IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.: 2922/2016

In the matter between:

ROBOR (PTY) LTD Plaintiff

and

RAZZMATAZZ CIVIL (PTY) LTD Defendant

CORAM: MENE, AJ

JUDGMENT BY: MENE, AJ

HEARD ON: 3 February 2017

DELIVERED ON: 2 March 2017

---

[1] The plaintiff has instituted action against the defendant for payment of an outstanding amount of R4 057 048.89 due to it in terms of a contract that was entered into between them.

[2] The defendant has filed a notice in terms of Rule 23(1) excepting to the plaintiff's particulars of claim on the ground that they are vague and embarrassing.

[3] The first complaint raised by the defendant relates to paragraphs 3, 4.3 and 6 of the particulars of claim and annexure R1 and R3 to the particulars of claim. According to the defendant the problem emanates from the content of annexure R3 and that the plaintiff cannot rely on the terms of both annexure R1 and R3. The second complaint of the defendant relates to the timeline in respect of the supply of material to the defendant. According to the defendant the timeline of events does not correlate. The other complaints relate to annexure R1 to the plaintiff's particulars of claim which according to the defendant does not reflect the purchase amount and that the shipping schedule contained therein is at odds with paragraphs 4.4 and 4.5 of the particulars of claim; and that annexure R4 does not contain the essential and epicentre quotations which serve as provenance of any purchase concluded under annexure R3.

[4] An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced (*Levitan v Newhaven Holiday Enterprise CC 1991 2 SA 297 (C); Quinlan v McGregor 1960 (4) SA 383 (D) at 393E - H)*; thereafter there must be a qualitative analysis of such embarrassment; and it is only where the embarrassment is so serious as to cause prejudice to the

excipient that the exception will be allowed. The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.

<u>THE FIRST COMPLAINT</u>

[5] In respect of the first complaint it is apposite to refer to the particulars of claim and annexure R1 and R3 which are the source of this complaint. The plaintiff pleaded as follows in the particulars of claim:

> "3. On or about 14 November 2014 plaintiff, duly represented therein by Nico Schoeman submitted a written quotation for the sale and supply of pipes and fittings to defendant. A copy of the written quote is attached as R-1 ["the written quote"]
>
> 4 The relevant terms of the written quote are the following:
>
> 4.1 Plaintiff was to sell and supply the pipes and fittings set out therein at the total price of R37 377 808.44 (Excl VAT);
> 4.2 The pipes and fittings were to conform with the specifications set out therein;
> 4.3 Acceptance of the written quote is subject to the credit requirements of plaintiff being satisfied;
> 4.4 A delivery schedule was to be agreed pursuant to acceptance of the written quote;
> 4.5 Plaintiff would not be held responsible if deliveries fail to meet the agreed delivery schedule due to special or unique supply conditions of shipment to South Africa;
> 4.6 The written quotation is based on plaintiff's terms and

conditions of sale.

5. On or about 14 November 2014 and at Bloemfontein defendant, duly represented by R.W. Parker, accepted the written quote by issuing and furnishing plaintiff with Purchase Order #RC 13709. A copy of the Purchase Order is attached hereto as R-2.

6. On or about 2 December 2014 defendant at Bloemfontein, duly represented by R.W. Parker, signed a written application to open a written credit account [“the application”] and bound the defendant to all the terms and conditions contained in the application.

6.1 A copy of the application is attached hereto as R-3.

6.2 Included in the application were the Credit Terms and Conditions and plaintiff’s Standard Terms and Conditions of Sale.”

[6] The defendant does not take issue with how the above paragraphs are pleaded. The exception is taken on the basis that the plaintiff cannot rely on both terms as contained in annexure R1 and R3, especially when annexure R-3 records in clause 14 that:

> “these terms and conditions constitute the sole record of the agreement between the parties in relation to its subject matter. The terms and conditions contained on the Applicant’s purchase order, order acceptance forms and/or invoices shall not apply to, supplement or supersede any provisions of these credit terms and conditions. No addition to, variation, novation or agreed cancellation of these credit terms and conditions shall be of any force or effect unless in writing and signed by or on behalf of the parties.”

[7] Furthermore the defendant contends that the credit contract does not incorporate by reference or otherwise the terms of the written quotation (annexure R-1) that was submitted on 14 November 2014. According to the defendant it cannot be discerned from the particulars of claim which contract the plaintiff relies on.

[8] In response to this complaint the plaintiff contends that annexure R-3 is a document containing four things: (i) an application to open a credit account; (ii) the terms and conditions that govern the credit facility; (iii) a cession of books debts, and (iv) the terms and conditions that apply to a sale agreement. According to the plaintiff, it does not plead or rely on the credit agreement but the sale agreement. The plaintiff argues that the defendant misreads its summons and pleadings. Clause 14 of annexure R-3 which the defendant relies on relates to the credit agreement. Furthermore the plaintiff argues that the manner in which the defendant approaches the pleadings is akin to criticising a plaintiff who sues a surety based on an agreement that contains both the sale terms and the suretyship, but relies only on the terms of the suretyship to advance its case against the surety. This approach was simply untenable. In addition the plaintiff argues that the defendant has not demonstrated that it cannot plead to the summons.

[9] It is indeed so that annexure R-3 is a hybrid document. Page 38-39 records the particulars (or details) of the

defendant as the party applying to open credit account; page 39 (starting from the bottom) – page 40 records the terms and conditions of a credit facility; page 40 (starting at the bottom) – 41 records the terms and conditions of cession of book debts; page 41-44 records the standard terms and conditions of sale.

[10] As argued on behalf of the plaintiff, and correctly so in my view, clause 14 relied on by the defendant relates to the credit facility. The provisions that are applicable in the case of the plaintiff are the provisions relating to the sale agreement.

[11] Even if one can argue, as it appears to be the contention of the defendant, that the credit agreement does not incorporate the quotation (R-1) (which quotation was accepted by the defendant), the defendant seems to overlook all the terms and conditions that appear on page 41 under the heading: STANDARD TERMS AND CONDITIONS OF SALE. Under the said heading the following clauses are relevant and applicable - clauses 1.1 and 2.2 which read as follows:

> "1.1 'Agreement/contract' shall mean these standard terms and conditions of sale, and such other terms and conditions of sale as may be agreed in writing between the parties.
>
> 2.2 This agreement shall be incorporated in and shall apply consistently to every contract of sale entered into between Robor and the customer regardless of whether such

Contract of sale is concluded orally or in writing."

[12] In my view annexure R-3, as per the standard terms and conditions of sale, incorporates any term and condition of sale agreement as may be agreed upon in writing. This includes annexure R-1 which was accepted by the defendant and any other agreement entered into subsequent to annexure R-3. When one looks at the case of the plaintiff as pleaded in the particulars of claim and more importantly paragraph 7 and its subparagraphs, the plaintiff relies on sale agreements and the standard terms and conditions thereof. The pleaded case is followed up in paragraphs 8 – 12. In these paragraphs the plaintiff pleads that it supplied and delivered all pipes and fittings, including the pipe specials in accordance with the purchase agreement and that payment in the amount of R39 902 576.42 (incl VAT) was made by the defendant. However, the outstanding balance is R4 057 048.89. There is no vagueness or ambiguity in the said paragraphs or in the attached annexures.

[13] Even if I am wrong on the above, I must say it is important to note that an exception that a pleading is vague and embarrassing will not be allowed unless the excipient would be seriously prejudiced if the offending allegations were not expunged. *In casu* the defendant has not shown any prejudice it would suffer if it pleads to the particulars of claim as they are.

[14] During oral argument it was contended on behalf of the defendant that if one considers annexure R-1 to R-3 and the purchase orders (annexure R-4), there must first be a quote in respect of the order to purchase and that in casu there was no such a quote. This argument, as I understand it, boils down to the challenge on the validity of a contract, or put differently that there was no contract in place in respect of the amount claimed by the plaintiff. If the defendant believes so or is of the view that there is no contract between itself and the plaintiff, then there is no reason why the defendant cannot plead as such as this will amount to its defence instead of excepting to the pleadings which in my view are not vague and embarrassing. I find therefore that there is no basis to this complaint and this disposes of the first complaint of the defendant.

SECOND COMPLAINT

[15] I have already indicated above that the defendant misread the summons and focused on the terms of the credit agreement hence its argument that the timeline does not correlate. It is clear from annexure R-3 that a quote would be submitted by the plaintiff and accepted by the defendant by way of a purchase order. It was argued on behalf of the plaintiff that indeed the purchase orders (as evident from annexure R-4 to the particulars of claim) were preceded by a quote which was sent by e-mail. This argument was not seriously disputed except that there was no quote. I must repeat what I have stated above in paragraph 14 that this

argument boils down to the challenge that there was no valid contract that was entered into between the parties. For the same reasons as stated above, this does not preclude the defendant from pleading to the particulars of claim and putting its defence that there no valid contract exists between itself and the plaintiff. The defendant will not be prejudiced in pleading to the particulars of claim. In my view the particulars of claim are put in a lucid, logical and intelligible form and the defendant can plead thereto.

OTHER COMPLAINTS

[16] Other complaints suffer the same fate and for the same reasons as the first and second complaints. The only complaint that has not been dealt with is the one relating to the amount that is allegedly not mentioned in annexure R-1. This complaint was not pursued in oral argument, and correctly so. I say so for the simple reason that the amount clearly appears on the second page of annexure R-1 (i.e. page 26 of the record).

[17] Having said so and for the reasons stated above, the exception cannot be upheld.

[18] In the event I make the following order:

The defendant's exception is dismissed with costs.

B.S. MENE, AJ

On behalf of the plaintiff:	Adv. C.J. McAslin Instructed by: Lovius Block BLOEMFONTEIN
On behalf of the defendant:	Adv. S. Grobler Instructed by: Peyper Attorneys BLOEMFONTEIN