



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2698/2012

In the matter between:

LUBRICATION SPECIALISTS (PTY) LTD

PLAINTIFF

and

ETOSHA LUBRICANTS CC

1ST DEFENDANT

MR PIETER HACOBUS LAMBERT

2ND DEFENDANT

Neutral citation: *Lubrication Specialists (Pty) Ltd v Etosha Lubricants CC* (I 2698/2012) [2014] NAHCMD 18 (24 January 2014)

Coram: CHEDA J

Heard: 15 October 2013

Delivered: 24 January 2014

Flynote: The particulars of claim should be concise and sufficiently clear. A claim which is capable of more than one interpretation deprives defend to defend and is vague and embarrassing – Exception will be upheld if the vagueness goes to the root of the cause of action – The excipient must show that if left unattended it will result in defendant’s prejudice.

Summary: Plaintiff issued summons against defendants on reliance of a purchase agreement. It was not sufficiently clear whether it relied on a contract

per se or agency. Plaintiff was called upon to remedy the complaint, but did not do so resulting in this application. Defendant/Applicant averred that Plaintiff/Respondent's particular of claim, left in that state was a vague and embarrassing, the vagueness went into the root of the cause of action and was prejudicial to it.

ORDER

- 1) The application for exception is upheld;
- 2) Defendants to pay the costs, which costs shall include the costs of one instructing and one instructed attorney.
- 3) Plaintiff be and is hereby granted permission to amend its further particulars within 14 days from the date of this order.

JUDGMENT

CHEDA J [1] Plaintiff issued out summons against defendants on the basis of an agreement allegedly entered into between the two parties during June 2009 at Walvis Bay. A dispute arose during the operation of the agreement and hence the parties dragged each other to court.

[2] While the pleadings are in progress, defendants lodged this application for exception in terms of Rule 23(1). The basis of their complaint is that:

- 2 (a) plaintiff's further particulars of claim dated 13 February 2013 do not contain the necessary averments to sustain a cause of action and;
and/or
- (b) fails to disclose a cause of action against defendants.

It is of note that the said particulars though filed, are undated.

GROUNDS FOR EXCEPTION

Defendant argued that plaintiff refers to and relies on an agency agreement. Further his reference to purchases effected on the basis of agency or contract in the matter should be clear on its face, It is therefore not adequate as it is not in compliance with Rule 18(6) which provides thus:

“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”

[3] In view of this rule defendants argued that both plaintiff’s particulars and indeed further particulars together with the annexures thereto lack the necessary averments to sustain its cause of action against them alternatively, that they fail to disclose a cause of action against them.

[4] It is their prayer, therefore, that:

- a) that plaintiff’s claim be dismissed or
- b) that plaintiff’s particulars of claim be struck out with costs (*supra*) and an alternative relief granted as the court deems it fit.
- c) the exception be upheld with costs, which costs should include costs of one instructing and one instructed attorney;

[5] Respondent/plaintiff argued that plaintiff’s particulars of claim are clear and sufficiently draw the necessary *nexus* between the “purchases” and the fact that same was done in terms of annexure (A) being the agency. It went further to argue that particulars of claim can only be regarded as failing to disclose a cause of action if a cause of action cannot be disclosed on all possible evidence that may be led on the pleadings.

[6] The second complaint with regards to plaintiff’s non-compliance with Rule 18(b), its argument is that, its particulars of claim are in fact rule compliant. For that reason Advocate Campbell argued that the application for exception is not properly before the court.

THE LAW

Plaintiff relies on a contract for its claim. Rule 18(b) *supra* is peremptory and these courts have followed this principle for a long time, see *South African Railways and Harbours v Deal Enterprises (Pty) Ltd*¹ where Botha J ably stated:

“In my opinion the argument for the plaintiff is unsound in both its parts. As to the first part, it seems to me that the framers of the Rules intended to prescribe pragmatically that certain classes of particulars, viz. those mentioned in sub-Rules (6), (8), (9) and (10) of Rule 18, should be contained in all pleadings, for the very purpose of eliminating disputes as to whether they were required to be supplied in terms of the general precept of Rule 21 (6) or not. The negative provision of Rule 18 (7) supports this conclusion. Since the prescribed particulars are required to be incorporated in the pleadings, it necessarily follows, in my view, that where they have been omitted the pleader can be compelled to remedy the defect by means of a request for those particulars by his opponent, and in such a case there is no room for an enquiry into the question whether the opponent requires the particulars in terms of Rule 21 (1) or not (cf. Van Tonder’s case, supra at p. 193H, and Mavundla’s case, supra at p. 28A). As to the second part of the argument, the suggested narrow interpretation of the expression “relies upon” appears to me to be artificial and unwarranted. A plaintiff clearly “relies upon a contract” when he uses it as a “link in the chain of his cause of action” (Van Tonder’s case, supra at p. 193H). He is accordingly obliged to furnish the particulars mentioned in Rule 18 (6) whenever the contract forms a part of the cause of action put forward by him, irrespective of whether the contract can aptly be described as the “bias” of the claim or not.”

[7] A pleading may be worded in such a way that it fails to disclose a cause of action or defence which results in the prevention of the opposite party clearly failing to defend the case it is called upon to meet on such instances the pleading can be said to be vague and embarrassing.

¹ *South African Railways and Harbours v Deal Enterprises (Pty) Ltd* 1975 (3) SA 944 (W at 952H – 953B)

[8] The correct legal position is that for what is worth, the exception on the ground that the proceeding is vague and embarrassing will not be upheld unless it is clear that the opposite party would be prejudiced in his defence or action. The burden of proof that the particulars of claim are vague and embarrassing lies with the excipient who must also show that they lack particularity which will embarrass it, in the event of attempting to plead to it. In addition it must show that it will suffer prejudice if the particulars of action remain as they are.

[9] The vagueness means that it is either meaningless or capable of more than one meaning. Above all it must strike to the root of the cause of action, see *Lampert-Zakiewicz v Marine Trade Insurance Co. Ltd*² and also *Dharumphal Transport (Pty) Ltd v Dhurampal*³.

[10] In *casu*, there are contradictions in the particulars of claim as correctly pointed out in defence's second complaint. The test in, vagueness and embarrassment is clearly laid down in *Classic Engines CC v Nghikofa*⁴. Plaintiff argued that further evidence will be adduced at a later stage, presumably to establish the nexus. With due respect this is unacceptable as it goes against the established legal principles in this court, see *July v Motor Vehicle Accident Fund*⁵, *Makenzie v Farmers' Co-Operative Meat Industries Ltd and Marney v Watson & another*⁶.

[11] In deciding the exception the court takes the facts alleged in a pleading as correct and for that reason the averments and arguments thereat cannot be interpreted in any other manner. They should therefore be given their ordinary and general meaning. The main purpose of an exception that a claim does not disclose a cause of action is to avoid leading unnecessary evidence at the trial, for that reason plaintiff's argument regarding further oral evidence later, which evidence should have been availed at the pleading stage is without legal foundation.

[12] Taking into account all the submissions made by both counsel, I find that there is merit in defendant's arguments that indeed upon reasonable construction of

² *Lampert-Zakiewicz v Marine Trade Insurance Co. Ltd* 1975 (4) SA 597 C at 599-G.

³ *Dharumphal Transport (Pty) Ltd v Dhurampal* 1956 (1) SA 700 (A) at 706

⁴ *Classic Engineers CC v Nghikofa* case No I 887/2010 (unreported – delivered on 29 July 2011) at par 5

⁵ *July v Motor Vehicle Accident Fund* 2010 (1) NR 368 (HC) at 373.

⁶ *Marney v Watson & another* 1978 (4) SA 140.

the pleadings excepted to and all possible evidence that maybe led, the defendants will not be in a position to disclose a defence in the circumstances, see *Dowles Manor Properties Ltd v Bank of Namibia*⁷.

[13] The question which logically follows in view of my determination towards upholding the exception is whether plaintiff should be awarded an opportunity to remedy the complaints raised by defendant. The guiding principle in such matters is the need for the court to take into consideration the following factors:

- 1) the amount involved in the dispute;
- 2) the reasonableness or otherwise of plaintiff's hold to its entrenched position;
- 3) the importance of the matter to the parties;
- 4) public policy; and
- 5) the inconvenience to both the court and the parties if the matter is adjudged to end thereat.

[14] The list is by no means inexhaustive. These courts are usually liberal when it comes to fairness and it is for that reason that I am of the opinion that plaintiff/respondent should not be completely shut out at this stage, see *Farman v Cardew*⁸: In *Cardew v Cardew and Farman*⁹ and the case of *Whitaker v Roos and another*¹⁰ where Wessels, J clearly stated:

"This court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the court is to do justice between the parties. It is not a game we are playing, in that is some mistakes are made, the forfeit is claimed"

The particulars of claim, if left as they are will no doubt result in serious prejudice to applicant/defendants as they lack sufficient particularity.

⁷ *Dowles Manor Properties Ltd v Bank of Namibia* 2005 NR 59 (HC) at 69-20

⁸ *Farman v Cardew*

⁹ *Cardew v Cardew and Farman* 1955 (3) SA 24

¹⁰ *Roos and another* 1911 TPD 1092 at 1102

In conclusion, therefore, I hold that the application succeeds with the following order:

ORDER

- 1) The application for exception is upheld;
- 2) Defendants to pay the costs, which costs shall include the costs of one instructing and one instructed attorney.
- 3) Plaintiff be and is hereby granted permission to amend its further particulars within 14 days from the date of this order.

M Cheda
Judge

APPEARANCES**PLAINTIFF :**

Ms Campbell

Instructed by M B De Klerk & Associates

Windhoek

1ST AND 2ND DEFENDANTS:

Mr A Van Vuuren

Instructed by Dr Weder, Kauta & Hoveka Inc.

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