

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

**Case Nr: 853/2011
Case Heard: 10/02/2012
Date delivered: 17/02/2012**

In the matter between:

Molema Projects and Developers CC

PLAINTIFF

and

L F Bantjies Civil t/a Elcon Civil

RESPONDENT

Coram: Olivier J

JUDGMENT

Olivier J:

- 1]. The defendant, L F Bantjies Civil CC (t/a Elcon Civil), has excepted to the particulars of claim of the plaintiff, Molema Projects and Developers CC, on the basis of it being vague and embarrassing.

- 2]. The plaintiff's attorney, Mr Kgotlagomang, argued *in limine* that the exception should be dismissed because it was filed three days late. There is no merit in this point. As pointed out by mr Burger SC, counsel for defendant, an exception to particulars of claim is a pleading and in the absence of a notice of bar the defendant is entitled to proceed with the exception¹. There is even less merit in

¹ Erasmus: Superior Court Practice, Farlam *et al*, B1-158; Landmark Mthatha (Pty) Ltd v King Sabata Dalindyebo Municipality and Others: *In re* African Bulk Earth Works (Pty) Ltd v Landmark Mthatha (Pty) Ltd and Others 2010 (3) SA 81 (ECM) paras [10] – [13]

Mr Kgotlagomang's reply that the defendant must be deemed to have waived its right to file an exception. A delay of only three days would not in these circumstances justify such an inference.

- 3]. The cause of action is basically the *conditio indebiti*, it being alleged² that the defendant overpaid the plaintiff in the amount of R234 176,37³. It is also alleged that this was caused by a *bona fide* and reasonable mistake of fact and in circumstances where there had been no obligation to pay this amount to the defendant.
- 4]. In paragraphs 3 to 9 of the particulars of claim the plaintiff clearly intended to plead facts to sustain the allegation that the payment had been *sine causa*. It was alleged that the parties had concluded a written contract in terms of which the defendant would subcontract for the plaintiff, at 84 % of the amounts paid to the plaintiff by De Beer Consolidated Mines ("*the owner*")⁴.
- 5]. The first complaint raised by the defendant, in paragraphs 1 and 1.1 of the exception, is basically that the purported written contract (annexure A to the particulars of claim) contains no provision to the effect that the defendant would be entitled to 84 % of the remuneration received by the plaintiff.
- 6]. This is clearly so. In fact, the contents of the written contract are in effect difficult to reconcile with an allegation that the defendant's remuneration would amount to 84 % of that received

² in paragraph 10 of the particulars of claim

³ allegedly the difference between the amount of R481 919,66 paid and the amount of R247 743,48 payable

⁴ paragraphs 4 and 5 of the particulars of claim

by the plaintiff. In clause 2.1.1 reference is made to fixed amounts to be paid to the defendant for “*site-establishment*”. There is no indication at all that the plaintiff would also be remunerated for site-establishment and that the amounts mentioned in clause 2.1.1 would constitute 84 % (or any other agreed percentage) thereof.

- 7]. In clause 2.1.2 reference is made to the total amounts payable to the defendant in respect of the construction of “*the works*” involved in the two construction contracts. Again these amounts are on the face of them fixed and there is no indication of them constituting 84 % (or, once again, any other agreed percentage) of payments received by the plaintiff in its capacity as the contractor.
- 8]. In paragraphs 6 to 9 of the particulars of claim it is basically alleged that the plaintiff rendered an account or invoice for an amount of R61 867,80 to the owner (after initially rendering one for an amount of R207 936,00 on the strength of an allegedly erroneous account or invoice rendered to the plaintiff by the defendant⁵), and that the defendant was then “*in terms of agreement*” only entitled to an amount of R53 206,30 (on the basis of the last account rendered by the plaintiff to the owner).
- 9]. Although this was not raised by the defendant in its exception, it is clear that the amount of R53 206,30 would not amount to 84 % of the amount of R61 867,80 (the final amount of that particular account or invoice).

⁵ the repeated reference to an “*amount*” which had been rendered is clearly a typing error and was probably intended to refer to an account.

- 10]. What was, however, raised in the exception is that it is impossible to reconcile the amount of R234 176,37, alleged in paragraph 10 to be the amount overpaid, with the allegations in paragraphs 6 to 9 of the particulars of claim.
- 11]. Once again, this is quite correct. If an amount of R481 919,66 was paid to the defendant, as alleged in paragraph 10, while the defendant had only been entitled to an amount of R53 206,30, as alleged in paragraph 9, the difference and the amount of overpayment would have been R428 713,36, and not R234 176,37⁶.
- 12]. These defects make it impossible to discern how the amount claimed (R234 176,37) is made up, on what basis it is alleged that the plaintiff had been under no obligation to pay it and what error of fact had led to the alleged overpayment.
- 13]. In my view there is a further defect in the particulars of claim. The amount of R481 919,66 allegedly paid to the defendant is far less than the total amounts payable to the defendant in terms of the written contract. It is not clear whether the work has been completed and finalised. If so, the defendant would, if no other payments had been made, be entitled to far more than the amount of R481 919,66. If not, the plaintiff's case should probably have been that the defendant received remuneration in the form of progress payments. No such allegation was made and the only express mention in the contract of the issue of progress payments

⁶ The amount alleged in paragraph 10, and which is in any event not the precise difference between the R481 919,66 allegedly paid and the R247 743,48 allegedly payable

is to the effect that the plaintiff would receive payment from the owner as the work progressed.

- 14]. Be that as it may, I am satisfied that the allegations in the particulars of claim are indeed vague and embarrassing, and in fact contradictory, on the grounds set out in the exception. The defendant is prejudiced. The only conceivable way in which it could approach these allegations in a plea, would be to simply deny all of them, which would render the plea excipiable?
- 15]. It follows that I am of the view that the exception should be upheld. I am not, however, prepared to dismiss the claim, as requested on behalf of the defendant. In my view the plaintiff should be granted one more opportunity to amend its particulars of claim.
- 16]. It is, however, a fact that the plaintiff was afforded this opportunity to amend, when confronted with the defendant's notice in terms of Uniform Rule 23 (1). There can therefore be no doubt that the plaintiff should pay the costs of the exception.
- 17]. In the premises I make the following order:
- 1. The exception is upheld with costs.**
 - 2. The plaintiff is granted leave to amend its particulars of claim within 15 days hereof.**

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the Plaintiff: **Mr C Kgotlagomang**
 Towel & Groenewaldt, KIMBERLEY

For the Respondent: **Adv A H Burger SC**
Instructed by: **Engelsman Magabane Inc, KIMBERLEY**