



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3643/2009

In the matter between:

**PAUL STEFANES OOSTHUIZEN**

**PLAINTIFF**

and

**WYNAND LODEWYK JORDAAN**

**DEFENDANT**

**Neutral citation:** *Oosthuizen v Jordaan* (I 3643-2009) [2013] NAHCMD 361 (29 November 2013)

**Coram:** UNENGU AJ

**Delivered:** 29 November 2013

**Flynote:** Practice – Judgment and orders – Oral rental lease agreement – Plaintiff alleges certain terms to have formed part of the oral agreement between him and the defendant – Version of the plaintiff improbable – Terms in paragraphs 5.1, 5.2 and 5.3 not part of oral rent agreement.

**Summary:** During July 2006, the plaintiff and the defendant entered into an oral lease agreement for grazing of sheep at a rate of N\$8.00 per month for a sheep older than three months. In his amended particulars of claim, the plaintiff alleged that terms in paragraphs 5.1, 5.2, and 5.3 of the amended particulars of claim were

part of the oral lease agreement entered into between him and the defendant. The defendant denied the alleged terms to have formed part of the oral lease agreement. After a trial, Court finds the version of the plaintiff improbable and that paragraphs 5.1, 5.2 and 5.3 of the amended particulars of claim did not form part of the oral lease agreement. The Plaintiff ordered to pay costs including costs of one instructing and one instructed counsel.

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### ORDER

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1. That the alleged terms by the plaintiff in paragraphs 5.1, 5.2 and 5.3 of the amended particulars of claim did not form part of the terms of the oral lease agreement entered into between the parties during July 2006;

2. That the plaintiff pays costs, which costs shall include the costs of one instructing and one instructed counsel.

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### JUDGMENT

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UNENGU AJ:

[1] On 14 October 2009, the plaintiff, Mr Paul Stefanés Oosthuizen instituted an action against the defendant, Mr Johan Wynand Lodewyk Jordaan seeking relief on the grounds set out in the particulars of claim indicated here below:

- '1. The PLAINTIFF is PAUL STEFANES OOSTHUIZEN, a major male person employed at Brothers Mattress Factory, Voigts Street, Southern Industrial Area, WINDHOEK.
2. The DEFENDANT is JOHAN WYNAND LODEWYK JORDAAN, a major male person who is residing on the Farm *Klein Swartmodder No 135*, Mariental district, NAMIBIA.

3. On or about 01 August 2006 the Plaintiff and Defendant concluded an oral lease agreement ('the lease agreement') in terms whereof Plaintiff rented certain grazing lands from Defendant on the property known as Farm *Klein Swartmodder* No 135, Mariental district, Republic of Namibia ('the farm') at the rate of N\$8.00 per head of adult sheep per month.
4. The Plaintiff delivered 1 459 head of sheep on the farm at the commencement date of the lease agreement.
5. The lease agreement contained the following express, alternatively implied, in the further alternative tacit terms that Defendant would –
  - 5.1 manage the Plaintiff's head of sheep;
  - 5.2 guard against any stock theft of the head of sheep;
  - 5.3 maintain the head of sheep in its original numbers.
6. Plaintiff duly complied with all his obligations in that he paid the rental for the grazing in advance to Defendant in the amount of N\$52,000.00 on or about 01 August 2006, representing 6 (six) months' rental.
7. Defendant failed in his duty as set out in paragraph 5 above in that when Plaintiff repossessed the head of sheep from 23 – 25 February 2007, the herd, inclusive of progeny, numbered 703 heads.
8. The deficit in the herd of sheep, including progeny, numbered 850.
9. Defendant therefore caused Plaintiff to suffer a loss of N\$425,000.00

**WHEREOF PLAINTIFF CLAIMS:**

- (1) Payment of the amount of N\$425,000.00;
- (2) Interest on the aforesaid amount calculated at the rate of 20% per annum a tempore morae until date of payment;
- (3) Costs of suit;
- (4) Further and/or alternative relief.'

[2] On 27 April 2010 the plaintiff filed the following amended particulars of claim:

**AMENDED PARTICULARS OF CLAIM**

1. The PLAINTIFF is PAUL STEFANES OOSTHUIZEN, a major male person employed at Brothers Mattress Factory, Voigts Street, Southern Industrial Area, WINDHOEK.
2. The DEFENDANT is JOHAN WYNAND LODEWYK JORDAAN, a major male person who is residing on the Farm Klein Swartmodder No 135, Mariental district, NAMIBIA.
3. On or about 01 August 2006 the Plaintiff and Defendant concluded an oral lease agreement ('the lease agreement') in terms whereof Plaintiff rented certain grazing lands from defendant on the property known as Farm Klein Swartmodder No 135, Mariental district, Republic of Namibia ('the farm') at the rate of N\$8.00 per head of adult sheep per month.
4. The Plaintiff delivered 1 459 head of sheep on the farm at the commencement date of the lease agreement.
5. The lease agreement contained the following express, alternatively implied, in the further alternative tacit terms that Defendant would-
  - 5.1 manage the Plaintiff's head of sheep;
  - 5.2 guard against any stock theft of the head of sheep;
  - 5.3 maintain the head of sheep in the its original numbers.
- 6.1 Plaintiff duly complied with all his obligations in terms of the lease agreement in that he, on or about 9 August 2006, paid the rental for the grazing for 750 sheep for the period 1 August 2006 to 31 January 2007 in advance to the Defendant in the amount of N\$36,000.00 plus VAT in the amount of N\$5,400.00 totalling N\$41,000.00. In addition, and on the same day, Plaintiff also reimbursed Defendant in the amount of N\$15,000.00 in respect of 15 rams which the Defendant purchased for and on behalf of the Plaintiff. The total amount therefore paid by the Plaintiff to Defendant on 9 August 2006 amounted to N\$56,400.00.
- 6.2 In addition, and on or about 3 September 2006, Plaintiff also paid to defendant the rental for grazing for the period 01 September 2006 until 31 January 2007 (5 months) in an amount of N\$8,360.00 in respect of 209 sheep at a rate of N\$8.00 per head of sheep per month. In addition, Plaintiff also reimbursed Defendant with an amount of N\$15,784.68 for sheep which Defendant bought for an on behalf of the Plaintiff, totalling N\$24,144.68. from

this total Plaintiff deducted the vat portion of N\$5,400.00 referred to paragraph 6.1 above, by reason of the fact the Defendant was not registered for VAT, leaving a total amount actually paid by Plaintiff to Defendant as follows:

6.2.1	Rental of grazing for 209 sheep for 5 months @ N\$8.00 per head of sheep per month	N\$ 8,360.00
6.2.2	Reimbursement due to Defendant for Sheep purchased on Plaintiff's behalf	15,784.68
6.2.3	<u>Less</u> VAT portion referred to in paragraph 6.1 above, to which Defendant was not Entitled to	5,400.00
	Amount paid by Plaintiff to Defendant On 03 September 2006	N\$ 18,744.68

7. Defendant failed in his duty as set out in paragraph 5 above in that when Plaintiff repossessed the head of sheep from 23 – 25 February 2007, the herd, inclusive of progeny, numbered 703 heads.

8. The deficit in the herd of sheep, including progeny, numbered 850.

9. Defendant therefore caused Plaintiff to suffer a loss of N\$425,000.00

**WHEREOF PLAINTIFF CLAIMS:**

- (1) Payment of the amount of N\$425,000.00;
- (2) Interest on the aforesaid amount calculated at the rate of 20% per annum a tempore morae until date of payment;
- (3) Costs of suit;
- (4) Further and/or alternative relief.'

[3] The defendant, on 15 June 2010, tendered his plea to the amended particulars of claim in which plea, he denied paragraphs 5, 7, 8 and 9 thereof in whole.

[4] During the Judicial Case Management proceedings of the matter, a proposed pre-trial order<sup>1</sup> was filed by both parties and was adopted and made an order of the Court.

[5] In paragraph (1) of the pre-trial order, the parties set out issues to be resolved during the trial and in paragraph (9)(iii) thereof, facts not in dispute between the parties.

[6] On 27 May 2013, when the trial of matter started, it was agreed upon by the parties that the Court would first determine the terms and conditions of the oral agreement entered into by the parties on 30 July 2013. Depending then on the ruling by the Court on the terms and conditions of the oral agreement, the way forward will be determined.

[7] The first witness called to testify for the plaintiff is the plaintiff himself. He testified amongst others that he, his wife, daughter and son-in-law went to the farm of the defendant. This happened on the last Sunday of July 2006. The date is in accordance with the amended particulars of claim agreed upon by the parties during the trial. While on the farm, the defendant drove them around the farm looking at grazing. Mr Louw, the defendant's foreman on the farm, was present. Mr Oosthuizen further testified that the farm Klein Swartmodder, is near Hoachanas, 250 km south of Windhoek. He said that he was impressed by the grazing but fencing of a kraal at the two posts was flat. However, according to him the defendant said that he (defendant) will repair the fencing, look after the sheep and attend to the water.

[8] According to plaintiff, and when he offered to bring a person on the farm to take care of the sheep, the defendant said no. The reason being that he (defendant) did not want an overcrowding of people who will come to visit the employee on his farm. Plaintiff then told the defendant to compile a lease agreement on terms agreed on. He further testified that he would not have agreed to enter into the agreement if

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<sup>1</sup> Rule 37(12)(c)

he himself was to manage the sheep from Windhoek, 250 km far from where the sheep were grazing. It was impossible, he said. In brief, that is the evidence-in-chief of the plaintiff.

[9] In cross-examination by Mr Obbes, the plaintiff agreed that the amended particulars of claim of 27 April 2010 were prepared on his instructions. He further agreed that an oral lease agreement between him and the defendant was concluded on 1 August 2006 to lease certain grazing land from defendant at the farm Klein Swartmodder No 135. When asked about the contents of the witness summary of evidence, Mr Oosthuizen was evasive and disagreed with some of the issues contained in the summary although he had conceded that the summary of evidence was prepared on his instructions by his legal practitioners. In the summary, it is stated that the plaintiff and his team visited the farm on the last Sunday of June 2006 when the oral agreement was entered into between him and the defendant.

[10] It was put to Mr Oosthuizen, by Mr Obbes that the defendant disputes that it was agreed between him and the plaintiff that he (defendant) will be prepared to collect the sheep every six weeks to two months to count and mark them. When asked about the issue during the negotiations that he offered someone who could come and look after the sheep which the defendant declined, to point this out in his statement of summaries, Mr Oosthuizen did not and could not explain why this important issue was not captured in the summary of his evidence.

[11] Again when pressed, Mr Oosthuizen conceded that it was not agreed between him and the defendant that the defendant will walk behind the sheep and look after them. Similarly, he conceded that it was not agreed on that the defendant will maintain the sheep on the original numbers as alleged in paragraph 5.3 of the amended particulars of claim. He also conceded that no agreement was reached that the defendant will guard against stock theft of the herd of sheep.

[12] The second witness called to testify for the plaintiff is Mr Liebenberg, his son-in-law. Mr Liebenberg told the Court amongst others that the negotiations on the farm were about rent. He did not mention anything about the defendant to look after sheep, to manage and mark them, in his evidence-in-chief. But said during cross-examination that they also discussed the issues of looking after the sheep, collecting and counting them every six weeks to two months. However, Mr Liebenberg did not say that the plaintiff and the defendant agreed thereon.

[13] The third and last witness to testify for the plaintiff is Charlotte Liebenberg, the wife of the second witness and daughter of the plaintiff. Essentially, her evidence-in-chief, corroborated the evidence of her husband. She testified, among other things, that they went to the farm of the defendant to look at how the grazing was in the field and talk for a possible lease on the farm. Further to that, Mrs Liebenberg told the Court that the defendant offered to look after the sheep since he was the whole time on the farm and also offered to collect and count the sheep once or twice in a month. Mrs Liebenberg was also cross-examined by Mr Obbes where-after the case for the plaintiff was then closed.

[14] Mr Jordaan, the defendant, is the first witness to testify in defence. He testified that he was also engaged in the farming activities but later reduced his sheep on the farm because his abattoir kept him busy so he could not give full attention to his farm. This started beginning of 2006 as the abattoir business entailed acquiring of livestock, slaughtering them and transporting same to his businesses in Walvis Bay, Grootfontein and other places. The acquiring and the purchase of the livestock to be slaughtered were done at NHL, Agra and from private people. These activities required him to travel a lot, he said.

[15] Further, Mr Jordaan, testified that stock theft was a concern to him on the farm if one does not give full attention to his farm because two main roads go through his farm. This issue impacted on his decision to reduce the number of sheep on the farm and to focus on his abattoir business.



[16] Furthermore, Mr Jordaan testified that he saw an advertisement in the Agra Forum which was done by the plaintiff looking for grazing for his livestock. He reacted to the advertisement and as a result thereof a meeting was held on the farm between him and the plaintiff. He said that he took the plaintiff and his family around the farm – drove to three posts which he showed to Mr Oosthuizen and intended to lease. Back at the farm house, at the table, the lease was discussed. However, nothing was discussed regarding the fences during the trips to the various posts.

[17] Mr Jordaan further stated that, initially the plaintiff was looking for grazing for 500 sheep but increased the number to 750 sheep. He said that he told the plaintiff that he did not have a problem to maintain the water as some of his livestock were moving and drinking water in the camps. Mr Jordaan denied in his testimony that it was included as terms of the lease agreement concluded that he will manage, guard against any stock theft of the herd, and to maintain the herd of sheep in its original numbers or manage them. This is, he said, because he was travelling a lot for his business and stock theft was a risk if one is not always on the farm, therefore he could not take such a responsibility.

[18] Mr Jordaan further testified that the plaintiff told him that he (plaintiff) has a very good person who was in his employment in Gobabis and that he wanted to bring him to the farm to look after the sheep and he (the defendant) offered to give corrugated iron sheet and other equipment for Mr Oosthuizen to erect a building for this employee. He called the plaintiff and asked him when he will bring the person to the farm. According to him, the plaintiff had access to the farm through the back gate on the Hoachanas main road going to Derm. The plaintiff had free access to the farm because he was given the keys of the gate. Mr Jordaan, however, denied that they have agreed that he will look after the sheep, manage and collect the herd every six weeks to two months to count and mark the sheep.

[19] After evidence-in-chief, he was cross examined by Mr Mostert. Questions were asked about commission paid by the plaintiff to the defendant for loading sheep

bought for the plaintiff in trucks whether this commission was also agreed on when the oral agreement was concluded. When asked to tell the Court what the terms of the oral agreement were, the defendant replied that the plaintiff would lease land from him for eight Namibian Dollars (N\$8.00) for a sheep older than three months, that he will look after the water and that the plaintiff will bring his own employee to look after the sheep. Further, it was discussed between them regarding the acquiring or purchasing of the sheep, he said. The further questions put to Mr Jordaan were of such a nature to test his credibility, which questions he answered by saying correct and not correct.

[20] After the defendant had testified, Mr Obbes called Mrs Analice Jordaan, the wife of the defendant to testify. Mrs Jordaan's evidence was brief and to the point. She told the court that she was aware of the agreement concluded between the plaintiff and her husband. It was about a lease agreement – the plaintiff, Mr Oosthuizen was looking for grazing for his sheep. That her husband leased certain portions or parts of the farm Klein Swartmodder. She further testified that they started with an abattoir the time they decided to lease the grazing lands – that they did not have time to supervise their own livestock. According to her, the plaintiff's team had a responsibility to look after his sheep. Her testimony corroborated the defendant's evidence in all material respects. After the cross-examination of the witness by Mr Mostert, the defendant also closed his case.

[21] The issue for determination by the Court at this stage, as agreed between the parties, is what is contained in paragraph 5 of the amended particulars of claim. As already indicated above in the judgment, whether these terms form part of the terms of the oral lease agreement entered into between the plaintiff and the defendant on the last Sunday of July 2006 on the farm Klein Swartmodder No 135. Paragraph 5 of the amended particulars of claim reads as follow:

'5. The lease agreement contained the following express, alternatively implied, in the further alternative tacit terms that the defendant would

- 5.1 manage the plaintiff's herd of sheep
- 5.2 guard against any stock theft of the herd of sheep;

### 5.3 maintain the herd of sheep in its original numbers'

[22] In his written heads of argument, which he termed 'plaintiff's concise heads of argument', supplemented by oral submissions, Mr Mostert, counsel for the plaintiff argued that it was common cause that there was a valid lease agreement, between the plaintiff and the defendant in that plaintiff would lease grazing land from defendant at a rate of N\$8.00 per head of sheep (per month). He argued further that from the outset it must be emphasised that the rent or lease at the rate of N\$8.00 per head implies by law and/or fact that the defendant had to count the sheep to determine the monthly rent. According to him this aspect alone cast implied legal obligations on the defendant as lessor.

[23] Mr Mostert is correct. It is common cause between the plaintiff and the defendant that a valid oral agreement was entered into between them for the lease of grazing land from the defendant for N\$8.00 per sheep older than three months and which fees were paid for six months in advance by the plaintiff. However, it cannot be correct that the payment of rent of N\$8.00 per month for a sheep older than three months implies by law and/or fact that defendant had to count the sheep to determine the monthly rental. It does also not, in my view, cast implied legal obligations on the defendant as lessor. The plaintiff must prove on a balance of probabilities that it was agreed by the plaintiff and the defendant that the defendant will collect and count the sheep. I agree with Mr Obbes that not all statements made in the course of formation of a contract are necessarily terms. The plaintiff is the party alleging that it is terms of the oral agreement between him and the defendant that the defendant agreed to collect, count and work the sheep six weeks to two months, therefore he has an onus to prove these terms on a balance of probabilities<sup>2</sup>.

[24] Similarly, I agree again with Mr Obbes' submission and the authority<sup>3</sup> cited to support the submission that the Court must be very slow to imply a term into a

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<sup>2</sup> Namibia Minerals Corporation Ltd v Benguela Concessions Ltd [1997] 1 All SA (A); 1997 (2) SA 548(A) E (SALP)

<sup>3</sup> Wessels' Law of Contract in South Africa, 2<sup>nd</sup> Edition, Volume 1 at para 257, P69-70

contract which the parties did not place there. It must not make contracts for people; that it must only imply a term when it is quite clear that they would not have contracted otherwise than on the basis of the term. In the present matter it has been alleged that the parties would not have entered into the oral agreement of lease of grazing land if the defendant did not accept the responsibility of collecting the sheep every six weeks to two months.

[25] With regard the testimonies of the witnesses who testified for the plaintiff and the defendant, both counsel are agreeable that there are two irreconcilable versions, as a result thereof, both in their submissions referred the Court to the matter of *Stellenbosch Farmers' Winery Group Ltd and Another v Martel et CIE and others*<sup>4</sup> where the following was stated:

'On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step,

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<sup>4</sup> 2003 (1) SA 11 (SCA) 14-15, par [5]

determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The D hard case, which will doubtless be the one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

[26] Applying the principles in the Stellenbosch Winery case, Mr Mostert submitted that the versions of the plaintiff and his two witnesses are lucid and impeccable. He submitted further that there is no doubt as to the veracity of the contents of the evidence of the plaintiff and his two witnesses in so far it pertains to the terms and conditions of the agreement – whereas, he argued, the defendant and his wife made a poor impression, that in the circumstances of the matter it cannot be excluded that the defense evidence was fabricated.

[27] The irony of counsel's submission is that this is a nude submission he had made. He does not say why, in his view, the evidence of the plaintiff and his two witnesses is lucid and impeccable in so far it pertains to the terms and conditions of their oral agreement, and why the defendant and his witnesses (his wife) are poor witnesses who possibly might have fabricated their evidence.

[28] To the contrary, my view is that the plaintiff and his two witnesses are the ones who might have fabricated their versions not the defendant and his wife. Why? Neither the plaintiff nor his two witnesses stated in their summaries of evidence that it was discussed and agreed upon between the plaintiff and defendant that the defendant accepted the responsibility of collecting, counting and marking of the sheep every six weeks or two months; guarding against stock theft of the plaintiff's sheep. In fact, Mrs Liebenberg denied under oath that she ever made any summary of her evidence before the legal practitioners of the plaintiff. She does not know where that statement has come from. The question is where did the summary of evidence of Mrs Liebenberg come from? Secondly, if one compares the contents of the summary of evidence of the plaintiff and his two witnesses, one will notice that the contents are identical, which is a sign of evidence of witnesses who discussed

and agreed on what to tell the legal practitioner prior to the making of their summaries of evidence. Unfortunately parts of what is contained in their summaries have been disclaimed by the witnesses leaving an impression that the legal practitioner himself put information in the statements without the knowledge of the witnesses.

[29] Further, the plaintiff was a poor witness. He is not a reliable nor credible witness what I am concerned. In his evidence-in-chief, Mr Oosthuizen testified that the defendant said that he will look after his sheep and that the defendant agreed to look after the sheep, to collect them every six weeks to two months to count and to mark them. In cross-examination, Mr Oosthuizen was not only emotional and uneasy but abrogated on what he said in evidence-in-chief. For example, he said the following during cross-examination: 'I do not expect him totally that he will look after it. Mr Jordaan said he will count the things, look after the water in case there is any problem he will inform me'. On a follow up question from Mr Obbes, Mr Oosthuizen replied as follows: 'That is correct. Not to look after them or look behind them. I was also a farmer, I also rent out grazing to farmers. If I see there is a cow, I got my people and will look for that cow. I do not walk around these things so but if I see there is a mistake, then I will investigate or the fault'. The quotations above tell us that the allegations in paragraph 5 (the whole) that it was the terms and conditions of the oral lease agreement that the defendant will look after the sheep, collect them every six weeks or two months to count and to mark the sheep, are pure figments of the imagination of the plaintiff. Can also be an afterthought hatched in order to shift the blame on the defendant for whatever went wrong with the sheep.

[30] With regard the allegation of keeping the herd of the sheep to its original numbers Mr Oosthuizen also conceded that it is practically impossible to maintain the original numbers because the sheep were breeding and as such the numbers will increase. There are other weaknesses in the evidence of the plaintiff. The plaintiff and his two witnesses contradicted the date in the particulars of claim, namely 1 August 2006, when the lease agreement was supposed to be entered into. All three

testified that it was the last Sunday in July 2006. The plaintiff could not explain where the date of 1 August 2006 was found by the drafter of the particulars of claim. More worse is that the summaries of evidence statements of the plaintiff and his two witnesses refer to the last day in June 2006 as the day when the lease agreement was entered into. Counsel for the plaintiff has to apply for a second amendment of particulars of claim to substitute the 1 August 2006 with the last Sunday in July 2006. Furthermore, as indicated, Mr Oosthuizen, in cross-examination, dodged direct and simple questions put to him by Mr Obbes. He did not answer questions straight and right away, instead, he resorted to explanations, despite Mr Obbes' requests not to volunteer information he has not been requested to provide. The Court also advised Mr Oosthuizen time and time again to stick to questions asked not to elaborate if not asked to do so. This, in my view, is an indication that Mr Oosthuizen was not sure about his answers to questions put to him by Mr Obbes.

[31] Once again, one would like to know why Mr Oosthuizen did not demand a bi-monthly report from the defendant about the numbers of the sheep on the farm at the end of September of that year, if it was a term of the agreement that defendant would collect and count sheep every six weeks to two months? Why wait until December, five months from date of the agreement to complain about missing sheep on the farm? It is again my humble view that the evidence of Mr Oosthuizen and his two witnesses failed the test of principles set out in the Stellenbosch Winery case above. Mr Oosthuizen was really a poor witness compared to Mr Jordaan, the defendant. As already pointed out, he answered simple questions with a long history of what he thought happened, and at times contradicted himself and his own witnesses.

[32] In sum, I find the version of the plaintiff being improbable and as such failed to discharge the onus resting on him. Consequently, it is my finding:

1. That the alleged terms by the plaintiff in paragraphs 5.1, 5.2 and 5.3 of the amended particulars of claim did not form part of the terms of the oral lease agreement entered into between the parties during July 2006;

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2. That the plaintiff pays costs, which costs shall include the costs of one instructing and one instructed counsel.

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PE Unengu  
Acting



APPEARANCE:

For plaintiff:

Mr C Mostert

Instructed by MB De Klerk & Associates

For defendant:

Mr D Obbes

Instructed by Fisher, Quarmby & Pfeifer