

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2194/2013

In the matter between:

NAMBOER GROUP OF AUCTIONEERS CC

PLAINTIFF

And

WELCOME HIKUEPI KAZONDUNGE

1ST DEFENDANT

FM OEHL TRUST CC

2ND DEFENDANT

MASTER OF THE HIGH COURT OF NAMIBIA

3RD DEFENDANT

Neutral citation: *Namboer Group of Auctioneers CC v Kazondunge* (I 2194-2013)
[2015] NAHCMD 169 (22 July 2015)

Coram: MILLER AJ

Heard: 2 April 2015

Delivered: 22 July 2015

Released: 24 July 2015

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 – Court held as far as the cheques are concerned they are part of the pleadings in support of the allegation that the commission agreed upon was 10 percent. I fail to understand on what basis the defendant is unable to plead to that allegation - Exception dismissed with costs.

ORDER

1. The exception is dismissed with costs, such costs to include the costs of one instructed and one instructing counsel.
2. The matter is postponed to **6 August 2015** at **15h30** for a status hearing.

JUDGMENT

MILLER AJ:

[1] The plaintiff instituted action against the defendants and claims for the following relief:

1. Rectification of annexure “C” by substituting “Namboer CC” where it appears with “Namboer Auctioneers CC”.
2. Rectification of annexure “C”, clause 10 thereof, by substituting “5%” with “10%”.

3. Payment in the sum of N\$822,250.00, alternatively N\$411,125.00 from the first defendant.
4. Interest a *tempore morae* on either one of the aforesaid amounts found to be due and payable, at the rate of 20% per annum calculated from 11 June 2013 to date of payment.
5. Costs of suit, including the costs of one instructing and one instructed counsel.
6. Further and/or alternatively relief.'

[2] The first defendant defended the action but did not file his plea. He however elected to serve and file an exception against the plaintiff's particulars of claim in terms of rule 57(1) of the Rules of the Court. The exception is the subject of the hearing that was set down on 1 July 2015.

[3] The two grounds of exception as contained in paragraphs 1 to 8 of the exception reads:

- '1. In paragraph 7 of the particulars of claim the plaintiff alleges that a "written mandate to sell on public auction for a price not less than N\$4,378,000.00 is evidenced from the conditions of sale of public auction of immovable property";
2. The aforementioned alleged "conditions of sale" comprise annexure "C" to the particulars of claim (vide paragraph 8 of the particulars of claim);
3. Annexure "C", *ex facie* its content, is a document titled "conditions of sale", with an apparent certification (page 5 thereof) dated 10 June 2013;
4. Annexure "C" –
 - 4.1 Could not have been in existence at the time when the "instructions" alleged in paragraph 5 of the particulars of claim were provided (January 2013);
 - 4.2 Is not, and does not evidence "the written mandate";

5. In so far as the “the written mandate” exists, the plaintiff has not complied with the rule 45(7) and same is not attached to the particulars of claim.

6. In paragraph 9 of the particulars of claim the plaintiff alleges that the “conditions relevant to the plaintiff and binding on the successful bidder” included that “the purchaser... had to pay the auctioneer’s charges calculated at 5% of the purchaser price (plus VAT thereon) on the day of sale” (vide paragraph 9.2).

7. In paragraph 10.2 of the particulars of claim the plaintiff alleges that there is a “second mistake”, and that the 5% unaltered in clause 10 was *bona fide* mutual error”.

8. Paragraphs 9.2 and 10.2 are mutually destructive and inconsistent. ‘

[4] The first defendant claims that he is prejudiced by the vague and embarrassing nature of the plaintiff’s pleadings and as a result, has afforded the plaintiff the 14 days permitted by the rules of court to remedy the aforesaid complaints, failing which the first defendant prays that the court uphold his exception and dismissed the plaintiff’s claim with costs.

[5] The plaintiff elected not to amend the particulars of claim after the exception was taken and chose to oppose the exception. The issue in this matter is therefore whether the plaintiff’s particulars of claim is vague and embarrassing.

Can the first defendant’s exception be upheld?

[6] The first defendant’s exception stems from basis that the particulars of claim are vague and embarrassing. The first defendant argues that rule 45(7) is peremptory and the plaintiff’s claim should comply with the said rule. Rule 45(7) reads:

‘A party who in his or her pleading relies on a contract must 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 must be annexed to the pleading.’

[7] Mr Obbes on behalf of the first defendant, during oral argument submitted that apart from non-compliance with rule 45(7), the vague and embarrassing nature of the plaintiff’s pleadings are seriously prejudicial to the first defendant, who is now required to meet a case which is entirely unclear and uncertain. This aspect, he argues, impacts on the first defendant’s rights to a fair trial as guaranteed by Article 12 of the Namibian Constitution.

[8] Mr Oosthuisen for the plaintiff, on the other submits that the first defendant seems to be under mistaken impression that the court should regard the individual paragraphs of the particulars disjunctively from each other, which is clearly not the position envisaged by Rule 45 and the first sentence of the *Trustco Capital (Pty) Ltd v Atlanta Cinema CC and 3 Others*.¹ Counsel for the plaintiff further argues that all that is required from a plaintiff is to plead clearly and concisely the material facts on which it rely for its claim, so as to enable the opposing party to plead thereto and set out its defence, if any. In addition, if a party relies on a contract, to state whether it is written or oral and if written, annex such a copy to the particulars of claim and state that it relies thereon.

[9] The plaintiff therefore avers that, apart from the citation of the parties, the plaintiff has complied with rule 45(7) and that all essential averments necessary to sustain a cause of action are indeed alleged and contained in the plaintiff’s amended particulars of claim filed on 27 March 2015. On this premise, the first defendant’s first ground should be dismissed.

¹*Trustco Capital (Pty) Ltd v Atlanta Cinema CC and 3 Others*, Case no. I 3268/2010 delivered on 12 July 2012. See also *Ardea Investments (Pty) Ltd v Namibia Ports Authority* (I 553/2009) [2013] NAHCMD 107 (19 April 2013).

[10] The test for determining whether a pleading is vague and embarrassing was succinctly set out in *Jacobs v The Minister of Safety and Security*² where Parker, AJ stated at para 12 that:

'Where a statement is vague it is either meaningless or capable of more than one meaning. (*Wilson v South African Railways and Harbours* 1981 (3) SA 1016 (C) at 1018H) And exception involves a two-fold consideration, that is: (a) whether the pleading complained of lacks particularity to the extent that it is vague, and (b) whether the vagueness is of such nature that the excipient is prejudiced. (*Trope v SA Reserve Bank and Two Other Cases*). Where the court finds that the pleading is not vague, the second consideration does not arise.'

[11] It is trite therefore that 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.

[12] The court has recently restated the legal principles relating to exceptions to pleadings on the grounds that they are vague and embarrassing in the *Trustco Capital (Pty) Ltd v Atlanta Cinema CC and Others*³ case, where the court stated that;

'[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.

² (I 3772/2013) [2015] NAHCMD 27 (19 February 2015) at para 12, p 7.

³ ((P) I 3268-2010) [2012] NAHC 190 (12 July 2012), p 8.

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.'

[13] The court went on further to state that:

'The test applicable in deciding an exception based on vagueness and embarrassment arising out of lack of particularity can be summed up as follows:

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 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.'

[14] As far as the cheques are concerned they are part of the pleadings in support of the allegation that the commission agreed upon was 10 percent. I fail to understand on what basis the defendant is unable to plead to that allegation.

[15] In the result, I make the following order:

1. The exception is dismissed with costs, such costs to include the costs of one instructed and one Instructing counsel.
2. The matter is postponed to **6 August 2015** at **15h30** for a status hearing.

Miller, AJ

Acting

APPEARANCES

PLAINTIFF:

G H Oosthuisen SC

Instructed by

Francois Erasmus and Partners, Windhoek

FIRST DEFENDANT:

D Obbes

Instructed by

Keop & Partners, Windhoek

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