IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO. 13225/2010

In the matter between:

VOERMOL FEEDS (PTY) LTD **PLAINTIFF**

and

LOUIS DE LA REY HATTINGH **DEFENDANT**

O R D E R

In the result, the following order will issue:

1. Judgment is granted in favour of the plaintiff against the defendant for:
   1.1 payment of the sum of R698 891.78;
   1.2 interest on the abovementioned amount at the rate of 11,5% per annum from 30 September 2010 to date of payment; and
   1.3 costs of suit on the scale as between attorney and own client.

2. The defendant's counterclaim is dismissed with costs on the scale as between attorney and own client.

J U D G M E N T

Henriques J

Introduction

[1] This matter was enrolled on the trial roll for hearing on 17 September 2018, to

determine an issue which the parties had agreed be separated in terms of the provisions of Uniform rule 33(4).

[2] The issue to be determined is whether the defendant's counter-claim founded in delict is legally sustainable in the face of the written agreement concluded between the parties and annexed to the plaintiff's particulars of claim as annexure "A".

[3] The matter proceeded on this agreed issue and the parties agreed that in the event it is found that the counter-claim is unsustainable in law, then judgment ought to be entered in favour of the plaintiff as claimed in the particulars of claim.

[4] No evidence was led at the proceedings. Both parties filed written heads of argument, for which I am indebted, and addressed me on the issue to be determined.

Pleadings

[5] In deciding the issue, it is useful at this juncture to have regard to the pleadings, which led to the issue being crystallized. The plaintiff instituted action by way of a combined summons against the defendant for payment of the sum of R690 891.78 together with ancillary relief. Such action was premised on a written credit application form (krediet aansoekvorm) incorporating the plaintiff's terms and conditions (terme en voorwaardes) which was concluded on 8 June 2006 (the agreement).

[6] In terms of the agreement, the plaintiff offered and the defendant accepted credit facilities for the sale and delivery of cattle feed. The plaintiff duly supplied the defendant with cattle feed in the amount claimed together with interest.

[7] The defendant did not dispute liability for the amount owing. However, he declined to effect payment of the amount together with the interest in lieu of damages suffered by him amounting to R5 439 309.32. This he alleged was as a consequence of the alleged unlawful and negligent conduct of the plaintiff's servants and their breach of a duty of care owed to him.

[8] In his counter-claim, the defendant alleges that the plaintiff's servants were

negligent and breached their duty of care in one or more of the following respects:

'(a) They failed to exercise due and proper care and diligence when advising, alternatively recommending that the Defendant change from a wet feed regimen to a dry feed regimen during or about the period 1 June 2010 to 10 June 2010;

(b) They failed to properly consider the consequences of a change in the feeding regimen when by the exercise of due care and diligence they could and should have done so;

(c) They failed to advise, alternatively inform the Defendant of the consequences of changing from a wet feed regimen to a dry feed regimen;

(d) They failed to recommend an alternative wet feed regimen when they could and should have done so.'[1]

[9] Although the defendant raised two special pleas relating to jurisdiction and compliance with ss 129 and 130 of the National Credit Act 34 of 2005 in the plea filed, these were not persisted with at the hearing, as the parties resolved them during a series of pre-trial conferences and pre-trial procedures.

[10] The plaintiff filed a plea to the counter-claim as well as a replication in which only the special pleas raised were canvassed. In the alternative in the event of the court finding it liable to the defendant in respect of his counter-claim, the plaintiff pleaded that as a consequence of the provisions of clause 6 of the agreement and the terms and conditions, the amount of the counter-claim was limited to the amount of any 'direct damages suffered by the Defendant but not more than the purchase price of the goods or products sold to the Defendant and from which the liability or claim arises'.

[11] In a rule 37(4) notice dated 26 September 2016, the plaintiff posed the following question to the defendant:

'Inasmuch as the Defendant has admitted the terms of the agreement annexed to the Plaintiff's particulars of claim marked "A" and clause 6 thereof limits the Plaintiff's liability in damages to the Defendant, the Plaintiff will enquire of the Defendant on what basis the Defendant claims to be entitled to pursue its counter claim against the Plaintiff for an amount in excess of the purchase price of the SB 100 used by the Defendant during the period June

[1] See defendant's conditional claim-in-reconvention para 8, page 57 of the index.

2010?'[2]

[12] The defendant in its written response to the plaintiff's notice in terms of rule 37(4) dated 11 January 2017 responded as follows:

'**2. Ad Paragraph 8**

In delict. That should be apparent from the pleadings.'[3]

[13] In order to decide whether or not the defendant's counter-claim is sustainable in law, and in light of the provisions of clause 6 of the terms and conditions, which formed part of the agreement concluded between the parties, it is necessary to consider clause 6 and the parties' submissions.

Clause 6 of the agreement

[14] Clause 6 reads as follows:

'*6. UITSLUITING VAN EISE*

6.1 Die Verkoper en sy direkteure, werknemers, agente, verskaffers en kontrakteurs, sal nie aanspreklik wees teenoor die Koper nie vir enige indirekte, toevallige of gebeurlikheidsskade (insluitende maar nie beperk tot 'n verlies aan verdienste of wins), wat voorspruit uit enige oorsaak, insluitend maar nie beperk tot die verbreking van enige koopkontrak wat gesluit word ingevolge hierdie Voorwaardes, of nalatigheid aan sy of hulle kant.

6.2 Die aanspreklikheid van die Verkoper en sy direkteure, werknemers, agente, verskaffers en kontrakteurs sal beperk wees tot enige direkte skade wat deur die Koper gelei word tot 'n bedrag nie meer as die koopprys van die goedere wat aan die Koper verkoop is nie en waaruit die aanspreklikheid of eis voorspruit.'

[15] Translated into English[4], clause 6 means the following:

'*6. EXCLUSION OF CLAIMS*

6.1 The Seller and its directors, employees, agents, suppliers and contractors shall not be liable to the Buyer for any indirect, incidental or consequential damages (including but not limited to a profit or loss), arising from any cause, including but not limited to breach of any contract of sale concluded under these terms, or negligence on his or her part.

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[2] See plaintiff's notice in terms of 37(4) para 8, page 19 of the index to rule 37 documents.
[3] See defendant's reply to plaintiff's notice in terms of rule 37(4), page 32 of the index to rule 37 documents.
[4] My translation

6.2 The liability of the Seller and its directors, employees, agents, suppliers and contractors shall be limited to any direct damages incurred by the Purchaser to an amount not exceeding the purchase price of the goods sold to the purchaser and from which the liability or claim arises.'

Submissions of the parties

[16] At the hearing, I heard argument from Mr *van Rooyen* on behalf of the defendant first. The defendant's oral and written submissions can be summarised as follows:

(a) Relying on the decision of *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd*,[5] the defendant submits an aquilian action is available alongside a contractual action only if the conduct complained of, apart from constituting a breach of a contract, also infringes a recognised interest, which exists independently of the contract.

(b) The defendant contends he has pleaded an independent cause of action, unrelated to the terms and conditions applicable to the purchase and sale relationship and terms and conditions concluded in the agreement between the parties established by annexure "A" to the particulars of claim.

(c) The plaintiff at, as a manufacturer and seller of stock feed products through its employees, provided expert advice regarding a change in the defendant's feeding regimen. Such advice was wrong and negligently provided. Owing to the plaintiff's negligent failure to exercise the degree of care and skill which the defendant was entitled to expect of employees referred to in the pleadings, the plaintiff should be held liable for such failure as he has suffered loss as pleaded.

(d) As his claim lies in delict, any restrictions imposed by annexure "A" to the particulars of claim on the plaintiff's liability do not apply to his claim founded in delict. Consequently, his counter-claim is legally sustainable on the facts of the matter.

[17] In the defendant's written heads of argument, Mr *van Rooyen* concedes that:

(a) Clause 6.1 of annexure "A" to the particulars of claim excludes all indirect or consequential loss from any cause, including but not limited to a breach of a sale agreement or negligence on the part of the plaintiff, its directors,

[5] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A),

employees, agents, suppliers and contractors.

(b) Clause 6.2 of annexure “A” limits direct loss to the purchase price of the goods sold to the defendant from which the liability or claim arises.

(c) The general terms and conditions of annexure “A” to the particulars of claim applied to the sale of goods by the plaintiff to the defendant as is evident from the preamble to the general terms of annexure “A”.

[18] From the pleadings and para 6 of the written heads of argument submitted by the defendant, it is clear that the defendant’s counter-claim is based in delict, and that he seeks to hold the plaintiff as manufacturer and seller of stock feed products, vicariously liable for the wrongful and negligent acts of the plaintiff’s servants which he submits is completely unrelated to the sale of goods by the plaintiff to the defendant. He submits the general terms and conditions of annexure “A” and annexure A itself “constitute the express context of the contractual relationship between the parties”. Consequently, it is for these reasons that the defendant submits his counter-claim is legally sustainable on the facts of the matter.

[19] Mr *Hoar,* who appeared for the plaintiff, submitted that it was not necessary for the court to decide on the issue of the enforceability of the contractual disclaimer contained in clause 6 of the agreement, as the defendant was faced with a more fundamental problem in the pursuit of his counter-claim founded in delict.

[20] In essence, the plaintiff submitted:

(a) That our courts recognise a *concursus actionum* and that the same set of facts may give rise to a claim both in contract and in delict. If a party elects to plead their claim in delict, it must independently satisfy all the requirements for a delictual claim, including both pleading and establishing wrongfulness.

(b) In this regard, the plaintiff similarly relies on the decision in *Lillicrap* above at 496D-497B;

(c) As the defendant has not pleaded that he suffered a loss arising directly from the damage to his property or injury to his person and the claim is one in essence which relates to a loss of profits, it amounts to a claim for pure economic loss. In respect of a claim for pure economic loss, no presumption of wrongfulness arises.

(d) In actual fact, in his attempts to plead and establish wrongfulness on the part of

the plaintiff, the defendant relies on an alleged infringement by the plaintiff of its contractual duties as pleaded in para 8(a) to (d) of his counter-claim.

(e) In the counter-claim, the defendant did not plead nor could he possibly contend that the plaintiff owed him a duty to furnish advice outside of the contractual relationship which existed between the parties. The defendant pleads the plaintiff's conduct was wrongful as it breached the contractual duty of care which existed between them and relies exclusively on the breach of the contractual duty to establish wrongfulness on the part of the plaintiff.

(f) As our courts have declined to extend liability in delict to include a situation where wrongfulness is based purely on the breach of a contractual duty, the defendant's counter-claim is legally unsustainable.

[21] It is perhaps useful at this juncture to consider how the legal framework against which the issue is to be determined has developed. In *Trotman & another v Edwick*,[6] Van den Heever JA held as follows:

'A litigant who sues on contract sues to have its bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him.'

[22] In *Lillicrap* above at 496F-I the court held the following:

'In modern South African law we are of course no longer bound by the formal actiones of Roman law, but our law also acknowledges that the same facts may give rise to a claim for damages *ex delicto* as well as one *ex contractu*, and allows the plaintiff to choose which he wishes to pursue. See *Van Wyk v Lewis* 1924 AD 438; *Hosten (op cit* at 262); R G McKerron *Law of Delict* 7th ed at 3; J C van der Walt in Joubert *The Law of South Africa* vol 8 para 5 at 7 - 11. The mere fact that the respondent might have framed his action in contract therefore does not *per se* debar him from claiming in delict. All that he need show is that the facts pleaded establish a cause of action in delict. That the relevant facts may have been pleaded in a different manner so as to raise a claim for contractual damages is, in principle, irrelevant.'

[23] In *Holtzhausen v ABSA Bank Ltd*,[7] Cloete JA explained the *ratio decidendi* of *Lillicrap's* case as follows:

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[6] *Trotman & another v Edwick* 1951 (1) SA 443 (A) at 449A-C.
[7] *Holtzhausen v ABSA Bank Ltd* 2008 (5) SA 630 (SCA) para 6.

'*Lillicrap* decided that no claim is maintainable in delict where the negligence relied on consists in the breach of a term in a contract. That is quite apparent from what was said by Grosskopff AJA at 499A–501H. The passage begins:

> "In applying the test of reasonableness to the facts of the present case, the first consideration to be borne in mind is that the respondent does not contend that the appellant would have been under a duty to the respondent to exercise diligence if no contract had been concluded requiring it to perform professional services."

The learned judge emphasised at 499D–F:

> "The only infringement of which the respondent complains is the infringement of the appellant's contractual duty to perform specific professional work with due diligence; and the damages which the respondent claims, are those which would place it in the position it would have occupied if the contract had been properly performed. In determining the present appeal we accordingly have to decide whether the infringement of this duty is a wrongful act for purposes of Aquilian liability."

The following passage written by JC van der Walt in Joubert (ed) *The Law of South Africa* vol 8 para 5 was approved (at 499I):

> "The same conduct may constitute both a breach of contract and a delict. This is the case where the conduct of the defendant constitutes both an infringement of the plaintiff's rights *ex contractu* and a *right which he had independently of the contract*."

(The italics were added by the learned judge.)

The judgment went on to point out (as 500A–B) that:

> "Apart from the judgments in *Van Wyk v Lewis* (supra) this Court has never pronounced on whether the negligent performance of professional services, rendered pursuant to a contract, can give rise to the *action legis Aquiliae*."

The learned judge then gave reasons why Aquilian liability should not be extended to cover the respondent's claim (at 500F–501G) and concluded (at 501G–H):

> "To sum up, I do not consider that policy considerations require that delictual liability be imposed for the negligent breach of a contract of professional employment of the sort with which we are here concerned."'

[24] In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*,[8] Harms JA held the following in regard to pure economic loss:

'"Pure economic loss" in this context connotes loss that does not arise directly from damage

[8] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 1.

to the plaintiff's person or property but rather in consequence of the negligent act itself, such as a loss of profit, being put to extra expenses, or the diminution in the value of property.' (Footnote omitted)

[25] In *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk h/a Pha Phama Security*,[9] Lewis JA held as follows:

'Where economic loss arises from a breach of contract, loss will of course be limited. But a negligent breach of contract will not necessarily give rise to delictual liability. This court has held that where there is a concurrent action in contract an action in delict may be precluded: *Lillicrap, Wassenaar and Partners v Pilkington Brothers SA (Pty) Ltd*. But that case held only that no claim is maintainable in delict when the negligence relied on consists solely in the breach of the contract. Where the claim exists independently of the contract (but would not exist, but for the existence of the contract), a delictual claim for economic loss may certainly lie.' (Footnote omitted)

Analysis

[26] The issue to be decided is whether the defendant relies on a negligent breach of the contract, which will not necessarily give rise to delictual liability, or whether his counter-claim exists independently of the contract. As mentioned earlier on, it is common cause that the defendant's counter-claim is based in delict and more importantly constitutes a claim for pure economic loss.

[27] That being so, it is incumbent on the defendant to satisfy all the requirements for a delictual claim, including establishing wrongfulness on the part of the plaintiff. In a claim based on pure economic loss, there is no presumption of wrongfulness. As correctly submitted by Mr *Hoar*, the defendant in an attempt to establish wrongfulness on the part of the plaintiff, relies on the alleged negligent breach of the contract by the plaintiff, alternatively, the breach of the duty of care (a form of negligence) to establish wrongfulness.

[28] The defendant consequently relies on the contractual relationship between him and the plaintiff to sustain his counterclaim. He has not pleaded an independent cause of action unrelated to the terms and conditions of the contract concluded between the parties. In addition, clause 6.1 of the agreement clearly excludes any claim for loss of profits based on negligent conduct by the plaintiff and/or its

[9] *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk h/a Pha Phama Security* 2010 (4) SA 455 (SCA) para 7.

employees, and its contractual damages are limited to those set out in clause 6.2 of the agreement. This much the defendant concedes.

[29] From the pleadings and from para 6 of the written heads of argument submitted by the defendant, it is clear that his counter-claim is based in delict. Apart from the fact that his claim is unsustainable in law, the defendant cannot, in my view, escape the consequences of clause 6.1 of the agreement and more importantly, he has failed to plead any wrongfulness on the part of the plaintiff other than a breach of the contractual duties owed by it to him, which is impermissible. The counter-claim is therefore unsustainable in law, as it is a claim based in delict relying on the breach of contractual terms, which is unsustainable based on the facts of this matter.

Conclusion

[30] The matter was argued on 17 September 2018 and judgment reserved. At the hearing of the matter, I requested an enlarged and clearer copy of the agreement annexed to the particulars of claim. Such copy was provided in October 2018.

[31] As the parties agreed that in the event of this court finding the defendant's counter-claim being unsustainable, then the plaintiff is entitled to judgment in the amount claimed in the summons together with interest and costs.

[32] In the result, the following order will issue:

[32.1] Judgment is granted in favour of the plaintiff against the defendant for:

1.1 payment of the sum of R698 891.78;

1.2 interest on the abovementioned amount at the rate of 11,5% per annum from 30 September 2010 to date of payment; and

1.3 costs of suit on the scale as between attorney and own client.

[32.2] The defendant's counterclaim is dismissed with costs on the scale as between attorney and own client

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Henriques J

CASE INFORMATION

APPEARANCES

Counsel for the Plaintiff	:	Advocate Stuart Hoar
Instructed by	:	Cox Yeats 21 Richefond Circle Ridgeside Office Park Umhlanga Ridge Ref: S Watson/ja/3V395/074 Tel: 031 536 8500 Fax: 031 536 8088 Email: swatson@coxyeats.co.za
Counsel for the Defendant	:	Adv R M van Rooyen
Instructed by	:	Venns Attorneys Suite 301 A 3rd Floor, Cowey Park 91 to 123 Problem Mkhize Road Essenwood, Durban Tel: 033 355 2189 Email: gaild@venns.co.za
Dates of Hearing	:	17 September 2018
Date of Judgment	:	5 November 2019