

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 4670/2012

In the matter between:-

PIONEER HI-BRED RSA (PTY) LTD

Plaintiff

and

J G KRIEK

Defendant

HEARD ON: 25 OCTOBER 2013

JUDGMENT BY: SESELE, AJ

DELIVERED ON: 21 NOVEMBER 2013

- [1] The plaintiff raised exceptions to the plea and the counterclaim in that both lack averments which are necessary to sustain a defence and a cause of action, respectively, alternatively, that same are vague and embarrassing for various reasons.
- [2] The plaintiff sued the defendant for R305 471,80, interest and costs being in respect of the sale and delivery of goods, namely, maize and soya seed during or about September 2011 to December 2011.

- [3] The defendant entered appearance to defend on 13 December 2012 whereafter the plaintiff filed its declaration on 1 March 2013.
- [4] The opposed application for summary judgment was set down for hearing on 24 January 2013 and by agreement an order was granted for the defendant to defend the matter. The costs were ordered to be costs in the main action.
- [5] The plaintiff filed the notices of exception in respect of both the plea and the counterclaim on 5 June 2013. The defendant did not remove the cause of the complaint.
- [6] Further notices of exception were filed on 4 July 2013 whereafter the same were set down for hearing.
- [7] There was no appearance for the defendant at the hearing.
- [8] Mr Pienaar, for the plaintiff, submits, *inter alia*, that the reasons for the exceptions are the following:

8.1 The defendant in his plea makes reference to a discussion between the plaintiff's representative and the defendant's representative, but it is not alleged that an agreement was made arising from the discussion.

8.2 In both the plea and the counterclaim the defendant alleges he suffered consequential damages of R2 300 000,00 as a result of the plaintiff's unlawful conduct.

8.3 The allegation relating to quantum does not comply with Rule 18(10), which provides that

“a plaintiff suing for damages shall set them in such a manner as will enable the defendant reasonably to assess the quantum thereof”.

8.4 The amount in both the plea and counterclaim is not set out in a manner to enable the plaintiff to reasonably determine how it is calculated – **Nel and Others NNO v McArthur and Others** 2003 (4) SA 142 (T) at 146F – 148I.

8.5 It is not alleged in the plea that the plaintiff was negligent nor whether the damages were suffered as a result of the breach of contract nor is it clear whether the defendant’s defence is based in contract or in delict.

8.6 Where the same fact can give rise to a claim for damages in delict and in contract, a party must choose which cause of action he wishes to pursue – **Holtzhausen v Absa Bank Ltd** 2008 (5) SA 630 (SCA) at paras [5] – [8].

8.7 The breach of a contractual duty is not *per se* wrongful for purposes of Aquillian liability – **Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd** 2011 (4) SA 276 at 292 para [33].

8.8 Negligent causation of pure economic loss is not regarded as *prima facie* wrongful. There must be a legal duty on a party for it to be wrongful. The

imposition of the legal duty is a matter for judicial determination involving the criteria of public or legal policy – **Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd** 2006 (3) SA 138 (SCA) at 143, para [10] to 146 para [12].

8.9 The defendant's claim based on negligence relying wholly on the plaintiff's breach of contract is not sustainable – **Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd** 1985 (1) SA 475 (A) at 500 – 501.

8.10 I have considered the facts and Mr Pienaar's arguments and conclude that the plaintiff's exceptions must be upheld and the plea as well as the counterclaim are struck out.

[9] **ORDER**

9.1 The exceptions against both the plea and the counterclaim are upheld with costs.

9.2 The plea and the counterclaim are struck out.

9.3 The defendant is granted leave to amend the plea and the counterclaim within 10 days from the date of this order.

9.4 Should the defendant fail to file the amended plea and counterclaim within 10 days from the date of this order, the plaintiff is authorised to apply for judgment against the defendant.

L.M.S. SESELE, AJ

On behalf of the plaintiff:

Adv C.D. Pienaar
Instructed by:
Rossouws Attorneys
BLOEMFONTEIN

On behalf of the defendant:

No appearance

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