
**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

**CASE NO: A 1635/2011**

In the matter between:

**ORYX DEVELOPMENT GROUP (PTY) LTD** **APPLICANT**

*and*

**GOVERNMENT OF THE REPUBLIC OF NAMIBIA** **RESPONDENT**

**Neutral citation:** *Oryx Development Group (Pty) Ltd v Government* of the *Republic of Namibia* (A 1635/2011) [2013] NAHCMD 129 (20 MAY 2013)

**CORAM:** **UEITELE, J**
**Heard:** **26 MARCH 2013**
**Delivered:** **20 MAY 2013**

**Flynote**

Practice - Pleadings - Exceptions - Exception to particulars of claim as disclosing no cause of action - Pleading only excipiable if no possible evidence led on the pleadings could disclose a cause of action.

Practice - Pleadings - Exception - On ground that pleading vague and embarrassing - Approach to be adopted - Such exception not to be allowed unless excipient seriously prejudiced if offending allegations not expunged - Validity of agreement

and question whether purported contract might be void for vagueness not readily falling to be decided by way of exception.

**Summary**

The plaintiff instituted action for damages against the defendant arising from an alleged breach of contract by the defendant. The terms of the alleged agreement were contained in various letters. The defendant excepted to the particulars of claim on seven grounds, four of the grounds of exceptions went to the alleged failure of the plaintiff to make averments necessary to sustain a cause of action. The other three grounds of exception were on the basis solely that the particulars of claim were vague and embarrassing.

*Held* that the failure to sign the particulars of claim is an irregularity but not a ground of exception.

*Held further* that evidence can be led at the trial as regards the place where the letters where posted thus disclosing the place where the agreements were concluded and that it is untenable to contend that an exception is the only remedy available to an aggrieved party in a case where the provisions of rule 18(6) have not been fully complied with.

*Held further* that a plaintiff who relies on a contract as intended in Rule 18 (6), and who fails to state the place where the contract was concluded does not render the plaintiff's claim excipiable and that the question whether or not an agreement was oral or in writing is not a fact that needs to be proven to entitle the plaintiff to succeed in its claim.

*Held further* that the question whether a purported contract may be void for vagueness do not readily fall to be decided by way of an exception.

**ORDER**

The defendant's exceptions filed against the plaintiff's particulars of claim on the basis that the particulars of claim do not disclose a cause of action and are vague and embarrassing are dismissed with costs.

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**JUDGMENT**

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**UEITELE J:**

**INTRODUCTION:**

[1] The defendant has excepted to the plaintiff's particulars of claim on the basis that it does not disclose a cause of action, and also on the basis that plaintiff's particulars of claim are vague and embarrassing.

[2] The background to this matter is briefly that the plaintiff instituted action against the defendant, in which action the plaintiff claims payment for an amount of N$ 33 467 827 from the defendant. In its particulars of claim the plaintiff amongst others alleges the following:

**(a)** That during September 2003, the defendant (represented by the then Minister of Works, Transport and Communication Dr. Moses Amweelo) requested the plaintiff (represented by William Richard Klemp) to make certain representations with regard to plaintiff's landscaping experience and technical skills.

**(b)** That on 07 April 2004 after the plaintiff had made the requested representations, the plaintiff and the defendant entered into an agreement in terms of which the defendant was appointed as the sole landscaping sub-contractor responsible for the landscaping work at new State House development in Auasblick, Windhoek. The plaintiff alleges that the agreement

was entered into by virtue of documents/letters which it attached to its particulars of claim as Annexures “A” & “B”.

**(c)** That after it was appointed as sole landscape contractor it relocated its entire operations from Orandjemund to Windhoek.

**(d)** That the agreement between the parties was amended on 20 September 2006 as a consequence of a meeting held between the parties on 14 August 2006. The plaintiff pleads that the amendment was effected by virtue of Annexures “E” and “F” which it also annexed to the particulars of claim.

**(e)** That on 13 June 2008 the defendant unilaterally terminated the agreements between the parties.

**(f)** That as a result of the defendant’s repudiation alternatively breach of contract the plaintiff suffered damages in the amount of N$ 33 467 827**.**

[3] The defendant, after having been put on notice (in terms of Rule 26) to file its plea, did not file a plea; it instead filed a notice of exception on 06 July 2012. In the notice of exception the defendant alleges that the plaintiff’s particulars of claim do not disclose a cause of action and it also indicated that it intended to except to the plaintiff’s particulars of claim on the ground that they are vague and embarrassing. The defendant thus gave the plaintiff fourteen days’ notice to remove the cause of complaint.

[4] The plaintiff did not file any notice to amend its particulars of claim or amended particulars of claim within the period of fourteen days given by the defendant. As a result of the plaintiff’s failure to amend the particulars claim the defendant, on 30 July 2012 filed its second notice of exception on the grounds that the plaintiff’s particulars of claim are vague and embarrassing.

[5] In its first notice of exception relating to the absence of a cause of action the defendant states that the exception is founded on the following grounds;

"(i) the Plaintiff's particulars claim do not comply with Rule 18 of the Uniform Rules of Court and more particularly Rule 18(1) thereof in that the Plaintiff's legal practitioner failed to sign the particulars claim;

(ii) the Plaintiff's particulars claim do not comply with Rule 18 (6) of the Uniform Rules of Court in that the Plaintiff failed to indicate where the agreements referred to were entered into;

(iii) it is also not clear *ex facie* the Plaintiff's particulars of claim whether the agreements were in fact oral or in writing; and

(iv) the Plaintiff's particulars claim do not comply with Rule 18 of the Uniform Rules of Court and more particularly Rule 18(6) thereof in that it failed to annex a true copy of the agreement which is relied on."

[6] In its second notice of exception relating to the vague and embarrassing particulars of claim the defendant states that the exception is founded on the following grounds;

"(i) in terms of the particulars of claim the plaintiff refers to various agreements and it is not clear as to which agreements the plaintiff rely on;

(ii) it is also further not clear *ex facie* the particulars of claim what the terms and/or conditions of the agreement/s are; and

(iii) the plaintiff's attached documents to its particulars of claim which are clearly marked as 'without prejudice of rights' and therefore cannot be used as such."

**The Legal Principles**

[7] I will now proceed to consider whether the exceptions raised by the plaintiff can be upheld or not. Before doing so I will briefly set out some of the legal principles which are applicable to exceptions.

[8] The *onus* of showing that a pleading is excipiable rests on an excipient.[1]

[1]Kotsopoulus v Bilardi 1970 (2) SA 391 (C) at 395D.

[9] The Cape Provincial Division of the High Court of South Africa articulated the general approach to exceptions in the case of *Colonial Industries Ltd v Provincial Insurance Co Ltd* [2] as follows:

> "Now the form of pleading known as an exception is a valuable part of our system of procedure if legitimately employed: *its principal use is to raise and obtain a speedy and economical decision of questions of law which are apparent on the face of the pleadings*: it also serves as a means of taking objection to pleadings which are not sufficiently detailed or otherwise lack lucidity and are thus embarrassing. Under the name of ''Demurrer'' it grew under the old English practice into a most pernicious evil: the Courts of Law abnegating their functions as Courts of Justice directly countenanced and encouraged the ingenuity of counsel in drafting fine demurrers which ignored the rights on which they were called to adjudicate. I think that the possibility of such abuse of legal proceedings should be jealously watched and that save in the instance *where an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he should be allowed to succeed."* (My emphasis.)

[10] This approach to exceptions has been consistently followed in this Court see for example, *Namibia Breweries Ltd v Seelenbinder, Henning & Partners*[3] *Total Namibia (Pty) Ltd v Van der Merwe t/a Ampies Motors*[4] *July v Motor Vehicle Accident Fund*[5], and the approach is neatly summed up by one writer[6] in the following manner:

> "The court should not look at a pleading with a magnifying glass of too high power. It is the duty of the court when an exception is taken to a pleading first to see if there is a point of law to be decided which will dispose of the case in whole or in part. If there is not, then it must see if there is an embarrassment which is real as a result of the faults in the pleadings to which exception is taken. Unless the excipient can satisfy the court that there is such a point of law or such real embarrassment the exception should be dismissed."

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[2] 1920 CPD 627 (at 630).
[3] 2002 NR 155 (HC).
[4] 1998 NR 176 (HC).
[5] *Infra* footnote No.7.
[6] See Joubert (ed) Law of South Africa vol 3 part 1 (first re-issue by Harms and Van der Walt, 1997) at para 186).

[11] This court[7] has accepted the principle stated in the case of *Mckelvey v Cown NO*[8] that:

> "It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action."

**The Legal Principles applied to the facts**

[12] I now proceed to consider the defendant's exceptions under the heads 'No cause of action' and 'Vague and embarrassing'.

*No cause of action*

[13] In the present matter the defendant's first ground of exception is that the plaintiff's particulars of claim have not been signed by its legal representative. I am of the view that the concession made by Mr Denk who appeared for the defendant that although the failure to sign the particulars of claim is an irregularity but not a ground of exception was correctly made. The first ground of exception thus falls away.

[14] The second ground of exception is that the plaintiff's particulars of claim fail to comply with rule 18(6) in that the particulars of claim fail to indicate where the alleged agreements were entered into. It is true that rule 18 (6) of this Court's rules provides as follows:

> "(6) A party who in his or her pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading."

[15] Mr Denk who appeared for the defendant argued that the subrule is coughed in peremptory language and that this means that a plaintiff who relies on a contract is bound by the requirements of the subrule. Does it then follow that, where a plaintiff who relies on a contract as intended in Rule 18 (6), and who fails to state the place

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[7] In the case of *July v Motor Vehicle Accident Fund* 2010 (1) NR 368 (HC) at page 371

[8] 1980 (4) SA 525 (Z) at page 526.

where the contract was concluded renders his or her claim excipiable? I do not think so. My view is based on the reasons I will advance in the next paragraphs.

[16] In the *Namibia Breweries*[9] matter Maritz J said:

> "the Court must remind itself that, having taken the exception, the defendant must satisfy the Court that, on all reasonable constructions of the plaintiff's particulars of claim as amplified and amended and on all possible evidence that may be led on the pleadings no cause of action is or can be disclosed." {I omitted the references to the authorities}.

[17] The general rule when considering exceptions is that, I must assume, for purposes of the exception, as true and capable of proof the facts pleaded by the plaintiff.[10] The facts pleaded by the plaintiff are that the plaintiff alleges the conclusion of a contract and relies on the letters written by Mr Kathindi (for the defendant) and Mr Namaseb (for the plaintiff). It is common cause that the plaintiff and defendant had their offices in Orandjemund and Windhoek respectively at the time the letters were written. I am therefore satisfied that evidence can be led at the trial as regards the place where the letters were posted thus disclosing the place where the alleged agreements were concluded.

[18] In the matter of *Kahn v Stuart*[11] Davis, J with Sutton, J concurring said the following:

> "In my view it is the duty of the court when an exception is taken to a pleading, first to see if there is a point of law to be decided which will dispose of the case in whole or in part. <u>If there is not, then it must see if there is an embarrassment which is real and such cannot be met by the asking of particulars, as the result of the faults in pleadings to which exception is taken</u>." {My Emphasis}.

Rule 21 of this Court's makes provision for a party to request further particulars to any pleadings and if the further particulars are not forthcoming a party can be compelled, by way of an application for further particulars in terms of Rule 21 (1), either to furnish sufficient particulars, or to declare unequivocally that he/she is

[9]Supra footnote 3.

[10]Namibia Breweries Ltd v Seelenbinder, Henning & Partners (supra) footnote 3; Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd 1999 (1) SA 624 (W) at 632C; Marney v Watson and Another 1978 (4) SA 140 (C).

[11]1942 CPD 386 at page 392.

unable to furnish such. The embarrassment in the present matter can easily be met by a request for further particulars. It is therefore clearly untenable to contend that an exception is the only remedy available to an aggrieved party in a case where the provisions of rule 18(6) have not been fully complied with[12]. The second ground upon which the exception is founded must accordingly also fail.

[19] The third ground of exception is that it is allegedly not clear *ex facie* the plaintiff's particulars of claim whether the agreement/s were in fact oral or in writing. I fail to see how the alleged failure to state whether the agreement/s was/were oral or in writing fails to disclose a cause of action. I say so for the following reason. In the *Namibia Breweries Ltd v Seelenbinder, Henning & Partners* case[13] Maritz J said[14] :

> "The proper legal meaning of the expression "cause of action" is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not "arise" or "accrue" until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action."

The question whether or not an agreement was oral or in writing is not a fact that needs to be proven to entitle the plaintiff to succeed in its claim. It is trite that any agreement whether written or oral is a valid contract and is enforceable. The third ground upon which the exception is founded must accordingly also fail.

[20] The fourth ground of exception is that the plaintiff's particulars of claim do not comply with Rule 18 of the Uniform Rules of Court in that it failed to annex a true copy of the agreement which is relied on. Mr Denk who appeared for the defendant argued that the subrule is coughed in peremptory language and that this means that a plaintiff who relies on a contract is bound by the requirements of the subrule. He referred me to the case of *Moosa and Others NNO v Hassam and Others NNO*[15] where it was held that

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[12]Vorster v Herselman 1982 (4) SA 857 (O).
[13]Supra footnote 3.
[14]At page 160 H-I.
[15]2010 (2) SA 410 (KZP).

> "[18] In the present case the respondents base their cause of action against the applicants upon the written agreement. The written agreement is a vital link in the chain of the respondents' cause of action against the applicants. In order for the respondents' cause of action to be properly pleaded, it is necessary for the written agreement relied upon to be annexed to the particulars of claim. In the absence of the written agreement the basis of the respondents' cause of action does not appear *ex facie* the pleadings."

[21] In the present matter the plaintiff alleges that the agreements between the parties were concluded by virtue of Annexures "A", "B", "C", "D", "E", "F" and "G". Those documents were attached to the particulars of claim. In the case of *Moosa and Others NNO v Hassam and Others NNO*[16] to which Mr Denk referred me the following was said[17]:

> "[16] The need to annex a true copy of the written agreement relied upon is obvious. In this manner the defendant is afforded full particulars of the written agreement, which the plaintiff relies upon for its cause of action. If, however, the plaintiff relies on only a portion of the written agreement in the pleading, only that portion need be annexed to the pleading, in terms of rule 18(6). As stated by Centlivres, CJ in the case of *Stern NO v Standard Trading Co (Pty) Ltd* 1955 (3) SA 423 (A) at 429H:
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> > 'When a plaintiff bases his cause of action on a document and annexes to his declaration only part of the document, the defendant is entitled to assume that the plaintiff will rely only on that portion. The defendant is under no obligation to call for a copy of the whole document.'

I therefore hold that the plaintiff complied with the requirements of Rule 18(6). It follows that the defendant is entitled to assume that the plaintiff will rely only on those documents/letters which it annexed to the particulars of claim. The fourth ground upon which the exception is founded must accordingly also fail.

*Vague and embarrassing*

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[16] Supra footnote 15.
[17] At page 413 para 16.

[22] I will now turn to the second notice of exception which was filed on 30 July 2012 in which it is alleged that the plaintiff's particulars of claim are vague and embarrassing. The first ground upon which this exception is based is that the plaintiff in its particulars of claim refers to various agreements and it is not clear as to which agreements the plaintiff relies.

[23] The approach to be adopted to an exception on the ground that a pleading is vague and embarrassing was stated as follows in *Levitan v Newhaven Holiday Enterprises CC.*[18]

> "It has been stated, clearly and often, that an exception that a pleading is vague or embarrassing ought not to be allowed unless the excipient would be seriously prejudiced if the offending allegations were not expunged."

[24] In *Trope v South African Reserve Bank and Another and Two Other*[19] the court held that:

> "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."

[25] In the present matter I understand the first ground of exception to be that the defendant alleges that the plaintiff, in its particulars of claim, refers to various agreements and it is not clear as to which agreement the plaintiff relies. If I apply the approach taken in the cases of *Levitan v Newhaven Holiday Enterprises CC* and *Trope v South African Reserve Bank and Another and Two Others* than the defendant's objection is without merit. I say so because the defendant does not object on the ground that the plaintiff's particulars of claim are vague and that he is embarrassed and severely prejudiced by the vagueness. He simply says he does not know on which agreement the plaintiff relies. Implicit in this objection by the defendant is the acknowledgement that the plaintiff basis its claim on agreements. I further do not agree with Mr Denk's argument that the defendant does not know on which agreement the plaintiff relies. I say so for the following reason. My reading of the plaintiff's particulars of claim is that the first agreement was concluded on 07

[18]1991 (2) SA 297 (C) at 298A - C; Also see South African National Parks v Ras 2002 (2) SA 537 (C) ([2001] 4 B All SA 380 at 385E.
[19]1992 (3) SA 208 (T).

April 2004 and that that agreement was amended on 20 September 2006 it is thus clear that the plaintiff relies on the agreement of 07 April2004 as amended. I am thus of the view that the defendant's professed uncertainty is illusory. This ground upon which the exception is founded must accordingly fail.

[26] The second ground upon which the exception is based is that defendant alleges that it is not clear *ex facie* the particulars of claim what the terms and/or conditions of the agreement/s are. I understand this complaint to be directed at the particularities of the claim. In my view, the allegations set out in paragraphs 5, to 24 of the plaintiff's particulars of claim are sufficient to ground a claim for damages and the defendant will suffer no prejudice if they are required to plead to the allegations set out in those paragraphs. The particulars of claim might with advantage have been framed with greater clarity. I do not, however, think that the particulars are so wanting in clarity that the defendant should have difficulty in pleading thereto. Secondly it is not the defendant's case that the particulars of claim are vague and embarrassing as such that the defendant would be 'seriously prejudiced' if the offending pleading is allowed to stand. I furthermore find the comments by Erasmus, J in the matter of *Francis v Sharp and Others*[20] relevant to this case. He said:

> '..the question whether a purported contract may be void for vagueness do not readily fall to be decided by way of an exception.'

This ground upon which the exception is founded must accordingly also fail.

[27] The third ground upon which the exception is based is that defendant alleges the plaintiff' attached documents to its particulars of claim which are clearly marked as 'without prejudice of rights' and therefore cannot be used as such. In view of what I have said in paragraphs 22 to 23 of this judgment, I am of the opinion that this not a ground upon which an exception can be founded. I would thus dismiss with costs all the exceptions raised by the defendant.

[28] In the result the following order is made:

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[20]2004 (3) SA 230 (C).

The defendant’s exceptions filed against the plaintiff’s particulars of claim on the basis that the particulars of claim do not disclose a cause of action and is vague and embarrassing are dismissed with costs.

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SFI UEITELE
Judge

APPEARANCES

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| PLAINTIFF: | ADV DENK<br>Instructed by Government Attorney |
| DEFENDANT: | ADVOCATE BOTES<br>Instructed by MB De Klerk |