



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1/2014

In the matter between:

**JUPITER IMPORT AND EXPORT CC**

**PLAINTIFF**

and

**GLOBAL FISHING ENTERPRISES CC**

**DEFENDANT**

**Neutral citation:** *Jupiter Import and Export CC v Global Fishing Enterprises CC* (I 1/2014) [2019] NAHCMD 557 (13 December 2019)

**Coram:** BASSINGTHWAIGHTE AJ

**Heard:** 17, 18, 19 and 24 July 2017; 27 February 2018; 19 November 2018;  
8 July 2019 – 12 July 2019 and 31 August 2019

**Delivered:** 16 December 2019

**Flynote:** Law of contract – Material misrepresentation – Alternatively, breach of contract – Claim for damages in the amount of N\$1 835 081.68 – Claims dismissed with costs.

**Summary:** The parties entered into a written agreement during February 2012, in terms of which the plaintiff was appointed as the sole agent of the defendant for the export of frozen fish, dried fish and tinned fish supplied by the defendant. Plaintiff

alleges that the fish were worm infested and defendant submits that defendant did not store the fish properly.

*Held:* Representations were made on defendant's website and cannot be said to have been aimed at specifically inducing plaintiff to enter into the agreement.

*Held:* There is no basis for a finding that the representations were untrue, as salted fish if properly stored could be virtually imperishable.

*Held:* Plaintiff failed to prove that the defendant made misrepresentations or breached the terms of the agreement.

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## ORDER

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1. The plaintiff's claims are dismissed with costs.
2. The plaintiff is ordered to pay the costs of the defendant, such costs to include the costs of one instructing and one instructed counsel.

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## JUDGMENT

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BASSINGTHWAIGHTE AJ:

Introduction:

[1] On 18 July 2019, whilst the plaintiff's first witness was under cross-examination, it was discovered that a material factual issue was recorded in the pre-trial order as being in dispute and also as being 'not in dispute'. This resulted in the matter being postponed. After several further postponements the parties signed a

revised proposed pre-trial order on 5 July 2019 and the matter could proceed from 8 to 12 July 2019.

[2] The proposed pre-trial order was not made an order of the court when the matter finally proceeded at the request of the parties who wanted to deal with the issue in their submissions. Neither party took any further issue with the proposed pre-trial order in their submissions. The matter was also argued on the basis set out therein and to the extent necessary, I herewith make it an order of court.

[3] The matter concerns dried, salted horse mackerel fish, which the plaintiff bought from the defendant for export purposes. Plaintiff's claim is that the fish, delivered in two consignments, was infested with insects and worms and was, for that reason, not fit for human consumption. Obviously, the defendant disputes that the fish was not fit for human consumption.

[4] Plaintiff's principal claim is that defendant represented to it that:

4.1 The dried fish had a lifespan of at least eight to twelve months without the need for refrigeration; and

4.2 The high salt content rendered the dried fish virtually imperishable and thus ensured a long shelf life up to twelve months.

[5] It is plaintiff's case that these representations were material, were made with the intention of inducing it to enter into the agreement, which it did. Plaintiff furthermore claimed that the representations were false in that the dried fish was infested with worms and insects and therefore perished in less than six months, was not virtually imperishable and that the defendant was negligent in making the representations. As a result, plaintiff cancelled the agreement and claims damages in the amount of N\$1,835,081.68.

[6] In the alternative, plaintiff relies on a breach of the terms of the agreement, alternatively an implied warranty that:

- 6.1 The dried fish would be fit for human consumption;
- 6.2 The dried fish has a lifespan of at least eight to twelve months;
- 6.3 The dried fish would be virtually imperishable; and
- 6.4 The defendant would deliver the number of cartons invoiced to plaintiff.

[7] Based on a breach of these terms/warranties:

- 7.1 The plaintiff claims that it was entitled to cancel the agreement and claim damages which it does; and
- 7.2 Claim a refund of the amount paid in respect of the cartons of fish that were not delivered and in respect of which it alleges defendant was enriched.

[8] Defendant, apart from denying the misrepresentation and breach alleged by the plaintiff, also pleaded that it was a term of the agreement that:

- 8.1 The risk of profit and loss passed to the plaintiff upon payment of the amount invoices in respect of a particular consignment; and
- 8.2 Plaintiff was responsible for taking delivery of the dried salted fish within 7 days of confirmation the order and that the plaintiff failed to collect all the fish although it was available for collection; the truck and container arranged by the plaintiff being too small for the consignments ordered.

[9] The defendant also pleaded that the plaintiff failed to store the fish in a cool, dry and clean facility and that any infestation which may have occurred, occurred whilst the fish was in the plaintiff's possession and due to the plaintiff's negligence.

The facts

*The following facts are common cause on the pleadings and as per the pre-trial order:*

[10] The parties entered into a written agreement during February 2012 in terms of which the plaintiff was appointed as the sole agent of the defendant for the export of frozen fish, dried fish and tinned fish supplied by the defendant. The following were the terms of the agreement between the parties:

- 4.1 The plaintiff and the defendant entered into an agency contract of which the defendant grants the plaintiff, which accepts, sole agency for the frozen fish, dry fish and tinned fish (referred to as "the products"), supplied by the defendant in Namibia;
- 4.2 The plaintiff will pay the defendant an agency fee of N\$50,000.00 (Fifty Thousand Namibian Dollars) on signing of the agreement;
- 4.3 The Agreement shall come into force on signing of this agreement and shall continue for a period of 5 (five) years with the option to renew for a further 5 (five) years and thereafter for such periods as the parties may agree upon;
- 4.4 The plaintiff agrees to purchase from the defendant, which hereby agrees to sell to the plaintiff the products at a price to be agreed upon by the parties from time to time;
- 4.5 Pro forma invoices shall be sent by the defendant to the plaintiff to such address as may be notified by the plaintiff whereupon the plaintiff shall within 48 (forty eight) hours accept such pro forma invoices of the defendant and where after the defendant shall sell the products to the plaintiff in accordance with such pro forma invoice at such price as agreed between the parties from time to time;
- 4.6 The defendant shall on the acceptance of such pro forma invoice proceed with the production and on loading the products, supply the plaintiff with the following documents, namely the Health Certificate of Origin and/or Specification of product, as the products' type may necessitate;

- 4.7 The defendant undertakes to fulfil the acceptance of invoices for the products within a reasonable dispatch but shall not be liable in any way for any loss of trade profit occurring to the plaintiff in the event of the products being frustrated or delayed by transport, strikes, riots, lock-out, trade disputes, acts of restraint by governments, the imposition of restrictions on exportation or *vis majeure*;
- 4.8 The price for the products shall become due and payable by the plaintiff in net cash by direct electronic banking transfer to the defendant's bank account in South African currency (Rand) or US Dollars as agreed *upon by both parties as follows*:
- 4.8.1 60% on acceptance of pro forma invoice;
- 4.8.2 40% ex factory;
- 4.9 All VAT payable by the plaintiff will be paid back (50%) to the plaintiff after the defendant has claimed this amount back from the Receiver of Revenue, as indicated on the pro forma invoice;
- 4.10 *The ownership of the products shall pass from the defendant to the plaintiff on delivery of the products by the defendant to the plaintiff;*
- 4.11 The defendant undertakes the following during the continuance of the agreement:
- 4.11.1 The defendant shall not sell whether directly or indirectly any of the products to any of the products to any person anywhere with a view to resale of the products; and
- 4.11.2 The defendant shall provide the plaintiff specifications of the product on invoicing meeting the following requirements:
- 4.11.2.1 Dried Fish:
- [a] Moisture content (36%);
- [b] Salt content (16% minimum);

[c] Export cartons with weight content of 30kg when packed.

[11] The terms mentioned above, are admitted. The defendant, however, pleaded that it was an implied term of the agreement that once payment is made as alleged in paras 4.8.1 and 4.8.2 the risk of profit and loss would pass to the plaintiff. It was subsequently argued on behalf of the defendant that the risk of profit and loss passed at delivery. This is also the position of the plaintiff, provided that there are no latent defects.

[12] On the defendant's website the following representations were made:

12.1 The dried fish has a lifespan of at least 8 to 12 months and requires no need for refrigeration; and

12.2 The high iodised salt content of these fish products, renders the dried fish virtually imperishable and thus ensures a long shelf life up to 12 months.<sup>1</sup>

[13] Two consignments of dried fish were delivered to plaintiff, one destined for Angola through Oshikango ('Oshikango consignment') and one destined for the Democratic Republic of Congo through Walvis Bay ('DRC consignment').

[14] On 11 May 2012<sup>2</sup>, the plaintiff returned 2,692 cartons of the Oshikango consignment to the defendant, so that the fish could be cleaned of worms and insects.

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<sup>1</sup> Initially the plaintiff also relied on the representation that each carton would contain a net weight of 10kg of fish. This was subsequently abandoned when it was pointed out Mr Lakkis that the plaintiff ordered cartons with a net weight of 9kg.

<sup>2</sup> Although the date of return was admitted on the pleadings, it was later shown in evidence that the return date was actually 2 June 2012.

[15] It is also common cause between the parties that the plaintiff paid the N\$50,000 agency fee, as well as an amount of N\$1,502,000 to the defendant in total in respect of the two consignments of fish delivered to it.<sup>3</sup>

[16] The DRC consignment was packed in a container, which was inspected on 7 June 2012 (in the pleadings the parties said 12 June 2012 but in evidence the date was rectified based on documents produced) and loaded on 15 June 2012 on the Safmarine vessel. Only 2,777 cartons could be packed in the container although 3330 were ordered and paid for.

[17] The following facts were recorded as being in dispute in the pre-trial order:

- 1.1 Whether or not the ownership in the product shall pass from the defendant to the plaintiff on delivery of the products by the defendant to the plaintiff.
- 1.2 Whether or not prior to the conclusion of the agreement (the defendant with the intention of inducing the plaintiff to enter thereto) (as well as related pleaded agreements) intentionally, alternatively negligently, alternatively innocently (on account of reasonably failing to ascertain the correctness of the representations), made the following material representations – on its website – to the plaintiff that:
  - 1.2.1 The dried fish has a lifespan of at least 8 to 12 months and there was no need for refrigeration;
  - 1.2.2 The high iodised salt content of the product, rendered same virtually imperishable and thus ensuring a long shelf life of up to 12 months.
- 1.3 Whether or not relying on the truth of the representation the plaintiff entered into the agreement with the defendant and whether or not it was foreseeable that the representations could induce a person to whom they are made to enter into the agreement.

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<sup>3</sup> On the pleadings, defendant denied payment of part of this amount. This was because the description for the payment was incorrect. The incorrect description was subsequently corrected in evidence.



- 1.4 Whether or not the representation was false in that:
- 1.4.1 The cartons of the dried fish had a weight of 9kg<sup>4</sup>;
  - 1.4.2 The dried fish were infested with worms and insects and perished in less<sup>5</sup> than 6 months and did not have a shelf life of 8 to 12 months;
  - 1.4.3 The dried fish were not virtually imperishable.
- 1.5 Whether or not on 3 May 2012, the plaintiff received a pro forma invoice showing that the quantity of dried fish to be delivered to the plaintiff will be 3333 x 9kg x 2 loads of export cartons, weighing approximately 30 tons times two loads at a price of N\$24.20 per kilogram.
- 1.6 Whether or not the container arrived in Kinshasa, Republic of Congo, with the fish not dry and with a high moisture content and infested with worms and insects.
- 1.7 Whether or not on 16 April 2012, the plaintiff received one truck load of fish with 2765 cartons, which truckload was 18 cartons short of what was invoiced for.
- 1.8 Whether or not, as a consequence of the defendant's representations regarding the weight of the cartons, lifespan of the fish, the plaintiff suffered damages in the amount of N\$1,835,081.68.
- 1.9 Whether or not the product did not perish due to being frustrated or delayed by transport, strikes, riots, lock-outs, trade disputes, acts of restraint by governments, the imposition of restrictions on exportation or *vis majeure*.

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<sup>4</sup> Not persisted with

<sup>5</sup> This date is wrong. The invoice was issued on 6 March 2012 and accepted on 14 March 2012.

- 1.10 In the event of the Honourable Court not upholding the principal claim, then in that event – whether or not the terms pleaded in respect of the principal claim were further express, alternatively implied, alternatively tacit terms of the agreement (including the related pleaded agreements), and as a consequence, whether or not the defendant breached the afore-alluded terms of the agreement.
- 1.11 Whether or not as a further consequence, the plaintiff was entitled to cancel the agreement – as it did and further whether or not the defendant was at the expense of the plaintiff unjustifiably enriched in the amount of N\$125,017.20 that the plaintiff paid the defendant in respect of the aforesaid cartons.
- 1.12 Whether or not there was an implied condition that the fish had to be stored in a clean and hygienic setting and whether plaintiff failed to do that.
- 1.13 Whether or not infestation took place in plaintiff's possession and as a sole result of negligent handling and storage by plaintiff.'

Evidence:

*Abdul Hakim El Lakkis (Lakkis Snr)*

[18] Lakkis Snr testified that the plaintiff is an importer and exporter of general trade items such as food, furniture, building materials, etc. Prior to entering into the agreement, he was provided with a document, a printout from the defendant's website containing a number of representations. He testified that the plaintiff entered into the agreement on the basis of the two representations set out in para 4 above.

[19] The first consignment of dried fish was received in Oshikango on 16 April 2012. Mr Lakkis Snr testified that upon receiving the consignment, they noticed that there were insects in the consignment and therefore he contacted Mr Lewis Roos, employee of the defendant. The defendant agreed that the consignment can be returned and mentioned that there would be some weight losses which gave him the impression that the fish was not dry in the first place and as a result would lose weight.

[20] The second consignment was destined for Kinshasa in the DRC to be shipped by sea. Payment was made and the fish was loaded in a container. A pro forma invoice dated 6 March 2012 indicated that 3,333 cartons would be loaded, but only 2,777 cartons were loaded. According to Mr Lakkis Snr, Mr Roos had insisted that he would be able to load all 3,333 cartons into the container, which is why the plaintiff paid for 3,333 cartons. The container was inspected on 7 June 2012 and loaded on 15 June 2012 on the Safmarine vessel. Upon arrival in Kinshasa, the fish was not dry and was infested with worms and insects.

[21] The first load of fish was received by the plaintiff on 16 April 2012 in Oshikango and also only contained 2,765 cartons, 18 cartons short of what was invoiced, which Mr Lakkis Snr said could have been stolen on the way by the driver. This consignment was returned to the plaintiff on 11 May 2012. The number of cartons returned was 2,692 cartons.

[22] Mr Lakkis Snr testified that the plaintiff made the following payments in total in respect of the two consignments:

	Description	Amount
15.1	Fee	N\$ 50,000
15.2	Payment made to Defendant on 15 March 2012 for dried fish, discovered to be invested with worms and insects	N\$435,600
15.3	Payment made to the Defendant on 21 March 2012 for dried fish, discovered to be invested with worms and insects	N\$310,000
15.4	Payment made to the Defendant on 28 March 2012 for dried fish, discovered to be invested with worms and insects	N\$350,000
15.5	Payment made to the Defendant on 12 April 2012 for dried fish, discovered to be invested with worms and insects	N\$100,000
15.6	Balance of invoice on 6 March 2012	N\$256,400
15.7	Transport to return fish to Defendant	N\$ 13,000

15.8	Freight costs to Metadi, Kinshasa, Democratic Republic of the Congo	N\$ 55,854.88
15.9	Transport and Duty for the fish in the Democratic Republic of Congo	N\$264,826.80
		<b>N\$1,835,081.68</b>

[23] Items 15.7 to 15.9 were not paid to defendant. According to Mr Lakkis Snr plaintiff claims the total amount of N\$1,835,081.68 because the dried fish was infested with worms and insects, perished in a period under six months, did not have a shelf life of 8 to 12 months, was not virtually imperishable nor was it fit for the purpose intended by the plaintiff and was therefore materially defective and unsuitable. This, he testified, showed that the representations made by defendant were false. Mr Lakkis Snr confirmed under cross-examination that the plaintiff's case is simply that the fish perished and was unfit for human consumption because they were infested with worms and insects and therefore did not have a shelf life of 8 to 12 months.

[24] Part of the claim is also because the defendant did not deliver in full. As far as the Oshikango consignment is concerned, only 2,765 cartons were delivered, 18 short of what was required and in respect of the Kinshasa consignment only 2,777 cartons were loaded instead of 3,333 cartons, which the plaintiff had paid for. Of the total amount claimed, an amount of N\$125,171.20 is claimed in respect of the cartons not delivered.

[25] In response to the defendant's claim that the storage in Oshikango was not suitable for the consignment of fish, Mr Lakkis Snr testified that fitness certificates were issued to the plaintiff for the years 2009 to 2014 in respect of the premises where the fish products were kept in Oshikango.

[26] Mr Lakkis Snr testified that the fish were placed on pallets with a plastic sheet underneath. Under cross-examination he testified that the cartons were also covered with a plastic sheet. In re-examination he denied having said that the cartons were covered in a plastic sheet. The warehouse has a 9 metre roof with proper ventilation and is partitioned in different areas for different products. The fish products were not

kept together with building materials or tyres. The tyres, he said, were outside the warehouse.

[27] Mr Lakkis Snr admitted that Mr Roos visited them in Oshikango. He, however, testified that Mr Roos came there because they asked him to come and inspect the fish because they had discovered insects and worms in the fish. They asked him to come get the fish, clean it and dry it properly.

[28] He denied that Mr Roos was upset with him regarding the condition in which the cartons of fish were kept. He denied that there was any discussion regarding him keeping the cartons of fish together with other items such as tyres and building materials. He furthermore denied any mention of unsuitable conditions or unsuitable premises. As to the presence of insects and worms, Mr Lakkis Snr testified that these were crawling out of the cartons. According to Mr Lakkis Snr they saw the insects inside the box before they saw any insects outside.

[29] Mr Lakkis Snr could not testify to the condition in which the fish were when they were loaded for transport to Oshikango. He, however, insisted under cross-examination that when the fish arrived there were worms and insects which meant that the fish was not dry enough. He, however, conceded that he did not test the fish for its moisture content, but said the fact that the defendant agreed to take it back shows that it was not done properly.

[30] Mr Lakkis Snr was unable to identify or describe the insects.

[31] When it was put to Mr Lakkis Snr that the reason given to Mr Roos as to why the fish needed to go back to Usakos, is because the buyer from Angola was no longer planning to take the fish and he had decided to send this consignment to the DRC as well, he stated that originally the plan was to send two containers to the DRC, but because there was a delay in getting the required licenses from the DRC, and they had seen an interest from Angola, they decided to take one consignment to Oshikango to sell to Angolans. He also explained that because of this, the fish remained at the factory for about 2 to 3 weeks after production for the license to come from the DRC and because the license was delayed, they at that stage

decided to ask for the consignment to be sent to Oshikango. This decision, he said, was already made by 6 March 2012.

[32] It was put to Mr Lakkis Snr under cross-examination that the reason why the fish were returned to Usakos, was to prepare them to be transported to the DRC and due to the fact that the fish had been kept in the warehouse which, according to the defendant, did not meet the conditions required, being cool and dry, the fish had lost moisture as a result of which the cartons had to be repacked to ensure that each carton had a weight of 9kg. Mr Lakkis Snr denied that this was the reason.

[33] He was then asked why he did not facilitate the load to be transported to the DRC and he said that the fish was no longer fit for human consumption and that he could not sell it to anyone. According to Mr Lakkis Snr, Mr Roos of the defendant told him that there were weight losses of 10 percent over the period of 2 to 3 weeks which in his opinion meant that the fish was not dried properly in the first place and therefore he did not want to resell the fish.

[34] A delivery note and delivery tally sheet were both handed in as evidence. On the delivery note there appears a note made by the driver saying 'good and clean condition'. Mr Lakkis Snr, however, testified that it was not the responsibility of the driver to indicate anything other than the number of cartons he loaded and any damages to the outside of the packaging. It was put to Mr Lakkis Snr that any reasonable driver who observes worms and insects in or around the cartons would have made a note of it. He denied this.

[35] Mr Lakkis Snr insisted that the purpose of the delivery tally sheet is to simply record how many cartons were delivered and in what condition. He accepted that the document does not record any damage being observed in respect of the cartons, nor any reference to worms or insects. Mr Lakkis Snr furthermore stated that even if there were worms, it would not have been mentioned on the delivery tally sheet because it has nothing to do with the transport company who simply needs to record how many cartons have been delivered.

[36] Mr Lakkis Snr confirmed that he received a report from Bureau Veritas recording the inspection that was conducted in respect of the DRC consignment and that he accepted that the inspection was in fact done and that the report is correct. Mr Lakkis Snr also confirmed under cross-examination that a certificate of origin was provided in respect of the DRC consignment as well as a certificate of health issued by the Ministry of Health and Social Services.

[37] Regarding the Oshikango consignment, Mr Lakkis Snr confirmed that the truck was not big enough to fit all the cartons ordered and that the defendant did inform him to collect the remaining cartons which they did not collect because the first delivery was bad. He also confirmed that the remaining cartons in respect of the DRC consignment were tendered but not collected.

[38] Mr Lakkis Snr was asked about the payments he made in respect of the transport of the fish back to the defendant, freight cost to Metadi and transport and duty for the fish in the DRC; items 15.7 to 15.9 in the table in paragraph 22 above. Mr Lakkis Snr testified that he did receive a receipt but it was not discovered. He also confirmed that he received a receipt for the freight cost to the DRC and that the payment was indeed made but plaintiff also did not discover the receipt or any proof of payment.

[39] The last amount of N\$264,826.80, Mr Lakkis Snr testified was in respect of inland transport, duties and clearance charges which was paid by the importer in the DRC. He testified that the amount was claimed back from the plaintiff. He then explained that it was not physically paid by the plaintiff to the importer, but that it was somehow compensated because the importer has an account with the plaintiff. No documents were, however, provided in evidence in support of this.

[40] Mr Lakkis Snr testified about a photograph that was taken by the importer of the fish in the DRC infested with worms and insects, but this photograph was not discovered or produced in evidence. According to Mr Lakkis Snr the photograph was made available to his legal team and he thought they made it available to the expert as well, but he could not confirm.

[41] Under re-examination Mr Lakkis Snr said that the Oshikango consignment was not intended to be sent to the DRC after it was cleaned. He testified that Mr Roos called him and informed him that he had cleaned the fish but that there is a weight loss from 9 kilograms to about 8 kilograms per box. He then refused to take back the fish because of this weight loss and because they were not sure that the fish was cleaned properly.

*Gail Morland – Expert witness for the plaintiff*

[42] Ms Morland testified that she is employed as a Junior Lecturer in Entomology at the Namibia University of Science and Technology and that she is an expert in the fields of ecology and entomology. She compiled a report by way of a desk top assessment based on information provided to her by the plaintiff and all the pleadings and witness statements provided to her by the plaintiff's erstwhile legal representatives.

[43] Ms Morland testified that she then did research on the possible insect types or pests associated with dried salted fish and found that there were three types of insects which could possibly infest dried salted fish.

[44] Ms Morland stated that she had very limited information, did not do any site visits and the photographs provided were unclear and insufficient for her to be able to make a sound identification of the organisms that had infested the fish consignment. The limitations constrained the assessment process, in particular to clearly identify the organism that caused damage to the fish consignments.

[45] Ms Morland testified that she met with Mr Lakkis Snr and his legal representatives on 27 February 2018 where she posed a certain number of questions to him and his legal representatives. He was, however, unable to state what exactly he saw when he opened the cartons, whether he saw worms, whether the worms had legs, whether the worms moved fast and away from the light, i.e tried to hide what the bugs looked like and whether the bugs flew.



[46] She also stated that she did not at the first meeting receive answers as to how the cartons were stored in the production facility, what she saw when they opened the cartons and whether there were any pictures of the consignment or description of the quality of the fish. She, however, stated that Mr Lakkis Snr was adamant that he saw worms and insects, but could not say whether the worms had legs.

[47] On 1 March 2018 she received a call from Mr Lakkis Snr who then informed her that the worms were black with no legs and the insects were black with legs. He also informed her that the worms hid away from the light and the insects continued walking over the fish and that when the box was opened the insects flew up and out of the box. According to Ms Morland, Mr Lakkis Snr informed her that only the fish was stored in the plaintiff's premises at the time.

[48] She furthermore testified that Mr Lakkis Snr was able to give a description of the defendant's facilities during the phone call because he claimed to have had a tour of the facility before the fish was purchased.

[49] After considering the timeline of events and comparing that with the life cycle of both flies and beetles, Ms Morland testified that the infestation most probably happened at the defendant's production facility. She did, however, say that she cannot say for certain that the fish were infested by insects because of the quality of the pictures provided and the fact that there were no samples collected from the infested fish before disposal. She could therefore only speculate based on the testimony of Mr Lakkis Snr and the conditions stated in both the defendant's and plaintiff's witness statements.

[50] She excluded the mite because it needs relatively high humidity to be able to infest fish and based on the humidity reported by the defendant the mite would not have developed. She furthermore speculated that the infestation would either have been of flies (Dipetera) or beetles (Coleoptera) because both these insects can develop at relatively low humidity (30 percent) and relative high salt concentration (39.5 percent for flies and 60 percent for beetles).

[51] She then narrowed it down further to the beetles because the plaintiff stated that the larvae were dark in colour and that there were worms and insects in the cartons and this points to the beetles having completed or partially completed a full life cycle inside the cartons and because beetle larvae are also more resistant to dehydration in high salt concentrations because it is covered in a thicker cuticle and is more sclerotized than fly larvae. The thick cuticle prevents excessive water loss in beetles and she found from her research that beetles are more tolerant to low humidities and higher salt concentration than flies.

[52] She furthermore stated that because the consignment of fish that went to the DRC was also found to be infested, she would conclude that infestation had to have occurred at the processing plant as that consignment was never stored in the plaintiff's storage facility and both consignments were produced around the same time.

[53] Ms Morland, however, agreed that infestation could have happened at the processing plant during packaging, transport or at the storage facility if an adult insect was present. She furthermore testified that insect infestation would impact on the size and shape of the fish, because the insect would be feeding on the fish. It would also change the colour of the fish, but not necessarily the odour because the odour is normally impacted by the introduction of bacteria. She stated that bacteria could be introduced by the insect. The odour would be produced when the bacteria breaks down the fish; i.e the fish decomposes. She confirmed that an insect infestation will make bacterial infection more prevalent.

[54] Ms Morland testified that insects will lay eggs on anything even if not a food source, so even on salted fish.

[55] Under cross-examination Ms Morland confirmed that even if a plastic sheet cover was placed over the cartons in the storage facility, the insects could have crawled underneath and penetrated the cartons because the cartons would not have been sealed with the plastic cover. She stated that if there were beetles in the vicinity of where the fish were stored, they would have been attracted to the fish.

[56] She testified that the plaintiff's legal representatives did not provide her with a photograph depicting fish infested with worms and insects. The only photographs she had were of the fish taken by the defendant when he was about to destroy the fish but they were not clear.

[57] Ms Morland furthermore testified under cross-examination that the fish will continue to lose moisture because of the salt even whilst in storage. She could not say whether the temperature would affect the speed of dehydration of the fish, but that the higher the temperature, the faster the insects would develop.

[58] Ms Morland testified that if the humidity levels went below 30 percent, there would be some demisted beetles that might survive because insects have a short lifespan and can adapt, but most would die. Those who survive would slow down their life cycle, meaning that they would take longer to develop from one state to another.

[59] She confirmed that the research did not specify which particular beetles would survive in 60 percent salt content. The research that she consulted made this as a general statement with reference to most beetles without identifying the particular beetle that would survive in those conditions. She, however, stated that she was in any event unable to identify the insect that may have infested the fish.

[60] Ms Morland furthermore testified that even if there were insects on the fish, it does not mean the fish is no longer fit for human consumption, neither would the fact that eggs have been laid on the fish make it unfit for human consumption.

[61] She explained that infestation happens when bacteria or insects feed on the fish. She could not see from the photographs whether there was indeed an infestation, but confirmed that if there was larva or worms on the fish, there would have been an infestation.

[62] She confirmed that salting is an old method of preservation and that it combats bacteria infestation, but added that there are some bacteria that can thrive in salted fish. Again, she could not provide any specifics.

[63] She furthermore stated that if there was a fly around or on the fish, one can assume that it laid eggs provided that the fly deemed the fish a viable food source. It would lay from between 1 to a 100 or more eggs, but this would not mean that the fish would be unfit for human consumption. In order for the food to perish, the insect or bacteria introduced to the fish must feed on the fish, changing its chemical composition and breaking it down into smaller particles (decomposition). In order to determine whether something has perished, one must determine whether the foreign organism actually fed on it.

[64] With regards to the DRC consignment Ms Morland testified that if the insect infestation happened at the production facility, and the inspection was done on 8 June 2012, the people who inspected and packed the cartons into the containers should have seen an infestation because the fish would have been oozing with insects.

[65] With regards to the report from the DRC she agreed with the defendant's expert that at 24 percent humidity there would be no insect infestation. She also confirmed that that level of humidity is consistent with the time at which the tests were done. She confirmed that by then the fish would have been very dehydrated.

[66] She stated that she does not understand why the fish were found unfit for human consumption if the report states that the colour and odour are normal. She, however, questioned the translation where it stated that the colour and odour was normal.

#### Lakkis Jnr

[67] Mr Lakkis Jnr confirmed his father's evidence regarding delivery of the Oshikango consignment.

[68] With regard to the DRC consignment he testified that he received a call from their customer, Mr Sharief, who informed him that the consignment was infected with worms and insects. He then travelled to the DRC, arriving there on 7 September

2012 from where he proceeded straight to the warehouse where the fish was stored. According to Mr Lakkis Jnr, every single box that was opened randomly was infested with worms and insects. He remained in the DRC for a period 3 weeks and only returned to South Africa on 30 September 2012 waiting in vain for Mr Roos to arrive in order to solve the problem with the consignment.

[69] Under cross-examination Mr Lakkis Jnr confirmed that the fish landed at the port of Metadi and was then taken up the river to Kinshasa where it was kept in a warehouse that he visited. The final destination for the fish was Kinshasa. He did not see the fish whilst it was in the container in Metadi.

[70] Mr Lakkis Jnr testified that he took pictures of the fish at the time, but that he does not have the pictures anymore. He assured the court that they did submit some of the pictures to the plaintiff's erstwhile legal representatives, but he is not sure why they were not discovered. He also testified about emails that were sent to the defendant informing him that there is a problem with the fish and that they would pay for all his expenses to Metadi so he could go see for himself and deal with the problem. But these emails were also not discovered and he is also not sure why.

[71] It was put to Mr Lakkis Jnr that both experts stated in their reports that insects would not survive at 24 percent humidity levels. Despite this he insisted that when he saw the fish, there were insects and worms on the fish. He also testified that he did not find it strange that the test report does not mention that there were insects or worms on the fish. For him it was enough that they stated that the fish were not fit for human consumption because he saw the infestation himself. Mr Jones also pointed out to Mr Lakkis Jnr that the letter received from the customer in the DRC is not dated nor can one see who signed it. Mr Lakkis Jnr confirmed this fact.

*Grant Davis expert for the defendant*

[72] Mr Davis testified that he is currently employed as an independent contractor at SGS Agricultural Services in Cape Town, South Africa. He holds a diploma in Animal Chemistry and has over 25 years of experience in fish and bio toxin research. He also stated that he is a qualified fish inspector for export purposes. The majority

of the fish inspections that he did is in respect of fresh or frozen and dried salted fish intended for the export market.

[73] According to Mr Davis, the fish inspection is required to meet the requirements imposed by the importing country.

[74] Mr Davis testified that he considered the DRC report. He explained the contents of the report. He explained that where the report deals with 'Aspect' it refers to the general appearance or features of the product and its ingredients. The fact that it was found to be satisfactory, indicates that there was nothing wrong with the appearance or ingredients of the fish.

[75] On the report it stated that the colour of the fish was non-conforming. He testified that in his experience dried salted horse mackerel does not have a standard colour. It can vary from a very light product to a dark product depending on the fat content. According to Mr Davis, the colour does not make a difference to the quality of the product. The only time that it would make a difference is if the fish is green from mould or the colour appears foreign.

[76] Mr Davis testified that the test result that one must consider in determining the quality of the fish, is the value indicated for the Total Volatile Basic Nitrogen ('TVBN'). According to Mr Davis the TVBN for dried salted fish must be under 100mg/100g. The DRC report records that the TVBN was found to be 43,78mg/100g, which indicates a very low TVBN for dried salted fish and therefore it was unlikely that the fish would have had a bad odour. According to Mr Davis a TVBN of 43mg/100g is typical of a good quality dried salted fish and would be fit for export purposes.

[77] Mr Davis also commented that 24 percent humidity is within acceptable standards, meaning the fish is well dried and is of good quality. According to Mr Davis even if the humidity levels were at 35 percent it would still pass for export.

[78] Considering these results Mr Davis expressed the opinion that the fish was indeed fit for human consumption and that the finding recorded in the report that the

fish was not fit for human consumption, does not correspond with the results obtained during the tests.

[79] He also commented that considering the results of the chemical tests, the person who inspected and tested the fish should have explained why it found that the product was not fit for human consumption. If for instance there was a green colour or worms or insects on the fish, it should have been mentioned in the report. Furthermore, the report also states that the exterior and interior aspect of the product packaging was satisfactory and that the aspect of the product was also satisfactory. Since the aspect refers to the physical characteristics and ingredients of the product, there should have been mention of worms and insects if they were indeed found as worms and insects are not ingredients which should have been in the product. The fact that the report says the aspect is satisfactory, is an indication that there were no foreign ingredients inside the box.

[80] Mr Davis then provided us with examples of reports he had done in the past. One of them was in respect of dried salted fish which was found to be fit for export. This fish had a TVBN of 89mg/100g, moisture of 26.5 percent a salt content of 25.3 percent as received and 48.8 percent in the aqueous phase. He testified that although the TVBN was 89mg/100g, it was still below the 100mg/100g limit and was therefore found to be acceptable.

[81] The other example was of fish that was dried too much resulting in a moisture content of 5.9 percent, a salt content of 84.6 percent in the aqueous phase (which is much too high) and no TVBN being detectable because it was so low. The fish no longer had a fishy smell and would be as dry as a piece of cardboard.

[82] Mr Davis also commented on a letter received by the plaintiff from its DRC customer in which it was stated that the fish had a rotten smell. He expressed the view that it is highly unlikely that there would have been a rotten smell considering the TVBN test results on the report.

[83] He also testified that he has never seen dried salted fish products with any worms and insects on them because the worms and insects would die from the salt

content. He stated that it is likely that the worms and insects could have been in the cartons and it is likely that it came from the cartons and not from the fish. However, considering that the report from the laboratory indicated that the exterior of the packaging was satisfactory, he was of the view that there were no worms or insects also because, if there were any worms or insects, it would have been mentioned and the fact that it was not mentioned indicates that there were no worms and insects.

[84] He also questioned why no photographs were taken, because if there were indeed worms and insects, photographs would have been taken.

[85] Mr Davis testified that in his experience dried salted fish does not attract insects and worms and in the years that he has inspected fish, he has never found worms and insects in the dried salted fish that he inspected. Even in cases where the fish was rotten, he has never found worms or insects. He has only found some in fishmeal, but that is because fishmeal has a very low salt content of between 1 percent and 3 percent and a moisture content of less than 10 percent.

[86] Mr Davis testified about tests that he had performed in respect of products from the defendant's facility on 21 February 2012 where the moisture and TVBN results were similar to those for the DRC consignment. He found the fish to have a moisture content of 22.9 percent and a TVBN of 43mg/100g. He also tested the salt content which tested at 21.4 percent as received and 48.3 percent in the aqueous phase which he states is quite possibly the same salt content which the DRC consignment would have had although that consignment's salt content was not tested. He did state that it is not the same batch of products, but the result shows that the factory produces a good product.

[87] Under cross-examination Mr Davis confirmed that if the product was not salted enough, it would start to rot and then the TVBN values will go up rapidly. This would happen if there is not more than 27 percent salt in the aqueous phase. He confirmed that he was unable to calculate the salt content of the DRC consignment in the aqueous phase using the information on the report. However, he can assume that the fish was well preserved because the TVBN did not go up, despite the fact that the test was done about 7 months after production.



[88] Mr Davis also testified that when measuring the TVBN of a dried salted fish product, one is trying to determine the freshness of the product. The TVBN is in essence a freshness indicator. He confirmed that the TVBN value will go up if the moisture value goes down, but emphasised that it would not go down significantly.

[89] Mr Davis testified that the shelf life of the product is impacted by the fat content. Over time the fat in the product oxidizes which impacts on the shelf life of the product. Although TVBN is a freshness indicator, it does not determine the shelf life of a product.

[90] Mr Davis agreed that he could not exclude the possibility that what was meant with non-conforming in the report with regard to the colour was possibly because the colour was foreign. He did, however, say that one cannot pass the aspect and fail the colour, because the colour is relevant when considering the issue of aspect. He said this despite the fact that the colour and aspect was dealt with separately in the report.

Pieter Kobus Roos

[91] Mr Roos testified that he is a member of the defendant whose principal business is the drying, salting and exporting of fish products, mainly horse mackerel, trading since approximately 1998 as a wholesaler.

[92] The plaintiff was introduced to him by Ms Melanie Viljoen who was appointed by the defendant as Director of Marketing, Administration and Correspondence. Ms Viljoen indicated that the plaintiff was looking for a dried fish supplier such as the defendant from whom they could purchase dried fish products for export throughout the African market.

[93] He testified that Mr Lakkis Jnr visited him at the defendant's premises to familiarise himself with the defendant's operations. At the time he gave him a detailed explanation of how the defendant goes about procuring and processing the products. He gave him a tour of the entire processing and storage facility. Mr Roos

gave a detailed explanation of the facility itself and the process undertaken by the defendant in salting and drying the fish. This explanation he said was also given to Mr Lakkis Jnr.

[94] Mr Roos testified that the fish is normally packed with a moisture content of roughly 38 percent because the fish will continue to dry and lose moisture and therefore also mass. The carton is packed until it reaches the specific weight as requested by the client, which in this case was 9kg and then one extra fish is packed to compensate for the ongoing loss of moisture which is unavoidable. Before the carton is packed with the fish, it is lined with plastic. By the time that the package is closed the moisture content would be at about 30 percent because the fish continued to lose moisture.

[95] Mr Roos testified that Mr Lakkis Jnr told him that the plaintiff is engaged in business operations in Dubai as well as Oshikango where they do commodity broking and import and export of consumer goods such as household appliances and building equipment into Angola and the rest of Africa. He stated that the Angolan export business was a bit slow at that time and that they were looking for an additional line of products to export, which is why they were very interested in the dried fish to export into the African market, mainly to Kinshasa.

[96] Mr Roos testified that Mr Lakkis Jnr visited him several times during which they negotiated their agreement and then during February 2012 the agreement was signed. He confirmed the payments detailed in items 15.1 to 15.5 in the table in paragraph 22 were made. He testified that he did not receive the amount detailed in item 15.6. He testified that the amount of N\$256,000 was still outstanding. He also denied the payments detailed in items 15.7 to 15.9.

[97] Mr Roos dealt with the terms of the agreement and emphasized that 60 percent of the selling price was payable upon acceptance of the pro forma invoice and that the remaining 40 percent would be payable as soon as the fish was ready for collection, which would be 6 to 7 days from acceptance of the pro forma invoice. He also emphasized that it was important that the fish be collected once it is processed, because he did not have sufficient storage facilities on the premises.

[98] A pro forma invoice was issued on 6 March 2012 in terms of which 6,666 cartons each weighing 9 kilograms would be produced, half of which to be dispatched to Metadi and the other half to Oshikango. The pro forma invoice was accepted on 14 March 2012 and the first batch of dried fish was ready for collection at which point the plaintiff was notified. At that time the risk of profit and loss passed to the plaintiff because it had already then paid the full price for the dried fish. Mr Roos testified that he informed Mr Lakkis Jnr and Snr that he did not have sufficient storage space and that they needed to collect the fish.

[99] Mr Roos testified that the plaintiff took about 6 weeks<sup>6</sup> before it picked up the first consignment. By the time that the plaintiff collected the first consignment, the second consignment had also been completed and was ready for collection.

[100] When the plaintiff's truck arrived on 16 April 2012 it only had capacity for 2,765 cartons. The remaining 18 cartons<sup>7</sup> remained at the factory and were never collected.

[101] A couple of weeks later he received a phone call from the plaintiff saying that the prospective purchaser from Angola would no longer purchase the dried fish and that they wanted to return the dried fish to the defendant to be dispatched to the DRC instead and invited him to Oshikango to discuss this issue. When he arrived at the facility he realised that the plaintiff was storing the dried fish in an open area together with other building material and old vehicle tyres. He did not consider the conditions suitable for the storage of food products and referred them to the product information on the pro forma invoice indicating that the storage facility must be cool, dry and clean, which was not the case. He testified that this visit happened around 30 April 2012.

[102] Mr Roos testified that whilst he was there, Mr Lakkis Snr called one of the ladies and told her to try and sell one of the cartons to the locals and see if they would be interested. Mr Roos testified that they inspected some cartons and found

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<sup>6</sup> This was subsequently corrected after Mr Jones pointed out to Mr Roos the dates to Mr Roos.

<sup>7</sup> Both parties mentioned 18 cartons. This must be wrong. If 3333 cartons were ordered, then 568 cartons were not loaded.

them to be perfectly conditioned. After he complained to Mr Lakkis Snr about the conditions in which the fish was stored, Mr Lakkis Snr informed him that they are busy renovating a house which the plaintiff had purchased and that the fish would be moved as soon as these renovations were done. He informed Mr Lakkis Snr that the house needs to be fumigated with Nupro Aerosol before the product is moved into the house to clean the area of any crawling insects, flies and mosquitoes.

[103] After he had returned to Usakos he was informed by the plaintiff that the dried fish had been infested with worms and that they were not satisfied with the product and wanted to return the product to him to clean and pack for export to the DRC. He agreed that they could return the product for him to clean and repack for export to the DRC.

[104] He testified that he informed the plaintiff that because the fish had now been standing in storage for approximately 3 months, the moisture content would have decreased resulting also in a decrease in the mass of the dried fish.

[105] The dried fish was returned to the facility where he covered the cartons with a big sheet of plastic and then fumigated with Nupro Aerosol. He did notice at that stage that there were insects in between the cartons and the dried fish itself. He then unpacked all the fish and had the fish cleaned by hitting two fish against each other to make sure there were no more insects and then repacked the fish into new cartons. He also noticed that there was a weight loss and that the cartons were now an average weight of about 8.01 kilograms to 8.02 kilograms.

[106] The second consignment destined for the DRC was packed in a container. He also had to repack this consignment to make sure that the weight was 9 kilograms because the cartons had been standing in storage since end of March 2012. Only 2,777 cartons fit into the container.

[107] Bureau Veritas sent out an inspector who came out on 7 June 2012 to do the inspection. The inspection took about 2 hours and then they started loading the cartons into the container. The container was sealed by Bureau Veritas and then taken to Walvis Bay the next morning. Mr Roos testified that the inspector counted

the cartons, inspected the cartons, opened some of the cartons to inspect the fish and took some photographs of the cartons packed in the container.

[108] The remaining cartons of about 2,500 (which included the Oshikango consignment) were still at the defendant's premises. The plaintiff refused to collect the cartons. Because he did not have enough storage space he requested Ms Viljoen to write a letter to the plaintiff on 19 September 2012 requesting them to make arrangements to collect the remaining cartons. Mr Roos testified that he had in the meantime moved the cartons to the outside of the factory and employed security personnel to look after the cartons. By the end of January 2013, having received no response from the plaintiff, destroyed the fish by burning it because he did not think it was fit for human consumption anymore as it was not stored in a cool, clean and dry environment.

[109] Mr Roos also confirmed that the fish provided to the plaintiff complied with the requirements set out on the defendant's website which contains some of the representations that the plaintiff relies on for its claim.

[110] On 21 August 2012, Mr Roos received a call from Mr Lakkis Snr informing him that there were 398 cartons missing from the DRC consignment. He subsequently received an email which was forwarded to him by a certain Catlyn Lightfoot of Bureau Veritas. The email was sent to her by Mr Lakkis Snr together with a photograph. The email basically states that when the container was opened at the warehouse in Kinshasa, there was a big gap showing that some of the cartons were missing. Mr Lakkis Snr wanted the photograph taken by Bureau Veritas after the container was packed and just before it was sealed in order to prove that the cartons were in all probability stolen at Metadi.

[111] Mr Roos confirmed that Mr Lakkis Snr called him around 22 August 2012 after the phone call about the missing cartons. Mr Lakkis Snr informed him that the container was opened and that there were worms and rotten fish in the cartons. He testified that he indicated his willingness to go to Kinshasa immediately and that he would also take the Nupro Aerosol spray with him. Mr Lakkis Snr informed him that he will let him know because he has to make all the necessary transport

arrangements. However, Mr Lakkis Snr never came back to him and he accepted the situation.

[112] During cross-examination Mr Roos testified that it was important that the fish be kept in a cool, clean and dry environment. This was one of the conditions which appeared on the pro forma invoice as an additional condition of sale which he could introduce in terms of clause 7 of the agreement between the parties.

[113] He insisted that the visit to Oshikango was merely a courtesy visit because he had also not met Mr Lakkis Snr before. He also testified that there was no mention of anything being wrong with the fish and that they only told him of the fact that they wanted to return the fish to Usakos to be sent to the DRC as well. He denied that he was invited to come and inspect the fish or that the fish was infested with worms and insects. If that were the case, he would have taken the Nupro Aerosol with him to Oshikango.

[114] It was pointed out to Mr Roos that the agreement in clause 6 provides that ownership of the product shall pass from the defendant to the plaintiff upon delivery of the product. Mr Roos testified that that was not the intention of the parties. He clearly indicated on the pro forma invoice that the product will be ready in 6 to 7 days, which means that once the fish is ready it had to be collected because he did not have sufficient storage space. He, however, conceded subsequently that there was nothing in the agreement or on the pro forma invoice indicating that ownership would pass before delivery.

[115] Mr Roos was confronted with his version that he did not have enough storage space despite the fact that he was the sole agent for the plaintiff and was therefore not supposed to be producing any fish for anyone else over the duration of the agreement. He tried to explain that there were discussions about other orders from the plaintiff intended for Zambia or Zimbabwe. This aspect was not very clear.

[116] Mr Roos testified that when he treated the Oshikango consignment with the Nupro Aerosol a small number of insects did come out of the cartons and die.

[117] Mr Roos could not say what colour the insects were nor could he identify the insects. He, however, said that it was not beetles. He did find very few worms inside the cartons. Most of these were also trying to come out and also died. There was hardly anything left after the first treatment.

[118] After he finished spraying, he removed the fish from the cartons and cleaned the fish. Mr Roos was asked whether any insects and worms were pointed out to him in Oshikango and he said that no worms or insects were pointed out to him during his visit in Oshikango. He also insisted that there were also no insects outside the cartons. He was simply concerned about the fact that the consignment of fish was not kept in a clean, cool and dry environment.

[119] It was pointed out to Mr Roos that when Mr Lakkis Snr was testifying, it was put to him that he would testify that when he visited Oshikango he saw beetles and insects crawling around the cartons. Mr Roos responded that he did not see any crawling insects outside the cartons when he visited Oshikango. If that was the case, Mr Lakkis Snr would have been very upset. Mr Roos furthermore testified that if he was told that there were worms and insects, he would have taken the spray with him to treat the consignment at the plaintiff's premises. He confirmed that the spray is not harmful to humans although it is an insecticide. He explained that it is commonly used in warehouses. It was, however, the first time that he used it to clean a food source.

[120] Mr Roos testified that the Oshikango consignment was sent back to Usakos on 2 June 2012. He referred the court to a delivery note that had been discovered by the parties (this delivery note was not admitted as an exhibit).

[121] Mr Roos denied that he told Mr Lakkis Snr that he could fit 30 tons into a container as far as the DRC consignment is concerned. He also stated that the plaintiff was responsible for shipping and the transport and all applicable logistics.

[122] Mr Roos denied that he was told that the plaintiff considered the fish to not be fit for human consumption and that that is the reason why the plaintiff did not collect the Oshikango consignment from him after he cleaned it. He also added that if that

was the reason, then they should have come to Usakos to at least inspect the DRC consignment before it left or called somebody from the Ministry of Health to inspect the fish.

[123] Mr Roos insisted that he found only about 15 to 20 worms and that not every carton had worms in it. About 95 percent of the fish was fine. It was put to Mr Roos that the visit to Oshikango was not just a courtesy visit and that he was in fact invited to inspect the fish. Mr Roos testified that it was a courtesy visit which happened on 4 May 2012. The fish was only sent back to Usakos on 2 June 2012, almost a month after the visit and if the fish was indeed rotten, then it would have been sent the next day already.

### The Law

[124] As correctly conceded by Mr Narib on behalf of the plaintiff, the onus rested throughout on the plaintiff:

[112] In *National Employers General Insurance Co. Ltd v Jagers*, Eksteen AJP stated the following in respect of the onus in civil cases at 440D-G:

“It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff’s allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff’s case any more than they do the



defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.<sup>8</sup> '

[125] Mr Narib furthermore argued with reference to *Smith v Mediva Fisheries (Pty) Ltd and Another*<sup>9</sup> that where there are two conflicting versions, the court must have regard to the undisputed facts, those that appear to be likely to be true, the reliability of a witness (where his or her evidence is in any serious respect inconsistent with undisputed or undisputable facts or where he contradicts himself on important points) to determine which story seems more credible. He furthermore argued that the court must look at the inherent probabilities taking into account common cause facts or facts established by the evidence.

[126] As far as expert evidence is concerned, Mr Narib submitted that the inferences experts seek to draw and their opinions cannot prevail where there is direct evidence of an eye witness<sup>10</sup>. Whilst this is correct, it must be added that -

'It is only where such direct evidence of an eye witness is so improbable that its very credibility is impugned, that an expert's opinion as to what may or may not have occurred can persuade the Court to his view.'<sup>11</sup>

[127] Whilst not taking issue with the approach outlined above, Mr Jones in his submissions dealt with the circumstances in which a party can cancel an agreement based on misrepresentations or breach of an agreement and when the risk of profit and loss passed.

[128] He submitted that in a sale, the residual rule is that the risk of profit and loss passes to the buyer as soon as the sale is *perfecta*. The sale is *perfecta* when there is agreement on the thing to be sold and the price. In this case, Mr Jones argued, the sale was *perfecta* upon delivery of the fish because of the term in the agreement that

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<sup>8</sup> Unreported judgment of the Supreme Court, *Burgers Equipment and Spares Okahandja CC v Aloisius Nepolo t/a Double Power Technical Services* Case No: SA 9/2015 delivered on 17 October 2018 at 40.

<sup>9</sup> (I 429/2012) [2013] NAHCMD 152 (06 June 2013).

<sup>10</sup> *Gear Transport CC v Springbok Touring of Namibia (Pty) Ltd* (I 3961/2014 [2019] NAHCMD 233 (8 July 2019) at para [46].

<sup>11</sup> *Motor Vehicle Assurance Fund v Kenny* 1984 (4) SA 432 (E) p 436-437A referred to in the *Gear Transport* matter.

ownership would pass upon delivery of the products to the plaintiff. Mr Jones argued that the risk of loss in respect of the Oshikango consignment passed on 16 April 2012 and in respect of the DRC consignment it passed on 7 June 2012 when the fish was loaded in the container.

[129] Mr Jones submitted that the risk refers to:

‘...every disadvantage which overtakes a thing sold, such as death; running away and wounding in the case of ... an animal soul; an opening of the ground in the case of a field; conflagrations and collapse in the case of a house; shipwreck in the case of a ship; mustiness, souring or leakage in the case of wine; and finally spoiling, going bad, perishing or purloining in the case of all things.<sup>12</sup> (My emphasis)

[130] Mr Jones furthermore submitted that in order to succeed with the claim based on misrepresentation the plaintiff must prove that the representation was made, that it was a representation as to fact (a promise, prediction, opinion or estimate or exercise of discretion is not a representation as to the truth or accuracy of its content but can be construed as a representation that the person making the representation is of a particular mind), that the factual representation was not true (and where it is a promise prediction etc., that it was inaccurate or erroneous and also that it did not represent the *bona fide* view of the person who made it), the representation was material and that it was intended to induce the person to whom it was made to enter into the agreement.<sup>13</sup>

#### Applying the law to the fact

[131] It is common cause that the defendant made the representations set out in paragraph 4 of this judgment. They were made on the defendant’s website and although not made to specifically induce the plaintiff to enter into the particular agreement, they must have been made with the intention to induce those who read them, to buy the defendant’s products.

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<sup>12</sup> Kerr’s, *Law of Sale and Lease*, 4<sup>th</sup> ed; Graham Glover p305, par 12.1 referring to Voet’s explanation of *periculum*.

<sup>13</sup> *Mbekele v Standard Bank Namibia Ltd (Vehicle & Asset Finance)* 2011 (2) NR 411 (HC) at 420E-G.

[132] There is no reason to reject Mr Lakkis evidence that the plaintiff was induced into entering into the agreement on the basis of these representations, especially after the visit that Mr Lakkis Jnr had at the defendant's facility where Mr Roos explained the entire process to him.

[133] In the context of the agreement, these representations were material as they concerned very important aspects of the product on offer by the plaintiff. Neither counsel considered whether these were representations as to fact or rather a promise or prediction in which case the approach would be slightly different. In my view, the representations do contain some elements of fact and some elements of a promise or prediction.

[134] As a general proposition, I can accept that dried salted fish has a long lifespan on the evidence of Mr Davis. Ms Morland also confirmed that salting or curing fish is an old age preservation method and therefore I can also accept that if done properly, the salted fish could be virtually imperishable depending on how it is stored etc. This was also confirmed by Mr Davis. Therefore, there is no basis for me to find that the representations were untrue or that the defendant was not *bona fide* (in so far as they may constitute a promise or prediction) when it made these representations.

[135] The plaintiff's case is that the representations were untrue as the fish perished because it had been infested with insects and worms, which it said rendered the fish unfit for human consumption. It thus had to prove that there was an infestation and that it either happened whilst the fish was in the defendant's possession or as a result of defendant's failure to produce the dried salted fish properly.

[136] Mr Lakkis expressed the view that the fish was not dried properly. Mr Narib also pressed this point in argument. It was argued that the only reason why there were insects in the fish is because the fish was not dried properly. Plaintiff relied on the evidence of Ms Morland in this regard.

[137] I must accept, based on the evidence of Ms Morland, an expert in entomology, that the infestation, if there was one, could have happened at defendant's premises, whilst being transported, at defendant's premises or the

premises where the fish was kept in Metadi or Kinshasa. I must also accept that, if an insect was present it would lay eggs on the fish as long as it considered the fish as a source of food.

[138] The insects would, however, only survive, if the humidity of the fish was 30 percent or up and if the salt content was 39.5 percent. As she was unable to identify the insect and was unable to say which type of beetle would survive in salt content as high as 60 percent, I deem that evidence as unhelpful in this case but will accept that both insects will be able to survive where the salt content is not more than 39.5 percent.

[139] The Oshikango consignment was never tested for its salt content or humidity levels. The contract required the fish to be packed with 36 percent humidity. At 36 percent humidity, both insects would survive but the humidity levels would comply with the terms of the agreement and thus, there could not be a breach of the terms of the agreement. Mr Roos initially testified that the fish was packed at 38 percent humidity. He subsequently corrected himself and testified that by the time the cartons are closed the humidity would have dropped to about 30 percent. Both experts confirmed that the fish would continue to lose moisture even after it has been packed. As to the exact humidity at the time the fish was packed, there is no evidence. There is also no evidence contrary to Mr Roos' evidence.

[140] I will also accept Ms Morland's evidence as to the life cycle of the two insects.

[141] The relevant timeline is as follows based on the admitted or undisputed facts, evidence and documents submitted and relied on by the parties:

	<u>Oshikango Consignment</u>	<u>DRC Consignment</u>
Production	26 March	4 April <sup>14</sup>
Inspection at Defendant's		

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<sup>14</sup> This is an assumption as neither party gave a date. Mr Roos indicated that it was completed shortly after the first consignment and that by the time the first consignment was collected it was also ready. I assumed, based on Mr Roos evidence that it takes 7 days to get a consignment ready.

Premises		7 June
Deliver	16 April	7 June
Arrival at destination	16 April	16 July (in Metadi)
Inspection at destination	30 April <sup>15</sup>	22 August (Kinshasa)
		7 September-Lakkis Jnr
Return to Usakos	2 June <sup>16</sup>	

[142] I deal first with the Oshikango consignment. Mr Roos testified that there were some worms and insects in the cartons when they were returned to him on 2 June 2012. He testified that the first time he was informed of worms and insects in the fish is after he had returned to Usakos from his visit in Oshikango. When he was in Oshikango, there was no mention of insects or worms and the cartons that were opened whilst he was there had no insects and worms.

[143] Mr Roos also denied seeing insects and bugs around the cartons when he was in Oshikango, despite it being put to Mr Lakkis Snr repeatedly that he would come and testify that he saw insects and bugs around the cartons when he was in Oshikango. Mr Roos was present in court when Mr Jones put this version to Mr Lakkis Snr. If it was done in error, one would have expected Mr Roos to correct Mr Jones. Mr Narib confronted Mr Roos with this aspect under cross-examination but did not take it further when Mr Roos insisted that he did not see insects and bugs around the outside of the fish cartons.

[144] Mr Lakkis Snr testified that they saw the insects and worms inside before they saw them outside.

[145] Ms Morland testified that insects would have been attracted to the cartons if they were in the vicinity.

<sup>15</sup> Mr Lakkis Snr's evidence in this regard was not clear. He initially indicated that the cartons were opened on arrival. He then said that when they showed the prospective Angolan customer the fish, they opened the cartons and saw the worms and insects. Mr Roos testified that he was called a couple of weeks after delivery to visit Oshikango. I thus set the date at 30 April.

<sup>16</sup> Initially it seemed as if the parties were in agreement that the Oshikango consignment was returned to Usakos around 11 May 2012. Mr Roos then pointed to a delivery note with the date 2 June 2012. This delivery note was discovered but not produced in evidence but it was pointed out to everyone in court and no one took issue with it. I thus accept that the Oshikango consignment was returned to Usakos on 2 June 2012.

[146] I am unable to determine on any of the objective facts what the true position was. It is likely that there were insects outside the cartons. Whether the insects were inside or outside the cartons is not the deciding factor. The issue is whether the fish were infested with insects.

[147] There is a dispute as to whether Mr Lakkis Snr showed Mr Roos the insects inside the cartons when Mr Roos visited the plaintiff's premises on 30 May 2012.

[148] Ms Morland testified that the fact that there are worms and insects does not automatically mean that there is an infestation or that the fish is unfit for human consumption. She testified that one would have to determine whether the insects (or bacteria introduced by such insects) were feeding on the fish to find that there is an infestation and that the fish was therefore unfit for human consumption. She did not have the opportunity to do so.

[149] It would also appear that neither the plaintiff, nor the defendant considered the fish unfit for human consumption on account of the presence of insects. Mr Lakkis Snr and Mr Roos both testified that the consignment was returned so that the fish could be cleaned. If there was a significant infestation, causing the fish to smell bad or appear rotten, it is highly unlikely that Mr Lakkis Snr would have even arranged for the fish to be cleaned.

[150] That there may have been some bugs in the cartons is also not unlikely. Mr Davis, an expert fish inspector, testified that bugs are often attracted to the cartons in which these products are packed as they feed on the glue in the cartons. I thus accept that there may have been some insects and worms inside the cartons. I am, however, unable to determine, on the evidence that there was an insect infestation which rendered the entire consignment unfit for human consumption.

[151] If there was a serious infestation as implied by Mr Lakkis Snr, I find it strange that he did not take any photographs, and if he did, that these were not produced in evidence. In fact, Ms Morland testified that she asked Mr Lakkis Snr about photographs of the fish with the insects on it in the presence of his legal

representative and he could not provide an answer. When he testified, he said that he had given photos to his legal representative and believed that they were provided to the expert. This does not explain why he did not mention these photographs when he had the meeting with Ms Morland during February 2018.

[152] I also find it strange that Mr Lakkis Snr only returned the consignment of fish on 2 June 2012, 7 weeks (almost 2 months) after they received the consignment and more than a month after they had, according to him, informed the defendant that the fish was infested with insects and worms. If the infestation was discovered on or shortly after 16 April 2012, a reasonable person in my mind, who deemed the consignment of fish inedible or unfit for human consumption, would have notified the defendant immediately (and probably in writing), most probably taken a picture and simply sent the consignment back immediately and asked for a new consignment or a refund of the amount paid for the fish.

[153] There is a dispute as to what was supposed to happen to the fish after it was cleaned. Mr Roos testified that this consignment was also supposed to be sent to the DRC because the Angolan purchaser cancelled. Mr Lakkis Snr testified that the Angolan purchaser did refuse to take the consignment because of the worms and insects. If this were indeed so, why would Mr Lakkis Snr ask the plaintiff to take the fish back for cleaning? If the defendant was indeed informed of the insects before he went to Oshikango, he could have just taken the Nupro Aerosol with him and treated the fish there and thereby do away with the need for the fish to be taken to Usakos and then back again to Oshikango. It seems more probable to me that the intention was for the fish to be sent to DRC.

[154] It is only when there was mention of weight losses that the defendant would not assume liability for the weight loss that Mr Lakkis Snr formed the opinion that the fish was not fit for human consumption because the weight loss meant the fish was not dried properly in the first place.

[155] As already indicated above, weight loss as a result of continued dehydration was to be expected. Mr Lakkis Snr never had the moisture levels tested and

therefore could not with certainty say that the fish was not dried properly. Nor can I find that on the facts.

[156] The fact that there were insects in the cartons of fish when returned to Usakos does not mean they were definitely introduced at the defendant's premises. If they were, the transport company would have seen the insects and would in all probability have mentioned it when the fish was collected on 16 April 2012. The delivery note mentions nothing of insects or worms. By then, the insects would have been in the third week of their life cycle. According to Ms Morland, the driver should have seen insects or worms. If he had, it is highly improbable that he would not have made a note of it on the delivery note.

[157] In light of the fact that Mr Roos saw insects when the fish was returned on 2 June 2012, it is probable, considering the life cycle of insects, that they were introduced to the fish in Oshikango because by then the fish would have been in storage in Oshikango for 7 weeks and the insects would have completed their life cycle.

[158] The issue for determination is, however, whether the fish perished or was unfit for human consumption. To make that finding, there needed to be evidence that the insects or bacteria fed on the fish. There was no such evidence, direct or indirect. The plaintiff bears the onus. I am of the view that it failed to discharge this onus in respect of the Oshikango consignment for the reasons mentioned above.

[159] Mr Narib argued that it is common sense that the Oshikango consignment was no longer fit for human consumption after it was treated with the Nupro Aerosol which is an insecticide and must be harmful to humans. He made reference to an internet search result. This was not the case made out by the plaintiff in its amended particulars of claim. It was also not what Mr Lakkis Snr said in evidence in the plaintiff's case. Although Mr Narib brought this up in cross-examination, Mr Roos testified that the product is not harmful to humans and that it is used commonly in warehouses. Mr Narib did not press the point and it would be unfair to decide on this issue because the defendant did not know that this is the case it was expected to



meet. I can also not rely on an internet search conducted by Mr Narib which was only referred to in his written submissions in making a finding in respect of this issue.

[160] The DRC consignment was inspected by Bureau Veritas at the defendant's premises on 7 June 2012. According to Mr Roos, the inspector opened cartons and looked at the fish. Ms Morland testified that if the infestation happened at the plaintiff's premises, the cartons should have been oozing with insects and worms at this stage. The certificate issued by Bureau Veritas makes no mention of insects and worms. Nor does the health certificate, issued thereafter in Walvisbay. Although the persons who issued the certificates did not testify to confirm the correctness of the content on the certificate, the plaintiff did not dispute that it was issued by the relevant authorities. One could reasonably expect that if there were insects and worms in the cartons, they would not have been allowed to be exported.

[161] The DRC consignment was only inspected in Kinshasa on 22 August 2012. It would appear that it is the same time when the plaintiff's customer complained of missing cartons and, on plaintiff's version, insects and worms. This is, however, hearsay evidence. The letter from the client is also not of much assistance as it does not even indicate who signed the letter.

[162] As far as the missing cartons are concerned, a photograph was sent to the plaintiff to show that there were cartons missing when the container was opened. This photograph was handed in as evidence as an attachment to an email which had been forwarded to the plaintiff by Ms Lightfoot of Bureau Veritas. Significantly, Mr Lakkis Snr had actually written an email to Bureau Veritas to ask for the photographs taken when the container was packed. There was, however, no photograph depicting fish infested with insects and worms. All that was provided is a letter purporting to be from plaintiff's customer in Kinshasa, undated and with no indication as to the signatory.

[163] Mr Lakkis Snr and Mr Lakkis Jnr both claimed that photographs were given to their legal representative. But these photographs were not provided to the expert, Ms Morland nor were they produced in evidence even after this was taken issue with. If the photographs were indeed provided to the plaintiff's previous legal representative,

they would have been discovered and would definitely have been provided to the plaintiff's expert when she asked for photographs.

[164] The matter was adjourned whilst Mr Lakkis Snr was still under cross-examination. At that time, the DRC test report was provided to the defendant's legal representative, presumably with the intention to use that as proof of the fact that the fish was declared unfit for human consumption. The issue as to whether the fish in DRC was infested with worms and insects was then accepted by both parties to be in dispute despite the unfortunate wording of the pre-trial order. This was also subsequently set out in the revised pre-trial order as being in dispute.

[165] The plaintiff thus knew since July 2017 that it had to prove that the DRC consignment was infested with insects and worms. The easiest way of proving that would have been by introducing the photographs into evidence and they would certainly have left no stone unturned to get the photographs from plaintiff's erstwhile legal representative.

[166] This did not happen. Instead, the plaintiff merely relied on the oral evidence of Mr Lakkis Jnr. By the time Mr Lakkis Jnr saw the fish, it was already 3 months after delivery to the plaintiff. In those 3 months, the fish had travelled from Usakos to Walvisbay, on a vessel to Metadi and thereafter to Kinshasa. The evidence shows that the container must have been opened somewhere along the journey because there were cartons missing. The infestation could have happened anywhere on that journey.

[167] The DRC test report indicates a moisture content of 24 percent. If the results can be accepted as correct, the moisture content was not high. The plaintiff did not present any other evidence that the DRC consignment of fish arrived in DRC with a moisture content which was too high.

[168] Furthermore, both experts were very clear that, if the test results on the DRC test report are correct, and the fish indeed had a humidity of 24 percent, no insect would have survived on the fish because of the low humidity. Mr Davis also testified that if there were insects on the fish, the author of the report would have mentioned

it. I agree and I find it strange that there was no mention of insects or worms if Mr Lakkis Jnr saw them after the fish was tested. The report does not mention insects or worms.

[169] Mr Davis also testified that, considering the test results, there is no apparent reason why the fish was found to be unfit for human consumption. He testified that the odour of the fish should have been found normal considering the low TVBN levels.

[170] Based on the evidence of the two experts, the fact that there is no mention of insects and worms on the DRC test report and the unexplained absence of photographic evidence of fish infested with insects, I am constrained to reject Mr Lakkis Jnr's evidence as to the presence of insects on the DRC consignment when he saw the consignment in Kinshasa.

[171] Even if the fish was packed with 38 percent or 36 percent humidity, by the time that it was inspected, it would have lost some of this humidity. There was no clarity on the evidence, by how much the fish was standing at defendant's premises from around 4 April 2012 and was only inspected 2 months later. If the insects were introduced at the defendant's premises, the insects would certainly have been present upon inspection by Bureau Veritas. This was confirmed by Ms Morland. In fact, she agreed that the fish would have been oozing with insects by the time it was inspected.

[172] Therefore, even if I am wrong in rejecting Mr Lakkis Jnr's evidence, the plaintiff has not established that the insects he claims to have seen were introduced at defendant's premises. The chances are, that if present, they were introduced after delivery. At that point, ownership and the risk of loss had passed to the plaintiff and therefore, it cannot hold defendant liable if the insects were introduced to the fish after delivery.

[173] For these reasons, I find that the plaintiff has failed to prove that the defendant made misrepresentations or breached the terms of the agreement in respect of the DRC consignment. The enrichment claim was linked to a breach of the

terms of the agreement and can therefore also not succeed but it also fails based on the following.

[174] As for the cartons that did not fit into the truck (to Oshikango) and the container (to DRC), Mr Lakkis Jnr admitted that the cartons were tendered but that they refused to collect them. There is no evidence before the court that the remaining cartons had any insects in them.

[175] I find the approach adopted by Mr Lakkis Snr strange and inexplicable. He was so adamant that the Oshikango consignment was infested with insects and worms. At some point he said the fish was rotten. Yet he sent it back to defendant to clean. There was not even an attempt to try and get the fish inspected by a health inspector before sending it back to the defendant.

[176] Mr Lakkis Snr did not even make sure that there is a representative of the plaintiff to inspect the DRC consignment before it leaves to make sure it does not have the same problem. This conduct is inconsistent with someone who claims to have been delivered a whole consignment of perished fish. Even when they were informed that the DRC consignment is infested with insects and worms, they did not confront the defendant with photographs. Not even when, Mr Roos, according to them, failed to take them up on their offer to go to Kinshasa. In this regard, the plaintiff presented no evidence that arrangements were indeed made for Mr Roos to travel to Kinshasa although it undertook to do so. Mr Lakkis Jnr claimed that emails were sent but failed to produce them.

[177] For these further reasons, I am of the view that the plaintiff failed to prove that there was a breach of contract or that the defendant made misrepresentations.

[178] In the result the following orders are made:

1. The plaintiff's claims are dismissed with costs.
2. The plaintiff is ordered to pay the costs of the defendant, such costs to include the costs of one instructing and one instructed counsel.

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N Bassingthwaite  
Acting Judge

APPEARANCES:

PLAINTIFF:

G NARIB

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DEFENDANT:

J P RAVENSCROFT-JONES

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