



**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 number: 5406/2014

In the matter between:

FREYSSENET POSTEN (PTY) LTD

1st Excipients

MURRAY & ROBERTS CONSTRUCTION (PTY) LTD

2nd Excipients

and

NICOLAS GEORGIOUS N.O

1st Respondent

MAUREEN LYNETTE GEORGIU

2nd Respondent

JOSEPH REYNOLDS CHEMALY N.O

3rd Respondent

(In their capacities as trustees of the
N Georgiou Trust no: TMP757]

HEARD ON: 31 MARCH 2017

JUDGMENT BY: MBHELE, J

DELIVERED ON: 03 JULY 2017

- [1] The respondents (plaintiffs) instituted an action against the excipient (herein referred to as the first defendant) for specific performance and damages arising out of an alleged breach of contract.
- [2] The first defendant is defending the claim and brought several exceptions against the plaintiffs' particulars of claim. This is a fifth exception brought by the first defendant. This exception follows the amended particulars of claim filed by the plaintiffs on 26 October 2016.
- [3] In the notice of exception the first defendant prayed for an order that the exception be upheld and that the plaintiffs' particulars of claim be struck out in its entirety as well as for a costs order.
- [4] The defendant raised extensive grounds of exception in support of its assertion that the plaintiffs' particulars of claim are vague and embarrassing and lack averments necessary to sustain a cause of action.
- [5] Before delivery of the amended particulars of claim the plaintiffs brought an application in terms of Rule 6(11) in terms of which failure to comply with Rule 18(6) was condoned by my brother Sibeko, AJ. At the heart of the above application was the inability of the plaintiffs to produce a copy of the Post-Tensioning Reinforcement subcontract on the project known as the Loch Logan Waterfront (being the subject of the plaintiffs' claim) entered into between the first defendant and the second defendant.

PRINCIPLES RELATING TO EXCEPTIONS

- [6] It is necessary to deal with the applicable principles before dealing with the grounds for exception. These are listed in Erasmus Superior Court Practice at B1 154 to B1 154A:

“(a) 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.

(b) If there is vagueness in this sense the court is then obliged to mistake a quantitative analysis of such embarrassment as the excipient can show it caused to him or her by the vagueness complained of.

(c) 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.

(d) The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.

(e) The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.

(f) The excipient must make out his or her case for embarrassment by reference to the pleadings alone.”

- [7] Requirements set out in Rule 18 (4) are emphasised in **Trope v South African Reserve Bank 1992 (3) SA 208 T at 221:**

“An exception to a pleading on the ground that it is vague and embarrassing involves a twofold 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.”

- [8] It is clear from the above that the assailed pleading must not only be vague and embarrassing but it must cause prejudice to the excipient.

- [9] For an exception to succeed, the excipient must establish that the pleading is excipiable on every interpretation that can reasonably be attached to it. (See, **FIRST NATIONAL BANK SOUTHERN AFRICA V PERRY N.O AND OTHERS 2001 (3) SA 960 (SCA)** at **965 D**; also **THEUNISSEN ENANDERE V TRANSVAALSE LEVENDEHAWE KOÛP BPK 1988 (2) SA 493 (A)** at **500 E-F**.)

- [10] The exception is a procedural means to avoid leading of unnecessary evidence at trial. Its object is either, if possible, to settle the case, or at least part of it, in a cheap and easy fashion, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception. (See **KAHN v STUART AND OTHERS 1942 CPD 386** at **391**;

- [11] The pleading on which the exception is based must be read as a whole to establish vagueness amounting to embarrassment resulting in prejudice to the excipient. All documents attached to the assailed pleading must also be looked at to satisfy oneself that no cause of action has been established.

[12] In **KAHN v STUART AND OTHERS** *supra* it was emphasised that a Court should not look at a pleading with a magnifying glass of too high power.

[13] While pleadings must be drafted carefully a court should not read them pedantically nor should it emphasize precise formalistic requirements; the substance of the allegations should be considered. (**See MN v AJ 2013 (3) SA 26 (WCC) at 33 par. 24**).

[14] In **JOWELL v BRAMWELL -JONES AND OTHERS 1998 [1] SA 836 W at 905E-H** the following was said:

"I must first ask whether the exception goes to the heart of the claim and, if so, whether it is vague and embarrassing to the extent that the defendant does not know the claim he has to meet..."

The term "cause of action" was defined in **McKenzie v Farmers' Cooperative Meat Industries Ltd 1922 AD 16 at 23** as

"..."every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

[15] It is important to look at the plaintiffs' particulars of claim before dealing with the grounds for exception:

3.1 On 3 July 2005 and at Bloemfontein the plaintiff, duly represented by MN Georgiou and the second defendant ("the contractor"), duly represented

by SD Pel entered into a written agreement (“the Murray & Roberts agreement”)

3.2 A copy of the relevant clause of the Murray & Roberts Agreement is annexed hereto, marked “A”.

4. It was *inter alia* terms of the Murray & Roberts Agreement that:

4.1 the Plaintiff appointed Second Defendant as contractor for a new shopping mall and additions to the existing shopping centre (“the project”) situated at Loch Logan Waterfront, Bloemfontein (“the LLW Shopping Centre”);

4.2 The principal agent appointed for the project shall:

4.2.1 Prepare tender documents in conformity with the JBCC Nominated/Selected Subcontract Agreement and the Murray & Roberts agreement for work intended to be executed by selected subcontractors. Such preparation shall be carried out in consultation with and to the reasonable approval of the contractor;

4.2.2 Call of tenders from a list of tenders agreed between the contractor and the principal agent;

4.2.3 In consultation with the contractor, choose a subcontractor and instruct the contractor to appoint such a subcontractor as a selected subcontractor in terms of the JBCC Nominated/Selected Subcontractor Agreement and other tender requirements;

4.3 The second Defendant shall within ten working days of the instructions referred to in paragraph 4.2 above determine that such a subcontractor can:

4.3.1 Meet the requirements of the JBCC Nominated/Selected Subcontractor Agreement and other tender requirements; and

4.3.1 Provide security in terms of such an agreement.

- 4.4 Any design responsibility undertaken by a selected subcontractor shall not dissolve upon the Second Defendant as contractor of the project.
- 4.5 All contractual and other rights the contractor shall have against a selected subcontractor arising from any design responsibility undertaken by the selected subcontractor are ceded to the First Plaintiff.
- 4.6 The right flowing from a warranty regarding such design responsibility are ceded to the Plaintiff as the employer whether or not such a design warranty is referred to in the Subcontractor Agreement.
- 4.7 The second Defendant, as contractor, shall make payment to the First Defendant, as selected subcontractor, of the amount certified and identified and in terms of the JBCC Nominated/Selected Subcontractor Agreement.
- 5.1 Tenders were called for by the principal agent in writing, for the Post-Tensioning Reinforcement Subcontractor on the project. A copy of the relevant tender documents consisting of the contents page, section 1 and section 6 thereof are annexed hereto, marked "**B**".
- 5.2 The First Defendant submitted a tender for the Post-Tensioning Subcontractor on 2 August 2005 under cover of a letter addressed to **Venter Berry Partnership Quantity Surveyors**, the quantity surveyors to the project, annexed hereto as annexure "**C1**".
- 5.3 On 23 August 2005 the First Defendant, at the special instance and request of the plaintiff, in writing submitted a revised price for the subcontractor to **Venter Berry Partnership Quantity Surveyor**, a copy of which is annexed hereto, marked "**C2**".
- 5.4 The First Defendant's tender was accepted by the Plaintiff and the Second Defendant was notified as such by way of a letter addressed to it by the principal agent dated 4 October 2005. A copy of the letter is annexed hereto marked "**D**".
- 5.5 In terms of the tender documents, annexure "**B**" hereto, submitted by First Defendant, duly represented by a duly authorized employee of the

First Defendant, whose full and further particulars are to the Plaintiffs unknown, and accepted by the Plaintiff, duly represented by MN Georgiou of the Plaintiff;

5.5.1 First defendant accepted that it will have to conclude a contract with the main contractor (Second Defendant) as selected subcontractor.

5.5.2 First defendant are referred to the specific conditions and obligations of the main contractor (Second Defendant) in respect of the Murray & Roberts Agreement, the relevant clauses of which is annexed hereto marked "A".

5.5.3 By submission of the tender, the First Defendant, was deemed to have acquainted himself fully with the terms of the tender document, (annexure "B" hereto) the Murray & Roberts Agreement (annexure "A" hereto), local requirements, law and all aspects of the work envisaged in the tender documents.

5.5.4 The tender forms a Selected Subcontractor to the Murray & Roberts Agreement (annexure "A" hereto) for the project.

5.5.5 The First defendant's attention is drawn to the Murray & Roberts Agreement and Preliminaries applicable to the tender.

5.5.6 The First Defendant will be required to enter into a subcontract with the Second Defendant in accordance with the latest addition of the JBCC 2000 Selected Subcontract Agreement.

5.5.7 The First Defendant specifically agrees that it is totally liable for the design, supply and installation of the post-tension cables, etc., as well as additional reinforcement, that the design and installation meets the requirement of the project (Works) and that it will perform accordance with the intended purpose of the works.

5.6 Subsequent to the First Defendant's appointment as selected subcontractor the First and Second Defendants entered into a Nominated/Selected Subcontractor Agreement, the originals and/or

copies thereof which are in the possession of the First and Second Defendants but not in the possession of the Plaintiff.

- 5.7 Annexure hereto, marked “E” is a pro-forma version of the Nominated/Selected Subcontractor Agreement similar to the one entered into between the First and Second Defendants whereby the terms and conditions of annexure “A” and “B” hereto relating to the Nominated/Selected Subcontract Agreement were incorporated by reference as pleaded in paragraphs 5.5.2 to 5.5.7 above.
6. In terms of annexures “A”, “B” and “E” hereto, the relevant express, alternatively implied terms of the Nominated/Selected Subcontractor Agreement were *inter alia* the following:
 - 6.1 The first Defendant was totally liable for the design, supply and installation of the Post-Tension cables, etc. as well as additional reinforcement s that the design and installations met the requirements of the project; and
 - 6.2 The First Defendant will perform in accordance with the intended purpose of the works and will closely liaise with the contractor in all matters concerned; and
 - 6.3 The First Defendant will perform the said subcontract work in a proper, workmanlike and professional manner.
 - 6.4 The First Defendant will execute the subcontractor works with due skill, diligence, regularity and expedition and bring the works to *inter alia* work completion, and final completion.
 - 6.5 The First Defendant shall not be responsible for the design of the Nominated/Selected Works, other than the First Defendant’s or his subcontractors’ temporary works, unless otherwise stated in the Nominated/Selected Schedule. The First Defendant shall not be responsible for the primary coordination of design elements.
 - 6.6 Any design responsibility undertaken by the First Defendant shall not devolve upon the Second Defendant. All contractual or other rights the Second Defendant has against the First Defendant arising from any design responsibility undertaken by the First Defendant are ceded to the Plaintiff. The rights flowing from a warranty regarding such design responsibility by the First Defendant are ceded to the Plaintiff whether or not such a design or warranty is referred to in the Nominated/Selected Agreement.

- 6.7 The First and Second Defendants agreed, when entering onto the Nominated/Selected Subcontract Agreement, that the First Defendant would be responsible for the design of the subcontract work as is evident from *inter alia* the following:
- 6.7.1 A letter addressed to the Plaintiff by the Second Defendant dated 16 November 2011, a copy of which is annexed hereto marked “E”;
 - 6.7.2 A letter by the principal agent, NBA Studio Architects, addressed to the First Defendant that it is being held responsible for the design defect, a copy of the letter is annexed hereto marked “E2”;
 - 6.7.3 A letter addressed by the First Defendant to the contractor dated 30 August 2010 regarding the First Defendant’s endeavours to rectify its said subcontract work. A copy of the letter is annexed hereto marked “E3”.
 - 6.7.4 An e-mail addressed by the Second Defendant to the principal agent and *inter alia* the First Defendant in which the Second Defendant confirms that in terms of clause 4 of the JBCC principal agreement any design responsibility undertaken by the First Defendant (subcontractor) shall not devolve on the Second Defendant and is ceded to the Plaintiff. A copy of the e-mail annexed hereto marked “E4”.
 - 6.7.5 A letter addressed by the Second Defendant to the representative of the Plaintiff dated 7 November 2011 calling for a meeting with, *inter alia*, the First Defendant pertaining to remedial work to be effected on the slow-curve wall, designed by the First Defendant in terms of the selected/nominated subcontract. A copy of the letter is annexed hereto marked “E5”;
 - 6.7.6 An e-mail message addresses by the Defendant’s representative to *inter alia* and Plaintiff’s the Second Defendant’s representatives on 1 December 2011 concerning the remedial work concluded by the First Defendant. A copy of the e-mail is annexed hereto marked “E6”;
 - 6.7.7 A letter addressed to the First Defendant by the principal agent, acting on behalf of the Plaintiff, dated 3 July 2013 regarding the remedial work concluded by the First Defendant on the structural defects of the curved wall. A copy of the letter is annexed hereto marked “E7”;

PLAINTIFFS CLAIM:

[16] The First Defendant failed to comply with the provisions of annexures “**A**”, “**B**” and “**E**” hereto and to conduct the selected subcontract work in a proper, workmanlike and professional manner in the following respects:

- 7.1 The top reinforcing for the cantilever portion of the band on the gridline at the first floor level has been underprovided;
 - 7.2 The design did not allow for the wall along the edge of the slab at the first floor;
 - 7.3 excessive deflections occurred on the slow curve slab edge;
 - 7.4 the design had to allow for a canopy to be attached to the cantilever, which canopy was build but not installed due to the cantilever deflections;
 - 7.5 The reinforcing over gridline 16 is deficient and has insufficient load allowances;
 - 7.6 The reflection of the slab caused the curved wall to lean or buckle outwards making this wall unsafe and not fit for use and unrepairable;
 - 7.7 It failed to conduct the Selected Contract work and/or repairing damages caused by the design defect;
 - 7.8 Failed to bring the works to completion and final completion.
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- 8.1 In terms of the provisions of annexures “**A**”, “**B**” and “**E**” hereto, the First Defendant, since 2008 on various occasions attempted to rectify the defects and defected design for the Post-Tensioning Reinforcement of the slow curve wall but the said attempts were insufficient and/or First Defendant failed to rectify the effects.
 - 8.2 The Plaintiff and Second Defendant complied with all their obligations in terms of annexures “**A**”, “**B**” and “**E**” hereto pertaining to the Post-Tensioning Reinforcement subcontract.
 - 8.3 Works and final completion in terms of annexure “**A**” hereto have not been reached.

- 9.1 As a result of the First Defendant's breach of contract pleaded in paragraph 7 above, the slow curve wall on the western façade of the L L W Shopping Centre was unstable and could buckle and collapse, causing injuries or loss of life to tenants and patrons of the shops in its vicinity.
- 9.2 In the premises the Defendant is liable towards the Plaintiff for fulfilment of its obligations in terms of annexures "**A**", "**B**" and "**E**" hereto.

[17] The first defendant's grounds for exception are stated as follows:

1. The particulars of claim seek to enforce alleged obligation in a contract allegedly concluded between the first and second defendant (to which the plaintiffs are not a party) in respect of which the plaintiffs, at best (if all the correct allegations were to be made) only became "cessionary" in respect an alleged design obligation, which obligation to design can only provide a remedy to perform the personal task of redesigning in the hands of the plaintiffs. The plaintiffs have failed to make sufficient allegations in support of each of the elements of the relief that they are seeking, alternatively the allegation in support thereof are vague and embarrassing to the extent of causing the first defendant prejudice by rendering it incapable of sensibly pleading thereto.
2. In paragraph 5.5 the plaintiffs alleged that annexure "**B**" was submitted by the first defendant to the plaintiffs, whereas annexure "**B**" constitutes the documents pursuant to which the plaintiffs allegedly called for tenders and "**C1**" and "**C2**" allegedly constituted the submitted tender.
3. The plaintiffs allege in paragraph 5.5.7 that the defendant agreed to certain obligations pursuant to annexure "**B**" in contradistinction to an alleged subsequent agreement alleged in paragraph 5.6 which precludes any preceding agreement.

4. The allegations in paragraphs 5.5.7, 5.7, 6.5 and 6.7 are contradictory in that paragraph 6.5 excludes any design obligation in the absence of an allegation that the Schedule to annexure “E” stated the contrary
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5. Paragraph 6.5 records that the first defendant shall not be responsible for the design of the Nominated/Selected Works “...unless otherwise stated in the Nominated/Selected Schedule”. In the absence of an allegation that the Schedule to annexure “E” stated the contrary no such obligation exists, nor has any been relied upon.
6. The first claim in paragraphs 7 – 9 of the particular of claim is precluded on the basis of paragraph [26] of the judgment by EBRAHIM J on 6 August 2015 as between the same parties.
7. Paragraph 4.5 and 4.6 relies upon alleged upon alleged agreements of cession, without compliance with rule 18(6).
8. Paragraph 6.1 refers to an alleged obligation in relation the “requirements of the project” without pleading any specifics in relation thereto.
9. Paragraph 6.2 refers to an alleged obligation in relation to the “intended purpose of the works” without pleading any specifics any relation thereto.
10. Paragraph 6.2 refers to an alleged obligation in relation to “all matters concerned” without pleading any specifics in relation thereto.
11. Paragraph 6.3 refers to an alleged obligation to perform the alleged subcontract work without pleading any specifics in relations thereto.
12. Paragraph 6.4 refers to an alleged obligation to perform the alleged subcontract work “with due skill, diligence, regularity and expedition” without pleading any specifics in relation thereto in contradiction the

plaintiffs allege in paragraph 7 that the first defendant failed “to conduct the selected subcontract work in a proper, workmanlike and professional manner”.

13. Paragraph 6.5 alleges that the first defendant shall have no design responsibility unless recorded in writing in a schedule, allegedly completed by other parties without alleging that it had been done.
14. The reference to attachment “E” does not substantiate the allegations in paragraph 6.6 in that it does not refer to or confirm the contents of the schedule in which the opposite of the obligation in paragraph 6.5 had to be stated.
15. Paragraph 6 relies on and attaches annexure “E”, which expressly excludes the any design responsibility, which attaching the relevant pro forma of the schedule referred to in paragraph 6.6 or without alleging that the schedule stated the opposite of the obligation alleged in paragraph 6.5.
16. The alleged failures to comply as alleged in paragraph 7 do not correspond with any specific obligation alleged in paragraph 6 or evident from the attachments referred to, and are made without alleging that the schedule stated the opposite of the obligation alleged in paragraph 6.5 and that it contained the specific obligations alleged to have been breached in the manner alleged in paragraph 7.
17. The failure to comply as alleged in paragraph 7 do not refer to any time at which it had to be performed or when the alleged failure to perform occurred.

18. The failure to comply alleged in paragraph 7 do not refer to the alleged schedule, but merely “E” which expressly excludes the design responsibility.
19. The first defendant is alleged to be a subcontractor to the second defendant in respect of the construction work, under circumstances where the plaintiffs allege that the plaintiffs (as employer) and the second defendant (as principal contractor to the first defendant) complied with all obligations of the contract, which precludes any possible claim based on the defect as alleged or at all.
20. It is evident from the particulars of claim that practical completion had been achieved and that second defendant complied with all its obligations (albeit it contradictorily alleged that works and final completion had not been achieved), before summons had been issued. Apart from the confusion and contradiction, the particular of claim failed to make the necessary allegations to show compliance with the contractual procedures stipulated for either before or after practical completion.
21. The allegations in paragraph 9.2 preclude reliance on any design obligation on the part of the first defendant.
22. The allegation in paragraph 8.2 to the effect that the second defendant complied with its obligations is contradictory to the alleged breach thereof by the first defendant as subcontractor of the second defendant.
23. The plaintiffs seek relief against the first defendant beyond the alleged obligation to design, allegedly “ceded” to the plaintiffs and beyond the obligation to remedy any breach design obligation.

24. The plaintiffs failed to make an allegation with reference to paragraph 7.1 as to what it is that the first defendant had to provide in order to give meaning and content to the word “underprovided”.
25. The plaintiffs did not allege an obligation in paragraph 7.2 from which it can be established that the design had to “allow for the wall along the edge of the slab at the first floor”.
26. The plaintiffs failed to allege in paragraph 7.3 which obligation and breach thereof resulted in the alleged excessive deflections on the slow curve slab edge.
27. The plaintiffs failed to allege in paragraph 7.4 any obligation to allow for a canopy to be attached to the cantilever.
28. The plaintiffs failed to allege in paragraph 7.5 an obligation in relation to reinforcing over gridline 16 so as to establish what was sufficient and what had been insufficient load allowances.
29. The plaintiffs failed to identify in paragraph 7.6 an obligation in relation to “reflection of the slab”
30. The order sought in prayer 1 failed to limit the relief to any contractual entitlement on the part of the plaintiffs as Employer in contradistinction to whichever obligations the first defendant owed the second defendant.

[18] Mr. Van Tonder, in his amplification of the grounds of exception, emphasised that without contractual relationship between the plaintiffs and the first defendant there can be no cause of action. He submitted that the particulars of claim fail to show that there

was any obligation on the first defendant to perform as alleged in the particulars of claim.

Mr. Van Tonder, further, contended that the agreement pleaded on an upon which the plaintiffs' claim was brought fails to establish a contractual relationship between the plaintiffs and the first defendant. He further contended that the plaintiff failed to show that the schedule that was to place design responsibility on the first defendant does exist and that it changed the relevant clause of the contract. In his view, the plaintiffs failed to plead the basis that such obligation does exist. He contended, further, that without the allegation that the schedule was changed there can be no cause of action.

[19] Mr. Grobler, on behalf of the plaintiffs, made a submission that the plaintiff pleaded that the design obligation fell on the first defendant and that it is evident from the pro forma contract, tender documents and annexures "E1 to E7", being correspondence exchanged between the plaintiffs and first and second defendants that such obligation does exist. The allegation that the schedule was changed cannot be made but the correspondence exchanged and other documents annexed to the particulars of claim support the allegation that the design obligation rested on the first defendant. He contended that the particulars of claim in their current form state the plaintiffs' claim with sufficient clarity and particularity.

[20] It is clear that the plaintiffs concluded an agreement with the second defendant for construction related work at the Loch Logan Waterfront in Bloemfontein. The second defendant had to enter

into an agreement with a subcontractor the terms of which were outlined in the principal agreement.

[21] Paragraph 4 of the agreement between the plaintiff and the second defendant state the following:

“4.1 The contractor shall not be liable for design of the works other than the contractor’s or his subcontractor’s temporary works. The contractor shall not be responsible for the primary coordination of design elements

4.2 Any design responsibility undertaken by a nominated subcontractor shall not devolve upon the contractor. All contractual or other rights the contractor shall have against such nominated or selected subcontractor arising from any design responsibility are ceded to the employer. The right flowing from a warranty regarding such design responsibility are ceded to the employer whether or not such a design warranty is referred to the subcontractor agreement.

4.3 The contractor shall be responsible for ensuring the timeous preparation of the design documentation undertaken by a selected subcontractor for acceptance by the principal agent to avoid delay to the intended date for practical completion or any revision thereof in terms of 29.0.”

[22] Annexure “E” to the particulars of claim state the following:

“4.1 The subcontractor shall not be responsible for the design of the n/s works, other than the subcontractor’s or his subcontractor’s temporary works, unless otherwise stated in his or her schedule. The subcontractor shall not be responsible for primary coordination of design elements.

4.2 Any design responsibility undertaken by the contractor shall not devolve upon the contractor. All contractual or other rights, the

contractor has against the subcontractor arising from any design responsibility undertaken by the subcontractor are ceded to the employer. The right flowing from warranty regarding such design responsibility are hereby ceded to the employer whether or not such a design warranty is referred to in this nominated/selected agreement.

Paragraph 13 of Annexure 'B', being the tender document that the first defendant responded to, state the following:

'The Subcontractor specifically agrees that he is totally liable for the design , supply and installation of the post tension cables etc as well as additional reinforcement that the design and installation meets the requirements of the Works and that it will perform in accordance with the intended purpose of the Works. The Subcontractor must however closely liaise with the Contractor in all matters concerned.'

- [23] The first defendant avers that the plaintiffs should have stated the terms of the Post – tensioning Subcontract. The plaintiffs have been allowed to approach this Court without the said contract. It is clear from the annexed documents that the first defendant responded to the tender as put out by the Plaintiff and submitted its quotation based on the same. The relationship between the parties is articulated in the contracts and correspondence exchanged between them. The confusion around these documents can be better cleared at trial.

I am unable to find vagueness and embarrassment that would result in prejudice to the defendant. I have to be persuaded by the excipient that the pleading is excipiable on every interpretation that can be reasonably attached to it. The particulars of claim, in my

view, disclose a cause of action with such clarity and particularity to enable the defendants to plead.

[24] In the circumstances, I make the following order.

ORDER

The exception is dismissed with costs.

N.M. MBHELE, J

On behalf of excipients:	Adv Van Tonder
Instructed by:	EG Cooper Majiedt Inc Bloemfontein

On behalf of respondent:	Adv S Grobler
Instructed by:	c/o Honey Attorneys Bloemfontein