



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 17 March 2011

STATUS Immediate

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Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd (20/10) [2011] ZASCA 22 (17 March 2011)

Today the Supreme Court of Appeal (SCA) dismissed an appeal by the Freddy Hirsch Group (Pty) Ltd (Hirsch), against the judgment of Blieden J of the South Gauteng High Court, Johannesburg. On 29 August 1994, the respondent, Chickenland (Pty) Ltd (Chickenland), which is the primary operating entity within the Nandos Group applied in writing to Hirsch on the latter's standard credit application form for a line of credit. Hirsch approved the application and took to supplying the latter with spice packs consisting of a blend of different spices prepared in accordance with the latter's specifications. In signing the application on behalf of Chickenland one of its employees inscribed the words 'standard conditions not checked'.

During January 2004 the United Kingdom health authority in Manchester tested Nando's extra hot peri-peri sauce and found it to be positive for Sudan 1 dye. Sudan 1 is a red dye that is used in colouring solvents, oils, waxes and shoe and floor polishes. It is considered to be a genotoxic

carcinogen rendering it unfit for human consumption. It has been banned by the World Health Organisation and its presence is not permitted in foodstuff for any purpose in this country and most others internationally. Nandos was obliged by the Food Standards Agency of the UK to place newspaper advertisements informing consumers of their finding and were given 48 hours to withdraw any contaminated products from all supermarket shelves in the United Kingdom. Subsequent investigations identified cayenne pepper that had been sourced in India by Hirsch and supplied to Chickenland in certain of the spice packs as the contaminant. A world wide recall of Chickenland's peri-peri sauces followed.

A dispute having arisen between them, Hirsch, relying on the standard terms and conditions to be found on the reverse credit application, caused summons to be issued against Chickenland for payment of the sum of R1 368 861.69 in respect of goods sold and delivered by it to Chickenland. Chickenland admitted the claim, but counterclaimed against Hirsch for damages for breach of contract and delict. Each of the four counterclaims succeeded in the high court before Bliden J.

On appeal Hirsch contended that the standard terms on the reverse of the credit application form contained certain clauses that exempted it from liability. The SCA, after a consideration of those clauses, concluded that they did not avail Hirsch in a situation such as this, where it had delivered something different to that bargained for and moreover, what was in effect an illegal banned substance. The SCA thus concluded that it was plainly improper for Hirsch to purport to contract out of liability in that fashion.

The SCA then considered each of Chickenland's counterclaims. The first was for the refund of the purchase price paid to Hirsch for the contaminated goods. The SCA held the contractual performance undertaken by Hirsch was illegal, but as Chickenland had performed under the agreement by paying the purchase price, it was entitled to its return. Claims 2 and 4 were claims for the wasted expenditure incurred by Chickenland in having to recall and, thereafter, replace the contaminated product. Before the SCA, Hirsch contended that having regard to the test for causation in a claim for damages for breach of contract, the loss suffered by Chickenland was too remote. The SCA held that Hirsch knew that the product was required for export purposes and that the spice packs had to comply with the legislative and other industry standards in the destination country. Accordingly, so the SCA concluded, the parties contemplated when they contracted that, if the spice packs were delivered by Hirsch with an illegal contaminant, Chickenland would be obliged to recall and replace all of the products affected by that contaminant that it, in turn, had supplied to its distributors and that Hirsch would be taken to have assumed liability for all such costs directly linked to that recall and replacement. It followed that Chickenland had established Hirsch's liability for those special damages.

In respect of the third claim, Hirsch contended that being a delictual claim for pure economic loss by Chickenland the court had to be satisfied that Hirsch's conduct was wrongful. The SCA after referring to various considerations of policy, including the fact that Hirsch had released a prohibited foodstuff

into the market, concluded that Hirsch's conduct was indeed wrongful. It accordingly dismissed the appeal.

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