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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 1005/2020

**REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO**

In the matter between:

ALMAR INVESTMENTS (PTY) LTD

PLAINTIFF

AND

EMANG MMOGO MINING RESOURCES (PTY) LTD

FIRST DEFENDANT

EMANG ONE RESOURCES (PTY) LTD

SECOND DEFENDANT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 23rd of January 2023.

DIPPENAAR J:

[1] This application concerns twenty-two exceptions raised by the excipients (the "defendants") against the plaintiff's particulars of claim on the basis that they are vague and embarrassing alternatively do not disclose a cause of action. The plaintiff contends that there is no merit in any of the exceptions and seeks their dismissal with costs.

[2] The plaintiff instituted a contractual action pertaining to the supply of mining equipment against the defendants claiming payment of an amount of R44 844 319.00 in respect of 46 unpaid invoices, pursuant to breaches by the defendants of various agreements concluded between the plaintiff and the second defendant.

[3] The plaintiff relies on a number of agreements central to the exceptions raised by the defendants. The plaintiff pleads a written agreement styled "Agreement of Subcontract" was concluded between the plaintiff and the second defendant on 3 June 2016 ("the 2016 agreement"), which terminated due to the termination of the Glencore supply contract to which it related, whereafter it and the second defendant concluded an oral agreement in July 2016 (the "2016 oral agreement"). The relevant terms of the alleged oral agreement are:

3.1. Despite the termination of the Glencore contract, the plaintiff's equipment already on the mine would remain on the mine for use in the second defendant's mining operations.

3.2. The charges for the mining equipment would be in accordance with the “Emang Mine Operational Costs Model (Screening Operations)” attached to annexures B and C to the 2016 Agreement.

3.3. If a jaw crusher “was required to do work outside of the ‘train’ the plaintiff would charge the second defendant separately for such use based on the plaintiff’s charges for the use thereof on an ad hoc rate per hour and in accordance with the plaintiff’s usual charges.

3.4. In respect of any hours recorded that the excavator and front-end loader worked and that they operated in excess of the operating hours recorded by the screen, such additional hours would be paid for by the second defendant and charged in accordance with the plaintiff’s usual charges for such use.

3.5. Should the second defendant require further mining equipment and/or the provision of any vehicle and/or services on the mine and request the plaintiff to provide same, the second defendant would be liable to pay the plaintiff’s usual charges for the provision of such equipment and/or provision and/or service in accordance with the plaintiff’s usual charges, unless the parties agree to the contrary.

3.6. The second defendant would be liable for the accommodation and transport costs of the plaintiff’s operators and supervisors operating the plaintiff’s mining equipment.

[4] In addition to the 2016 oral agreement, the plaintiff pleads that there were a number of additional agreements concluded between the plaintiff and the second defendant over the period June 2016 to July 2019. The relevant agreements are:

4.1. A written agreement, alternatively, a partly written, partly oral agreement that the second defendant was liable to pay for the accommodation obtained by

the plaintiff for the operators of its equipment ("the accommodation agreement");

4.2. A partly oral, partly written agreement concluded on 15 June 2016 for the provision of a B20 dump truck ("the B20 dump truck agreement");

4.3. A partly oral, partly written agreement concluded in September 2016 for the provision of the equipment listed in the quotation at Annexure G ("the annexure G agreement");

4.4. A partly oral, partly written agreement concluded in November 2016 for the provision of a 75mm cone crusher ("the cone crusher agreement");

4.5. An oral agreement concluded in December 2016 for the purchase of diesel by the second defendant from the plaintiff ("the diesel purchase agreement");

4.6. A partly oral, partly written agreement concluded on 25 January 2017 for the provision of a 200 Pecker excavator ("the pecker excavator agreement");

4.7. An oral agreement concluded in March 2017 to amend the invoices relating to the transport of material to be weighed at the railway siding ("the transport invoices agreement");

4.8. A partly oral, partly written agreement concluded on 2 December 2017 for the provision of a Hitachi 670 excavator ("the Hitachi 670 excavator agreement");

4.9. A partly oral, partly written agreement concluded on 2 February 2017 for the provision of the equipment listed in the quotation at Annexure K3 ("the annexure K3 agreement");

4.10. A partly oral, partly written agreement concluded in April 2018 for the provision of the equipment listed in the quotation at Annexure K4 in respect of a planned mining area (“the planned mining area equipment agreement”);

4.11. A partly oral, partly written agreement in November 2018 for the provision of a Hitachi 870 excavator (“the Hitachi 870 excavator agreement”);

4.12. A partly oral, partly written agreement concluded in November 2018 for the provision of an S74 service truck (“the S74 service truck agreement”);

4.13. An oral agreement concluded in April 2019 for the provision of two ADT trucks (“the ADT agreement”); and

4.14. An oral agreement concluded on 22 July 2019 for the hire and transport of a Hitachi 870 excavator (“the second Hitachi 870 excavator agreement”).

[5] The plaintiff pleads that the equipment was supplied by it to the second defendant who utilised it in its mining business. The plaintiff provided various quotations to the defendants for the provision of equipment, which quotations form the basis of various of the plaintiff’s claims.

[6] The plaintiff invoiced the second defendant in terms of the above agreements on a monthly basis over the course of the period June 2016 to October 2019. The second defendant paid some of the plaintiff’s invoices but failed to pay all of the invoices. The defendants terminated its agreement/s with the second defendant and removed its equipment from the mine.

[7] The unpaid invoices are listed in a table. In paragraph 36 of the particulars of claim, the plaintiff deals with each of the listed invoices in detail. Copies of the unpaid invoices are annexed as annexures T1 to T116. Ultimately, the plaintiff claims payment of each of the unpaid invoices, comprising separate claims.

[8] The particulars of claim are extensive and its attachments voluminous. The exceptions too, are extensive. To avoid prolixity, it is not feasible to set out the claims or the exceptions in substantial detail.

[9] The exceptions must be considered against the backdrop of the relevant well-established applicable principles. A pleading lacks averments which are necessary to sustain a cause of action where there are insufficient allegations to complete the plaintiff's cause of action.¹ The pleading must be excipiable on every reasonable interpretation it can bear².

[10] The enquiry into whether a pleading is vague and embarrassing involves a twofold consideration. The first; whether the pleading is vague. The second, whether the vagueness causes prejudice.³ Vagueness amounting to embarrassment and embarrassment in turn resulting in prejudice must be shown.

[11] Such an exception must satisfy the test in *Jowell*⁴. As stated by Heher J:

"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..."

[12] A pleading is vague when it is either meaningless or capable of more than one meaning⁵ or if it can be read in any number of ways so that it leaves a reader unclear as to its meaning.⁶ Simply put: the reader must be unable to extract from the statement a clear, single meaning.

¹ Makgae v SentraBoer (Koöperatief) Bpk 1981 (4) SA 239 (T) at p 244C

² Minister of Law and Order v Kadir 1995 (1) SA 303 (A) at 318D-E; Picbell Group Voorsorgfonds v Summer Law and other related matters 2013 (5) SA 596 (SCA) 506E-I; First National Bank Ltd v Perry NO and Others 2001 (3) SA 960 (SCA) para [3]

³ Trope v South African Reserve Bank 1992 (3) SA 208 (T) at p 211A-E

⁴ Jowell v Bramwell-Jones 1998 (1) SA 836 (W) at p 905E-H

⁵ Lockhat and Others v Minister of the Interior 1960 (3) SA 765 (D) at p 777D.

⁶ Nasionale Aartappel Koöperasie Bpk v PriceWaterhouseCoopers Ingelyf 2001 (2) SA 790 (T).

[13] An exception that a pleading is vague and embarrassing will not be upheld unless the excipient will be seriously prejudiced⁷. Prejudice will often be found in the fact that a defendant is unable to plead properly to particulars of claim on account of their vagueness. In such cases, the question is whether the embarrassment is, or is not, so serious as to cause prejudice to the excipient if he were compelled to plead to the paragraph in the form to which he objects, such as where averments are contradictory or inconsistent and are not pleaded in the alternative.

[14] The pleading must be considered in its entirety to consider whether or not it is vague and embarrassing. An exception can be taken to particular sections of a pleading provided that they are self-contained and amount in themselves to a separate claim⁸.

[15] It is trite that a court must accept the correctness of the allegations set out in the particulars of claim⁹.

[16] In considering the exceptions in turn, I have applied these principles. Most of the defendant's exceptions are self-standing although there are certain exceptions which are underpinned by the same or similar contentions. The exceptions are primarily based on the vague and embarrassing ground. The exceptions are aimed at certain portions of paragraph 36, which particularises the plaintiff's various claims and the corresponding paragraphs wherein the agreements underpinning those claims are pleaded.

First exception

[17] The exception is aimed at paragraph 9 of the particulars of claim where the plaintiff pleads an agreement by the second defendant to "accept" that it must pay for the accommodation of the plaintiff's operators.

⁷ Frank v Premier Hangers CC 2008 (3) SA 595 (C) at 600F-G

⁸ Barnett v Rewi Bulawayo Development Syndicate 1922 AD 457 at 459; Barclays National Bank Ltd v Thompson 1989 (1) SA 547 (A) at 553F; Tobacco Exporters & Manufacturers (Pty) Ltd v Bradbury Road Properties (Pty) Ltd 1990 (2) SA 420 (C) at 424E

⁹ Picbel Group Voorsorgfonds v Somerville 2013 (5) SA 496 (SCA) 511-512

[18] It is pleaded that the plaintiff represented by Maree sent an email to “the second defendant” and that “the second defendant accepted” that it was liable to pay for accommodation.

[19] The defendants contend that the plaintiff fails to plead who, on behalf of the second defendant, accepted, whether the acceptance was oral or in writing, and when and where it was communicated, thus rendering the pleading vague and prejudicing it in relation to the acceptance of the offer pleaded.

[20] The plaintiff contends that the identity of the persons who represented the parties is reflected in the email annexure “E”, dated 13 June 2016, confirming the oral discussions held and that the question of accommodation was addressed subsequently in the various quotes presented. The information does not however appear clearly from the particulars of claim and a defendant should not be left to trawl through voluminous attachments to establish the plaintiff’s case.

[21] I agree with the defendants that, whilst the plaintiff pleaded an offer in the form of the email referred to, it did not plead sufficient particularity in relation to the acceptance of the offer, nor comply with the requirements of r 18(6). The defendants are clearly prejudiced.

[22] I conclude that this renders the particulars of claim vague and embarrassing as contended.

[23] It follows that that exception must be upheld.

Second exception

[24] The second, sixth, seventh, thirteenth, fourteenth and fifteenth exceptions are in similar terms.

[25] They are based on the contention that the particulars of claim do not disclose a cause of action as there are no claims for unpaid invoices.

[26] The second exception relates to paragraph 10 of the particulars of claim, where the plaintiff pleads the conclusion of the partly oral partly written B20 dump truck agreement. The written portion is the quotation attached as “F2”, containing the express terms of the agreement. The plaintiff then pleads certain express terms.

[27] The plaintiff contends that the identities of the parties who dealt with the hiring of the equipment appears from “F1” and “F2”.

[28] The defendants contend that the particularity required by r 18(6) is lacking. I agree that the plaintiff has not pleaded the acceptance of the charges in respect of the use of the articulated B20 dump truck with sufficient particularity and that this renders the particulars of claim vague and embarrassing for the same reasons as provided in relation to the first exception.

[29] In paragraph 10.5 the plaintiff pleads that it invoiced for the use of the truck *“which invoices were paid except for what is referred to hereunder in the plaintiff’s unpaid invoices”*.

[30] The plaintiff agrees with the defendants that there is no further reference to an unpaid amount for the use of the truck, and that there is no reference to a B20 dump truck either in paragraph 36 or the invoices in annexures T1 to T116.

[31] The defendants contend that they are consequently unable to determine which amounts are claimed by the plaintiff on the basis of this particular agreement and thus cannot plead to the allegations in paragraph 10.

[32] The plaintiff in response contended that the particulars of claim demonstrates that subsequently and from the date of the first invoice, number 1022, there is no reference to the articulated dump truck and thus that there is no merit in the complaint.

[33] The defendants should not be expected to trawl through the extensive particulars of claims and annexures to establish whether the plaintiff has pleaded a claim or not. It is now common cause that there is no such claim.

[34] In my view the plaintiff should have pleaded all the relevant facts in terms of r 18(4). If there is no claim, as now conceded by the plaintiff, it is unclear why the B20 dump truck agreement was pleaded.

[35] The defendants' exception that no cause of action is disclosed has merit. It follows that the exception must be upheld.

Third exception

[36] The defendants raise various complaints under this ground of exception, which centrally complains about the *ad hoc* charges claimed by the plaintiff and inconsistencies between the agreements relied on and the basis on which the charges were levied in the plaintiff's claims for unpaid invoices.

[37] In broad terms, the defendants contend that the basis pleaded by the plaintiff for charging the second defendant for mining equipment provided and used in screening trains in accordance with the model attached as annexures B and C to the written agreement annexed as annexure B¹⁰, is irreconcilable with the basis on which the charges in certain invoices were levied. It is contended that it was based on hourly charges or "in accordance with the plaintiff's usual charges", pleaded in paragraph 12.2.3, rendering the averments irreconcilable. Complaints were also raised regarding the definition of a "train" as pleaded which is inconsistent with the basis of the invoices and charges levied by the plaintiffs, specifically in relation to a "jaw crusher" and what is pleaded in paragraphs 12.2.2 in relation to jaw crushers being charged for separately on an *ad hoc* rate per hour and in accordance with the plaintiff's usual charges.

¹⁰ That model sets out rates per ton of material screened or crushed by the plaintiff, using its equipment and two distinct operations, being "screening" and "crushing" is envisaged. As pleaded, the 2016 oral agreement confines the applicability of this model to screening operations.

[38] By way of example, reliance was placed on annexure T2 (invoice 1022) and paragraph 36.1.1. The defendants contend that the same defect applies in respect of paragraphs 36.5.1, 36.9.1, 36.11.1, 36.15.1, 36.20.1, 36.23.1, 36.24.1 and 36.29.1 and invoices T10, T19, T23, T34, T46, T52, T54 and T62.

[39] It was also contended that the averments in the pleadings are contradictory or inconsistent insofar as the phrase “further mining equipment” pleaded in paragraph 12.2.4 is not used in paragraph 36 of the particulars of claim and it cannot be discerned from the invoices T1 to T116 which, if any amounts claimed pertain to charges for further mining equipment.

[40] The plaintiff in response argued that the *ad hoc* charges appear from the invoices and from a schedule attached to its heads of argument containing references to further invoices and paragraphs. In its heads of argument, the plaintiff further gave a description of a train in an attempt to clarify the issues and explain the differences in how additional pieces of equipment was charged for.

[41] The plaintiff’s contentions do not pass muster. I agree with the defendants that as pleaded, the averments in the particulars of claim and the invoices are inconsistent, confusing and contradictory as to the basis for the various *ad hoc* charges levied and the contents of the agreements relied on. The plaintiff is obliged to clearly plead all the material facts to enable the defendants to know what case they must meet.

[42] In my view, these deficiencies render the particulars of claim vague and embarrassing. Considering the extent of the vagueness, the defendants are prejudiced. I do not however agree with the defendant that there is no cause of action pleaded for these charges, considering every possible interpretation the particulars of claim may bear.

[43] It follows that the exception that the deficiencies render the particulars of claim vague and embarrassing, must be upheld.

Fourth exception

[44] The defendants' complaint is similar to the third exception and is based on the oral agreement pleaded at paragraphs 12.1 and 12.2 of the particulars of claim in terms of which the plaintiff would charge for mining equipment provided and used in screening trains in accordance with the Emang Mine Operational costs model, set out in annexures B and C to the written agreement, annexure B to the particulars of claim.

[45] That model envisages the performance of "screening operations" and "crushing operations" and provides for the plaintiff to charge for the operation of three screening trains and a crushing train on the basis of the variables indicated in the slide scale in Annexure B. The slide scale entails a rate per ton of product from the screening and crushing operations. The cost of hire of the equipment utilised and the hours of operation of that equipment to produce this tonnage does not form part of the model nor of the quotation at annexure C.

[46] The defendants complain about the formulation of each of the crushing and screening invoices, referred to in paragraphs 36.1.1, 36.5.1, 36.9.1, 36.11.1, 36.15.1, 36.20.1, 36.23.1, 36.24.1 and 36.29.1 and the corresponding documents at annexures T2, T10, T19, T23, T34, T46, T54 and T62.

[47] In the aforementioned subparagraphs of paragraph 36 the plaintiff expressly pleads that the invoices referred to were "*calculated on the basis of the quotation, Annexures "B" and "C" attached ...*".

[48] In broad terms, the complaint is that the pleaded case is that the sliding case applies only to screening trains, whereas the equipment constituting the train has been charged for at a rate per hour. They point to an inconsistency as there is a reference to the use of the slide scale in respect of train 1 but this is a crushing train due to the presence of the crusher J1175 and the plaintiff's pleaded case is that the slide scale applies only to screening trains. The defendants complain that the basis on which the plaintiff has levied the charges based on a rate per hour in respect of equipment used in

the four trains cannot be discerned from paragraph 12 or from the particulars of claim. On this basis, the defendants argue that there is no cause of action pleaded for the claims represented by the invoiced charges for the trains.

[49] The plaintiff concedes that the quotation annexures B and C does not provide a basis for the plaintiff to charge for equipment used in a screening train on the basis of rate per hour. It then sets out a version of its case pertaining to the “train” which is not discernible from the particulars of claim which includes material facts which should have been expressly pleaded. The plaintiff cannot simply present its version in its heads of argument, it must be properly pleaded.

[50] I agree with the defendants that the particulars of claim are excipiable in the respects contended for. It follows that the exception must be upheld.

Fifth exception

[51] The fifth, sixth and twelfth exceptions are similar.

[52] This exception pertains to the Annexure G agreement pleaded at paragraph 13 of the particulars of claim. The plaintiff pleads that it was an express, alternatively implied term of the agreement that the plaintiff would provide an invoice to the second defendant for the use of plaintiff’s equipment and for accommodation and transport costs.

[53] The invoices corresponding to the particulars provided in paragraphs 36.1, 36.5, 36.9, 36.11, 36.15, 36.20, 36.23, 36.24 and 36.29 of the particulars of claim, reflect that the plaintiff provided the invoices to the second defendant.

[54] However, annexure G provides, under the heading “*General stipulations*” that “*The stipulated costs will be invoiced to the Joint Account between Emang and Almar Investments*”. It was undisputed that none of the invoices referred to above are addressed to the Joint Account.

[55] The defendants contend that the express, written terms of the agreement contradict the pleaded terms and the pleadings are vague and embarrassing in that the defendants are unable to extract from the statement of claim a clear, single meaning.

[56] The plaintiff contends that the particulars of claim are not vague and that the defendants do not recognise the express allegations in paragraph 13. However, that response does not recognise the discrepancy between annexure G and the express terms of the agreement pleaded.

[57] I agree with the defendants that the discrepancy and inconsistency renders the particulars of claim vague and embarrassing in that respect.

[58] It follows that the exception must be upheld.

Sixth exception

[59] The same objection as the fifth exception is made, pertaining to the cone crusher agreement pleaded at paragraph 14, the written portion of which is Annexure “H”.

[60] Annexure H contains a similar stipulation to Annexure G requiring the costs of the cone crusher to *be invoiced to the Joint Account between Emang and Almar Investments* while the plaintiff alleges that it was a term of the agreement that it invoice the second defendant in terms of paragraph 14.3.6, which it did.

[61] I agree with the defendants that the express, written terms of the agreement contradict the pleaded terms and the pleadings are vague and embarrassing in that respect.

[62] The defendants further contend that it cannot be discerned from paragraph 36 and annexures T1 to T116 which amounts in the invoices, if any, pertain to the 75mm cone crusher, the costs of its transport and the costs of the accommodation and transport of its operators and/or which of these amounts, if any, are unpaid.

[63] It is argued that the defendants are unable to determine which amounts are claimed by the plaintiff on the basis of this particular agreement and cannot plead to the allegations in paragraph 14.

[64] The plaintiff argues that a perusal of the invoices for which payment is claimed demonstrates that there is no claim in respect of the “crushing of material to 75mm with a gun crusher” and for which the plaintiff has claimed payment. On the basis stipulated in annexure “H” in respect of invoice 1022 it is stated that there is no crushing.

[65] As already stated in relation to the second exception, the defendants cannot be expected to trawl through the annexures to determine whether the plaintiff has properly set out its claim and whether there is any claim.

[66] It is incumbent on the plaintiff to plead all material facts on which it relies in a clear and concise manner with sufficient particularity to enable the defendants to plead in terms of r 18 (4).

[67] The plaintiff in conceding there is no claim effectively concedes the complaints raised by the defendant.

[68] I conclude that the exception has merit and must be upheld.

Seventh exception

[69] The seventh exception is in similar terms to the sixth exception in that it contends that the plaintiff has made out no cause of action, given the absence of any invoice corresponding to the diesel purchase agreement pleaded in paragraph 15 of the particulars of claim.

[70] The plaintiff concedes that there is no outstanding invoice in respect of diesel and thus no claim. It contends that this is clear from paragraph 36.

[71] For the reasons already advanced in respect of the second and sixth exceptions, this exception must also be upheld.

Eighth exception

[72] This exception concerns the 200 pecker excavator agreement pleaded at paragraph 16 of the particulars of claim, the written portion of which is the quotation annexed as “I”.

[73] The plaintiff pleads that it was a term of the alleged agreement that “the stipulations as set out in Annexure “I” will be applicable. Annexure “I” provides under the heading “General Stipulations” that “Payment terms will be implemented as per the current contractual agreement”.

[74] The defendants complain that it is not discernible from the particulars of claim what the “current contractual agreement” refers to, given the number of oral and partly oral partly written agreements pleaded as governing the relationship between it and the second defendant, rendering the particulars of claim vague and embarrassing in that the defendants are unable to extract from the statement of claim a clear, single meaning of this phrase which governs the payment terms of the 200 pecker excavator agreement.

[75] There is merit in the defendants’ complaint. The varying phrases used to describe the principal agreement referred to in the particulars of claim as “main agreement”, “main operational agreement” and current contractual agreement” exacerbates the lack of clarity relating what exact agreement is being referred to.

[76] The plaintiff argues that an inspection of the invoices clearly identifies the equipment referred to in annexure such as the pecker. It argues that the equipment referred to in the trains and in the invoices are identifiable and the charges in respect of the various mining equipment appear from each invoice.

[77] I have already dealt with the need for the plaintiff to comply with the requirements of r 18(4). The defendants cannot be excepted to draw conclusions regarding facts which should have been pleaded. I do not agree. The plaintiff is obliged to provide a clear statement identifying which agreement it is relying upon. The use of different unclear phrases, does not meet this requirement.

[78] In my view, there is merit in the defendants' complaints. It follows that the exception must be upheld.

Ninth exception

[79] This exception pertains to the vagueness of the agreement pleaded in paragraph 17 of the particulars of claim. The plaintiff pleads that an oral agreement was concluded between it and the second defendant to amend "*the invoices relating to the transport of material to be weighed at the railway siding*". Reliance is placed on a written quotation attached as annexure "J".

[80] The defendants' complaint is that no basis is pleaded in the particulars of claim for the issuing by the plaintiff of such invoices which were purportedly amended in terms of the agreement pleaded in this paragraph. It is argued that in the absence of an allegation of the existence of an underlying agreement that would permit invoicing for transport, the claim of an agreement to amend the invoices is unintelligible and results in no cause of action being pleaded for the various charges in respect of a "transport agreement" such as in paragraphs 36.2 and 36.10 of the particulars of claim.

[81] In the alternative it was argued that the defendants are embarrassed and prejudiced in being unable to plead in response to the amendment of an agreement that itself has not been pleaded.

[82] The plaintiff relies on what is pleaded in paragraph 17 and invoices 1023, 1037, 1166, 1181, 1244, 1345, 1780, 1942, 2137 and 2178. It argues that it is abundantly clear what the claim is all about. To illustrate, it referred to paragraph 36.2 pertaining to

the supply of tipper trucks. The plaintiff provided trucks to transport product from the mine at an agreed rate and the second defendant was invoiced for the work done.

[83] I further do not agree that the way in which the plaintiff has pleaded renders the particulars vague to the extent that it complies with the test enunciated in *Jowell* and that the defendants have illustrated that the exception is vague and embarrassing to the extent that the defendants do not know what claim they have to meet.

[84] It follows that this exception must fail.

Tenth Exception

[85] This ground of exception pertains to the Hitachi 670 excavator agreement pleaded in paragraph 18 of the particulars of claim for the provision of a Hitachi 670 excavator at a dry rate of R1042.16 (excluding VAT) per hour. The agreement was pleaded as being partly oral and partly in writing. The written part of which is annexure K2.

[86] At paragraphs 36.23.3 and 36.23.4 the plaintiff alleges that certain ad hoc charges itemised in invoice 1956 of 30 April 2019 were charged in terms of this agreement and in terms of annexure K2.

[87] The defendant's complaint is that the charges on T52 appears to be charges in respect of two machines "470A" and "470B" at a rate of R1004.99 per hour. A "470" is a reference to a Hitachi 470 excavator and not a Hitachi 670. The rate for these machines does not correspond to the pleaded rate of R1042.16. Further, it is not pleaded that the second defendant agreed to the provision of two machines but to the provision of "a Hitachi 670 excavator".

[88] The defendants contend that the plaintiff accordingly fails to plead any basis for it to have invoiced the second defendant for the provision of a 470A excavator and/or a

470B excavator as it did in the invoice at T52 rendering the cause of action deficient, or causing vagueness and embarrassment.

[89] The plaintiff pleads that it is incorrect that there is no reference in the particulars of claim to the two different excavators. It contends that the 470A excavator was provided in terms of the quotation at K3. Reliance is placed on invoice 1022 and paragraph 36.1 and 36.11.4 of the particulars of claim as well as invoice 1243 in respect of the “470B”.

[90] I am not persuaded that the plaintiff has not pleaded any basis to have invoiced the second defendant for a 470A and a 470B excavator. I further do not agree that the way in which the plaintiff has pleaded renders the particulars vague to the extent that it complies with the test enunciated in Jowell and that the defendants have illustrated that the exception is vague and embarrassing to the extent that the defendants do not know what claim they have to meet.

[91] It follows that this exception must fail.

Eleventh Exception

[92] At paragraph 19 the plaintiff pleads that a partly oral and partly written agreement was concluded between it and the second defendant for the provision of mining equipment listed in annexure “K3”, constituting the written part of the agreement.

[93] The defendants’ complaint is that at paragraph 36.5.3, the plaintiff alleges that certain *ad hoc* charges itemised in invoice 1085 of 31 July 2019 and in respect of a “470 excavator” at a rate of R1016.65 were charged in terms of the agreement in paragraph 19 and in terms of annexure K2. It is argued that annexure K2 is not alleged to be part of the agreement at paragraph 19 and reliance on it as the basis for charges in terms of that Agreement does not disclose a cause of action or is vague and embarrassing.

[94] The plaintiff argues that its claim in paragraph 36.5 deals with its claim in terms of invoice 1085, annexures T9 and T10. It provided an explanation in its heads of argument which is not evident from the particulars of claim. In my view, such explanation should have been pleaded.

[95] The way in which the plaintiff's claim is pleaded is not clear and does not comply with the requirements of r 18(4). I agree that it is vague and embarrassing in the respects contended by the defendants.

[96] It follows that this exception must be upheld.

Twelfth exception

[97] This ground of exception also pertains to the Annexure K3 agreement pleaded at paragraph 19 of the particulars of claim. The defendants' complaint is aimed at two issues. The first is the discrepancy between the agreement as pleaded and the written portion relied on which refers to a "Joint account between Emang and Almar Investments" as referred to in the fifth and sixth exceptions.

[98] For the same reasons already advanced in relation to those exceptions, I agree with the defendants that there is a discrepancy between the pleaded version of the agreement and the written terms of the written portion of the agreement relied on, rendering the particulars of claim vague and embarrassing.

[99] It follows that this portion of the exception must be upheld

[100] The second complaint is that the plaintiff's charges relate to more than one piece of equipment. The defendant refers to paragraphs 36.20.3 and 36.20.4 in which the plaintiff alleges that certain ad hoc charges itemised in invoice 1781, annexure T45 were charged in respect of respectively a 470A excavator and a 470B excavator, thus two excavators on the basis of the quotation in K3 whereas annexure K3 only lists as an item a "Hitachi 470 excavator". The defendants complain that the plaintiff does not plead

that the second defendant agreed to the provision of two excavators and the plaintiff accordingly fails to plead any basis for it to have invoiced the second defendant for the provision of more than one Hitachi 470 excavator.

[101] The plaintiff contends that the quotation does not limit the quantity of the equipment to be provided but rather gives a price for the provision of the various items of mining equipment. There is merit in this argument.

[102] I am not persuaded that the defendants have illustrated that the particulars of claim are vague and embarrassing on this basis. This portion of the exception must fail.

[103] It follows that the exception is upheld in respect of paragraph 19. The remainder of the exception pertaining to paragraphs 36.20.3 and 36/20.4 must fail.

Thirteenth exception

[104] The exception is similar to the second, sixth, seventh, thirteenth, fourteenth and fifteenth exceptions.

[105] This ground of exception pertains to the partly oral partly written planned mining area equipment agreement pleaded at paragraph 20, the written portion of which is annexure K4.

[106] The defendants complain that the express term of the agreement pleaded in paragraph 20.2.1 is at variance with paragraph 2.2 of annexure K4 which provides for a four month duration and cannot be reconciled, thus rendering the particulars of claim excipiable as it does not disclose a cause of action.

[107] I do not agree that the particulars of claim are excipiable on every reasonable interpretation it may bear and that K4 is irreconcilable with what is pleaded in paragraph 20.2.1.

[108] There is however merit in the defendants' contention that the pleading of the planned mining area equipment agreement further suffers from the same defect as that raised in the seventh exception that there is no claim based on unpaid invoices.

[109] The plaintiff concedes that there are no unpaid invoices but contends that the exception is not proper as exceptions are not directed at sections of a particulars of claim. It argues that if there is no claim flowing from the agreement of lease, it does not mean the pleading is excipiable.

[110] The argument in my view lacks merit. Given that the claim for each unpaid invoice is in fact a separate claim, it is not objectionable for an excipient to raise an exception to the paragraphs dealing with a specific claim¹¹.

[111] The plaintiff did not however raise this issue in respect of the exceptions similar to the present. The principle in my view pertains to all the exceptions.

[112] For the same reasons as advanced in respect of the seventh exception, this exception too must succeed.

[113] It follows that the exception must be upheld.

Fourteenth Exception

[114] A This ground of exception pertains to the S74 service truck agreement pleaded at paragraph 25 of the particulars of claim.

[115] The exception is in similar terms as the thirteenth exception. The plaintiff's contentions are also in similar terms.

¹¹ Barnett v Rewi Bulawayo Development Syndicate at 459; Barclays National Bank Ltd v Thompson at 553F; Tobacco Exporters & Manufacturers (Pty) Ltd v Bradbury Road Properties (Pty) Ltd at 424E fn 8-supra

[116] For the same reasons advanced in respect of the thirteenth exception, I conclude that this exception must be upheld.

Fifteenth Exception

[117] This exception is in similar terms to the seventh, thirteenth and fourteenth exceptions.

[118] It relates to an agreement for the provision of two ADT machines pleaded in paragraph 26.

[119] The plaintiff advanced a similar argument to that raised in relation to the thirteenth exception.

[120] For the same reasons as already advanced in relation to the seventh exception, I conclude that this exception must be upheld.

Sixteenth Exception

[121] The exception relates to what is pleaded in paragraph 30 of the particulars of claim. The plaintiff pleads an oral agreement for the provision of a Hitachi 870 excavator with an eccentric ripper and for payment of the transport costs of the excavator.

[122] The plaintiff pleads that it invoiced the second defendant for the transport costs of the excavator in terms of invoice 2336. Invoice 2336 is however an invoice for R212 750.00 for site establishment of an "870X".

[123] The defendants rely on what is pleaded in paragraphs 30.6 and 31.2 and complain that invoice 2336 is not listed as an unpaid invoice, and no claim is made for payment of that invoice. As such it contends that no cause of action has been made out, alternatively that the particulars of claim are vague and embarrassing in that respect.

[124] The plaintiff contends that paragraph 30 must be read with paragraph 36.39 and annexures T80 to T83. It provides an explanation in its head of argument, the material facts of which are not clearly set out in the particular of claim. It further concedes that the reference to invoice 2336 is a typographical error. It refers to T80, invoice 2338, which it is contended constitutes its claim.

[125] For the reasons already provided, the plaintiff is obliged to clearly and succinctly set out its claim and cannot seek to rectify the position in its heads of argument. I agree with the defendants that as presently pleaded, no proper cause of action has been pleaded.

[126] It follows that the exception must be upheld.

Seventeenth Exception

[127] The exception relates to charges for a frontend loader. At paragraphs 36.1.3 and 36.1.4 the plaintiff pleads that the second defendant was invoiced for charges for a “966-55 frontend loader” and a “966-80 frontend loader” at a dry rate of R656.56 on the basis of annexure G read with paragraph 13 and annexure G. The invoice that pertains to this claim is T1.

[128] The defendants rely on annexure G which lists, *inter alia*, an item “CAT966 FEL”. They complain that the plaintiff does not allege that the second defendant agreed to the provision of more than one CAT966 FEL.

[129] The defendants contend that the plaintiff accordingly fails to plead any cause of action for it to have invoiced for the provision of more than one 966 front end loader as alleged in these paragraphs and in paragraphs 36.11.7 and 36.11.8), 36.15.7, 36.15.8 and 36.15.13); 36.20.7, 36.20.8 and 36.20.9; 36.23.7, 36.23.8 and 36.23.9; 36.24.7, 36.24.8 and 36.24.9 and 36.29.7, 36.29.8 and 36.29.9.

[130] The defendants further rely on paragraph 36.11.6 wherein the plaintiff pleads that it invoiced for a “950 L2 frontend loader” in terms of the agreement the written portion of which is annexure G. The defendants complain that annexure G does not provide a basis for the plaintiff to invoice for a 950 L2 frontend loader and there is accordingly no cause of action pleaded for this claim.

[131] The plaintiff contends that annexure G does not refer to only one piece of equipment but a type of equipment. I have already concluded in respect of the twelfth exception that I agree with the plaintiff's contention.

[132] Considering what is pleaded in paragraph 36.11. 6, I agree with the plaintiff that the necessary facts are pleaded to sustain a cause of action. As referred to earlier when setting out the relevant principles, for purposes of an exception, the facts set out must be accepted.

[133] It follows that this exception must fail.

Eighteenth Exception

[134] The defendants contend that there is a defect similar to that raised in the seventeenth exception in respect of the claim pleaded at paragraph 36.1.5 pertaining to charges for a “PC 200-3 Komatsu 20 ton excavator” on the basis of the annexure G agreement.

[135] They complain that annexure G does not contain any item of equipment corresponding to the description “PC 200-3 Komatsu 20 ton excavator” at the rate pleaded. It is contended that there is thus no cause of action pleaded for the charges for a Komatsu 200 excavator alleged in paragraph 36.1.5 and in paragraphs 36.5.6, 36.11.9, 36.23.2, 36.24.2 and 36.29.2. Essentially the complaint pertains to a different brand of excavator being provided.

[136] The plaintiff avers that the quotation provides for the provision of “an excavator” and the court has to accept the averments in the particulars of claim and the plaintiff can provide evidence to explain why a different excavator was provided.

[137] I agree with the plaintiff’s argument that it can lead evidence as to the reasons a different brand of excavator was provided.

[138] In my view, the facts pleaded sufficiently disclose a cause of action. It further cannot be concluded that the particulars of claim meet the threshold set out in *Jowell* for the claim to be vague and embarrassing.

[139] It follows that the exception must fail.

Nineteenth Exception

[140] The exception is also based on annexure G and the averments in paragraphs 13, 36.11.10 and 36.11.11. Similar to the twelfth and seventeenth exceptions, the defendants’ complaint is that annexure G does not constitute an agreement for the provision of more than one piece of equipment. It is contended that the claim thus does not disclose a cause of action in relation to the second excavator provided in the aforesaid paragraphs and as alleged in these paragraphs and in paragraphs 36.20.10 and 36.20.11; 36.23.10 and 36.23.11; 36.24.10 and 36.24.11 and 36.29.10 and 36.29.11.

[141] I have already concluded that annexure G does not specify the quantity of the various types of equipment to be provided as argued by the plaintiff.

[142] For the same reasons as previously advanced in relation to the twelfth and seventeenth exceptions, this exception must fail.

Twentieth Exception

[143] The exception is aimed at annexure G which it is contended does not provide a basis for the rates charged in relation to various equipment, being articulated dump trucks or ADT's.

[144] The defendants rely on paragraphs 36.11.5, 36.15.6, 36.20.5, 36.23.5, 36.24.5 and 36.29.5 of the particulars of claim wherein the plaintiff pleads that the second defendant was invoiced for charges for a "[....] articulated dump truck" or "an articulated dump truck with machine number [....]" at a dry rate of R807.98 per hour (in terms of paragraph 36.11.5) and R798.71 per hour (in terms of paragraph 36.15.6 and the other paragraphs referred to above) on the basis of the annexure G agreement.

[145] The defendants complain that annexure G does not list equipment corresponding to the description "[....] articulated dump truck" and it is argued that there is accordingly no cause of action pleaded for these claims.

[146] For reasons already provided in relation to the exceptions pertaining to annexure G, I am not persuaded that the plaintiff's claim is excipiable on every reasonable reading of the particulars of claim.

[147] The defendants further contend that the basis for the discrepancy between the rate of R807.98 and R798.71 claimed for this equipment cannot be discerned from the particulars of claim and the claim is consequently vague and embarrassing in this respect.

[148] The plaintiff contends that its case was that the trucks were provided in terms of annexure G. An explanation was provided for the differences between the dry rate and the wet rate in the heads of argument. That was however not pleaded.

[149] For reasons already provided the plaintiff is obliged to plead its case in clear and concise terms in compliance with r 18(4) and all the material facts must be pleaded to explain the rates which were charged. The plaintiff cannot rely on an explanation proffered in its heads of argument.

[150] It follows that the exception on the vague and embarrassing ground must be upheld.

Twenty-first Exception

[151] This exception pertains to paragraph 36.9.2 of the particulars of claim pertaining to invoice 1180, T18 and the *ad hoc* costs referred to therein. It is pleaded that the invoice included “*payment for mining equipment as stipulated and more particularly as set out hereunder*”. The plaintiff lists six items of equipment supplied and charged for at various rates in paragraphs 36.9.3 to 36.9.8.

[152] The defendants contend that the plaintiff fails to plead, and it cannot otherwise be discerned from these paragraphs, which of the various agreements alleged in the particulars of claim pertains to the various items of equipment listed and charged for in these paragraphs.

[153] It is contended that there is accordingly no underlying agreement or agreements pleaded to justify the charges referred to and claimed which would constitute a cause of action for the claims, thus valid causes of action are not disclosed. In the alternative it is contended that the claims are vague and embarrassing.

[154] The plaintiff contends that the particular of claim make it clear that T18 refers to equipment supplied in terms of annexure K3, being the agreement pleaded at paragraph 19 as the. It provided an explanation in its heads of argument which was not pleaded. It is further argued that the exception should not be upheld, based on the principle that the particulars of claim must be vague and embarrassing on any interpretation.

[155] The plaintiff’s contentions do not pass muster. There is no indication in paragraph 36.9 of the particulars of claim that the agreement relied on is the one pleaded in paragraph 19 and that reliance is placed on K3. It cannot be expected of the

defendants to deduce on what agreement reliance is placed. It is also insufficient for the plaintiff to provide an explanation in its heads of argument.

[156] Whilst I am not persuaded that no cause of action has been made out, I agree with the defendants that the particulars of claim are vague and embarrassing in the respects alleged.

[157] It follows that the exception must be upheld.

Twenty-second Exception

[158] This exception pertains to the issue that the plaintiff seeks a judgment on the basis of breach of the various agreements against the first and second defendants jointly and severally. In the alternative, judgment is sought against the second defendant only.

[159] The defendants complain that the plaintiff does not allege that any of the pleaded agreements provide for the joint and several liability of the first and second defendants to the plaintiff.

[160] It is argued that there is thus no cause of action for the imposition of joint and several liability and that the plaintiff is obliged to establish a basis for joint and several liability, either in contract or in law and must plead the facts on which it relies.

[161] In response, the plaintiff relies squarely on the acknowledgment of debt, pleaded in paragraph 38 and attached as annexure Q, concluded on 19 May 2019, as the basis on which a joint and several order is sought.

[162] The defendants, relying on *Tucker*¹² point out that an intention to impose a joint and several liability must be plainly expressed or clearly inferred, failing which a liability will be joint.

[163] The defendants argue that on a proper interpretation of the acknowledgment of debt, it does not evidence a joint and several liability and that the issue can be decided on exception.

[164] The plaintiff on the other hand, argues that interpretation issues should not be decided on exception and that the defendants have failed to illustrate that on any possible interpretation, no cause of action is disclosed¹³.

[165] It is well established that generally speaking, courts are reluctant to decide questions regarding the interpretation of an agreement where it appears from the contract or from the pleadings that there may be admissible evidence which if placed before a court could influence a court's decision as to the meaning of the agreement. Such possibility should be something more than a notional one.

[166] It is trite that exceptions must be dealt with sensibly and that the mere notional possibility that evidence of surrounding circumstances may influence the issue of interpretation should not debar a court from deciding such issue on exception¹⁴.

[167] Considering the golden rules of interpretation¹⁵, I am not persuaded that there is a mere notional possibility of the plaintiff establishing a joint and several liability, as argued by the defendants. The plaintiff may still lead evidence to enable a proper purposive, linguistic and contextual interpretation of the acknowledgement of debt.

¹² *Tucker and Another v Carruthers* 1941 AD 251 at 254

¹³ *Francis v Sharpe* 2004 (3) SA 230 (C)

¹⁴ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) para [3]

¹⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras [18]-[19] at 603E-605B

[168] It can further not be concluded that on every reasonable interpretation, no cause of action has been made out¹⁶.

[169] It follows that the exception must fail.

[170] There is no reason to deviate from the normal principle that costs follow the result. The defendants have been substantially successful. I am persuaded that the employment of two counsel was justified, considering the nature and ambit of the application.

[171] I grant the following order:

[1] The ninth, tenth, seventeenth, eighteenth, nineteenth and twenty-second exceptions are dismissed;

[2] The first, second, third, fourth, fifth, sixth, seventh, eighth, eleventh, thirteenth, fourteenth, fifteenth, sixteenth, twentieth and twenty-first exceptions are upheld;

[3] The twelfth exception is upheld insofar as it relates to the joint account issue and the remainder of the exception is dismissed.

[4] The plaintiff's particulars of claim are struck out;

[5] The plaintiff is afforded an opportunity to amend its particulars of claim within 20 days from date of this order utilising uniform rule 28;

[6] The plaintiff is directed to pay the costs of the exception, including the costs of two counsel.

¹⁶ Francis v Sharpe supra

EF DIPPENAAR
JUDGE OF THE HIGH COURT JOHANNESBURG

APPEARANCES

DATE OF HEARING : 31 October and 1 November 2022

DATE OF JUDGMENT : 23 January 2023

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