third followed by the second ground.

(x) As stated above, it is clear that the particulars of claim read with annexure “A” (initially annexed) are vague and embarrassing because annexure “A” deals with a written commercial agreement relating to the provision of berthing space by the defendant to the plaintiff, whereas the terms of the oral portion of the agreement relate to a contract of deposit, which do not correspond with the terms of annexure “A”. However, the plaintiff did attach annexure “A1” to the further particulars, which it specifically stated replaced annexure “A”, which was incorrectly attached. This renders the first ground largely academic because the plaintiff clearly stated in the further particulars that it no longer relied on annexure “A”. In this regard the fourth ground raised by the defendant is that annexure “A1” was impermissibly introduced in the further particulars and that the plaintiff was required to amend its particulars of claim by following the procedure prescribed by Rule 28. I hold the view that this fourth ground is clearly a procedural objection, which should have been taken in terms of Rule 30 of the Rules of Court on the grounds that the procedure followed by attaching a different contract to the further particulars without filing a notice to amend was irregular. The Rule 30 procedure is essentially designed to object to irregularities of form and not substance.

(y) Although Mr Tötemeyer SC appearing for the defendant sought to argue that this was an instance where a notice in terms of Rule 23(1) or a notice in terms of Rule 30 would both be apposite, I am constrained to disagree with the submission. The plaintiff in annexing the correct written portion of the agreement without a notice to amend may have followed an incorrect procedure. That procedure did not render the particulars of claim vague and embarrassing. It did not result in the particulars of claim lacking particularity to the extent that they are vague, or capable of more than one meaning, or not reasonably clear even though Rule 18 was not strictly followed. The defendant’s complaint that the Rule 28 procedure was not followed thus rendering the particulars excipiable can accordingly not be sustained. The

Rule 30 procedure was the correct procedure to have been followed and this was not done. The plaintiff simply attached the "correct" contract in any event and this was stated in the further particulars.

(z)

(aa) In China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC[9] Silungwe J made a number of pertinent observations regarding the application in terms of Rule 30. I illustrate some of the observations. Where an irregular step has been taken, it cannot be ignored but application should be made to set the proceeding aside. The court has a discretion to refuse to set the proceeding aside, even if an irregularity is established. The general rule is that in a proper case, the court is entitled to overlook any irregularity which does not occasion any substantial prejudice[10]. Prejudice is a prerequisite for success in an application in terms of Rule 30. Where an irregular step or proceeding causes no prejudice, the best thing for a party to do would be to ignore it, because a Rule 30 application will in any event be dismissed.

(bb)

(cc) The defendant did not follow the Rule 30 procedure. In my view, the objection is unnecessarily technical and formalistic in the circumstances. In any event, I see no prejudice to the defendant as a result of the procedure followed by the plaintiff. Not every non-compliance with a rule of court automatically results in prejudice to the other party. Thus the first and fourth grounds of exception fail.

(dd) As regards the third ground, I point out for ease of reference, that a contract of deposit is in essence a contract whereby one person delivers a thing to another for the purpose of safe custody and the latter gratuitously or for a reward undertakes to take care of the thing and restore it on demand. [11] The defendant, relying on the contents of annexure "A1" contends that without written validation of the rate in the particulars of claim there is no agreement in

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[9]2007 (2) NR 675 (HC) at para [14]-[15] applied in Namibia Development Corporation v Aussenkehr Farms 2010 (2) NR 703 at para [32] and the authorities collected there.

[10]Gariseb v Bayerl 2003 NR 118 (HC) at 121I-122B applied in NDC v Aussenkehr Farms *supra.*

[11]Joubert LAWSA, 2nd Ed Vol 8 para 174.

law. In my view, the failure to plead that the rates were validated in writing does not render the particulars excipiable. The particulars as they stand are not rendered meaningless or capable of more than one meaning, nor can it be said that it cannot be gathered what grounds are relied upon by the plaintiff in its particulars of claim. It can also not be said that the lack of written confirmation of the storage rate meant that the defendant intended that there be no consensus between the parties until a written confirmation of the 'offer' is accepted. The issue relates merely to the acceptance of rates, not the acceptance of an offer to store the plaintiff's goods. In any event, it can also be implied from paragraph 4.3 of the particulars of claim read together with annexure "A1" to the further particulars that the rate was agreed and if not, this aspect could be dealt with in the defendant's plea. To my mind there is also no prejudice to the defendant. In this regard I agree with the submission by Mr Heathcote SC appearing for the plaintiff that this ground of exception amounts to an attempt to elevate the relevant sentence in annexure "A1" to a condition. In the result, this ground also fails.

(ee) I deal with the second ground of exception on the basis of the particulars of claim read with annexure "A1" to the further particulars. It was argued by Mr Tötemeyer SC appearing for the defendant that annexure "A1" to the further particulars read with the particulars of claim amounts to a different agreement resulting in a material change in the plaintiff's cause of action. Mr Tötemeyer SC argued that this material change rendered the particulars vague and embarrassing. He also argued that there were now different parties to the agreement. In my opinion the particulars of claim read with annexure "A1" do not amount to a different agreement or create a material change to the terms as pleaded. The contract is alleged to be partly oral and partly written and there appears to be sufficient correlation between the terms as pleaded in paragraph 4 of the particulars of claim and annexure "A1" that can be clarified, if necessary by the leading of evidence. The oral portion of the contract was set out in the particulars of claim. Annexure "A1" comprises only one page. It does not include the terms pleaded in the particulars of claim, but the written document shows a rate for storage.

(ff) However one aspect of annexure “A1” is of concern. Annexure “A1” is addressed to Mr Gowaseb as Managing Director of “CP Whalerock Cement” (emphasis supplied) and not to him as a representative of the plaintiff, Ardea Investments (Pty) Ltd (emphasis supplied). There is clear ambiguity as regards the entity with which the contract of deposit was concluded, namely whether it was the plaintiff or CP Whalerock Cement.

(gg)

(hh) One of the main elements of a contract relates to the parties who concluded it. This aspect is significantly unclear, as it does not appear *ex facie* annexure “A1”, that the contract was concluded between the defendant and the plaintiff, represented by J Gowaseb. It is not reasonably clear what the pleading means with reference to the entity with which the contract was concluded. The fact that Mr Gowaseb was a party to the contract does not help the plaintiff. Clearly the entity he represented plays a significant role for the plaintiff. In this aspect, the particulars are indeed vague and embarrassing and the defendant is prejudiced as it cannot simply deny that the agreement was concluded with the plaintiff, and would therefore not be sufficiently able to meet the plaintiff’s case. The defendant in my opinion is embarrassed by this vagueness and lack of particularity and the particulars of claim are thus vague and embarrassing on this basis. Surely the plaintiff must clarify why annexure “A1” relates to the plaintiff as a party to the contract when it is addressed to another entity.

(ii)

(jj) Thus, the defendant succeeds on this aspect of the second ground of exception only, and having been successful on one of the grounds raised is entitled to costs. Both parties agreed that this matter was complex enough to warrant the costs of one instructing and two instructed counsel. In the result I make the following order:

(a) The second ground of exception succeeds and the particulars of claim are vague and embarrassing insofar as it is unclear whether the plaintiff or another entity concluded the agreement with the defendant.

(b) The plaintiff is directed to remove the cause of complaint within 14 days.

(c) The plaintiff is ordered to pay costs, such costs to include the costs of one instructing and two instructed counsel.

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E SCHIMMING-CHASE

Acting Judge

APPEARANCES

PLAINTIFF:	R Heathcote SC assisted by D Obbes Instructed by Fisher, Quarmby & Pfeifer
DEFENDANT:	R Tötemeyer SC assisted by C van der Westhuizen Instructed by HD Bossau & Co