



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) [2017] NAHCMD 336 (27 November 2017).

Coram: VAN NIEKERK J

Heard: 7, 8, 9, 10, 11 November 2011; 17, 18 February 2012; 13 March 2012; 26 July 2012; 26, 27, 28, 29 May 2015; 9, 10 July 2015; 24, 25 February 2016; 13 July 2016; 12 October 2016

Delivered: 27 November 2017

ORDER

The action is dismissed with costs, such costs to include the costs of one instructing and one instructed legal practitioner.

JUDGMENT

VAN NIEKERK, J:

[1] The plaintiff in this trial action is a farmer in the south of Namibia, where he farms with sheep and cattle. The defendant (“also referred to as “Namco”) is a company which purchases livestock for slaughter and export to South Africa.

[2] During the trial the plaintiff presented the evidence of several witnesses. At the close of the plaintiff’s case the defendant made an application for absolution from the instance, which was dismissed. (See *Labuschagne v Namib Allied Meat Company (Pty) Ltd* (I 1-2009) [2014] NAHCMD 369 (1 December 2014) (hereinafter “the absolution judgement”). Thereafter the defendant called several witnesses. After the defendant’s case was closed, the matter was postponed for argument. Submissions having been heard, the matter was postponed for judgment.

[3] The plaintiff’s action against the defendant is for the following relief:

- “1. Payment in the amount of N\$164 000-00.
2. Interest *a temporae morae* calculated on the aforesaid amount at the rate of 20% p.a.
3. Costs of suit.
4. Further and/or alternative relief.”

[4] The plaintiff's case is one of a claim for damages as a result of the defendant's alleged breach of contract. As appears from paragraphs 6.1 and 6.2 of the (second) amended particulars of claim, the plaintiff initially relied on two breaches of an agreement allegedly concluded between him and the defendant. The first is that the defendant allegedly failed to pay the plaintiff for 418 sheep sold and delivered to it. The second is that the defendant prohibited the plaintiff from retaking possession of the sheep carcasses in order for the plaintiff to mitigate his loss.

[5] During the trial the plaintiff accepted that the defendant's calculation of the alleged claim is correct, namely a sum of N\$160 733.83. During cross-examination the plaintiff conceded that the claim should be further reduced by an amount of N\$3089.02, being certain amounts charged by the abattoir. It is common cause, therefore, that the plaintiff's claim is for N\$157,644.81.

[6] The plaintiff also conceded during cross-examination that the defendant is not responsible for the alleged second breach, which need not be considered any further.

[7] In the (second) amended particulars of claim the plaintiff set out the allegations regarding the contract between the parties 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.”

[8] The defendant's plea on the remaining matters in issue is that it denies that it is liable to the plaintiff for the amount claimed as the plaintiff did not comply with his obligations in terms of the agreement in that the plaintiff failed to deliver sheep that were fit for human consumption as was evident from the fact that the State Veterinarian declared the sheep unfit for human consumption after they had been slaughtered. The defendant further pleaded that the defendant failed to mitigate his losses despite the fact that he had the opportunity to do so.

[9] The defendant also pleaded that, should the Court find that the plaintiff is entitled to payment, the amount should be reduced by N\$120,713.59 which amount includes slaughter fees, grading fees, inspection fees, and certain levies, as well as cooling fees charged by Meatco Namibia and for which the defendant had paid.

[10] The defendant also denied that the parties had entered into a written agreement and that the agreement was subject to the terms alleged by the plaintiff, except in respect of the terms which the defendant admitted in the plea. The defendant's plea in regard to the agreement reads as follows:

"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."

[11] It is common cause that after the plaintiff's sheep had been slaughtered, the State Veterinarian declared them unfit for human consumption and that the defendant refused to pay for the sheep.

The evidence for the plaintiff

The plaintiff

[12] In the absolution judgment (at paras. [18] –[31] I summarised the plaintiff's evidence as follows:

"[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."

[13] There were further contradictions in the plaintiff's testimony. For instance, he gave yet another version of when risk and ownership would pass to the defendant. He stated that once the carcass obtains a roller mark from the Meat Board and is weighed, the defendant at that stage buys the carcass from him and that risk and ownership then passes. According to him, if a carcass is unfit for human consumption, it would still be graded, but the roller mark of the Meat Board would not appear on the carcass.

[14] Apart from the last-mentioned contradiction, this evidence is also unsatisfactory because the plaintiff was aware that the Meat Board is responsible for the grading of the meat, whereas the State Veterinarian is responsible to determine whether the meat is fit for human consumption. Furthermore, in spite of the fact that in this case the carcasses bore the Meat Board's roller marks, and the risk and ownership, according to him had passed to the defendant, the plaintiff initially sought to institute action against the State Veterinarian, instead of the defendant. He also became engaged in a battle with the State Veterinarian to have the carcasses released in order to mitigate his damages. This is not the action of a person who all along understood that it was a term of the contract that risk and ownership passed had passed to the defendant, whether at delivery, whether at the moment the animal is killed, or whether at the time the carcass had been graded and weighed.

[15] Another example of contradictory evidence occurred when he distinguished between two types of written contract provided by the defendant to producers for signature. In 2007 the contract provided for a fixed price for sheep delivered during the year from January until December. From 2008 the contract provided for peak season delivery and off season delivery which involved a difference in the amount a producer would earn in contract premiums and performance bonuses. In spite of testifying about this difference, the plaintiff stated in evidence in chief that in 2007 he entered into a contract which was the type of contract as existed in 2008. During cross-examination he changed his version and stated the he signed a fixed price contract for the year 2007. This also contrary to what he pleaded in the (second) amended particulars of claim dated 30 June 2011.

[16] The plaintiff on various occasions testified that he entered into a written agreement with the defendant, otherwise he would not have qualified for a N\$1/kg “premium” or “subsidy” which the defendant was obliged to pay. When counsel for the defendant asked him where this was provided for in the written agreement, he stated that this was an oral term. However, this evidence is contrary to the pleadings.

[17] At no stage during the trial was there an application to amend the pleadings to align with the plaintiff’s testimony.

Everhardus Smith

[18] Mr Smith is a farmer from the south of Namibia where he had been farming with small livestock and cattle for 45 years. He was called to testify that there were always written agreements and that the term as to risk and ownership was as plaintiff alleged. He supplied sheep to the defendant when it used to be known as Just Lamb and continued to do so when the defendant became known as Namco. For about 10 years he delivered sheep in terms of a written agreement in terms of which he would earn a certain premium if he succeeded in delivering in accordance with the agreement. He said that the producers were given forms to complete and sign since the time of Just Lamb. He did not recognise Annexure “A” (Exhibit “B”) as the form or being similar to the form he signed, which detracts from the purpose for which he was called. He was never aware of any oral agreements concluded with the defendant and he would never have entered into an oral agreement.

[19] He testified that ownership passed on delivery when the sheep are offloaded at the abattoir. At a later stage he stated that once the animal is killed, there could be no question about the passing of ownership. He strongly denied that the agreement provided that ownership would pass upon certification of the carcass as being fit for human consumption.

[20] It is clear that he was uncertain about when risk and ownership would pass. The moment shifted back and forth. For example, about this question he testified (at Record 343 lines 10-33):

“... ideally once the transportation occurred, meaning that the livestock is then loaded to the transportation of the abattoir, the ownership is handed over ... once the stock is loaded off at the premises, at the abattoir, then inspection will take place. Once the inspection has been done and the animals are then approved by the officials or the workers, then I feel that that is the last stage at which ownership is then transferred to the next person. ... When the abattoir kills the animal.”

(I pause to note that at times his evidence seems to have come close to expressing legal opinion, but no objection was raised to its admissibility. Perhaps he did not express himself well in this respect.)

[21] During cross-examination the witness deviated from his initial testimony. Regarding the forms he had testified were always there he then said they were introduced sporadically and at times they would deliver livestock without signing a form which is in clear contradiction of his earlier statement agreements to deliver were always in writing and that he would not transact on an oral basis because he prefers it in writing.

[22] Mr Smith distinguished between “killing” and “slaughtering”. After reading clause 6.4 of the 2008 contract he stated that slaughtering begins when the animal was killed. He emphasized on various occasions that ownership passed when the animal is killed. In this manner he gave evidence in contradiction to some of the plaintiff’s evidence on this issue. When confronted with the fact that clause 6.4 states that risk and ownership would pass upon slaughtering, he stated, curiously, that he would accept it if the slaughtering is speedy, but not if the slaughtering does not take place speedily.

[23] The witness also testified that according to his understanding, even if the veterinarian declares the carcasses unfit for human consumption after the animals had been slaughtered, whether because of something that the producer did or did not do, risk and ownership would pass to the defendant, which would have to pay the producer and sue for damages. This evidence about the relevant term of the contract is in sharp contrast to that of the plaintiff, whose evidence is to the effect that it would depend on the reason for the declaration of unfitness and whether he was guilty of, say, delivering sheep within the withdrawal period of a substance like Ivermectin.

[24] In my view Mr Smith's testimony was of poor quality, did not assist the plaintiff's case and created more confusion than clarity.

Erens van der Merwe

[25] Mr van der Merwe is a retired meat inspector who was employed at the State Veterinarian Services for 34 years. During these years he served for some years at the Meatco abattoir. He was called as an expert witness.

[26] He gave evidence about the slaughtering line and process at the Meatco abattoir. An inspection *in loco* was also held. This was very useful to obtain an understanding of the process. I do not deem it necessary to set out this process in any detail, as most of the facts turned out to be common cause and do not play a role in the eventual conclusion I have come to regarding the outcome of this case.

[27] As plaintiff highlighted in his heads of argument:

"38. The significance of Mr van der Merwe's evidence centres on the way in which the carcasses are being dealt with on the slaughter line at the Meatco abattoir coupled with the duties of the meat inspectors in conjunction with that of the state veterinarian on duty. He also in detail testified about the way in which the Meat Safety Act 4 of 2003 from the Republic of South Africa is applied at the Meatco abattoir."

.....

39 However the most significant part of his testimony centered on the fact that according to him the South African Act and regulations apply locally to the exporting abattoirs and as such it is the abattoir that must adhere to the Act. Further he also confirmed that by the time the carcasses have been weighed and graded then the price is also known."

[28] Defendant submitted in this regard (at para. 101 of its heads of argument):

"Mr van der Merwe was asked what he understands from section 85(1) of the Meat Safety Act and he testified that the veterinarian must certify the meat as fit for human consumption before it leaves the premises and she does so by putting

on a stamp or mark. He also confirmed that grading and weighing does not mean that the carcass has been determined fit for consumption. The State veterinarian must still put her stamp on it. He in fact state that the State veterinarian stamp is done after all other stamps that is the grading and weighing stamp. The veterinarian stamp is the last stamp that goes onto a carcass. As he put it, after weighing, after marking, after the roller mark everything was put on they then put a stamp that is marked onto that carcass. This is crucial because the plaintiff testified that the sheep is certified fit for human consumption at the Meat Board grading and it is signified by the roller mark. However, on the evidence of Mr van der Merwe, it seems this only happens after the carcass has been weighed. The only way in which the plaintiff could thus prove that all his carcasses, or some of them, were certified fit for human consumption is through evidence that they bore the stamp of the veterinary services. There is no such evidence before the court.”

[29] In my view these submissions must be accepted. The plaintiff testified that he knew that the carcasses were to be exported to South Africa and that the State Veterinarian’s certification as fit for human consumption would be required as an indispensable pre-requisite.

Andries van Vuuren

[30] Mr van Vuuren was, at the time, the plaintiff’s legal practitioner when he worked for a certain legal firm in Windhoek. The plaintiff approached him for assistance when he was trying to have his carcasses released while they were hanging in the abattoir’s chillers.

[31] He testified about what had occurred at the time and the efforts he had made in order to mitigate the plaintiff’s losses. He gave an account about a meeting that took place at Meatco, which meeting was attended by representatives of the defendant, the State Veterinarian, Dr Hemberger, and others. He dealt with several pieces of the correspondence that exchanged between his office and that of the Government

Attorney. For purposes of this judgment, it is not necessary to traverse all this evidence. Suffice it to state that I accept his evidence as trustworthy.

[32] The plaintiff made the following submission in para. 56 of his heads of argument:

“It is significant to note that according to him, as time progressed, the goal posts were continually shifted by Dr Hemberger in connection with the status of the carcasses as well as the fact that despite the eventual results of the laboratory tests indicating negative, the said Dr Hemberger notwithstanding refused to release the carcasses.”

[33] This submission contains an accurate summary of Mr van Vuuren’s evidence. However, I am satisfied, having heard Dr Hemberger’s evidence, that she had valid considerations underpinning the decisions she took from time to time and in changing circumstances, about the fate of the carcasses. From her testimony it is very clear that her main concern, and rightly so, was the safety of the public. What is also clear is that, because of the plaintiff’s insistence that the carcasses remain in the chillers until he had been exonerated by the results, the carcasses deteriorated to such an extent that they were no longer fit for human consumption and hardly fit for anything else.

[34] Counsel for the defendant pointed to Mr van Vuuren’s evidence that the initial focus of his efforts were to have the carcass samples tested for any residue of Ivermectin and to assist the plaintiff in mitigating his losses. As the matter was urgent, he did not consult with the plaintiff in depth. He also did not recall that the plaintiff ever instructed him that according to the plaintiff’s version of the agreement, risk and ownership had already passed to the defendant upon delivery. Counsel submitted that it is reasonable to conclude that the plaintiff only came up with this version when cross-examined and that Mr van Vuuren’s evidence, in effect, explains why the plaintiff initially intended to take legal action against the State Veterinarian, and not the defendant for non-payment. I agree with these submissions.

Dr Ian Baines

[35] Dr Baines testified as an expert. He is a veterinarian by profession and in private practice. At the request of the plaintiff, he inspected the carcasses hanging in the chiller on 16 August 2007. I concentrate on the salient parts of his evidence. He testified that he saw no visible injection marks, although he did see marks where tissue samples had been removed for analysis. During cross-examination, however, he clarified that due to the fact that the carcasses had been hanging for such a long time, he could not commit to an opinion because he could not distinguish whether a mark was as a result of bruising caused during the slaughtering, or as a result of injections that had been made. I agree with the defendant's counsel that Dr Baines's evidence on this aspect does not assist the plaintiff in proving that he had not injected his carcasses.

[36] Dr Baines explained that Ivermectin is contained in an oil based injectable substance, which is usually administered subcutaneously by injection. This should, if properly done, be by lifting the loose skin at the neck or shoulder blade of the animal and then injecting under the skin. The hole made by the injection would then be visible in the skin. However, some farmers do not do so properly by pulling the skin away, but rather inject into the muscle, which leaves a blood spot in the muscle and a light spot on the inner side of the skin on the corresponding. He emphasised the importance of focusing the attention on the skin where there is a suspicion that animals have been injected. However, it is common cause that the skins of the animals in question had in this case already been separated from the slaughtering line area to another area in the abattoir when Dr Hemberger inspected them. It would therefore not have been possible to examine the skins in relation to the carcasses, although I accept that it would have been preferable.

[37] Dr Baines further testified that Ivermectin has a 28 day withdrawal period. This means that no-one may deliver an animal injected with Ivermectin for slaughtering purposes within 28 days from the date of injection. Counsel for the plaintiff submitted (see para. 34.8 of the heads of argument) that the witness's opinion was that there should have been evidence of medicinal residue in more than 50% of the samples sent

away for testing. However, a proper reading of the record (at p237, lines 25 – 27) makes it clear that Dr Baines actually stated: “*If I can explain it different (sic). A drug will not be able to be registered with a 28 day withdrawal period if more than 50% of the samples are still positive at that time*”, i.e. up until 28 days. Therefore, Counsel’s conclusion (in as much as it is specifically based on his incorrect submission), that there could be no question that residue should have been detected in the samples sent away if injection had taken place on the date as suspected by Dr Hemberger, cannot be upheld.

[38] Ms *Bassingthwaighte* for the defendant further pointed thereto that Dr Baines acknowledged that there are certain factors which may influence the reliability of the sample test results, such as the manner in which the samples are stored, the dosage injected, e.g. whether there was under-dosage or whether was diluted with water, and the functionality of the laboratory equipment. She pointed out that there was no evidence on these aspects and the parson who did the tests was not called to testify. I agree with her submission that the results, although negative, are not evidence that the sheep were not injected.

[39] Dr Baines further confirmed that the veterinarian’s decision that meat is fit or unfit for human consumption has nothing to do with the grading of the carcass (by the Meat Board).

The defendant’s evidence

[40] The defendant called several witness, namely Mr Chris Harmse, who was the defendant’s general manager at the time of the slaughtering of the plaintiff’s animals and who left the defendant’s employ at the beginning of August 2007; Mr Jan-Harm Schutte, who became the defendant’s general manager during late 2007 after Mr Harmse had left; Mr Heini Isaacks who was the operational manager of the defendant at the relevant time; and Dr Hemberger.

[41] On the view I take of the strength and cogency of the plaintiff's case, I do not deem it necessary to deal with their evidence. Suffice it to state that nothing in their evidence serves to strengthen the plaintiff's case on the matters where it falls short. Having said this, there is one aspect with which I should deal.

[42] Mr Schutte initially stated that there were no written agreement for delivery of livestock during 2007 and that he introduced the first written agreement in the form of Exhibit "B" during 2008. Later he stated that livestock supply agreements may have existed already from August/September 2007. However, the agreement referred to in the plaintiff's second amended particulars of claim, (Exhibit "B"), was only introduced in 2008.

[43] I deal with this because counsel for the defendant referred to Mr Schutte's evidence about written agreements which might have existed during August/September 2007 as evidence supporting the plaintiff's version. I do not agree, but if it does, it is not of importance, because the plaintiff's alleged written agreement was already concluded long before that time, i.e. in January 2007.

Further evaluation of submissions and evidence

[44] Counsel for the plaintiff submitted that the Court should not be astute to find that there is no enforceable contract simply because there is some doubt about its terms, but that the Court should brush aside the doubt if the terms can be ascertained with reasonable certainty.

[45] The defendant's counsel submitted the following as set out in the heads of argument:

- “6. At the close of the plaintiff’s case one was left to wonder exactly what the plaintiff’s case is. It became even more confusing when the plaintiff’s version was put to defendant’s witnesses under cross-examination. It is important to start by considering the plaintiff’s case as set out in the pleadings in detail. The purpose of pleadings is to inform the parties and the Court of the issues in dispute. The summons and particulars of claim are there to inform the defendant of the claim or demand he is required to meet.
7. It is also rather crucial to point out that the plaintiff’s particulars of claim were amended at least twice. In his original particulars of claim filed on 16 December 2008 together with the original summons (the particulars of claim are not dated except that it indicates December 2008), the plaintiff alleged in paragraph 3 that he concluded a written sale agreement with the defendant and annexed a copy of the agreement as well as a sworn translation thereof as annexures “A1” and “A2” respectively.....
8. After the defendant requested further particulars to the particulars of claim, the plaintiff responded in the further particulars and stated that the agreement concluded between the parties was concluded on an oral basis and not in writing as alleged. One must assume that this response was provided after the plaintiff was consulted on the issue.
9. The pleadings were then amended to reflect this position.

10. It is important to also point out that in the further particulars provided by the plaintiff at the time, it was indicated that annexure "A" to the particulars of claim reflects the terms of the agreement agreed upon orally.

11. During or about June 2011 the plaintiff filed a further amended particulars of claim in which it was alleged that the plaintiff concluded a written agreement with the defendant. An unsigned copy of the sales agreement was annexed to the particulars of claim and the terms and conditions were incorporated in the particulars of claim as if specifically traversed and pleaded. In the alternative the plaintiff stated that should the Court find that the agreement was concluded orally instead of in writing the terms and conditions embodied in annexures "A1" and "A2" constituted the agreement so concluded between the parties. Annexures "A1" and "A2" are once again the Afrikaans and English translations of the agreement which had already been annexed to the original particulars of claim and also appears at Exhibits bundle 49-53.

12. This was the final amendment to plaintiff's particulars of claim. The case as set out therein is what plaintiff was required to prove to be entitled to the relief sought and it is also the case which the defendant was expected to answer. It is however important to highlight the amendments to the plaintiff's particulars of claim as it, together with his evidence and the evidence presented on behalf of the plaintiff, has a bearing on the question whether he has discharged his onus. In fact, it places in question the reliability and perhaps the credibility of the plaintiff's evidence. There is one consistent thread that runs through the particulars and that is that whether the agreement was oral or in writing, the terms were as contained in annexure "A" to the particulars of claim.

13.

14. As appears below the plaintiff's case as set out in his particulars as to what the terms of the agreement were that were applicable in 2007 differed significantly from the plaintiff's case as set out in his evidence. Despite the significant differences, the plaintiff did not move for an amendment to his particulars of claim to reflect the case that he is in fact advancing. As it stands, the plaintiff is advancing two cases, one as set out in the pleadings and one as set out in his evidence. The differences in the pleadings and his evidence are crucial as to whether or not the plaintiff has made out a *prima facie* case against the defendant.

15. In the case of Drayer t/a Jordra Engineering v Heyman[1998 NR 127 (HC)] (my insertion) Gibson J said the following at p 141:

"In this case the plaintiff has not attempted to alter or amend the issues listed in his declaration so that the defendant may be given time to consider them. The plaintiff has merely rested his case leaving the conflict in the pleadings and the evidence unresolved. Clearly the omission here detracts from the burden of proof borne by the plaintiff."

[46] In my respectful view, the last sentence of the quotation from the *Drayer* case is, at first glance, unclear. However, when the passage is read in context to the rest of the judgment, it is clear that the Court held the failure to amend in line with the evidence against the plaintiff.

[47] I pause to note that Ms *Bassingthwaighte* made, in substance the same submissions as set out above when addressing the Court during the application for absolution. As noted in the absolution judgment, I refrained from commenting and discussing the plaintiff's evidence when I stated:

"[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."

[48] At this stage of the proceedings, the fact that the plaintiff's evidence was riddled with contradiction and confusion as set out above in the discussion of the evidence during the judgment may be taken into consideration. I regret to say that the plaintiff was a particularly poor witness. In several crucial aspects as set out above his evidence also was not in harmony with the evidence of witnesses called on his behalf. I also point to the contradictions in the evidence of Mr Smith. Ultimately the Court is not in a position to make a finding on a balance of probabilities that there is sufficient evidence on which the Court should find for the plaintiff. He simply did not prove his case. In the result the following order is made:

The action is dismissed with costs, such costs to include the costs of one instructing and one instructed legal practitioner.

VAN NIEKERK, J

APPEARANCES

PLAINTIFF:

Mr J.A.N. Alberts
For Plaintiff
Instructed by Delpport Nederlof Attorneys
Windhoek

DEFENDANT:

Miss Bassingthwaighe
For Defendant
Instructed by LorentzAngula Inc.
Windhoek