REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2011/6076

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

…… ……
SIGNATURE **DATE**

DATE SIGNATURE

In the matter between:

ROLANDO ELECTRICAL CC	Plaintiff
AND	
MUNAKA GENERAL TRADING (PTY) LTD	First Defendant
UBUHLUBETHU BUSINESS ENTERPRISE CC	Second Defendant
MUNAKA UBUHLUBETHU JOINT VENTURE	Third Defendant

JUDGMENT

STRAUSS, AJ:

INTRODUCTION

1. The plaintiff instituted action against all defendants during 2011. All three defendants pleaded to the claim. Thereafter the plaintiff amended its particulars of claim the first time on 18 June 2013 by including further claims, i.e. claims (A) to (E).

2. The second defendant hereafter filed a notice of exception and a Rule 30(1) irregular step application on 25 July 2013, containing eleven grounds of exception.

3. Plaintiff effected amendments to the first particulars of claim. Hereafter a second notice in terms of Rule 23 was filed in August 2013. Plaintiff again elected to amend its particulars of claim. Second defendant thereupon filed its third notice in terms of Rule 23(1) dated January 2014 containing 16 grounds of exception.

4. When the matter was enrolled or hearing on 4 August 2015, the exceptions had not been heard and the parties proceeded to enrol the matter for hearing of the exceptions and Rule 30(1) application on the opposed roll.

5. The second defendant maintains that the plaintiff has failed to remove the causes of complaint and prays for either an order that the exception be upheld, if not, that the Rule 30(1) is upheld and that the particulars of claim are struck and the plaintiff is given an opportunity to amend its particulars of claim once again.

6. The defendants have raised 16 grounds of exception of which the 8th, 13th and 15th were not proceeded with and the 14th ground was abandoned during argument.

7. Considering the wide ambit of the grounds of exception, it is useful to state the legal principles relating to pleadings and exceptions thereto.

8. **The principles relating to exceptions:**

An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and its legal validity. It is not directed at a particular paragraph within a cause of action, but at the cause of action as a whole, which must be demonstrated to be vague and embarrassing. As was stated in ***Jowell v Bramwell - Jones & Others 1998 (1) SA 836 (W) 905 E – H.***

"*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.*"

9. Vagueness amounting to embarrassment and embarrassment in turn resulting in prejudice must be shown. Vagueness would invariably be caused by a defect or incompleteness in the formulation and is therefore not limited to an absence of the necessary allegation, but also extends to the way in which it is formulated. An exception will not be allowed, even if it is vague and embarrassing, unless the excipient will be seriously prejudiced if compelled to plead to pleadings against which the objection lies.

10. The approach to be adopted and applicable considerations were described as follows in ***Trope v South African Reserve Bank 1992 (3) SA 208 (T) at 221A – E.***

"*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. (Quinlan v McGregor 1964 SA 383 (D) at 393E – H). As to whether there is prejudice, the ability of the excipient to produce an exception proof plea is not the only, or indeed the most important, test. (See the remarks of Conradie, J in Levitan v New Haven Holiday Enterprises CC 1991 (2) SA 297 (C) at 298G – H.) If that were the only test the object of pleadings to enable parties to come to trial, prepare to meet other's case and not be taken by surprise may well be defeated. Thus it may be possible to plead to particulars of claim which can be read in any one of a number of ways by simply denying the allegations made, likewise to a pleading which leaves one guessing as to the actual meaning. Yet, there can be no doubt that such a pleading is excipiable as being vague and embarrassing".*

"It follows that averments in the pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing: one can but be left guessing as to the actual meaning, if any, conveyed by the pleadings."

"Rule 18[4] imposes a "Goldilocks test" in the sense that it requires a balance between too few and too many allegations. Too few allegations could render it excipiable for lack of the necessary averments whilst too many create the risk that unnecessary allegations could render the pleading vague and embarrassing"

"A pleading should not contain matter irrelevant to the claim. The facts whereon a plaintiff relies should be concisely stated in his particulars of claim and these facts only, and no other, should be pleaded. However, for the sake of clarity it is sometimes necessary to plead history. The pleader should do this with caution. Unless such history is clearly severed from the cause of action the pleading may be rendered vague and embarrassing." See: ***Secretary for Finance v Esselmann 1988 [1] SA 594 SWA at 597G-H***

11. The significance and requirements of Rule 18[4] were commented on in ***Trope*** *supra**:***

"It is, of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defense must appear clearly from the factual allegations made (Harms Civil Procedure in the Supreme Court at 263-4). At 264 the learned

author suggests that, as a general proposition, it may be assumed that, since the abolition of further particulars, and the fact that non-compliance with the provisions of Rule 18 now (in terms of Rule 18(12)) amounts to an irregular step, a greater degree of particularity of pleadings is required. No doubt, the absence of the opportunity to clarify an ambiguity or cure an apparent inconsistency, by way of further particulars, may encourage greater particularity in the initial pleading

12. These exception requires a consideration of what is required of pleadings, and in particular particulars of claim, to meet the requirements of Rule 18[4] which seems to postulate two basic requirements, both of which need to be met constitute compliance with Rule 18[4]. The first requirement [i.e. that the pleading should contain the "… *material facts upon which the pleader relies for his claim*"] relates to the substance of a pleading. The second requirement [i.e. that it should consist of a "…*clear and concise statement…*" of "…*sufficient particularity to enable the opposite party to reply thereto"*] deals with way in which a pleading should be formulated. Each of the requirements is dealt with separately hereunder.

13. The "…*material facts upon which the pleader relies for his claim*"

The first requirement poses the question as to what "…*material facts*…" are. It requires a pleading to disclose a cause of action or defense as the case may be, even if this may not be expressly

stated in Rule 18[4]. Rule 18[4] is however interpreted and applied as requiring that a cause of action must be contained in the pleading. See: ***Makgae v Sentraboer [Koöperatief] Bpk 1981 [4] SA 239 T at 244C.***

14. The term "cause of action" was defined in ***McKenzie v Farmers' Co-operative 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. In ***Evins v Shield Insurance Co Ltd 1980 [2] SA 814 A at 825G*** it was said that "cause of action "… *is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action*."

16. The requirement that a cause of action be contained in a pleading can and should therefore be read into the words "material facts", which would in turn imply that only facts which serve to establish the cause of action would be regarded as "material". The converse also applies, namely that allegations that do not serve to establish the cause of action would not qualify as being "material".

17. The need to distinguish between *facta probanda* and *facta probantia* is a further aspect of the requirement that material facts only be pleaded. Is set out in ***Makgae*** *supra* at 244C-H. *Facta probanda* should be distinguished from "pieces of evidences" [*facta probantia*]

required to prove the true *facta probanda*. ***King's Transport v Viljoen 1954 (1) SA 133 (K) at 138 – 139] Dusheiko v Milburn 1964 (4) SA 648 (A) at 658A.***

18. The *Facta probantia* has no place in a pleading and the contents of any pleading should be restricted to those facts only which serve to establish the cause of action, excluding any evidence required to prove them.

19. This first requirement of necessity puts the pleader's legal knowledge of what the necessary allegations or essential elements are to sustain a cause of action to the test;

"c*lear and concise statement*…" of "…*sufficient particularity to enable the opposite party to reply thereto*"

20. Whereas the first requirement concerns itself with the substantive law, the second requirement relates to the formulation and structure of the pleading in determining whether the pleading contains a "…*clear and concise statement…*" of "…*sufficient particularity to enable the opposite party to reply thereto". See :* ***Imprefed [Pty] Ltd v National Transport Commission 1993 [3] SA 94 A at 107C – E***

21. Aside from carefully formulating sentences and choosing the language the structure of a pleading will be determinative whether it meets the requirements of conciseness, lucidity, logic, clarity and precision. Pleadings that are "*…a rambling preview of the evidence proposed to be adduced at the trial*…" do not meet the requirements

of clause 18[4] and would be excipiable as being vague and embarrassing. *See* ***Moaki v Reckitt and Colman [Africa] and another 1968 [3] SA 98 A at 102A-B;***

22. It follows that the more complex the matter is the greater would be the demands for conciseness, lucidity, logic, clarity and precision. See; ***Swissborough Diamonds Mines [Pty] Ltd and others v Government of the Republic of South Africa and others 1999 [2] SA 279 T at 324C.***

23. The grounds of exception are to be considered having regard to what has been stated in ***Alpidi Investments v Green Tops (Pty) Ltd at 161H – 162A.***

"*The court is inclined to look benevolently at pleadings especially in the Magistrate's Court so that substantial justice need not yield to technicalities. Such a view was expressed, inter alia, in Odendaal v Van Oudtshoorn 1968 (3) SA 433 (T) at 436D. Nevertheless, the issues as defined by the pleadings must not be lost sight of and a party cannot rely on causes of action or on defences which are not in put in issue and were consequently not fully investigated.*"

24. In ***Spearhead Property Holdings v ED Motors (Pty) Ltd 2010 (2) SA (SCA) at 15A – 16A*** it was stated that:

"*It is equally trite that since pleadings are made for the court and not the court for the pleadings, it is the duty of the court to determine the real*

issues between the parties, and provided no possible prejudice can be caused to either, to decide the case on those real issues."

THE PLAINTIFF'S CLAIMS

25. I now proceed to assess the particulars of claim in this matter having regard to the requirements set out above. The plaintiff in this action has instituted five claims against the defendants and seeks payment from against the first, second and third defendants and/or the joint venture, jointly and severally, the one to pay the other to be absolved.

26. In the first claim, Claim A, the plaintiff seeks payment for a shortfall payment made by the joint venture to the plaintiff, which shortfall was calculated excluding amounts contained in claim (b) and (c).

27. The second claim, Claim B, is the re-measurement claim based on an oral agreement in terms whereof the plaintiff had to re-measure a bill of quantities and the total re-measurement was verified and the plaintiff claims the difference between the re-measurement of quantities, and amount allowed for by the engineer. The joint venture accepted liability for payment of the re-measurement amount, it is pleaded.

28. The third claim, Claim C, is a stolen material claim, also based on an oral agreement between the joint venture and the plaintiff in terms whereof the plaintiff replaced stolen material and rendered invoices to the joint venture for payment of work and replacement such material.

29. The fourth claim, Claim D, is based on an oral agreement once again for the supply of additional temporary electrical installations for which the

plaintiff rendered an invoice to the joint venture and which the joint venture failed to pay.

30. The last claim, Claim E, is a variation orders claim, also based on the oral agreement between the joint venture and the plaintiff as the plaintiff had effected certain variations to the requirements in terms of the alterations to the JBCC agreement, and delivered invoices for such variations completed, the joint venture did not make payment as agreed.

31. The total amount of all five claims of the plaintiff amount to R2, 387,545.78.

32. The particulars of claim contain 70 paragraphs, some of which having sub-paragraphs comprising a total of 29 typed pages.

33. The defendants raised a total of 16 grounds of exception against the plaintiff's particulars of claim some of which they say renders it vague and embarrassing and some of the claims according to the defendants failed to disclose a cause of action.

34. Twelve of the sixteen grounds were persisted with. The grounds of exception are dealt with in sequence in which they were raised and some are conveniently considered together.

35. The plaintiff in its particulars of claim sets out in the first 33 paragraphs thereof the background and the appointment of the plaintiff as a subcontractor. The plaintiff in essence has for the sake of clarity, pleaded the history of the third defendant entering into a Principal Building Agreement with other parties in terms of a Johannesburg

Building and Construction Contract, later referred to as the JBCC agreement.

36. The plaintiff pleads that he was not a party to this JBCC agreement, but nevertheless incorporates the applicable terms of the JBCC agreement in its particulars of claim. The plaintiff sets out the appointment of a subcontractor, one Mithro, and in terms whereof Mithro Construction Management was required to give effect to contract instructions pertaining to the project previously entrusted to the third defendant. Mithro contracted the plaintiff to perform certain alterations to the existing buildings, specifically the installation of electrical reticulation and also the re-measurement of the original bill of quantities and other requested services.

37. Therefore, in the first 33 paragraphs the plaintiff does not set out any cause of action against the defendants and simply pleads the history and on this score alone the court must state that the history is clearly not severed from the cause of action and is necessary to bring the court attention to the claims of the plaintiff against the defendants.

38. The plaintiff therefore in these paragraphs sets out the parties, the citation, the background of how the joint venture was formed and for what reason and also the Mithro appointment of the subcontractor, and thereafter the appointment of the plaintiff in terms of the Mithro appointment. The plaintiff also sets out the claim procedure used by the plaintiff in order to receive payment from the joint venture, it has some similarities with the claim procedure set out in the JBCC agreement.

39. The plaintiff also in these paragraphs sets out that at all times the plaintiff was appointed by the joint venture on or about 23 July 2009 following a meeting held between the representatives of the plaintiff and the joint venture in Pretoria and pleads the implicit, implied, and tacit terms of the oral agreement between the parties.

40. The first five exceptions taken by the second defendant in this matter were taken against facts pleaded by the plaintiff contained in paragraphs 1 to 33. Thus the exception is not directed against a cause of action of the plaintiff contained in these paragraphs, as it is simply not possible due to the facts that the plaintiff does not in these paragraphs set out any cause of action and any claim against the defendants.

41. The 1st to 5th exception taken by the defendants due to the fact that the pleading is vague and embarrassing, strikes at the formulation of the action and not its legal validity. It cannot be directed at a particular paragraph, but at the cause of action as a whole.

42. The cause of action of the plaintiff is not set out in these paragraphs, but simply the background and basically how this stage is set between the parties for the claims which are to follow from A to E contained in paragraph 34 to 78.

43. The vagueness that the defendants complain about is the fact that certain terms of the JBCC are referred to in the background in these paragraphs, and that the plaintiff pleads that an oral agreement existed between itself and the third defendant. The second defendant's complaint is therefore that it is vague and embarrassing, due to the fact that the second

defendant does not know if reliance is placed on the JBCC to which the plaintiff was never a party, or reliance is placed on the oral agreement between the parties.

44. I cannot find in the formulation by the plaintiff of its claim contained in paragraphs 1 to 33, vagueness leading to embarrassment and that embarrassment leading to prejudice of the second defendant. The second defendant is not called upon to plead to facts setting out a cause of action vis-à-vis him, but simply facts that set out how the plaintiff supports his case as to the claims that will follow from A to D. On this score therefore, it is possible for the second defendant to plead to these paragraphs and plead with admission or denial setting out his facts as to how the background and/or claim procedure and/or appointment or not of the plaintiff and Mithro transpired.

45. The 1st to 5th exceptions therefore against the plaintiff's particulars of claim are dismissed.

46. In the sixth ground, the defendants complain that the plaintiff approved claims as set out annexure "RE8" to a net value of R6, 587,224.50, but this amount is inconsistent with paragraph 35 of the amended particulars of claim in which the plaintiff alleges another amount of R7, 533,476.31 and that the plaintiff has failed to plead how the above amount is made up. Thus, the exception is that there is a disconnect between the amount set out in annexure "RE8" and the amount claimed in paragraph 35 and 42 of the particulars of claim.

47. However, what the second defendant does, is to refer and rely on the annexures and not the actual claim set out by the plaintiff in this claim against the defendants. This is the shortfall claim in which the plaintiff pleads that certain payments were made to the plaintiff by the joint venture and that it short-paid the plaintiff in regards to the amount of R7, 533, 476.31 which was an amount claimed by the plaintiff and submitted to the engineer for verification and approval.

48. The evidence with regard to the amount of shortfall payment does not strike at the root of the cause of action due to the lack of particularity in setting out how the R7 million was made up, and these averments may however be substituted by evidence. Thus, the exception on this score is dismissed.

49. The seventh ground of exception is that the claim of the plaintiff alleges that invoices were directed to the third defendant for payment, but some of these invoices were addressed to the first defendant and not the third defendant, thus rendering the particulars of claim vague and embarrassing. Once again, failure to mention why these invoices were made out to any of the defendants and not specifically to the joint venture is not strictly necessary for the purposes of pleading and the lack of stating the particular person to whom the invoices were directed does not make the pleading vague and embarrassing as it forms part of the *facta probantia*. This exception is therefore dismissed.

50. On the ninth ground the second defendant contends that the plaintiff failed to set out in its particulars of claim how the third defendant

accepted liability for payment of the re-measurement amount. And if such acceptance was oral or in writing and that the plaintiff failed, if it was in writing, to attach the alleged agreement. Therefore the particulars are vague and embarrassing. Once again the claim must be read in its totality and not just each paragraph. The plaintiff specifically pleads that this re-measurement claim begins at paragraph 46 and pleads that on 23 July 2009, the parties represented by their representatives entered into an oral agreement and agreed to certain terms of the re-measurement.

51. The plaintiff pleads the oral terms and thereafter pleads that the joint venture accepted liability in terms of this oral agreement. Thus, the terms as stated in the particulars of claim are the terms which the plaintiff avers and if the defendant disputes the nature of the terms, it cannot be said to be vague and/or embarrassing. It is clear that the plaintiff refers to the oral agreement and does not plead any other obligation to pay or acceptance of liability to pay. Thus this exception is dismissed.

52. The tenth exception is that the plaintiff pleads that the third defendant agreed to subtract the value of work done by a previously appointed electrical subcontractor in an amount mentioned. The complaint is that the plaintiff has failed to plead how the amount is made up and that renders the claim vague and embarrassing. The plaintiff specifically pleads that it was in terms of an oral agreement entered into between the parties on 23 July 2009, that the value of work done by a previously appointed subcontractor would be subtracted. The plaintiff sets out specifically in paragraph 22.15 as to the background that the amount

complained about is the amount pertaining to the work previously executed by the erstwhile electrical subcontractor which was to be deducted from the total re-measurement of the re-measurement bill of quantities in order to quantify the total contract value and amounts due to the plaintiff.

53. Thus, when one has regards to the particulars of claim as a whole, read together with this paragraph of which the second defendant complains, it cannot be said to be vague and embarrassing as the plaintiff sets out exactly where this amount is derived from. This exception is dismissed.

54. The eleventh ground of complaint is that the plaintiff pleaded that in “addition” to the above agreements there was an oral agreement that the third defendant would replace stolen materials, and that the reference to additional agreements renders the pleadings vague and embarrassing. Once again, the plaintiff herein pleads the oral agreement and refers in addition to the above agreements, which are the agreements as set out in claim A to B, and sets out that the joint venture required the plaintiff to replace stolen electrical installations and for that material the joint venture was provided with invoices which it failed to pay.

55. The defendants also venture into an attempt of interpretation of the JBCC agreement and/or oral agreement, which will not necessarily make the pleading vague and embarrassing as it forms part of the *facta probantia* between the parties. It certainly raises certain disputes in regard to liability, which can be pleaded. This exception is therefore dismissed.

56. The twelfth ground is an exception raised against invoices not addressed to the second and/or third defendant, but to the first defendant. The second defendant complains that this makes the pleadings vague and embarrassing. Once again, the evidence with regard to invoices delivered to the second defendant, or all defendants together, does not strike to the root of the cause of action and/or makes it vague and embarrassing. These averments may however be substantiated by evidence. Thus, this ground is also dismissed.

57. In the sixteenth exception taken by the defendant, the defendants complain that the plaintiff did not set out or plead whether the instructions received from BVI were in writing or given orally. However, if one has regard to the particulars of claim, it is evident that the joint venture required variations to the specific electrical installations received from the contractor, BVI, and it is not the plaintiff that received these instructions. Therefore, this is not in any case facts that the plaintiff would have knowledge of. The plaintiff simply attaches copies of drawings and variations done. Thus, this complaint does not strike to the root of the cause of action and is in any case not necessary for the purposes of pleading and it forms part of the *facta probantia* that the defendants will probably plead. This exception is therefore also dismissed.

58. A summons will be vague and embarrassing if it is not clear what the contract is on which the plaintiff relies or whether he or she sues or on a written contract or a subsequent oral contract or if it can be read in one of a number of different ways or if there are more than one claim and the

relief claimed in respect of each is not separately set out. This is set out in various case law with reference to ***Herbst v Smit 1929 TPD 306***.

59. What, however, is clear in these particulars of claim by the plaintiff before court, is that the plaintiff relies on an oral agreement between itself and the joint venture entered into on 23 July 2009, Mr Nene and Mr Robalo representing the parties respectively.

60. The plaintiff does not in the particulars of claim plead at any stage that it was a party, or a signatory to the terms and conditions of the JBCC agreement that binds the joint venture and/or any other party.

61. In my view the averments embodied in the particulars of claim set out the history of the matter and the claims sufficiently clear and unambiguously in order for the defendant to plead thereto. It does disclose a cause of action and are therefore not vague and embarrassing. In the premises the application for exception must fail.

62. The second defendant also complains and launched a Rule 30 (1) application and contends that the amended particulars of claim fails to comply with Rules 18(4) and 18(6) and thus constitutes an irregular step. Rule 18(4) has already been discussed.

63. Rule 18(6) provides: "*that a party who in its pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof, or part relied on, shall be annexed to the pleadings".*

64. I find in this matter that there is no substance in the Rule 30 application, as the plaintiff in terms of Rule 18(4) set out a clear and concise statement of the material facts upon which it relies for its claim and that it also in its pleadings relied upon an oral agreement and pleaded the terms thereof fully.

65. Pleadings can be both vague and embarrassing and constitute an irregular step, this was set out in ***Absa Bank v Boksburg Transitional Local Council 1997 (2) SA 415 (W) at 418E – H.*** It says that where pleadings fail to comply with the provisions of Rule 18 and is vague and embarrassing the defendant has a choice of remedies. He may bring an application in terms of Rule 30 to have the pleadings set aside as an irregular step or raise an exception in terms of Rule 23. The remedies, however, are based on separate and distinct complaints requiring different adjudication. The crucial distinction between Rule 23 and Rule 30 is the following:

" An exception that a pleading is vague and embarrassing can only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded. Whereas Rule 30 may be invoked to strike out the claim pleaded when individual averments do not contain sufficient particularity. It is not necessary that the failure to plead material facts goes to the root of the cause of action."

66. In the Rule 30 application also, launched together with the Rule 23 application, the main complaints against the particulars of claim are that the plaintiff fails to set out how amounts are made up. What is telling

from the Rule 30 is that all the amounts referred to are amounts that either appear in an invoice and/or a re-measurement bill and/or a verification of another party. Thus, these amounts would clearly be proven on the basis of either oral evidence or documentary evidence being provided at trial. It emanates mostly from other parties and the plaintiff can hardly be blamed for not setting out how the amounts are made up due to the fact that he was not the author of these amounts or delivered the services for these amounts.

67. There is no prejudice as set out in the Rule 30 and the prejudice does not emanate from the irregular steps averred by the second defendants in their application.

68. I consequently make the following order:

1. The exception application as well as the Rule 30(1) application to the plaintiff's amended particulars of claim effected on 9 December 2013 is dismissed with costs.

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STRAUSS AJ

ACTING JUDGE OF THE HIGH COURT OFSOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

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HEARD ON 8 OCTOBER 2015
JUDGMENT ON 16 OCTOBER 2015