REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 4235/2008

In the matter between:

1.1.1.1.	**ERIC VAN DER MERWE t/a**
1.1.1.2.	**SNOWMAN REFRIGERATION**
	PLAINTIFF

And

RAINER ARANGIES	**1ST DEFENDANT**
AUTO TECH TRUCK & COACH CC	**2ND DEFENDANT**

Neutral citation: Van der Merwe v Arangies (I 4235/2008) [2014] NAHCMD 202 (25 June 2014)

Neutral citation:

Coram: SMUTS, J

Heard: 20 June 2014

Delivered: 25 June 2014

Flynote: Exception taken against portions of further amended particulars of

claim on the grounds that such portions were vague and embarrassing. Defendants failing to establish vagueness and furthermore unable to establish vagueness amount embarrassment and prejudice. Furthermore the exception complains about the use of two terms and does not go to the whole cause of action. Exception proceedings inappropriate. Exception dismissed with costs.

ORDER

(a) The exception is dismissed with costs. These costs include the costs of one instructing and one instructed counsel.
(b) The matter is postponed for a status hearing in judicial case management a 9 July 2014 at 15h30.

JUDGMENT

SMUTS, J

[52]

[2] I have before me an exception taken by the defendants against the further amended particulars of claim on the grounds that the sub paragraphs in question are vague and embarrassing. I refer to the parties as plaintiff and defendants.

[3]

[4] This action was instituted some time ago, in 2008. The exchange of pleadings took time. Both sides have amended their pleadings. The particulars of claim have been amended more than once. The latest amendments have given rise to this exception. Further particulars were sought to the particulars of claim, as further amended. An application to compel more particularity was partially successful. After those further particulars were supplied, the defendants – gave the plaintiff notice of their exception under the erstwhile rule 23 in April 2014 but only filed their exception on 10 June 2014, shortly before the trial, set

down for 16-20 June 2014, was due to be heard.

[5] The exception did not include a prayers and at the hearing Mr Mouton who appeared for the defendants, moved for an amendment to include relief to the effect that the exception be upheld and that the words ‘certain components’ and ‘certain’ be struck as they respectively appear in paragraphs 5.1 and 5.2 of the further amended particulars of claim.

[6]

[7] These paragraphs relate to the plaintiff’s averments as to the agreement between the parties. The plaintiff pleaded that the agreement was in essence for the plaintiff to attend to the supply and fitment of fresh air ventilation system for the defendants. It is alleged that this would include certain aspects of its design, certain aspects of extraction elements, including related apparatus and ducting apparatus. Further particulars were requested and supplied concerning the terms of the agreement contended for. Annexures were attached. These comprised a quotation and an invoice detailing parts. The plaintiff also referred to portions of his witness statement which dealt with the agreement. There is also some cross referencing in the further particulars.

[8]

[9] Mr Mouton, who appeared for the defendants, complains that there is an inconsistency and some overlap in the answers and that, as a consequence these paragraphs of the particulars of claim are vague and embarrassing as it is not clear as what the term ‘certain’ refers to in these paragraphs. He contended that the defendants are ‘severely prejudiced’ in meeting the plaintiff’s case as it would be ‘impossible for (the defendants) to know which case to meet’ by reason of the repeated use of ‘certain’ to describe items forming part of the agreement.

[10]

[11] I do not propose to quote the portions of the pleadings relating to the plaintiff’s version of the agreement. The defendants not only pleaded to the plaintiff’s version of the agreement but also brought a counter claim based upon their version of the agreement between the parties.

[12]

[13] Mr Obbes argued that, as the exception related to the terms of the

agreement as averred by the plaintiff, it would not be a proper platform to contend that the agreement itself is vague. Furthermore, he argued that the exception directed at striking words from pleadings is not appropriate and that an application to strike out those terms should rather have been launched. But, he submitted that there is in any event no inconsistency or confusion and certainly no prejudice, let alone serious prejudice to the defendants. I tend to agree with him.

[14]

[15] I have carefully examined the paragraphs objected to. They contain a portion of the terms of the agreement contended for. When they are read in context, there would appear to be some overlap. That may arise because of an abundance of caution in the drafting of the pleading as to the categorisation of components and parts as forming part of the air supply or extracting elements for the system. As Mr Obbes contended, they may even be required for both. Those aspects can be clarified in evidence. Whilst there could have been greater precision in the formulation of the paragraphs (to avoid overlapping and possibly duplication), the particulars read with the further particulars are not in my view vague and embarrassing as a consequence.

[16]

[17] The defendants have furthermore pleaded their version of the agreement between the parties and based their counterclaim upon it. I am at a loss to comprehend the defendants' professed prejudice. An examination of the further amended particulars of claim together with the further particulars reveals that it meets the requirement of providing a clear enough exposition of the plaintiff's case to enable them to respond and know what case to meet.[1]

[18]

[19] In my view the defendants have not discharged the onus to show both vagueness amounting[2] to embarrassment and embarrassment amounting to prejudice.

[20]

[21] The defendants have also not shown that the particulars of claim as

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[1] *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) at par 15.

[2] See *Venter* supra at par 16.

further amended do not state the nature and extent of the cause of action. As has been made clear,

> 'As long as a declaration reasonably states the nature, extent and grounds of the cause of action, the court will not as a rule strike out paragraphs as vague and embarrassing, provided the information given is reasonably sufficient and provided it does not appear to the court that the paragraphs cannot be pleaded to by the defendant.'[3]

And reiterated in the *Venter* matter:

> 'An exception to particulars of claim on the basis that they are vague and embarrassing strikes at the formulation of the cause of action and not its legal validity. It must go to "the root of the matter". Such an exception may not refer only to certain paragraphs of the particulars of claim, it "must go to the whole cause of action, which must be demonstrated to be vague and embarrassing."'[4]

[22]

[23] The exception complains about the use of two terms used in the formulation of the agreement relied upon by the plaintiff and does not remotely go to the whole cause of action. Nor do the portions complained of amount to being impermissibly vague and cause embarrassment and prejudice.

[24] It would also appear to me that an exception to challenge the portions of the particulars of claim was inappropriate and that an application to strike out those portions of the pleading would have been the appropriate course. Even before the erstwhile rule 23 introduced applications to strike portions of pleadings, the courts have over the years discouraged application of this nature. This consideration is strongly underpinned by the introduction of judicial case management whose objectives include the expeditious and economical disposal of matters, their curtailment and reducing delay and the expenses of interlocutory processes.[5] I would further and in any event have been disinclined to grant the relief sought in view of these considerations, even if the defendants

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[3] *Lockhat and Others v Minister of the Interior* 1960(3) SA 765 (D) at 777E.

[4] Supra at par 10 and the authorities collected there.

[5] See *Roads Contractor Company (Pty) Ltd v Lemur Investments NO. 66 CC and Others* (I 512/2011) [2012] NAHCMD 34 (19 October 2012).

were to have established that there was impermissible vagueness, which I do not consider they have. This because of the singular lack of prejudice established by them and inappropriateness of exception proceedings.

[25] It follows that the exception is to be dismissed. The following order is made:

(a) The exception is dismissed with costs. These costs include the costs of one instructing and one instructed counsel.

(b) The matter is postponed for a status hearing in judicial case management a 9 July 2014 at 15h30.

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SMUTS, J

Judge

APPEARANCES

APPLICANTS/DEFENDANTS:	C. J Mouton Instructed by Mueller Legal Practitioners
RESPONDENT/PLAINTIFF:	D. Obbes Instructed by Dr Weder, Kauta & Hoveka