REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

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

10 December 2013
Date

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Signature

CASE NO: 44618/2011

XSTRATA COAL SOUTH AFRICA (PTY) LIMITED
t/a XSTRATA COAL SOUTH AFRICA

Plaintiff

and

SANDVIK MINING AND CONSTRUCTION RSA (PTY) LTD

First Defendant

MURRAY & ROBERTS ENGINEERING SOLUTIONS (PTY) LIMITED

Second Defendant

SANTAM LIMITED

Third Defendant

MUTUAL & FEDERAL INSURANCE COMPANY LIMITED

Fourth Defendant

SCINTILLA-ERU (PTY) LIMITED

Fifth Defendant

LION OF AFRICA INSURANCE COMPANY

Sixth Defendant

CONSTRUCTION AND ENGINEERING UNDERWRITERS (PTY) LIMITED, A DIVISION OF SANTAM LIMITED

Seventh Defendant

EMERALD INSURANCE COMPANY LIMITED

Eighth Defendant

JUDGMENT

WEINER J:

INTRODUCTION

[1] The plaintiff has instituted action against eight defendants. The first and second defendants are contractors; and the third to eighth are insurers (save for the seventh defendant who is an underwriter).

[2] The excipient (the third defendant) filed four exceptions to the plaintiff's particulars of claim.

BRIEF BACKGROUND

[3] The plaintiff concluded an Engineering, Procurement and Construction Management Services Agreement (EPCM agreement) with the first defendant in respect the project management, engineering, procurement and construction management services for the coal handling preparation plant at the Goedgevonden Colliery Project (hereinafter referred to as "the Construction Contract").

[4] The plaintiff was required, in terms of the EPCM agreement as concluded with the first defendant, to effect Project Professional Indemnity Insurance in

accordance with the provisions of Policy Number: P01421 (the PI Policy).

THE PLAINTIFF'S CLAIM

[5] The plaintiff has instituted action against, *inter alia*, the first and third defendants for payment of the sum of R60 368 902.40 and R100 million respectively. The plaintiff's claim against the first defendant is based upon a breach by the first defendant of the EPCM Agreement and the damages suffered by the plaintiff as a result thereof.

[6] The plaintiff's claim against the third defendant is based upon an alleged obligation on the part of the third defendant to indemnify the plaintiff in terms of the PI Policy for the losses suffered by the plaintiff as a result of the first defendant's breach of the EPCM Agreement.

[7] The third defendant submits that the claim against it is excipiable on four grounds, three of which relate to the lack of a valid cause of action and the fourth on the grounds that the particulars of claim are vague and embarrassing.

LEGAL PRINCIPLES RELATING TO EXCEPTIONS

[8] It is trite that in exceptions alleging that no cause of action is made out,

"the onus is always on the excipient to satisfy the court that sound and adequate grounds exist why the exception should be upheld."[1]

[9] The truth of the allegations set out by the plaintiff have to be accepted. Thus:-

"the exception being restricted to pure matters of law, it is, of the essence, of a valid exception that no new facts should be raised at all; nor should any facts be disputed. The excipient, for the purposes of the exception, is bound by the pleading to which he or she excepts, and is taken to admit those facts."[2]

[10] The plaintiff contends that the most pertinent principle which pertains in the present dispute is that:-

"(w)here a clause in a contract is ambiguous and extrinsic evidence is admissible, an exception is not competent to decide the meaning."

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1 City of Cape Town v. National Meat Suppliers, Ltd 1938 CPD 59 at 63.
2 Beck's Theory and Principles of pleadings in civil actions 6ed. 129.

[11] Ramsbottom J in *Sacks v Venter*[3] held as follows:

"I think it is clear that if the condition is unambiguous so that evidence is not admissible for its interpretation, the question of its interpretation can properly be decided on exception... In order to succeed, the excipient must show that the clause is unambiguous and that the meaning for which he contends is the correct meaning."[4]

[12] In the *locus classicus* of *Jowell v Bramwell & Jones and Others*[5], Heher, J held:-

"One must bear in mind in considering this exception that the interpretation of a will, like a contract, is not appropriate at the exception stage unless the excipient can demonstrate that there are no possible meanings other than that contended for and that no admissible evidence which is not remote or merely notional can shed light on the true meaning of the words and the testator's intent: ... Sacks v Venter 1954 (2) SA 427 (W) at 429D"

[13] In *Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd*[6] Marcus AJ stated the position as follows:

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3 1954 (2) SA 427 (W).
4 *Ibid* 429C-E.
5 1998 (1) SA 836 (W).
6 1999 (1) SA 624 (W).

"When an exception is taken to a pleading, the excipient proceeds on the assumption that each and every averment in the pleading to which exception is taken is true, but nevertheless contends that, as a matter of law, the pleadings do not disclose a clause of action or defence, as the case may be ... An exception will not succeed unless no cause of action or defence is disclosed on all reasonable constructions of the pleading in question. ... When, as in the present case, the exception is based upon the interpretation of a contract, it is necessary for the excipient to demonstrate that the contract is unambiguous. This is well illustrated by the case of Sacks v. Venter 1954 (2) SA 427 (W)."[7]

[14] The third defendant has contended that the function of an exception, that a pleading does not disclose a cause of action, is to dispose of the case, as pleaded, in whole or in part.[8] In *Telematrix (Pty) Ltd v Advertising Standards Authority SA*[9], Harms JA held that:

"Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility. To borrow the imagery employed by Miller J, the response to an exception should be like a sword that 'cuts through the tissue of which the exception is compounded and exposes its vulnerability'."[10]

[15] In *Sun Packaging (Pty) Ltd v Vreulink*[11], Nestadt JA confirmed that there is no hard and fast rule that the interpretation of agreements is to be avoided on exception.

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7 *Ibid* 632B-E.
8 Barclay's National Bank Ltd v Thompson 1989 (1) SA 547 (A) at 553
9 2006 (1) SA 461 (SCA)
10 *Ibid* 465, para [3]
11 1996 (4) SA 176 (A)

He held:

"As a rule, courts are reluctant to decide upon exception questions concerning the interpretation of a contract. But this is where its meaning is uncertain. In casu, the position is different. Difficulty in interpreting a document does not necessarily imply that it is ambiguous... Contracts are not rendered uncertain because parties disagree as to their meaning."[12]

[16] In Telematrix *supra*, Harms JA quoted with approval the *dictum* by Miller J in *Davenport Corner Tearoom (Pty) Ltd v Joubert*[13] in dealing with an issue of interpretation. Miller J held that:-

"Nor do I think that the mere notional possibility that evidence of surrounding circumstances may influence the issue should necessarily operate to debar the court from deciding such issue on exception. There must, I think, be something more than a notional or remote possibility. Usually that something more can be gathered from the pleadings and the facts alleged or admitted therein. There may be a specific allegation in the pleadings showing the relevance of extraneous facts, or there may be allegations from which it may be inferred that further facts affecting interpretation may reasonably possibly exist. A measure of conjecture is undoubtedly both permissible and proper, but the shield should not be allowed to protect the respondent where it is composed entirely of conjectural and speculative hypotheses, lacking any real foundation in the pleadings or in the obvious facts."[14]

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12 *Ibid* 186J-187B
13 1962 (2) SA 709 (D) at 715H.
14 *Ibid* 716C-E.

THE POLICY IN CASU

[17] In the present instance, the entire PI Policy is before the court and there is no suggestion by the plaintiff that the meaning will be influenced by admissible evidence to be led at trial. The third defendant, accordingly, contends that the court can and should decide the interpretation of the PI Policy on exception.

THE EXCEPTIONS

First Exception

[18] In dealing with the PI Policy, the third defendant raises the issue that there is a distinction between property insurance and indemnity insurance. The PI Policy is purely an indemnity policy into which the plaintiff has attempted to insert a property insurance claim.

[19] The plaintiff's claim against the third defendant is based on an indemnification to which the plaintiff contends it is entitled under the PI Policy as a result of the first defendant's breach of its professional activities or duties under the EPCM Agreement.

[20] In claiming such indemnification, the plaintiff relies on the provisions of Clause B of the professional indemnity section of the PI Policy. Indemnity Clauses A and B read

as follows:

"A. LEGAL LIABILITY

The Insurers will indemnify the Insured in accordance with the Application of Indemnity Clause in respect of compensatory damages which the Insured or other parties appointed by the Insured shall become legally liable to pay in consequence of any actual or alleged neglect, error or omission by or on behalf of the Insured or those for whom the Insured is responsible in the conduct or execution of their Professional Activities and Duties as defined.

B. PRIOR TO HANDOVER

Insurers will also indemnify the Insured against Loss arising out of any defect in the Works discovered prior to the issue of any practical completion or take-over certificate or any defect in the product prior to it having left the custody and control of the Insured, provided that any such defects are caused by a negligent breach of a Professional Activity or Duty by the Insured or other parties appointed by the Insured or those for whom the Insured is responsible."

[21] The third defendant has argued that a professional indemnity policy indemnifies an insured against losses caused by its own negligence.[15] The heading under which the clause is to be found, in the absence of any express provision to the contrary, can be taken into account in interpreting the PI Policy.[16] In the present case, the plaintiff seeks a professional indemnity in respect of losses caused, not by its own conduct, but

[15] Gordon & Getz, The South African Law of Insurance by DM Davis at 483.
[16] Sentinel Mining Industry Retirement Fund v Waz Props 2013 (3) SA 132 (SCA) at 137, para [10].

rather by the conduct of another insured, namely the first defendant.

[22] The third defendant submits that the reference to the insured in the aforegoing clauses of the PI Policy is a reference to the insured whose negligent breach of a professional activity or duty caused the defect in question. In the present instance, that insured is not the plaintiff, it is the first defendant.

[23] The endorsement to the policy extends the meaning of insured to include, *inter alia,* the first defendant. The first defendant contends that the use of the word *"insured"* in Clause B of the PI Policy cannot be used interchangeably to refer, in the first instance, to the plaintiff but then subsequently to refer to the first defendant. The reference to the insured must entail the use consistently of the same insured.

[24] The fact that the PI Policy provides that each legal entity indemnified is indemnified separately in respect of claims made against any of them by any other does not, the third defendant submits, detract from this principle. All that that clause does is to permit a claim to be made by one insured against the other and for the latter to seek an indemnity under the PI Policy in respect of such claim made against it.

[25] In these circumstances, it is argued that the plaintiff's reliance on Clause B of the PI Policy to claim an indemnity from the third defendant, in respect of a breach by the first defendant of its professional activities or duty under the EPCM Agreement, is misconceived and results in the plaintiff's claim being excipiable.

[26] The plaintiff submits that:-

26.1. the word "*Loss*" relates only to Indemnity Clause B and does not pertain to Indemnity Clause A;

26.2. the PI Policy does not only indemnify the Insured (as defined) against losses caused by its/their own negligence. The PI Policy comprehends two species of insurance cover, namely, constituting "*Legal Liability*' and that constituting a "*Loss*" which occurs "*Prior to Handover*".

26.3. the PI Policy relates to more than one "*Insured*" and the PI Policy is silent as to which of the insured or combination thereof is the "*Insured*" for purposes of the context in question.

26.4. the "*Insured*" can, in terms of the endorsement, be either the plaintiff or the first defendant or the second defendant or a combination of the two (no relief is sought against the second defendant).

26.5. the third defendant's liability for losses caused by the first defendant, arises in consequence of the definition of "*Insured*" in the policy having been extended so as to include the first defendant and in consequence also of giving effect to the purposive construction recognised and endorsed by Grosskopf JA in the Venter case *supra*.

26.6. Clause B of the PI Policy is rendered operative not only by a negligent breach of a professional activity or duty by the Insured (which may be either the plaintiff or the first defendant), but also,

"... by other parties appointed by the Insured or those for whom the [Insured] *is responsible."* [emphasis added]

26.7 the interpretation of Clause B of the PI Policy, in consequence of the definition which is ascribed to the word "*Insured*", renders the clause ambiguous. The forum in which an exception is heard is not the forum in which such an issue ought to be decided.

26.8 clause 13 of *"The Exclusions"* section of the PI Policy excludes cover for "*Liability*": the Exclusions section of the PI Policy is silent insofar as the "Loss" portion of the policy document is concerned. To the extent, therefore, that the exclusion section of the PI Policy provides that, *"(t)his Policy does not cover liability arising out of the failure by the Insured to meet completion dates"*, it refers only to Indemnity Clause A and not to Indemnity Clause B which has its own set of rules. Plaintiff argues that a contrary interpretation renders the provisions in question ambiguous.

[27] The third defendant, however, contends that:-

27.1. Clause B is not applicable to losses in the sense claimed by the plaintiff but refers to an insured who is facing a claim. In terms of the EPCM agreement, the plaintiff was obliged to get professional liability insurance and not property insurance. The policy would only cover claims against an insured and not damages which the insured has suffered;

27.2. Clause A refers to legal liability in respect of a claim that has already been made. Clause B does not relate to a different insured but to a different

situation. Although no legal liability to pay has yet arisen, the insured might be liable, after handover, if there are defects which were caused by the insured's breach. The reference to "*Loss*" refers to the actual expenses incurred before being held liable but this "*Loss*" is what the first defendant has incurred and not the plaintiff. The indemnity policy would only cover claims against the plaintiff and not claims for which another party is liable. It would not be a reasonable interpretation of the policy for Clause B to be interpreted as a property insurance policy to which none of the exclusions apply.

ANALYSIS OF ARGUMENTS

[28] The third defendant's argument, in regard to the court's ability to decide an exception relating to an "*unambiguous*" interpretation, has its attractions. However, the inclusion of the First Defendant as an Insured and the reference to "*Insured*" in Clause B as well as the inclusion of the words "*by other parties (such as the First Defendant) appointed by the Insured or those for whom the Insured is responsible.*" [emphasis added] introduces an ambiguity which cannot, at this stage, be excluded. Relying on the various authorities referred to above[17], the court is of the view that this interpretation should not be decided by way of exception. Accordingly, the first exception fails.

[17] See Sacks v Venter (*Supra*) and others.

The second exception

[29] The third defendant's second exception is similarly confined to Clause B of the PI Policy upon which the plaintiff relies in its claim against the third defendant.

[30] In terms of that section:

"The onus of proving a claim under this Indemnity Clause B shall be upon the Insured who will be obliged to give prior written notice to the Insurers of the intention to take such action as is necessary to rectify such defect and obtain the Insurers' written agreement to such action being taken and the costs and expenses expected to be expended." [emphasis added]

[31] In order to advance any claim under Clause B of the professional indemnity section of the PI Policy, the plaintiff was obliged, according to the third defendant, firstly to give written notice to the third defendant of its intention to take action in order to rectify any defect and, secondly to obtain the third defendant's written agreement to such action being taken and the costs and expenses expected to be expended in that regard.

[32] In paragraphs 33 and 34 of the plaintiff's particulars of claim, the plaintiff alleges that as a result of the first defendant's failure to exercise the standards of skill, care and diligence reasonably expected of a professional services provider, defects in the project

were discovered prior to the issue of a practical completion or take over certificate and that this necessitated remedial work and/or replacement of work, resulting in actual expenses being reasonably and necessarily incurred by the plaintiff with the Insurer's prior written consent, alternatively with the Insurer's knowledge [emphasis added]

[33] No such written consent is pleaded in the plaintiff's particulars of claim, nor is a copy attached.

[34] The allegation that the plaintiff had given such prior written notice to the third defendant was a jurisdictional pre-requisite, the third defendant submits, to a claim being made under Clause B of the professional indemnity section of the PI Policy. In the absence thereof, the plaintiff's particulars of claim lack the necessary averments to sustain its cause of action.

[35] Plaintiff submits that the question as to whether or not the giving of prior written notice gives rise to an issue which ought to be decided at the exception stage cannot be decided in favour of the third defendant on the basis that the acceptance of the truth of the allegations set out in paragraph 34 of the Particulars of Claim (for the purposes of an exception) precludes a finding that the Particulars of Claim lack the necessary averments.

[36] Plaintiff argued that, in pleading, the insurer's "*prior written consent*" it is implied that there must have been prior notice to the third defendant.

[37] Plaintiff has, however, added the rider, "*alternatively with the insurer's knowledge*". This alternative places a different slant on the interpretation claimed by the plaintiff in para 34 above. In my view, the allegation requires something more to render it compliant with the section of the PI Policy. Either the allegation of written notice must be made or the allegation of the insurer's "*knowledge*" must be expanded upon to render it sufficient to amount to compliance. Without such detail, the jurisdictional pre-requisites have not been met and the exception must be upheld.

[38] Insofar as the second of the complaints is concerned, plaintiff contends that there is no requirement, as a matter of pleading or in terms of the Rules of Court, that a copy of a notice such as that contemplated in Clause B of the PI Policy be furnished by way of an annexure to a Plaintiff's summons. This appears to be correct.

The Third Exception

[39] The plaintiff alleges that as a result of the first defendant's failure to exercise the

standards of skill, care and diligence reasonably expected of a professional services provider, defects in the project were discovered prior to the issue of a practical completion or take over certificate, which necessitated remedial work and/or replacement of work resulting in actual expenses being incurred by the plaintiff.

[40] The plaintiff contends that those expenses were due to:

40.1. its project resources having to be deployed for a period of 16 months longer than would have been the case had the first defendant properly performed its professional activities and duties;

40.2. escalation costs due to delays and/or the prolongation of the project claimed by other contractors.

[41] The amount claimed in respect of these escalation costs is R26 940 910.11.

[42] The third defendant contends that the PI Policy does not cover liability arising out of the failure by the insured to meet completion dates and for consequential losses (other than the cost of re-design, rectification, replacement or material damage as a

consequence of the defect). The plaintiff's claim for expenses incurred due to it having to deploy its project resources for a further period of 16 months and for escalation costs due to delays and/or prolongation claimed by other contractors are either expenses arising out of the failure by the first defendant to meet its completion dates or are consequential losses. These are excluded by the PI Policy. Even if such losses were to fall outside the ambit of clause 13 of the PI Policy, they would nevertheless constitute consequential losses and would thus similarly be excluded by the PI Policy.

[43] The phrase "*arising out of*" used in clause 13 of the PI Policy implies that the loss is "*caused by*"... and that there is some causal connection between the loss claimed and the failure to meet the completion dates under the project.[18] In *Stocks v Stocks (Gauteng) (Pty) Ltd v A&P Electrical CC*[19] Wunsh J held that:

"The expression 'arising out of' is, like 'in respect of' and 'in relation to', of very wide and not very definite meaning. To determine its meaning in a particular case regard should be had to the context in which the words are used in the statute or contract in question and to any other indications which may present themselves.'[20]

[44] In the present instance, the third defendant contends that the losses allegedly suffered by the plaintiff and claimed by it relate to, arise from or are connected with the

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[18] Jacobs v Auto Protection Insurance Co Ltd 1964 (1) SA 693 (W)
[19] 1998 (4) SA 266 (W)
[20] *Ibid* 273B

first defendant's failure to meet the completion dates under the project. The losses claimed by the plaintiff are not direct losses, but are consequential losses that arise from the direct loss, namely the defects and the remedial work that was required to attend to those defects.[21] The third defendant is thus not liable to indemnify the plaintiff in respect of such losses.

[45] The plaintiff, on the other hand, contends that the exclusions referred to by the third defendant only exclude cover for "*liability*" in Clause A. No reference is made in the preamble to any exclusion of cover in respect of "*Loss*", in Clause B.

[46] The argument of the plaintiff would involve a finding that Clause B stands on its own and is not affected by the exclusions and other conditions of the PI Policy. Such an interpretation is commercially unrealistic. The submission that the word "Loss" must be allocated a definitive meaning, which would exclude the application of any of the other terms of the PI Policy to it, is improbable. One can take judicial notice of the fact that insurance policies all contain exclusions. Any other interpretation is commercially unsound.

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[21] *Stocks Supra fn* 30 at 273B.

[47] The plaintiff does not challenge the first defendant's interpretation of what is excluded. It only relies upon its interpretation of Clause B as not being subject to the exclusions. Having rejected this interpretation, the losses claimed would be excluded. This exception is accordingly upheld.

The Fourth Exception

[48] The third defendant's fourth exception, unlike the previous three exceptions, relates to the vague and embarrassing nature of the plaintiff's particulars of claim.

[49] Heher J in *Jowell v Bramwell-Jones & Others*[22] identified the approach to be adopted in such a case, as:-

49.1. firstly, asking whether the exception goes to the heart of the claim and;

49.2. if so, whether it is vague and embarrassing to the extent that the defendant does not know the claim he has to meet and;

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[22] *Supra Fn 5* at 905G-H.

[50] The following general principles which aid in determining when a pleading lacks the requisite particulars rendering them vague and embarrassing or in non-compliance with rule 18(4) are:

50.1. the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not to be taken by surprise;[23]

50.2. pleadings must be lucid and logical and in an intelligible form;

50.3. with the abolishment of further particulars, a greater degree of particularity of pleadings is required;[24] and

50.4. the more complex a matter, the more detailed the particulars ought to be.[25]

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[23] Persons listed in Schedule A v Discovery Health [2009] All SA 479 (T) at 481H.
[24] Trope v South African Reserve Bank & Another 1992 (3) SA 208 (T) at 210F-J.
[25] Nationale Aartappel KoÖperasie Bpk v Price Waterhouse Coopers Ing en andere 2001 (2) SA 790 (T).

[51] In South African Railways and Harbours v Deal Enterprises (Pty) Ltd[26], Botha JA pointed out that:-

"*No hard and fast rules can be laid down as to the degree of particularity that is required; the court exercises its discretion upon the facts of each case; and the decision in one case is no safe guide to the solution of another unless the relevant facts are identical.*"[27]

[52] The vague and embarrassing nature of the particulars of claim complained of relates to the plaintiff's failure to identify whether its claim for R100 million comprises a single occurrence, as contemplated by the PI Policy, or a number of occurrences. If the plaintiff's claim is based on a single occurrence, then in terms of the PI Policy, it is limited to R50 million with a deductible of R5 million. If, on the other hand, it is made up of a number of occurrences, then each occurrence is subject to a deductible of R5 million.

[53] According to the third defendant, it is not clear from the plaintiff's particulars of claim or indeed the annexure attached thereto whether the plaintiff relies on a single occurrence or on a number of occurrences. This uncertainty creates doubt whether the plaintiff's claim is one for R45 million (In other words an indemnity of R50 million, less the deductible of R5 million) or whether it is a claim comprising a multitude of

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[26] 1975 (3) SA 944 (W).
[27] *Ibid* 947D-E.

occurrences, each of which are to be reduced by the deductible of R5 million, in which case the quantum of the plaintiff's claim remains obscure and unascertainable.

[54] The plaintiff contends that the definition of "*Occurrence*" and the application thereof to the Limits of Indemnity in the PI Policy is only applicable to Clause A of the PI Policy, that is, to the portion dealing with legal liability and not to Clause B which relates to "*Loss*".

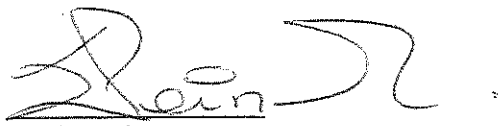
[55] Having found this interpretation to be unsustainable, the first defendant is entitled to know the basis and extent of the plaintiff's claim. As it stands, it is vague and not in accordance with the policy. This exception is accordingly upheld.

COSTS

[56] In regard to costs, although the third defendant has been substantially successful, the dismissal of the first exception carries with it a substantial effect on the plaintiff's claim: accordingly, I intend to order each party to pay their own costs.

[57] In the premises, the following order is made:-

1. The first exception is dismissed.
2. The second, third and fourth exceptions are upheld.
3. The plaintiff is afforded 30 days within which to amend its particulars of claim.
4. Each party is to pay its own costs.



Weiner J

Date of Hearing:	22 October 2013
Date of Judgment:	10 December 2013
Counsel for Excipient / Third Defendant:	Adv CDA Loxton SC (Assisted by Adv MA Chohan)
Attorneys for Excipient/Third Defendant:	Webber Wentzel Inc.
Counsel for Respondent/Plaintiff:	Adv KJ Trisk SC (Assisted by Adv RL Harding)
Attorneys for Respondent/Plaintiff:	Bowman Gilfillan Inc.