

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: HCA37/2023

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED</u>
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DATE	18/6/24
SIGNATURE	

In the matter between:

KRANSKOP DIEREKLINIEK &
WILDDIESTE CC

1ST APPELLANT

DR DEWET BARNARD

2ND APPELLANT

and

BGM TRADING 88 CC t/a ANDRE KOCK &
SON

RESPONDENT

JUDGEMENT

MATHABATHE AJ

Introduction

- [1] The First appellant is Kraganskop Direklenniek en Wilddientse CC, a close corporation, conducting business as veterinary surgeons, second appellant Dr De Wet Branard, a veterinary surgeon and the respondent is BG Trading 88 CC, a close corporation trading as profession auctioneers. The appellants appeal against the whole Judgment and orders granted by Modimolle Regional Court on 5 May 2023 handed down by Magistrate PT Manthata (Court *a quo*).
- [2] This appeal flows from the action which was instituted by the respondent against the appellants claiming the sum of R 381, 762,91, wherein the respondent sued the first and second appellants for damages as a result of the appellants not having been informed the respondent timeously of the fact that five bulls that were sold as breeding stock by the appellant, an auctioneer, at an auction on 27 May 2016, actually had a serious disease and could only be sold at slaughter stock price, which is lower than the breeding stock price.
- [3] The Court *a quo* granted judgement in favour of the Respondent against the first appellant alternatively the second appellant for payment in the sum of R 381, 762,91 together with interest calculated therefore at the rate of 9% per annum at *tempore morae*.

The facts

- [4] The respondent's claim against the appellant is found on three different ground and cause of action to be specific:
- 4.1 Firstly, based on the agreement entered into between the parties that the appellants would be responsible for the damages claimed on the basis set out in paragraph 19¹, which meeting was held partly orally and partly in written entered into on 31 May 2016, at or near Hammanskraal.
 - 4.2 Secondly, based on the negligent breach of the agreement between appellants and the respondent, pertaining to the rendering of professional veterinarian services by the appellants to the respondent, regarding the testing of illnesses for the cattle to be sold on the auction on 27 May 2016.
 - 4.3 Thirdly was instituted in the alternative to claim one, based on delict, namely breach of a legal duty the appellants had towards respondent pertaining to their professional duties and obligations, not to cause the respondent damages and not to act negligently.
- [5] The respondent's claim relied on the following facts, which are common cause:
- 5.1 The appellants provided information to the respondent before commencement of the auction, that the five bulls were free from any diseases, and that the auction took place on the basis of those facts.
 - 5.2 Only after the auction, the respondent was informed by the appellants that the bulls and other cattle had in fact tested positive for an illness called *Trichomonas Foetus* and *Campylobacter Fetus* (commonly referred to as Trich). The seller, a certain Mr. Wayne van den Burgh, insisted on payment of the amounts based on the bids on the auction, that were bids for the value of

¹ Vol 1 of 5 page 62-63 of the records.

breeding stock instead of slaughter stock. Respondent paid those amounts to Van Den Burgh in terms of their agreement.

- 5.3 Slaughter stock is worth much less than breeding stock. The respondent had to cancel certain sale transactions entered into with successful bidders at the auction, as a result of the fact that the cattle had been infected with Trich and Van Den Burgh claimed full payment of the price achieved at the auction for the cattle on the basis of breeding stock, in terms of his agreement with respondent.
 - 5.4 After the auction, a meeting was held between representatives of the respondent, the second appellant representing the first appellant and Van Den Burgh, pertaining to the matter, and that it was decided that the bulls would be sold at another auction as slaughter stock and that the difference between the breeding stock prices and the slaughter stock prices would be paid to the respondent by first and second appellants, including all the unnecessary costs caused as a result of the cancellation of certain agreements with bidders after the auction.
 - 5.5 The respondent alleges that this constituted a binding agreement between appellants and the respondent, but the appellant denied that such an agreement was entered into.
- [6] The appellants raised the following defenses:
- 6.1 That the initial incorrect report of the appellants that the bull not ill, did not alter the status of the bulls concerned, which were at all material times diseased, and as such the appellants did not cause the damage as alleged, being the difference in the value of breeding stock and the value of the bulls as slaughter stock.
 - 6.2 The agreement relied upon by the respondent is denied and disputed by the appellants.

- 6.3 The appellants deny that the respondent was obliged to pay the full proceeds of the cattle at breeding stock price to Van De Burgh, and that respondent therefore failed to mitigate its damages.
- 6.4 The appellant raised a further defence and argued as not pleaded, such as that the second appellant was coerced and threatened into the agreement relied upon by respondent. The respondent submitted that the appellant cannot rely on such defenses.
- [7] The evidence that was placed in the Court *a quo* by the plaintiff ("respondent") Mr Van Vuuren:
- 7.1 He testified that the appellants were requested to investigate whether the cattle brought by Van Den Burg had any illnesses, and especially for TB and Trich, so that they could be sold as breeding cattle.
- 7.2 After the auction, and after the bulls had been sold as breeding stock, at approximately 17h00, Van Vuuren was informed by appellants that some of the bulls had been tested positive for Trich, and that the previous report that was provided that morning was wrong.
- 7.3 Mr. Van Vuuren testified that he had to phone purchasers, and that the respondent had to cancel some of the agreements that were entered into at the auction.
- 7.4 He testified that it was agreed with the second appellant, at the meeting in Hammanskraal, acting on behalf of the first appellant, that the cattle that came back to the respondent after cancellation of purchase agreements, would be thereafter auctioned as slaughter cattle, and that the appellants would be responsible for the difference between the value of such cattle as breeding cattle as opposed to slaughter cattle. That was done shortly after the auction by way of a further auction held by the respondent.

- 7.5 Van Vuuren testified that the cattle had to be transported back to the respondent at the cost of the respondent and had to be held in a feedlot before they could be sold at the second auction.
- 7.7 Van Vuuren testified how the damages calculated and as to the costs of breakdown, transport and administrative costs. He personally verified the correctness of the amounts utilised to make up the damages claim, and that he had personally verified the amounts.
- 7.8 An affidavit in terms of the Electronic Communication and Transactions Act was also handed up as Exhibit A, pertaining to the correctness of the documents presented in evidence, but this was for some reason not made part of the records. However, the evidence in terms of the Electronic Communication and Transactions Act was evidence as to correctness of the amounts making up the damages. This was confirmed by a concession by evidence of appellants' legal representative, Mr Fyl "It seems to me that what is now offered as evidence is more or less common cause in this matter, so I will not object to it".
- 7.9 Van Vuuren also testified about the discussion that was held at the meeting between himself, Van De Burgh, and the second appellant and others, where the agreement was reached that the appellants would pay for the damages for the cattle that were returned and that would be sold at another auction, at slaughter cattle prices.
- 7.10 The respondent provided to the appellant all the necessary documentation and amounts for purposes of calculation of the damages. The appellant attempted to obtain payment from their insurers, but they were not successful. Only thereafter they decided to dispute the claim of the respondent.
- 7.11 Van Den Burgh was paid by the respondent in terms of their agreement, the full amount of the bids achieved at the auction, based on the value of breeding cattle that was obtained for his cattle at the auction.

- 7.12 It is recorded that under cross-examination Van Vuuren testified that if Dr Barnard (second appellant) had not made the mistake and if he knew of the status of the cattle before the auction, he would have engaged with Van Burgh about it and the respondent would not have sold the cattle as breeding cattle.
- 7.13 Van Vuuren also testified that he trusted the appellants and that he would not have sold the cattle as breeding cattle, if he had known that they had illnesses.
- 7.14 Van Vuuren again reiterated in his evidence, the agreement between the appellants and the respondent and terms thereof, that was reached at the meeting at Hammanskraal after the auction, in cross-examination.
- 7.15 It is clear from reading of the cross-examination, that no version of the appellants in particular as to the meeting and the agreement reached there, was ever put to Van Vuuren in cross-examination, and therefore the version of the facts of Van Vuuren stand uncontested.
- 7.17 Dr Barnard (second appellant) testified on behalf of the appellants: He testified about the version of the agreement, without his version understating thereof ever having been put in cross-examination, to Van Vuuren.
- 7.18 Dr Barnard testified that he did not cause the disease, that he only caused delay in the knowledge of the disease, but that the disease was already present in the herd, and that herd did not have breeding value because of the presence of the disease.
- 7.19 Dr Barnard disputes having entered into any agreement as alleged by the respondent, which version was never put to Van Vuuren.
- 7.20 Dr Barnard conceded that the auctioneer wrongly represented the status of the cattle at the auction to prospective purchasers and that he was the cause thereof.

7.21 Dr Barnard also conceded that the auctioneer had no choice but to cancel agreements with purchasers and to provide credit to them.

- [8] It is apparent that the cancelled sales were debited on the account of the first appellant by agreement, and the affected cattle were then sold by way of another auction, which a difference, after costs been taken into account, of R 381, 762,91, on the account of the first appellant with respondent. That is the amount that was claimed by the respondent.
- [9] That difference was due and owing by the auctioneer to the seller, for purposes of payment of the full purchase price of the goods advertised and sold as breeding stock at the auction. The full purchase price obtained at the original auction for the affected cattle were paid by the respondent to the seller Van De Burgh, which meant that the respondent was out of pocket with the claimed amount.
- [10] Dr Barnard argument is that no damages were caused by the appellants, because the cattle had always been affected with illness, and that there was therefore no difference in the status of the cattle, and therefore no damages arose.
- [11] Under South African law, claims for damages are financial claims that are brought to compensate a plaintiff as a result of a loss-causing event that occurred because of the fault of the defendant.
- [12] A claim for damages may be instituted by a plaintiff: (a) in the event of a breach of contract; (b) in the event that the defendant has committed a delict (tort) against the plaintiff; or (c) where there has been a breach of a statute that provides for an award of damages or compensation in the event of such a breach.
- [13] The court *a quo*, correctly noted that what is in dispute is whether as a result of the mistaken result of the test by Dr Barnard there was damages caused. And if the answer is in the positive whether expenses were incurred as a result thereof and whether Dr Barnard is liable for the expenses incurred. And whether Dr Barnard was pressurized or put under duress to accept he caused loss as a result of his mistake,

at the meeting held at Carousel and whether he agreed to the holding of the second auction where the cattle would be sold as slaughtering breeds to recover the loss.

- [14] In *Country Cloud Trading v MEC, Department of Infrastructure Development*², the Constitutional Court summarised the approach our law takes to wrongfulness by pointing out that the wrongfulness enquiry focuses on 'the [harm-causing] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability'.
- [15] Negligence, or culpa, may be defined as the failure to exercise towards another in given circumstances the care which the law considers a reasonable and prudent man would exercise towards him in those circumstances.
- [16] "Legal negligence," said INNES, C.J., in *Union Government v. National Bank of South Africa Ltd* 1921, A.D. 121, "consists in a failure to exercise that degree of care which, under the circumstances, it was the duty of the person concerned to use towards another. It involves, therefore, the existence of a duty to take care owed to the complainant."

Conduct

- [17] Conduct is a voluntary human act or omission. It has to be done by a person himself or through a person using an instrument. It also has to be done through the free will of a person.

Wrongfulness

² *Country Cloud Trading v MEC, Department of Infrastructure Development* [2014] ZACC 28; 2015 (1) SA 1 (CC)

- [16] Without wrongfulness, a defendant may not be held liable even if his conduct may have been negligent and caused harm to the plaintiff³. The general test for determining whether conduct⁴ which causes harm to another is wrongful is the legal convictions of the community (*boni mores*)⁵.
- [17] The basic principles underlying the element of wrongfulness have been summarised as follows by the Constitutional Court in *Le Roux and Others v Dey*⁶
- “In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to be present – it would be reasonable to impose liability on the defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant’s conduct (which is part of the element of negligence), but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.” (emphasis added)”.
- [18] In determining the reasonableness or unreasonableness of the defendant’s conduct for purposes of wrongfulness, various factors may play a role. These factors include inter alia: (a) the nature and extent of the harm; (b) whether the harm was subjectively foreseen or reasonably foreseeable⁷; (c) the possible value to the defendant or society of the harmful conduct; (d) the costs and effort of steps which could have been taken to prevent the loss; (e) the degree of probability of the

³ Neethling, Potgieter and Visser (2015) *Law of Delict* 7th Edition 33 (Neethling).

⁴ Conduct for purposes of determining delictual liability can take the form of either a positive act or an omission. Neethling 30. It is important to distinguish between positive acts and omissions when enquiring, whether conduct is wrongful since the enquiry into wrongfulness is normally more intricate in the event of an omission.

⁵ *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597 (Ewels). Neethling 36.

⁶ *Le Roux and Others v Dey* 2011 (3) SA 274 (CC) para 122 (Dey).

⁷ *MTO Forestry (Pty) Ltd v Swart* NO 2017 5 SA 76 (SCA) (MTO), Leach JA

success of preventative measures; (f) the nature of the relationship between the parties; (g) whether the costs of preventing the harm would have been proportional to the harm that the plaintiff could suffer; (h) the motive of the defendant; (i) economic considerations; (j) the legal position in other countries; (k) ethical and moral issues; (l) as well as other considerations of public interest or public policy, including the values and norms underpinning the Constitution, 1996 and the Bill of Rights.

Fault

- [19] Fault exists either in the form of intention or in the form of negligence. Negligence refers to when a person is blamed for an attitude or conduct of carelessness, thoughtlessness or imprudence because, by giving insufficient attention to his actions, he failed to adhere to the standard of care that is legally required of him. The criterion that has been adopted by our law to establish whether a person has acted carelessly and therefore negligently is the objective standard of the reasonable person. The appellants are to be held negligent if the reasonable person in their position would have acted differently, and according to the courts, the reasonable person would have acted differently if the unlawful causing of damage was reasonably foreseeable and preventable.

Causation

- [20] There has to be a casual nexus between conduct and damage that is required for a delict. The Court *a quo* correctly found that the respondent incurred costs forms a causal connection, between the negligent conduct and/or misrepresentation by the appellants, resulting in damages suffered by the respondent.

Damage

- [21] A harmful consequence has to have occurred. Furthermore, damages are a monetary equivalent of damage that is awarded to a person with the aim of eliminating as fully as possible his past as well as his future patrimonial and non-patrimonial damage. Therefore, money is an equivalent to damages. One of the ways in which damage takes place is when the utility value (expressed in monetary terms) of a positive element of an estate is reduced.
- [22] In *casu* the second appellant "Dr Barnard conceded that the auctioneer wrongly represented the status of the cattle at the auction to prospective purchasers and that he was the cause thereof and conceded further that the auctioneer had no choice but to cancel agreements with purchasers and to provide credit to them".
- [23] Misrepresentation may be actionable where there is a materially false statement of fact made by one party (or their agent) that is intended to, and does, induce the other party to enter the contract. A statement may be made in writing, orally or even by conduct (making the goods tell a lie about themselves). A mere statement of opinion, provided it is genuinely held, is not a statement of fact. However, a statement of opinion by someone who is in a position to know the facts will be regarded as a statement of fact.
- [24] In *Hansa Silver (Pty) Ltd and Others v Obifon (Pty) Ltd t/a The High Street Auction Company* (192/2014) [2015] ZASCA 54 at para 26, van der Merwe AJA stated:
- "In my view the enquiry should center on whether the non-disclosure of a vendor bid in any given case constituted a misrepresentation. That question must of course be decided on the facts and circumstances of each case. If the failure to identify a vendor bid as such does constitute a misrepresentation in the particular circumstances, an auction sale may in terms of general principles of contract be avoided if the misrepresentation was material and induced the sale."
- [25] In *Agri Operations Limited v Hamba Fleet (Pty) Limited* 2021 (1) SA 91 (SCA) the following was stated:

"[11] As to the general principles concerning the exercise of a discretion by a court, the Constitutional Court's judgment in the *National Coalition for Gay and Lesbian Equality & others v The Minister of Home Affairs & Others* has made it clear that an appeal court will not interfere with a lower court's discretion unless that court was influenced by wrong principles or a misdirection of the facts or that court reached a decision the result of which could not reasonably have been made by the court properly directing itself to all the relevant facts and principles. The court *a quo* was mindful of the fact that its discretion must be 'exercised on judicial grounds'."

Conclusion

- [26] In my view, appellants have not established reasonable prospects of success, that the appeal court will come to different conclusion. The appeal falls to be dismissed with costs.
- [27] It is undisputed that the appellants provided information to the respondent before commencement of the auction, that the five bulls were free from any diseases, and that the auction took place on the basis of those facts, the appellants wrongly represented the status of the cattle at the auction to prospective purchasers.
- [28] In view of the fact that the respondent incurred costs forms a causal connection, between the negligent conduct and/or misrepresentation by the appellants, resulting in damages suffered by the respondent. The appellants attempted to obtain payment from their insurers, but they were not successful, this demonstrate that the appellants acknowledge their shortcoming, and only thereafter they decided to dispute the claim of the respondent, which afterthought.
- [29] In the result, the following order is made:

The appeal must fail, and it is accordingly dismissed with costs.




Mathabathe A.J

Acting Judge of the High Court of South Africa
Limpopo Division
Polokwane

I agree



Kganyago J

Judge of the High Court of South Africa,
Limpopo Division
Polokwane

Appearances

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Date of Hearing : 1 March 2024

Date of Judgement: 17 June 2024