



IN THE HIGH COURT OF SWAZILAND

RULING

Case No.1024/11

In the matter between:

THOKO MDLULI

Plaintiff

And

MANUEL DE – CAIRES

Defendant

Neutral citation: **Thoko Mdluli v Manuel De Caires 1024/11 [2012] SZHC
(16 March 2012)**

CORAM: **M. Dlamini**

Heard: **13th March 2012**

Delivered: **16th March 2012**

For the Plaintiff: **B. Simelane**

For the Defendant: **T. Ndlovu**

Pleadings - exception – whether words such as misrepresentation and defendant not entitled to payment are sufficient to inform opposite party of cause of action based on *condictio indebiti* - words to be specifically pleaded in claims based on *condictio indebiti*

Summary: The plaintiff lodged in this court a combined summons. In turn, the defendant requested for further particulars. Having received a reply to the request for further particulars, the defendant filed an application in terms of Rule 23.

[1] To reach a justifiable conclusion, one has to first consider the particulars of claim, the request for further particulars and the reply thereto.

Particulars of Claim.

- “ 4. *During the year 2005, plaintiff and defendant entered into a verbal lease agreement for the hiring by plaintiff and letting by plaintiff of Plot 165 Manzini in the Manzini District”.*
5. *In terms of the lease agreement plaintiff paid E2,700.00 per month to defendant as rental;*
6. *When the lease agreement was made defendant presented himself as owner and landlord of Plot 165 Manzini, when in fact he is neither owner nor landlord of the property;*
7. *As a result of the misrepresentation by defendant to plaintiff, plaintiff paid rentals for 12 months giving a total of E32,400.00.*
8. *Defendant as neither owner nor landlord of the said property was not entitled to the payment of E32,400.00 and therefore the amount was not owing and payable to him.*
9. *Defendant nevertheless appropriated the monies which were not due and payable to him.*

[2] Request for further particulars:

“Ad Paragraph 4

- 1.1 *Where was this verbal lease entered into (see Rule 18);*
- 1.2 *Who represented the plaintiff and who represented the defendant;*
- 1.3 *It is being alleged the defendant was acting or in a representative capacity?*
- 1.4 *If it is alleged the defendant was acting on a representative capacity, the identity of the defendant’s principal is requested.*

Ad Paragraph 5

- 2.1 *What was the alleged duration of this alleged verbal lease;*
- 2.2 *Did the defendant hand over possession of the property to the plaintiff upon entering the alleged oral lease agreement;*
- 2.3 *If so did the plaintiff take occupation of the said premises as handed over by the defendant;*
- 2.4 *Did plaintiff ever take occupation and what was the duration of the plaintiff’s occupation on the premises?*

Ad Paragraph 6

- 3.1 *Who is it alleged the property belongs to and / or who is it being alleged is the rightful landlord to the property.*
- 3.2 *It is being alleged the plaintiff was evicted by anyone from the alleged premises;*
- 3.3 *If so, was such eviction by order of court or otherwise.*

Ad Paragraph 7to 9

- 4.1 *Is it being alleged the plaintiff suffered any loss;*
- 4.2 *If so the plaintiff is called upon to particularize such loss”.*

[3] Reply to request for further particulars:

- “1.1 *Manzini*
- 1.2 *She appeared personally;*
- 1.3 *He appeared personally and never declared to being acting in a representative capacity.*
- 1.4 *Not applicable.*
- 2.1 *Month to month.*
- 2.2 *Yes.*
- 2.3 *Yes.*
- 2.4 *Yes and for twelve months.*
- 3.1 *Manzini City Council.*
- 3.2 *No.*
- 3.3 *Not necessary for pleading purposes.*
- 4.1 *Yes*
- 4.2 *Defendant was enriched and plaintiff impoverished in the amount claimed in the summons.*

[4] It was the totality of defendant’s submissions that since plaintiff by his own showing admitted that during the subsistence of the verbal lease agreement he enjoyed undisturbed and peaceful *vacuo possessio* and that no third party demanded from him any further payment, plaintiff’s particulars of claim lacked averments necessary (*facta probantia*) to sustain an action. Plaintiff on the other hand submitted that as evident in his heads of arguments, the cause of action was based on *condictio indebiti*. The plaintiff relies for this assertion on paragraphs 7 and 8 which read:

- 7. *As a result of the misrepresentation by defendant to plaintiff, plaintiff paid rentals for 12 months giving a total of E32,400.00.*
- 8. *Defendant as neither owner nor landlord of the said property was not entitled to the payment of E32,400.00 and therefore the amount was not owing and payable to him.*

[5] Rule 18 (4) dictates:

“Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto”.

- [6] The issue at present is not whether the averments in the declaration satisfy the elements of *condictio indebiti*. This is a matter for the later stage of the proceedings. I say this because the defendant, during the hearing attempted to address the court on the same. I am now to determine whether plaintiff’s particulars of claim is a clear and concise statement of material facts such that one can say it indeed contains sufficient particulars so as to enable the defendant to plead thereto.
- [7] Harms LTC in **Armler’s Precedents of Pleadings 7th Edition Lexis Nexis, Durban 2009** page 100 at pages 102 and 103 outline averments material in claims based on *condictio indebiti*. Harms gives us two examples on how to draft claims based on *condictio indebiti* as follows:

“Claim – based on a void contract

3. *In anticipation of the grant of the consent, plaintiff made payment to defendant of the following instalments in the bona fide and reasonable belief that the agreement was valid and that the minster would grant his consent:*

Claim - based on payment wrongly made

2. *In the bona fide and reasonable belief that defendant, who bears the same name as [X], is in fact [X, plaintiff on [date] by post sent the said sum to defendant.”*

On a close analysis of the precedents outlined above, one can safely conclude that in every action based on *condictio indebiti*, irrespective of the specific subject (such as whether based on void contract or wrong payment) the declaration or particulars of claim should indicate that the plaintiff making the payment or delivery did so with a *bona fide* and reasonable belief that the opposite party was entitled to the same.

Harms seems to further highlight as an essential averment that the said sum was not due and owing to the defendant as did the plaintiff in this present case in terms of his paragraph 8 of the particulars of claim.

However, plaintiff's particulars of claim lack one of the essential averments which is that he acted on a bona fide and reasonable belief. The assertion that the defendant misrepresented to the plaintiff is unfortunately not sufficient to inform the other party with clarity as to the cause of action.

In the circumstances, defendant's application in terms of Rule 23(1) is upheld.

[8] It was defendant's prayer that in the event his application for exception is upheld the plaintiff should be ordered to amend his pleading.

I accordingly order as follows:

1. Defendant's application is upheld.
2. Plaintiff is ordered to pay costs.
3. Plaintiff is granted leave to amend his particulars of claim and file the same within three (3) days from date of delivery of this ruling.
4. Thereafter the matter is to take its normal course.

M. DLAMINI

JUDGE

