

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 1/2009

In the matter between:

WILLEM PETRUS LABUSCHAGNE

PLAINTIFF

And

NAMIB ALLIED MEAT COMPANY (PTY) LTD

DEFENDANT

Neutral citation: *Labuschagne v Namib Allied Meat Company (Pty) Ltd* (I 1-2009)
[2014] NAHCMD 369 (1 December 2014)

Coram: VAN NIEKERK J

Heard: 7, 8, 9 November 2011; 17, 18 February 2012; 13 March 2012; 26 July 2012

Delivered: 1 December 2014

Flynote: Application for absolution from the instance at close of plaintiff's case –
Applicable legal principles restated – Application dismissed.

ORDER

1. The application for absolution from the instance is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.
2. The matter is set down for a status hearing in Chambers on Monday, 8 December 2014 at 14h30 to determine dates for continuation of trial.

JUDGMENT

VAN NIEKERK J:

The pleadings

[1] This is an application for absolution from the instance at the close of the plaintiff's case. In his amended particulars of claim the plaintiff sets out the cause of action as follows:

- '3. During July/August 2007 the plaintiff, acting personally, and the defendant, then and there represented by one Chris Harmse, concluded a written agreement (hereinafter referred to as "the sale agreement") in terms of which the plaintiff sold to the defendant 418 sheep for slaughter purposes. An unsigned copy of the sale agreement as well as a sworn translation thereof is annexed hereto marked "A1" and "A2" respectively, the terms and conditions of which are incorporated herein as if specifically traversed and pleaded.
- 3A. In the alternative to paragraph 3 above and in the event of the honourable Court finding that such agreement was concluded orally instead of in writing then the plaintiff avers that the terms and conditions embodied in annexure "A1" and "A2" constituted the terms of the agreement so concluded between the parties.
4. The following were express, alternatively tacit, in the further alternative implied terms of the sale agreement so concluded between the parties:
 - 4.1 The defendant undertook to pay to the plaintiff the best possible price for slaughter small stock in the form of:
 - (a) A comparative market related price for the grading obtained plus the appropriate premium as mentioned in the agreement;
 - (b) A contract performance bonus as contained in the appropriate contract options.

- 4.2 The advance price would be payable in collaboration with the normal slaughter price as arranged in paragraph 4.4 hereunder.
- 4.3 The contract performance bonus would be payable within 15 calendar days after the date whereupon the applicable contract expired.
- 4.4 The defendant guaranteed payment to the plaintiff in consideration of the payment period which currently amounts to 10 calendar days from the date on which the transaction took place.
- 4.5 The defendant would as long as possible in advance announce a slaughter date to the plaintiff and allocate it to the Meatco abbatoir (*sic*) as close as possible to the schedule as set out in the agreement, but the date would not be announced to the plaintiff less than fourteen days before the applicable date.
- 4.6 The plaintiff would at his own costs deliver the agreed small stock to the slaughter location not later than 18h00 on the day before the allocated slaughter date.
- 4.7 The risk and ownership of all delivered small stock for the (*sic*) slaughter purposes transfers to Namco upon slaughtering.
- 5. The plaintiff duly complied with his obligations in terms of the aforesaid agreement and more in particular by delivering 418 head of sheep to the defendant.
- 6. The defendant however breached the agreement so concluded between the parties by *inter alia* by (*sic*) virtue of the following:
 - 6.1 By failing to make payment to the plaintiff in respect of the sheep so sold and delivered;
 - 6.2 By refusing and prohibiting the plaintiff from retaking possession of the sheep carcasses in order for the plaintiff to mitigate his losses.

7. In and as a result of the defendant's breaches as aforesaid the plaintiff suffered damages to the tune of N\$164 000-00 which amount constitutes the fair and reasonable replace (*sic*) value of the sheep carcasses so sold and delivered to the defendant.
8. Notwithstanding proper demand for payment of the aforesaid amount, the defendant fails and/or refuses and/or neglects to pay to the plaintiff the amount of N\$164 000-00 or any part thereof.'

[2] The plaintiff's claim is for payment of the sum of N\$164 000.00, interest *a tempore morae* at the rate of 20% p.a. and costs of suit. During the trial the plaintiff accepted that the defendant's calculation of the claim, being N\$160 733.83, is correct. However, during cross-examination the plaintiff agreed that the claim should be further reduced by subtracting certain amounts charged by the abattoir. As I understand it the total amount charged is N\$3,089.02, meaning that the amount actually claimed is N\$157,644.81.

[3] Although not highlighted by specific mention in the particulars of claim, clause 7 of the agreement attached to the particulars of claim as "A1" and "A2" provides that the agreement is subject to the general conditions attached thereto. Clause 6 of the general conditions relates to quality and reads as follows:

"QUALITY"

- 6.1 The seller carries the risk that all livestock delivered in terms of this agreement shall be free from any diseases and parasites and shall be preventatively vaccinated against such diseases as prescribed in terms of legislation from time to time and if not, such carcasses which are rejected shall be for the seller's loss.
- 6.2 The purchaser shall not be obliged to accept delivery of any livestock which does not conform to the quality as set out in 6.1 unless the parties agree otherwise.

- 6.3 The mass and quality of livestock delivered by the seller shall be determined by the purchaser's experts on the date of slaughter and shall be final and binding upon the parties."

[4] The defendant pleaded as follows to the relevant part of the amended particulars of claim:

"2.

AD PARAGRAPH 3 THEREOF

- 2.1 The defendant admits that it entered into an agreement with the plaintiff in terms of which the plaintiff would supply it with 418 sheep for slaughter purposes subject to the terms and conditions set out below.
- 2.2 The remaining allegations in this paragraph are denied. The defendant specifically denies that the parties signed any written agreement or a written agreement containing the terms and conditions set out in annexure "A1" and "A2" during July/August 2007.
- 2.3 The defendant denies that the agreement entered between it and the plaintiff was subject to the terms and conditions contained in annexure "A1" and "A2".
- 2.4 The defendant further pleads that it only introduced written agreements during or about October 2008.

3.

AD PARAGRAPH 3A THEREOF

- 3.1 The defendant denies that the agreement entered between it and the plaintiff was subject to the terms and conditions contained in annexure "A1".
- 3.2 The defendant instead pleads that the terms and conditions agreed between the parties are the terms and conditions set out in detail below.

4.

AD PARAGRAPH 4 THEREOF

- 4.1 The defendant admits the allegations contained in paragraph 4.6 thereof.
- 4.2 Each and every other allegation contained in these paragraphs is denied as if separately set out, and the plaintiff is put to the proof thereof. In amplification of its denial, the defendant pleads that the express, alternatively implied alternatively tacit material terms of the oral agreement were limited to the following:
 - 4.2.1 the plaintiff agreed to deliver to the defendant sheep that were healthy and fit for human consumption and to this end represented to the defendant that his sheep are healthy and fit for human consumption;
 - 4.2.2 the defendant would supply the sheep to the Meatco Abattoir for slaughter on a specified date determined by the defendant;
 - 4.2.3 after the slaughter of the sheep, upon medical inspection by the state veterinarian, the carcasses would officially be certified as fit for human consumption;
 - 4.2.4 the prices of the sheep per carcass, duly certified as fit for human consumption, would be paid by the defendant in accordance with the classification by grade of the sheep as determined by the Meat Board of Namibia;
 - 4.2.5 the defendant would pay the plaintiff in accordance with the defendant's weekly pricing schedule, annexed hereto and marked "B";
 - 4.2.6 the plaintiff would be paid the above amounts within 10 days of certification of the sheep carcasses as fit for human consumption by the State Veterinarian;

4.2.7 the risk in and ownership of all sheep delivered for slaughter purposes would remain vested in the plaintiff until certification of the sheep as fit for human consumption took place.

5.

AD PARAGRAPH 5 THEREOF

Each and every allegation contained in this paragraph is denied as if separately set out and the plaintiff is put to the proof thereof. In amplification of this denial, the defendant pleads that the plaintiff's sheep were declared by the state veterinarian to be unfit for human consumption. A copy of this declaration dated 10 August 2007 is annexed hereto and marked "C".

6.

AD PARAGRAPH 6 THEREOF

- 6.1 The defendant admits refusing to pay the plaintiff any amount for his sheep carcasses. The defendant pleads that it is not liable to the plaintiff in any amount or at all for the reasons pleaded above.
- 6.2 The defendant denies refusing or prohibiting the plaintiff from retaking possession of the carcasses in order for the plaintiff to mitigate his loss.
- 6.3 The defendant pleads that the sheep carcasses were not, nor have they previously been its custody.
- 6.4 The defendant pleads that the plaintiff had an opportunity to mitigate his losses but failed to do so.

7.

AD PARAGRAPH 7 THEREOF

- 7.1 The defendant denies that the plaintiff suffered damages in the amount as claimed or at all and puts the plaintiff to the proof thereof.

- 7.2 The defendant further denies that the amount claimed constitutes the fair and reasonable replacement value of the sheep carcasses and puts the plaintiff to the proof thereof.
- 7.3 Should the Court find that the plaintiff is entitled to payment, which is still denied, the defendant pleads that plaintiff's claim should be reduced with an amount of N\$120,713.59 which amount is made up of the slaughter fees, grading fees, inspection fees, Meat Board levy, NCA levy and cooling fees charged by Meatco Namibia. These fees are ordinarily deducted from any payment due to the plaintiff when plaintiff supplies sheep to the defendant for slaughter purposes. A copy of the tax invoice received from Meatco Namibia is annexed hereto marked annexure "D" and a copy of the proof of payment of the tax invoice is annexed hereto marked annexure "E".

8.

AD PARAGRAPH 8 THEREOF

The defendant admits demand but denies that it is liable to pay the plaintiff in the amount or at all.

WHEREFORE the defendant prays that the plaintiff's claim be dismissed with costs."

[5] The plaintiff testified in person and presented evidence by several other witnesses. An inspection *in loco* was held at the Meatco abattoir in Windhoek to observe the slaughtering line and the various steps along the process from delivery until preservation of the slaughtered carcasses in the cooler rooms.

[6] At the close of the plaintiff's case, Ms *Bassingthwaighe* on behalf of the defendant moved for absolution from the instance.

The law

[7] The test to be applied in applications of this kind is well known. In *Bidoli v Ellistron t/a Ellistron Truck & Plant* 2002 NR 451 (HC) it was set out as follows (at 453D-F):

“In *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) the Court of Appeal held that when absolution from the instance is sought at the end of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff established what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff.

The phrase 'applying its mind reasonably' requires the Court not to consider the evidence *in vacuo* but to consider the admissible evidence in relation to the pleadings and in relation to the requirements of the law applicable to the particular case.”

(Approved in *Kaese v Schacht and Another* 2010 (1) NR 199 (SC) at 205C-E).

[8] In *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) at 92F – G Harms JA referred to the above formulation as set out in *Claude Neon Lights (SA) Ltd v Daniel* (*supra*) and went on to explain at 92H – 93A:

“This implies that a plaintiff has to make out a *prima facie* case — in the sense that there is evidence relating to all the elements of the claim — to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G – 38A; *Schmidt Bewysreg* 4 ed at 91 – 2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (*Schmidt* at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is "evidence upon which a reasonable man might find for the plaintiff" (*Gascoyne (loc cit)*) — a test which had its origin in jury trials when the "reasonable man" was a reasonable member of the jury (*Ruto Flour Mills [(Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T)). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another "reasonable" person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted

sparingly but when the occasion arises, a court should order it in the interest of justice. . . .”

(Applied in *Stier and Another v Henke* 2012 (1) NR 370 (SC) at 373F-I.)

[9] The reasoning at this stage is to be distinguished from the reasoning which the Court should apply at the end of the trial. At that stage the enquiry is: ‘Is there evidence upon which a Court ought to give judgment in favour of the plaintiff?’

[10] In *Barker v Bentley* 1978 (4) SA 204 (N) (at 206C) the approach to be followed is set out as follows:

“In approaching an application for absolution at the close of the plaintiff’s case it is necessary to bear in mind the test which the court must apply at that stage, which is whether there is evidence on which a reasonable man might give judgment for the plaintiff. If there is such evidence then absolution must be refused even if the court itself considers that the evidence produced by the plaintiff is open to question. At this stage it must not seek to resolve the matter upon the balance of probabilities. See *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A); *Gascoyne v Paul and Hunter* 1917 TPD 170.”

[11] It should further be borne in mind that it must be assumed that in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true (*Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525 (E) at 527C-D). Except where a witness has clearly broken down and where it is clear that their evidence is not the truth, questions of credibility should normally not be investigated at the stage of proceedings when absolution from the instance is considered at the close of the plaintiff’s case. (Erasmus, *Superior Court Practice*, B1-292-293 and cases cited in fn.1) The Court should also refrain from unnecessary discussion of the evidence to avoid the appearance that it is taking a view of its quality and effect that should only be reached at the end of the whole case (*Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A) at 340D-E).

[12] In *De Klerk v Absa Bank Ltd* 2003 (4) SA 315 (SCA) the court observed as follows at 320H-321A):

“[1] Counsel who applies for absolution from the instance at the end of a plaintiff's case takes a risk, even though the plaintiff's case be weak. If the application succeeds the plaintiff's action is ended, he must pay the costs and the defendant is relieved of the decision whether to lead evidence and of having his body of evidence scrutinised should he choose to provide it. But time and time again plaintiffs against whom absolution has been ordered have appealed successfully and left the defendant to pay the costs of both the application and the appeal and with the need to decide what is to be done next. The question in this case is whether the plaintiff has crossed the low threshold of proof that the law sets when a plaintiff's case is closed but the defendant's is not.”

The issues

[13] Mr *Strydom* who appears on behalf of the plaintiff set out in paragraphs 20.1 - 20.6 of the plaintiff's head of argument what is, on the pleadings, common cause between the parties: (i) that the parties have *locus standi*; (ii) that the parties concluded an agreement of sale in respect of 418 sheep for slaughtering purposes; (iii) that the plaintiff delivered 418 sheep to the Meatco abattoir; (iv) that the defendant refused to pay for the sheep sold and delivered; (v) the quantum of the plaintiff's losses; and (vi) that the plaintiff made demand for payment.

[14] In the amended particulars of claim the plaintiff relied on two breaches as set out in paragraph 6.1 and 6.2 thereof. He conceded during cross-examination that the defendant is not responsible for the breach alleged in paragraph 6.2. This issue therefore falls away.

[15] The issues to be determined include (i) whether the agreement was concluded orally or in writing; (ii) whether the terms of the agreement between the parties are the terms as set out in “A1” and “A2” to the amended particulars of claim; (ii) when risk and ownership would pass from the plaintiff to the defendant; (iii) whether the plaintiff

complied with his obligations under the agreement; and (iv) whether the defendant was entitled to refuse payment.

[16] The onus is on the plaintiff to prove the terms of the contract on which he relies. The onus is also on him to prove that the contract does not include the terms alleged by the defendant (*Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk* 1976 (3) SA 470 (A) 474A-C).

The evidence

[17] I now turn to a consideration of the evidence. In this regard I shall concentrate on the parts relevant to the enquiry before me and not deal with the evidence as a whole.

[18] In summary the salient facts of the plaintiff's evidence are as follows: He resides in the Karas Region and farms mostly with sheep. From 1997 he acted as an agent for various entities, namely Agra, Just Lamb and later for the defendant. His duty was to recruit clients, i.e. farmers, also referred to during evidence as producers, to provide sheep for slaughter by Meatco. If such producers entered into an agreement with the said entities, whereby they undertook to provide a certain number of sheep at different times of the year when called upon to do so, they would obtained certain advantages and a higher price per kilo for the sheep they provided. The plaintiff also entered into such agreements as a producer. I shall deal later with the evidence about the terms of the agreement.

[19] On 23 July 2007 the plaintiff gathered together a group of sheep for delivery inter alia to the defendant to be slaughtered. The animals were loaded onto a truck early on the morning of 24 July 2007. During the handling of the animals he detected that one of the last lambs to be loaded had a symptom which raised his suspicion that the sheep possibly have contracted a disease called scab.

[20] After the truck had departed for Windhoek, he telephoned Dr Dakwa, the State veterinarian at Keetmanshoop, to report the suspicion and to obtain advice about the

dosage of a substance called Ivermectin with which to inject the remaining sheep on the farm.

[21] Late on 25 July 2007 he received a report from Mr Isaacs behalf of the defendant that all 418 sheep slaughtered had been condemned by the State veterinarian at Meatco. On 27 July 2007 the defendant confirmed this in writing and informed the plaintiff that Namco would “not be liable for any costs involved.”

[22] The plaintiff was informed that the reason for the condemnation of the carcasses was that some injection marks had been found on the animals, which clearly had scab, and that Dr Hemberger, the State veterinarian, had taken samples from five of the carcasses to test for any residue of Ivermectin. It is common cause that scab is not a disease which would normally lead to rejection for human consumption as it is a disease of the skin and not of the meat. It is also common cause that it is prohibited to deliver sheep for slaughter which have been injected with Ivermectin before a certain period, termed the withdrawal period of the substance, had passed.

[23] The plaintiff from the start denied both to the defendant and to Dr Hemberger that he had injected any of the sheep delivered. He obtained permission to take his own samples for testing. As the local laboratory had problems with its equipment, the samples were sent to South Africa, which caused some delay. Eventually the results were orally released on 16 July 2007 and later in writing. The results were negative.

[24] The plaintiff embarked on various attempts to have the carcasses released for use other than export to South Africa for human consumption in order to mitigate any losses, but all came to naught for various reasons.

[25] I return now to the agreement between the parties. The plaintiff testified that he entered into a written agreement with the defendant during 2007. The blank agreement was faxed to him. He made copies and distributed the agreement to other producers to sign, where after they sent the documents back to him, as I understand it, in his capacity as agent. He also signed such an agreement in his capacity as producer and later sent all the signed agreements to the defendant in Windhoek. He did not keep a

copy of the agreement and could not provide the Court with such an agreement. However, he identified the blank agreement attached as "A1" and "A2" to the amended particulars of claim as being the 'typical' contract like, or 'similar' contract as, the one he signed in 2007. It is common cause that "A1" and "A2" is the contract used by the defendant during 2008 (Exhibit "B"). For the sake of convenience I shall refer to it as annexure "A".

[26] The plaintiff at first testified during examination in chief that in years prior to the signing of these agreements the risk and ownership in the sheep sold passed from the producer to the purchaser upon delivery and signature in respect of such delivery by the purchaser.

[27] His attention was drawn to clause 6.4 of annexure "A", which states that the "risk and ownership of all delivered small stock for slaughter purpose transfers to Namco upon slaughtering." He stated that he understood slaughtering to mean when the animal is killed, i.e. when he cannot get his animal back, then risk and ownership passes. He further agreed with his counsel that this provision "is a bit different, than what you just indicated earlier as to prior to these agreements what the farmers understood when risk could pass". Later he stated that in the case of the farmers who did not sign this type of agreement, the risk and ownership would pass to the purchaser on delivery and signature in respect thereof.

[28] However, near the end of his evidence in chief, the plaintiff testified that the risk clause contained in the 2008 (and 2009) agreement did not apply to the 2007 agreement. He testified that the risk and ownership passed at delivery upon signature at the Meatco abattoir. The plaintiff also gave evidence to this effect at various stages during cross-examination. It is clear from this evidence that the plaintiff was referring to the written 2007 agreement. In this respect the plaintiff differed from his earlier testimony and from the allegations contained in the amended particulars of claim.

[29] During re-examination the plaintiff's counsel established that the plaintiff is not sure if the risk clause contained in paragraph 4.7 of the amended particulars of claim is the same as the risk clause in the 2007 agreement.

[30] The plaintiff also repeatedly during his testimony stated that he did not properly study the 2007 agreement because, as agent, he was in a hurry to collect signed agreements from as many producers as possible. .

[31] During cross-examination the plaintiff admitted that it was a term of the agreement that he should deliver sheep that are healthy and fit for human consumption. At first he stated that it was an oral agreement, but later he appeared to state that it was always a term, whether the contract was written or oral.

[32] Ms *Bassingthwaighe* submitted that the evidence presented by the plaintiff about the terms of the contract is such that one is left wondering what the plaintiff's case is at the close of his case. The reasons for this, according to counsel are, in summary, (i) that the pleadings have been amended several times to make varying allegations about whether the agreement is oral or written; (ii) the plaintiff deviated from the pleadings when testifying about the terms of the agreement without moving for leave to amend; (iii) the plaintiff testified about certain terms which were orally agreed without relying on a partially written and partially oral agreement; (iv) the plaintiff admitted in cross-examination that it was always a term, whether oral or written, that he had to deliver animals that were fit for human consumption (which term is not contained in his particulars of claim, but is a term pleaded by the defendant); and (v) the plaintiff repeatedly stated that he was not 100% sure of the contents of the 2007 contract he signed as he did not study it properly.

[33] Counsel also submitted that the combined effect of the various amendments and the evidence presented is to show that the plaintiff either does not know what the agreement between the parties was or that he is being dishonest about it.

[34] Bearing in mind the approach to be followed in an application such as this as set out in the various authorities cited above, I am wary to analyse and comment upon the

credibility of the plaintiff or the cogency of his evidence, except where it might be inherently unacceptable. The Court should rather consider these aspects, including any contradictions and deviations at the end of the trial. This would include considering whether any contradictions may be reconciled, whether all or only parts of the plaintiff's evidence may be accepted, and if so, what weight they are to be given.

[35] Counsel for the defendant further submitted that it must have been an "implied" term (in the sense of the term having been tacitly agreed) of the contract, as alleged by the defendant, that the fitness of the sheep for human consumption be determined by the State veterinarian. Apart from submitting that the existence of such a term is *prima facie* established by applying the standard tests employed by the Courts in such cases, she pointed to certain answers given by the plaintiff during cross-examination, e.g. that if the State veterinarian had not certified the animals as fit for human consumption, the defendant "could do nothing".

[36] However in my view it should also be borne in mind that the plaintiff repeatedly denied that certification by the State veterinarian was a term of the contract. Furthermore, it seems to me that the plaintiff qualified the admission that the animals had to be fit for human consumption and the role to be played by the State veterinarian in determining this condition by emphasizing that it would depend on (i) the stage of the slaughtering process at which the determination is done (e.g. "before the scales" or "after the scales"); (ii) whether the carcasses have been graded and weighed; and (iii) the reason why the carcasses are condemned.

[37] In view hereof I do not think it can be said at this stage that there is no evidence upon which a reasonable Court might decide that the "implied" term (i.e. the tacit term) contended for by the defendant did not come tacitly into being. In this regard I also bear in mind Mr *Strydom's* valid submission that the existence of otherwise of a term tacitly agreed upon by the parties (the existence of which is alleged by the defendant) is more appropriately determined at the end of the trial.

[38] As I understand the evidence, the plaintiff did not accept that, if the reason for the condemnation was not attributable to his conduct, the mere fact that the animals are not declared fit for human consumption meant that he had not fulfilled his obligations under the contract. He was also of the view that the State veterinarian made mistakes, that she was inconsistent, that she abused her powers and that she failed to stop the slaughtering process in time.

[39] In this context his persistent denials of the risk clause pleaded by the defendant are relevant. Although it is so that the plaintiff gave two versions of the terms of the risk clause on which he relies, his evidence indicates that, on whichever version, the risk passed to the defendant before the carcasses were certified to be healthy and fit for human consumption.

[40] The plaintiff's evidence is to the effect that, although some of the animals delivered may have presented with scab, the disease does not affect the meat and that this was no reason to declare the carcasses condemned. He was adamant that he did not inject the sheep; that he knew very well that he was not supposed to deliver animals which had been injected before expiry of the withdrawal period of the substance injected and that he never ever had done so in all the years that he has delivered animals for slaughter. The evidence presented is that samples were only taken from five of the carcasses on which injection marks had allegedly been found, yet all 418 carcasses were eventually rejected. There is evidence that both the plaintiff's samples and those taken by the State veterinarian tested negative for the presence of Ivermectin residue.

[41] In my view there is evidence upon which a reasonable Court might find that the animals delivered were fit for human consumption in spite of the condemnation by the State veterinarian. There is evidence upon which a reasonable Court might find that the risk had passed to the defendant at the latest upon slaughtering, meaning that the risk of any mistakes made by the State veterinarian would fall upon the defendant, there being no evidence or argument presented that the term "slaughtering" includes the certification process.

[42] There is also sufficient evidence at this stage given by the plaintiff (and to some extent by his witness, Mr Smith) that the agreement between the parties was in writing, except that the plaintiff put a figure to the premium mentioned in paragraph 4.1(a) of the amended particulars of claim of N\$1 per kilo, which figure he stated was orally agreed. In light thereof that the calculation of the plaintiff's damages has become the subject of agreement between the parties, the fact that the plaintiff testified about on alleged oral term relating to the premium the defendant had to pay is not such to upset the plaintiff's claim at this stage.

[43] It was submitted on behalf of the defendant that the plaintiff on his own evidence failed to mitigate any damages he may have suffered. However, to the extent that mitigation of damages might be relevant, the plaintiff's evidence is to the effect that, all his attempts to mitigate the damages were frustrated by the State veterinarian's conduct, which includes inconsistent decisions on her part.

Conclusion

[44] In conclusion, it seems that the plaintiff has put forward sufficient evidence to ward off the application. The result is that it is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

____(Signed on original)_____

K van Niekerk

Judge

APPEARANCE

For the plaintiff:

Adv J A N Strydom

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Instr. by Delport Attorneys

For the defendant:

Adv N Bassingthwaite

Instr. by LorentzAngula Inc