



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

HC-MD-CIV-ACT-CON-2017/03477

In the matter between:

**IBB MILITARY EQUIPMENT AND ACCESSORY
SUPPLIES CC**

PLAINTIFF

and

NAMIBIA AIRPORTS COMPANY LIMITED

DEFENDANT

Neutral citation: *IBB Military Equipment and Accessory Supplies Cc v Namibia Airports Company Limited* (HC-MD-CIV-ACT-CON-2017/03477) [2019] NAHCMD 56 (15 March 2019).

Coram: OOSTHUIZEN, J

Heard: 21 January 2019

Delivered: 15 March 2019

Flynote: Civil practice – Pleadings – Exception – On the grounds that the particulars of claim concerning claim one is vague and embarrassing and does not disclose a cause of action.

Summary: The plaintiff sued out summons for specific performance and payment of N\$156 125 620.00 by the first defendant, alternatively contractual damages and further alternatively for delictual losses on a renovation agreement in respect of the Hosea Kutako International Airport and the Eros Airport. First defendant excepted to claim one of the particulars of claim on the ground that it is vague and embarrassing and does not disclose a cause of action. The legal principles on exception applicable in the Namibian Jurisdiction recorded and applied. Paragraphs [8] to [18].

Held, that identified paragraphs in the particulars of claim are vague and embarrassing and struck in their present form.

ORDER

[1] First defendant's exception on the ground that the particulars of claim is vague and embarrassing concerning claim one is upheld.

[2] Sub-paragraphs 6.3 to 6.6 and paragraphs 7 to 10 of the particulars of claim are struck in its present form.

[3] Plaintiff is granted 15 court days to give notice of intention to amend, if so advised, in terms of Rule 52(1) of the Rules of the High Court of Namibia.

[4] First defendant is granted 15 court days to object, if so advised, in terms of Rule 52(2) and (4) of the Rules of the High Court of Namibia.

[5] Plaintiff shall pay the costs of the first defendant, including the costs of one instructing and two instructed counsel free from the limitation/capping imposed by Rule 32(11) of the Rules of the High Court of Namibia.

JUDGMENT

Background and relevant part of particulars of claim

[1] Plaintiff, a Namibian registered Close Corporation, issued summons against the Namibia Airports Company ("NAC") and its erstwhile Chief Executive Officer ("CEO") on 22 September 2017.

[2] The particulars of claim contained two main claims. The first claim based on an alleged renovations agreement and the second based on an alleged maintenance agreement.

[3] NAC raised an exception to the first claim, the alleged renovation agreement on the grounds that it is vague and embarrassing and prejudicial to NAC as a result of its vagueness, and in any event does not disclose a cause of action.

[4] Claim 1 (on the renovation agreement), claims specific performance and payment of N\$156 125 620.00, alternatively contractual damages in the aforesaid amount and further alternatively delictual loss in the amount of N\$156 125 620.00 (alternatively N\$26 860 000.00).

[5] The pleaded cause of action is a partly written and partly oral agreement concluded during June 2016 between plaintiff and NAC represented by second defendant, which NAC breached and repudiated on 14 November 2016 by way of a letter from second defendant.

[6] Plaintiff pleaded the renovation agreement's 'salient and material terms' in the following fashion:

6.1 The plaintiff was appointed to design, supply and install check-in counters and integrated security systems for the Hosea Kutako International Airport and Eros Airport, as reflected by the appointment of plaintiff in a letter of first defendant signed and authored by its CEO dated 24 June 2016, a copy of which is attached hereto as **annexure "IBB1"**.

6.2 The above letter of appointment identified and described the agreement between the parties as "Contract Number NAC/E/277/16".

6.3 The agreed remuneration of the plaintiff for the performance of such services were €9 183 860. 00 (being N\$156 125 620.00), as reflected by the contents of **annexure "IBB2"** hereto, containing a breakdown of how such sum was computed, which document was provided to first defendant prior to the date of the letter reflected by annexure "IBB1".

6.4 The nature and particulars of the services to be rendered to first defendant in terms of the renovation agreement were fully set out in a document, a copy of which is attached hereto as Annexure 'IBB3', styled "CUTE, CUSS, BRS ONLINE, AMS ITRACK AND IVALIDATE PROPOSAL TO IBB NAMIBIA", dated 13 May 2016, presented to first defendant prior to the confirmation of the agreement.

6.5 The dates and junctures at which first defendant had to effect payment of the contract price were set out in a document styled 'Cash Flow Projection', a copy of which is attached hereto as Annexure 'IBB4', that was handed to first defendant prior to the date of the letter reflected by Annexure 'IBB1'.

6.6 The documents reflected in the annexures referred to above, together with the parties' oral agreement on the contents thereof, cumulatively constituted the agreement between the parties.

7. Pursuant to the conclusion of the agreement first and second defendants instructed plaintiff to proceed with procuring the materials and services required for the implementation of the agreement.

8. In giving effect to such instruction, plaintiff, with the knowledge of the defendants:

8.1 mandated the enterprise DSIGNLINQ to design the seats, trolleys and counters contemplated by the agreement, which mandate was duly executed;

8.2 caused the seats, trolleys and counters to be manufactured according to such design, and procured the availability of the ready products for final delivery to first defendant;

8.3 caused CCTV security cameras to be procured ready for installation;

8.4 concluded a subcontract with the enterprise DSC for services essential for plaintiff's agreement with first defendant, including services such as a site inspection visit, the provision of a technical assessment report, and a technical proposal.

9. The total cost to plaintiff in procuring what was set out in paragraphs 8.1 to 8.3 above amounted to €1.2million, and the cost of producing what was set out in paragraph 8.4 above amounted to €380 000, in total amounting to €1.58 million, reflecting the amount that the plaintiff has already expended in performing its obligations in terms of the agreement.

10. The plaintiff's expectation interest in the agreement amounts to €9 183 860,00 (being N\$156 125 620.00) which the plaintiff would be entitled to employ towards payment of expenditure already incurred in performing its obligations, such as the €1.58million referred to in the foregoing paragraph.'

[7] The appointment letter dated 24 June 2016 and attached to the particulars of claim as Annexure 'IBB1' reads as follows:

'IBB Military Equipment & Accessories Supplies
P O Box 40727
Windhoek
Namibia

Attention Mr M A Omar

APPOINTMENT LETTER - CONTRACT NO: NAC/E277/16: DESIGN, SUPPLY AND INSTALLATION OF CHECK-IN COUNTERS AND INTEGRATED SECURITY SYSTEM FOR HKIA AND EROS AIRPORTS.

This letter serves to inform that IBB Military equipment & Accessories Supplies have been appointed to design, supply and installation of check-in counters & integrated security system for HKIA and Eros Airports.

The agreed price for redesigning the layout of HKIA and Eros with necessary equipment will be N\$156 125 620.00.

This appointment letter, your financial proposal in the manner aforesaid and your letter of acceptance shall form part of the Contract for the design, supply and installation of check-in counters and integrated security system for HKIA and Eros Airports.

You are kindly requested to immediately prepare the Contract alluded to above upon receipt hereof to ensure swift signature thereof by yourselves and the NAC. A further three (3) copies of the contract will be required to our records.

This project will be overseen by NAC Engineering, IT & Projects Department Contact Person.

Mr Justin Strauss or Mr Wilhelm Hanghuwo @+264 61 2955134

You are kindly requested to immediately prepare the Contract alluded to above upon receipt hereof to ensure swift signature thereof by yourselves and the NAC.

We reckon you would find the foregoing to be in order and await a swift response at your earliest convenience with the requisite expediency that the project forming the subject-matter hereof merits.

Yours sincerely,

Tamer El-Kallawi
Chief Executive Officer'.

Legal principles applicable to exceptions

No cause of action

[8] In *Van Straten No and Another v Namibia Financial Institutions Supervisory Authority and Another*¹, the Namibian Supreme Court pronounced itself as follows:

[18] Where an exception is taken on the grounds that no cause of action is disclosed or is sustainable on the particulars of claim, two aspects are to be emphasised. Firstly, for the purpose of deciding the exception, the facts as alleged in the plaintiff's pleadings are taken as correct. In the second place, it is incumbent upon an excipient to persuade this court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed. Stated otherwise, only if no possible evidence led on the pleadings can disclose a cause of action, will the particulars of claim be found to be excipiable.'

[9] In *Brink No v Erongo All Sure Insurance CC*², the Namibian Supreme Court held that:

[52] The correct position of our law in the determination of whether the pleadings are excipiable on the ground that they lack sufficient averments to sustain a cause of action is illustrated through rule 45(5) of the Rules of the High Court and the principles developed through case law. The requirement of clear and concise statement of the material facts upon which the pleader relies for his claim is fundamental to alert the other party of the conduct complained of and to enable it to plead. This means that, a pleader is only required to plead what is material. Facts that are not material need not be pleaded'.

[10] The Namibian Supreme Court adopted the definition of 'cause of action' set out in *McKenzie v Farmers' Co-Operative Meat Industries Ltd* 1922 AD 16 at 23³. A plaintiff is required to plead every fact which is necessary to be proved in order to support his right to judgment. The requirement to plead every fact necessary to

¹ 2016 (3) NR 747 (SC) at 755 and 756. Footnotes removed from text.

² 2018 (3) NR 641 SC at 654.

³ Brink NO, op cit, at 654 [53].

establish the cause of action does not include every piece of evidence necessary to prove each fact.

Vague and embarrassing

[11] The Court is mindful of the fact that motion proceedings require from an applicant to set out both his cause of action and his evidence in support thereof in the founding affidavit⁴.

[12] Therefore the court approach the reliance of first defendant in argument on the Namibian Supreme Court cases dealing with motion proceedings with caution.

[13] Rule 45(5) of the Rules of the High Court of Namibia requires the plaintiff to plead 'a clear and concise statement of the material facts on which a pleader relies for his or her claim,...with sufficient particularity to enable the opposite party to reply' and which 'are necessary to enable the opposite party to identify the case that the pleadings requires him or her to meet'.

[14] High Court Rule 7(8) requires that the "particulars of claim must contain a statement of the material facts relied on by the plaintiff in support of his or her claim, the cause of action and the relief claimed,..."

[15] In Van Straten⁵ this ground is discussed as follows:

'[19] Whether an exception on the ground of being vague and embarrassing is established would depend upon whether it complies with rule 45(5) of the High Court Rules. This rule requires that every pleading must contain a clear and concise statement of the material facts on which the pleader relies for his or her claim with sufficient particularity to enable the opposite party to identify the case that the pleading requires him or her to meet. Assessing whether a pleading is vague and

⁴ *Nelumbu and Others v Hikumwah and Others* 2017 (2) NR 433 SC at 442, [40] and [41].

⁵ *Op cit*, at 756 [19] and [20]. Footnotes removed from quotation.

embarrassing is now to be undertaken in the context of rule 45 and the overriding objectives of judicial case management. Those objectives include the facilitation of the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable by saving costs by, among others, limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and timely disposal of a cause or matter.

[20] The two-fold exercise in considering whether a pleading is vague and embarrassing entails firstly determining whether the pleading lacks particularity to the extent that it is vague. The second is determining whether the vagueness causes prejudice. The nature of the prejudice would relate to an ability to plead to and properly prepare and meet an opponent's case. This consideration is also powerfully underpinned by the overriding objects of judicial case management in order to ensure that the real issues in dispute are resolved and that parties are sufficiently apprised as to the case that they are to meet'.

[16] From the quotations above referring to the overriding objective of case management, this Court shall deal with this matter in a way which is proportionate to the amount of the monetary claim involved and the complexity arising from the pleading⁶.

[17] While heeding the caution referred to in paragraph [12] of this judgment, this Court however accept as valid in action proceedings what was stated in regard of motion proceedings in *Standard Bank Namibia Ltd and Others v Maletzky and Others* 2015(3) NR 753 SC at 771 [43]:

'Although a litigant may attach annexures to the founding affidavit, it is not sufficient for a litigant to attach an annexure without identifying the facts contained in the annexure upon which the litigant relies'.

⁶. Rule 1(3)(c) of the Rules of the High Court of Namibia.

[18] A clear and concise statement of the material facts necessary to enable a defendant to identify the case specifically (and not evasively or vaguely) it is required to meet, should be pleaded⁷.

Consideration and evaluation

[19] Annexure 'IBB1' to plaintiff's particulars of claim is contained in paragraph [7] before.

[20] Annexure 'IBB1' convey:

[20.1] that plaintiff was informed of its appointment to design, supply and install check-in counters and integrated security systems for Hosea Kutako International Airport and Eros Airport.

[20.2] that the agreed price for redesigning the layout of the two airports with the necessary equipment will be N\$156 125 620.00.

[20.3] that this appointment letter, plaintiff's financial proposal in the manner aforesaid and plaintiff's letter of acceptance shall form part of the contract for the design, supply and installation of check-in counters and integrated security systems for the two airports.

[20.4] that plaintiff is requested to immediately prepare the Contract alluded to upon receipt of this letter to ensure swift signature of the contract by plaintiff and NAC.

[20.5] that a further three copies of the contract will be required for NAC's records.

[20.6] which departments and persons will oversee the project.

[20.7] a repetition of the request to immediately prepare the contract to ensure swift signature thereof by plaintiff and NAC.

⁷. See Rule 45(5) to (7) of the Rules of the High Court of Namibia

[20.8] the contract number for the design supply and installation of check -in counters and integrated security systems at the two airports.

[21] Annexure 'IBB2' seems to be a summary breakdown of expected payments totalling the claimed amount and derived from Annexure 'IBB4'. In context this Court accepts that both documents were provided by or on behalf of plaintiff.

[22] Annexure 'IBB3', parts A and B, contains a proposal from a third party, SITA, to plaintiff. This proposal consists of 75 pages. Clauses 12, 13 and 14 therein contains SITA's Commercial Offer in US dollars to plaintiff, Assumptions and a Legal Notice. The SITA proposal clearly envisaged a written agreement to be concluded with plaintiff. The Court and first defendant is left in the dark whether plaintiff entered into such an agreement.

[23] Annexure 'IBB3', parts C and D, consists of a further 63 pages containing a final design dated 20 December 2016 (contrary to plaintiff's claim that Annexure 'IBB3' was provided to NAC prior to NAC's letter of appointment dated 24 June 2016), graphic images, a page marked 'B' (which might have originated from minutes of NAC, but which is not identified and placed in any time frame by plaintiff), a document from DSINGNLINQ containing more images concerning foreign airports, a letter from DSINGNLINQ dated 28 April 2016 to Mr Silombela of NAC, which is termed a quotation without any discernible pricing, an incomplete update dated 11 May 2016 without any pricing and two undated equipment lists from Namibia Synthetic Lubricants & Engineering to an undisclosed recipient called a quotation, without any discernible pricing. Reverting to the page marked 'B' in part C of Annexure 'IBB3' it NOTED that the cost for the design, supply and installation of check-in counters and integrated security system and Cute system for the two airports is N\$156 126 620.00 and that the price is firm. It was RESOLVED that the request for approval for the exemption to appoint plaintiff on the basis of being the best preferred service provider has been approved.

[24] In order to summarize the contents of Annexure 'IBB3' to the plaintiff's particulars of claim the court had to delve into the voluminous annexures in search for facts which should have been pleaded, if present.

[25] In view of the court's analysis contained in sub-paragraphs 20.3 to 20.7 and paragraphs [21] to [24] above, the contents of sub-paragraphs, 6.3, 6.4, 6.5 and 6.6 of the particulars of claim and paragraphs 7 to 10 thereof should not be allowed to remain in their present form in the particulars of claim due to their vagueness and embarrassing nature.

[26] The court reached the above conclusion based on the applicable legal principles⁸, and the following pertinent accepted grounds of the exceptions raised by first defendant and the omission to plead that a written agreement was drafted by plaintiff and signed by the parties:

[26.1] 'The Plaintiff fails to plead the various provisions of the agreement "between the parties" identified and described as "Contract Number NAC/E/277/16".'

[26.2] 'Moreover, Annexure 'IBB4' on plain reading does not provide for dates on which first defendant purportedly had to "effect payment of the contract price as alleged in paragraph 6.5 of the particulars of claim".'

[26.3] 'The plaintiff has failed to plead or identify the various terms of the alleged oral and or written agreement and which plaintiff contends "cumulatively constituted the agreement between the parties".'

[26.4] 'The plaintiff has failed to plead when the agreement between the parties was concluded, and furthermore, how and or when First and Second Defendant "*instructed Plaintiff to proceed with procuring the materials and services required for the implementation of the agreement*".'

[26.5] 'The Plaintiff has failed to plead when it proceeded with the instruction and why it contend that the defendants particularly First Defendant had knowledge that Plaintiff intended to proceed as set out at sub-paragraphs 8.1 to 8.4. In any event the Plaintiff has

⁸ Vide paragraphs 11 to 18 of this judgment.

failed to plead and or demonstrate the nature and or type of agreements it entered with third parties to procure the services and or products referred to at sub-paragraphs 8.1 to 8.4.'

[26.6] 'The Plaintiff does not plead when it procured the services and or goods which are set out in sub-paragraphs 8.1 to 8.3 and/or the terms of the sub-contract with DSINGNLINQ or DSC. Furthermore, the Plaintiff does not plead when it purportedly expended the amount of 1.58 million euros "reflecting the amount that the Plaintiff expended in performing its obligations in terms of the alleged agreement".'

[26.7] 'The plaintiff does not plead the terms and or basis on which it contends that it is entitled to "expectation interest in the agreement".'

[26.8] 'Annexure "IBB1" does not properly identify the services to be rendered, or the goods to be delivered.'

[26.9] 'The agreement as alleged by Plaintiff leaves the Plaintiff at its own will, to determine how much of what and where, the services should be rendered and the goods be delivered. Yet, all this uncertainty comes, according to Plaintiff at a fixed price of N\$156,125,620.00. In such circumstances no contract could come into existence or can be enforceable.'

[26.10] 'Paragraph 4 of "IBB1" stipulates that an agreement still had to be drafted and signed. No allegation is made that such an event occurred.'

[26.11] 'Neither the financial proposal nor the letter of acceptance is identified. It is also not alleged that plaintiff signed a letter of acceptance or provided it to first defendant.'

[26.12] 'The agreement relied upon is alleged to be a partly oral and a partly written agreement, but the oral portion is not identified. This allegations read with the written documents annexed is truly confusing.'

[27] First defendant has established that sub-paragraphs 6.3 to 6.6 and paragraphs 7 to 10 of the particulars of claim is vague and embarrassing in that they lack particularity to the extent that they are vague and that their vagueness causes prejudice to the extent that first defendant is unable to plead thereto and to properly prepare thereon to meet the plaintiff's case.

[28] Both parties are in agreement that the capping provision in High Court Rule 32(11) should not apply. The court agree. The interlocutory application was complex, both parties employed instructed counsel, the monetary claim in the first claim is far above average, the parties are litigating with equality of arms and command substantial resources⁹.

[29] In the result the following orders are made -

[29.1] First defendant's exception on the ground that the particulars of claim is vague and embarrassing concerning claim one is upheld.

[29.2] Sub-paragraphs 6.3 to 6.6 and paragraphs 7 to 10 of the particulars of claim are struck in its present form.

[29.3] Plaintiff is granted 15 court days to give notice of intention to amend, if so advised, in terms of Rule 52(1) of the Rules of the High Court of Namibia.

[29.4] First defendant is granted 15 court days to object, if so advised, in terms of Rule 52(2) and (4) of the Rules of the High Court of Namibia.

[29.5] Plaintiff shall pay the costs of the first defendant, including the costs of one instructing and two instructed counsel free from the limitation/capping imposed by Rule 32(11) of the Rules of the High Court of Namibia.

GH Oosthuizen
Judge

⁹ South African Poultry Association v Ministry of Trade and Industry 2015 (1) NR 260 HC at 282 [68].

APPEARANCES

PLAINTIFF: T.A Barnard
Instructed by Dr Weder, Kauta and Hoveka Inc,
Windhoek.

FIRST DEFENDANT: R. Heathcote SC (with him U.A. Hengari)
Instructed by Kangueehi and Kavendjii Inc,
Windhoek.