REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no**: I 671/2011**

In the matter between:

WESBANK TRANSPORT (PTY) LTD **APPLICANT/PLAINTIFF**

and

MMD MINERAL SIZING (AFRICA)
(PTY) LTD **RESPONDENT/DEFENDANT**

Neutral citation: *Wesbank Transport (Pty) Ltd V MMD Mineral Sizing (Africa) (Pty Ltd* (I 671/2011) [2013] NAHMD 55 (28 February 2013)

Coram: Kauta, AJ
Heard on: **31 July 2012**
Delivered on: **28 February 2013**

ORDER

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1. The Plaintiff is granted leave to amend its particulars of claim dated 21 February 2011 in accordance with Plaintiff's notice in terms of Rule 28 dated 10 November 2011, by filing its amended particulars of claim no later than the 18th of March 2013.

2. The Plaintiff is granted leave to amend its further particulars dated 9 September 2011 in accordance with Plaintiff's notice in terms of Rule 28

dated 10 November 2011, by filing its amended further particulars no later than the 18th of March 2013.

3. The Defendant is ordered to pay all costs occasioned by the application for amendment, such costs are to include that of one instructing and two instructed counsels.

JUDGMENT

Kauta, AJ:

[1] The Plaintiff is demanding payment in the sum of N$895 744.20 from the Defendant. The claim is based on a partly written, partly oral agreement in terms whereof the Defendant hired a 95 ton mobile crane, together with certain ancillary services from the Plaintiff.

[2] In an attempt to answer the claim the Defendant requested further particulars which were furnished on the 9th September 2011. After careful perusal of the further particulars the Defendant served a notice in terms of Rule 23(1) of the High Court. The Plaintiff answered to the Rule 23(1) notice with a notice to amend its particulars of claim and further particulars.

[3] Any belief held by the Plaintiff that it's intended amendment will bring it so ever to the finalization of this matter was dashed when the Defendant objected to its proposed amendment on the 31st October 2011.

[4] Faced with the objection to its amendment, the Plaintiff sought to amend its claim for the second time on the 11th November 2011, in the hope to move the matter forward. Hope turned to despair on the 25th November 2011, when the second amendment was also objected to by the Defendant.

[5] On the 20th January 2012, the Plaintiff enrolled an application in which it sought leave to amend its particulars of claim and further particulars in accordance

with its second notice to amend dated the 11th of November 2011. The Defendant opposed the application.

[6] I am indebted to both Mr Heathcote and Mr Tötemeyer, counsel of the parties, for their useful synopsis. Initially, the Defendant raised six objections, at the hearing Mr Tötemeyer, on behalf of the Defendant did not proceed with the first objection nor did he persist with objection 3(1). As a result, I shall deal only with objections 2; 3(2); 4 and 5 seriatim.

Vague and Embarrassing: (Objection 2)

[7] The Plaintiff intends substituting paragraph 3 of its particulars of claim with a claim that the written parts of '*the agreement are attached thereto and marked "POC1", "POC2" and "POC3"*. *"POC3" being a quotation dated 16 July 2009, Plaintiff's general terms and conditions of contract and Defendant's purchase order P0000288*'.

[8] In terms of paragraph 2 of the Plaintiff's Notice, the Plaintiff intends substituting the documents currently annexed to its Particulars of Claim as "POC1" with the documents annexed to the Plaintiff's Notice as "POC1" ('the new "POC1"').

[9] In the new "POC1", the costs quoted by the Plaintiff for the 95 ton crane is stated as follows:

Per hour	N$1 900.00
Site establishment and return	N$36 000.00
Travel of operator and crew	N$1 600.00/day
Rigger and Rigging tools	N$230/hour

[10] The proposed new paragraph 4.3 states that *'defendant shall pay Plaintiff for hiring the 95 ton mobile crane and for the ancillary services at the rate set out in the aforesaid table, alternatively at fair and reasonable rates. The aforesaid fair and reasonable rates were the same as the rates set out in the aforesaid table'.*

[11] The Defendant contends that the content of the new "POC1" and the proposed paragraph 4.2 and 4.3 are at odds with the content of annexure "POC3", which does not contain any rate and limits the amount in respect of any services to be rendered by the Plaintiff to the Defendant to R464 356 for the off-loading of material as per the loading schedule.

[12] The Defendant concludes that, as a result, the proposed amendment will render the Plaintiff's Particulars of Claim vague and embarrassing with regard to the rates allegedly agreed upon between the parties.

[13] Geier J in *Trustco Capital (Pty) Ltd v Atlanta Cinema CC and Three Others ((P) I 3268/2010) [2012] NAHCMD 187 (12 July 2012)* at paragraph [16] cited the following authorities, with apparent approval:

'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 expiable cause of action is in the same portion as one who has no cause of action at all."'*

And further –

'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.

The object of all 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 pleader.

Where 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.'

[14] The court was also referred to "Erasmus Superior Court Practice" from which the following relevant extracts were quoted:

'An exception that a pleading is vague and embarrassing is not directed to a particular paragraph within a cause of action: it goes to 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:

(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 it caused to him or her by the vagueness complained of.

(3) In each case an adhoc 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'.

[15] The court in, *Trans-Drakensberg Ltd v Combined Engineering (Pty) Ltd 1967 (3) SA 632 (D) at 638A and 640H to 641B*, stated that *'. . . the aim should be to do justice between the parties by deciding the real issues between them. The mistake or neglect of one of them in the process of placing the issues on record is not to stand in the way of this; his punishment is in his being mulcted in the wasted costs. The amendment will be refused only if to allow it would cause prejudice to the other party not remediable by an order for costs and, where appropriate, a postponement. It is only in this relation, it seems to me, that the Applicant for the amendment is required to show it is bona fide and to explain the delay there may have been in making the application, for he must show that his opponent will not suffer prejudice in the sense I have indicated. He does not come as a suppliant, cap in hand, seeking mercy for his mistake or neglect. Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on record an issue for which he has not supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an*

amendment which would make the pleading excipiable (Cross v Ferreira, supra at p. 450), or deliberately refrain until a late stage from bringing forward his amendment with the purpose of catching his opponent unawares ***(Florence Soap and Chemical Works (Pty) Ltd v Ozen Wholesalers (Pty) Ltd, 1954 (3) SA 945 (T)****), or of obtaining a tactical advantage or of avoiding a* special order as to *costs (****Middleton v Carr, 1949 (2) SA 374 (AD) at p. 386****)".*

And further, at 642A, with reference to **Zarug v Parvathie NO**:

'An amendment cannot however be had for the mere asking. Some explanation must be offered as to why the amendment is required and if the application for amendment is not timeously made some reasonably satisfactory account must be given for the delay. Of course if the application to amend is mala tide or if the amendment causes an injustice to the other side which cannot be compensated by costs, or in other words, if the parties cannot be put back for the purposes of justice in the same position as they were in when the pleading it is sought to amend was filed, the application will not be granted.'[1]

[16] With the above principles in mind, I will now carefully approach each objection raised. Mr Tötemeyer, who appeared for the Defendant contended that the purchase order dated 21 July 2009 ("POC3"), constitutes the only agreement entered into between the parties. And the Defendant tendered payment of N$ 464 356 upon receipt of an invoice of this sum. To bolster this premise Mr Tötemeyer contended that the Plaintiff's managing director has acknowledged this true position.

[17] "POC3" prima facie reflect that the value of N$464 356 is a provisional sum and will be re-evaluated. The Plaintiff's intended amendment in my view seeks in clear terms to illustrate how "POC3" was varied. The Defendant contended that the amendment will be prejudicial to it because lack of particularity in this instance will lead to a bare denial plea and guesswork. In my view the prejudice claimed by the

[1] Confirmed in: Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another 1990 (3) SA 547 (A) at 565G — I; and Ciba-Geigy (Pty) Ltd v Lushof Farms (Pfr) Ltd 2002 (2) SA 447 (SCA) at 462 G-H. See also South Bakels (Pty) Ltd v Quality Products, 2008 (2) NR 419 (HC) at 421, para [101] and 423, paras [16) and [17]; Hwedhanga v Cabinet for the Territory of South West Africa
1988 (2) SA 746 (SWA) at 749G; Andreas v La Cock and Anatheb 2006 (2) NR 472 (HC) at 484.

Defendant is not apparent but perceived. The prejudice, if any, exists in the Defendant's mind only and not in law because it pursues to seek *facta probantia* in the particulars of claim. The intended amendment is not meaningless and not is it prejudicial to the Defendant.

No cause of action: Objection 3(2)

[18] Plaintiff intends to amend paragraph 3 of the particulars of claim inter alia to the effect that plaintiff and defendant entered into an agreement '*in terms whereof defendant hired a 95 ton mobile crane, together with certain ancillary services, from plaintiff'.*

[19] In terms of paragraph 1.11 of defendant's request for further particulars, defendant requested which "ancillary services" the plaintiff alleges defendant hired from plaintiff in terms of the agreement referred to in paragraph 3 of the particulars of claim.

[20] In terms of paragraph 11 of plaintiffs further particulars plaintiff replied by stating that '*Transportation of staff. Subsistence and travel, rigging, site establishment and operator services (what was necessary to offload the equipment)'.*

[21] In terms of paragraph 2.6 of defendant's request for further particulars, the defendant requested to which 'ancillary services' reference is being made in paragraph 4.2 of the particulars of claim.

[22] In terms of paragraph 17 of plaintiff's further particulars, plaintiff replied to defendant's aforesaid request by stating that *'Transportation of staff subsistence and travel, rigging, site establishment and operator services (what was necessary to offload the equipment)'.*

[23] In terms of paragraph 3 of plaintiff's rule 28 notice, plaintiff intends to amend paragraph 4.2 of the particulars of claim to read *'Plaintiff's rates (excluding VAT) per*

hour for hiring the aforesaid crane and for the aforesaid ancillary services were as follows'.

[24] In terms of paragraph 5 of plaintiff's rule 28 notice, plaintiff intends amending the particulars of claim by inserting the following paragraphs after paragraph 4.10 of plaintiff's particulars of claim, before plaintiff's current paragraph 5, as a new paragraph 5:

> *'5. During or about July 2009 and at Trekkopje, Republic of Namibia, the agreement was varied by oral agreement between plaintiff, duly represented by C Nolte and F Lambrechts, and defendant, duly represented by Riaan van Zyl and Johan Combrinck, to the following effect and with inter alia the following express, alternatively, implied, further alternatively, tacit terms:*
>
> *5.1 Plaintiff's rates (excluding VAT) per hour for hiring the aforesaid 95 ton mobile crane and for the aforesaid ancillary services were as follows:*

CONTRACT RESPONSIBILITY		
CRANE	**SITE ESTABLISHMENT**	**RATE/HOUR**
95 TON	14 000.00	1 800.00
TRAVEL		**PER R/TRIP**
95 TON		720.00
RIGGER		**RATE/HOUR**
95 TON		228.00

STANDING TIME RESPONSIBILITY		
CRANE		**RATE/HOUR**
95 TON		1 800.00
TRAVEL		PER R/TRIP
95 TON		720.00
RIGGER		**RATE/HOUR**
95 TON		228.00
ON SITE RESPONSIBILITY		

CRANE		**RATE/HOUR**
95 TON		1 900.00

5.2 Defendant shall pay plaintiff for hiring the 95 ton mobile crane and for the ancillary services at the rates set out in the aforesaid tables, alternatively at fair and reasonable rates. The aforesaid fair and reasonable rates were the same as the rates set out in the aforesaid tables'.

[25] The rates and resultant charges set out in "POC 5", being 720 and 228, are provided for in terms of paragraphs 4.2 and 5.2 of the proposed particulars of claim, as read with the further particulars.

[26] The Defendant objects because Annexure "POC5", being invoice number 185963, contains charges in respect of 'transportation of staff' (in the amount of N$12 240) and 'subsistence and travel' (in the amount of N$23 712):

26.1 these charges are not provided for in terms of paragraphs 4.2 and 5.2 of the proposed Particulars of Claim;

26.2 the Plaintiff's Particulars of Claim therefore will not disclose a cause of action in respect of these charges.

[27] The intended amendment set a rate for site establishment, travel, rigger, standing time and on site responsibility. Mr Tötemeyer is correct that transportation and subsistence charges are conspicuous by their absence in paragraphs 4.2 and 5.2 of the proposed Particulars of Claim. But in their further particulars the Plaintiff in clear terms elaborate that the ancillary services in paragraph 5.2 of the proposed particulars of claim constitute transportation of staff, subsistence and travel, rigging, site establishment and operator services which was necessary to offload the equipment. I see no prejudice or embarrassment to Defendant, as it is now able to use the rate provided in consultations to determine if any sum is indeed owed to Plaintiff.

Vague and embarrassing: (Objection 4)

[28] In the proposed new paragraph 6 of the Particulars of Claim, the Plaintiff pleads that '[d]uring or about August 2009 and at Trekkopje, Republic of Namibia, the agreement was further varied by oral agreement between Plaintiff . . . and defendant . . . The proposed new paragraph 6,4 of the Particulars of Claim will read as follows: 'Pursuant to the aforesaid variation and in order to provide for additional costs involved in hiring cranes and the ancillary services related thereto in order to off-load the equipment concerned, defendant's purchase order P000 0288 was varied to the amount required to provide for the aforesaid additional costs.

[29] Plaintiff's proposed paragraph 6.4 states that *'defendant's purchase order P0000288 was varied to the amount required providing for the aforesaid additional costs'.* That is what was agreed. No specific amount was agreed upon. It was agreed that it be varied to whatever amount is required to cater for the required additional.

[30] Mr. Heathcote argued that the particulars of claim will not be vague and embarrassing on the ground that paragraph 6.4 fails to specify a specific amount, since no specific amount was agreed upon. The rates and work to be performed were agreed upon as set out in the proposed particulars of claim. Further allegations relate to *facta probantia and not facta probanda*.

[31] He further contended that in many contracts parties agree on specific work to be performed, without a specific price being agreed upon. Then, the law determines that the price must be fair and reasonable. On defendant's version, no party will ever be able to claim in a court of law, unless a specific price had been agreed upon.

[32] Mr Tötemeyer, on behalf of the Defendant contend that an averment that the purchase order was varied to the amount required, without stating the sum makes the proposed amendment vague and embarrassing especially in view of the Plaintiff's attorneys assertion that 'no specific amount was agreed upon'. Based on the above he contends that the proposed amendment is capable of two meanings.

[33] I fail to see the logic in counsel's submission that this proposed amendment is vague and embarrassing. The amount required must be determined from N$895 744.20 claimed, by simply deducting N$464 356 therefrom. It follows logically that the amount required was N$431 388.20.

No cause of Action: (Objection 5)

[34] Plaintiff intends to amend paragraph 6 of the particulars of claim to read as follows:

'The rates and figures contained in the tables above are in accordance with plaintiff's rates as agreed between the parties, alternatively, in accordance with the fair and reasonable value of the services rendered and are exclusive of VAT'.

[35] In terms of paragraph 3 of plaintiffs particulars of claim as it stands (and in terms of the proposed new paragraph 3), plaintiff's claim is based on a partly written, partly oral agreement entered into between the parties.

[36] Defendant alleges that in so far as plaintiff seeks to claim payment of any amount other than that allegedly agreed upon between the parties, plaintiff's particulars of claim will not disclose a cause of action for such payment.

[37] Defendant concludes therefore that, Plaintiff's alternative claim for the 'fair and reasonable value of the services rendered' will render the particulars of claim excipiable on the basis that they do not disclose a cause of action.

[38] In terms of paragraph 5 of plaintiffs rule 28 notice plaintiff intends amending the particulars of claim by *inter alia* inserting the following paragraphs after paragraph 4.10 of plaintiff's particulars of claim, before plaintiff's current paragraph 5, as a new paragraph 5:

> *'5. During or about July 2009 and at Trekkopje, Re pub/ic of Namibia, the agreement was varied by oral agreement between plaintiff duly represented by C Nolte and F Lambrechts, and defendant, duly represented by Riaan van*

Zyl and Johan Combrinck, to the following effect and with inter a/ia the following express, alternatively, implied, further alternatively, tacit terms:

5.2 Defendant shall pay plaintiff for hiring the 95 ton mobile crane and for the ancillary services at the rates set out in the aforesaid tables, alternatively at fair and reasonable rates. The aforesaid fair and reasonable rates were the same as the rates set out in the aforesaid tables'.

[39] From the aforesaid it is clear that plaintiff is not seeking payment of any amount other than that agreed upon between the parties, As a result, defendant's fifth objection is devoid of any merit.

[40] In the result, I make the following orders:

1. The Plaintiff is granted leave to amend its particulars of claim dated 21 February 2011 in accordance with Plaintiff's notice in terms of Rule 28 dated 10 November 2011, by filing its amended particulars of claim no later than the 18th of March 2013.

2. The Plaintiff is granted leave to amend its further particulars dated 9 September 2011 in accordance with Plaintiff's notice in terms of Rule 28 dated 10 November 2011, by filing its amended further particulars no later than the 18th of March 2013.

3. The Defendant is ordered to pay all costs occasioned by the application for amendment, such costs are to include that of one instructing and two instructed counsels.

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P Kauta

Acting

APPEARANCES:

PLAINTIFF	R Heathcote, SC
Instructed by:	Francois Erasmus & Partners, Windhoek
DEFENDANT	R Töttemeyer, SC
Instructed by:	Conradie & Damaseb, Windhoek