

CREST POULTRY GROUP (PRIVATE) LIMITED  
versus  
HAMISH CAMERON (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
CHIGUMBA J  
Harare, 4, 10, 27 June 2013, 25 September 2013

## **CIVIL TRIAL**

*Ms S. Njerere, with Ms E. Drury, for the Plaintiff*  
*J. Samukange, with T. Hungwe, for the Defendant*

CHIGUMBA J: Plaintiff issued summons against the Defendant, on 30 June 2011, claiming:

1. Payment in the sum of US\$178 294,00 (one hundred and seventy eight thousand two hundred and ninety four United States Dollars), being damages suffered by Plaintiff as an alleged consequence of defective goods sold to Plaintiff, by Defendant, in or about December 2010.
2. Interest at the prescribed rate, calculated from 15 April 2011, being the date of demand, to the date of payment in full.
3. Costs of suit.

In its declaration, Plaintiff averred that, Defendant knew, at all material times, that it was in the business of breeding and selling parent stock, hatching eggs, day old chicks, table eggs and chickens, just as Plaintiff knew that Defendant carried on the business of manufacture and sale of veterinary medicine and drugs. Plaintiff purchased a drug from the Defendant for

use on its poultry, named Tiamulin 12.5 % (Poultry), (hereinafter referred to as the *res vendita*).

Plaintiff averred that it administered the drug in accordance with the instructions given by the Defendant, and that the *res vendita* was defective in that:

- (a) It had high levels of toxicity
- (b) It had not been certified by, and or registered with the appropriate authorities to be safe for use on poultry.
- (c) It was harmful to poultry.

Plaintiff averred further, that, after it administered the *res vendita* to its poultry, its chickens died, cock fertility was reduced, egg production diminished considerably, as a consequence of the defects in the *res vendita*. Plaintiff claimed that it suffered loss as a consequence of the breach of contract by the Defendants in the sum of US\$178 294,00, or alternatively, as a consequence of Defendant's public representations that it had attributes or skill and knowledge in relation to the drug known as Tiamulin 12.5 % (Poultry).

Defendant denied being indebted to the Plaintiff in the amount claimed, or any sum at all, and postulated the following possibilities: that:

- (a) Plaintiff's employees did not properly administer the drug in terms of laid down instructions.
- (b) The chickens could already have been sick before the treatment.
- (c) The dosage given to the chickens was very small in order to cut corners and save costs, resulting in a state known as coccidiosis (state of the chicken at the time of the administration of the drug, caused by failure to administer the drug properly)
- (d) Two drugs could have been administered at the same time resulting in increased mortality of the chickens.
- (e) Coccidiosis state could have been in the stock feed resulting in increased mortality irrespective of administering the drug.

Lastly, Defendant contended that, because no independent tests were carried out to establish whether there were defects in the *res vendita*, and no independent post mortems were carried out on the chickens, the loss suffered by the Plaintiff cannot be attributable to it. On 12 July

2012, at the Pre-Trial Conference, the matter was referred to trial on the following issues, by consent:

1. Whether the Plaintiff administered the drug in accordance with the Defendant's instructions.
2. Whether the drug was defective.
3. Whether the drug was the cause of increased mortality, decreased cock fertility, decreased egg production, and a reduction in production.
4. The quantum of Plaintiff's loss.

Plaintiff sought an admission that Tiamulin 12, 5% (Poultry) was not registered with the Medicines Control Authority of Zimbabwe. No such admission was made at that stage.

#### The Evidence

##### Plaintiff's Case

At the hearing of the matter, Plaintiff called five witnesses.

Emildah Dzigagwe told the court that she is employed as the Operations Manager at Unit Hubbard located in Beatrice and owned by the Plaintiff. She said that she has a bachelor of science in agriculture and that she has worked for the Plaintiff since October 2009. She stated that her duties at Hubbard include generally supervising and overseeing operations. The witness told the court the Plaintiff is in the business of producing broiler day old chicks from grandparent stock which is received from Plaintiff's Europe branch. Plaintiff also produces eggs for sale, and hatching eggs. She said Plaintiff's sister company Vetco bought Tiamulin 12.5% (Poultry) (hereinafter referred to as Tiamulin) from the Defendant, for purposes of preventing microplasma. The Plaintiffs veterinary department had recommended the use of Tiamulin. Ms Dzigagwe told the court that she collected the Tiamulin on the 1<sup>st</sup> of December 2010, and received instructions to administer it for three days, commencing on 2 December 2010.

She said she administered the drug from 2 to 4 December 2010 to the Grandparent flocks, namely Import 12, B, and 14, and to the Parent Stock;PA,PB,PE,PG,PF. Some of the flock was in laying stage, some in rearing stage (growing). The witness explained that each of these sections has a Site Manager and an overseer and a foreman, who, together, are responsible for the day to day activities on the ground, in the section.

The witness testified that she collected from the Hubbard storeroom, and distributed the Tiamulin to each section, every day, for the three days that it was administered. Counsel for the Plaintiff applied for the admission into evidence as exhibit one, of an invoice book where information pertaining to the distribution and collection of the Tiamulin from the storeroom to the sections was contained. Counsel for the Defendant objected to the production of that exhibit, on the basis that the witness was not the author of the exhibit. The court overruled the objection, on the basis that the defense could always cross examine the witness on the contents of the book to test her knowledge of its contents, and admitted the invoice book into evidence.

Ms Dzigagwe testified that information such as the date of dispatch, the section where the Tiamulin was sent to, the dosage instructions, and the quantity delivered to each section was contained in books similar to exhibit one, for each section. She referred to page 34 of exhibit one, which contained instructions to those responsible for houses 1 to 6 of section PA. The page showed that 9x1 kilograms of Tiamulin were dispatched on 2 December 2010. The dosage instructions were one gramme per litre. The Tiamulin was dispatched by a named person, and collected by Dzigagwe and Connick, who countersigned on page 34 together with the security guard at the gate.

Information contained in exhibit one, which Dzigagwe patiently took us through, showed similar dosages of Tiamulin being dispatched and received in all the sections referred to above, for three days commencing on 2 December 2010, though to 4 December 2010. Exhibit one contained information pertaining to the administration of other drugs and electrolytes (vitamins), to the birds in all that section. It also contained information on the vaccines and disinfectants such as Coryza and Formalin administered to the birds in that section, and the dates of distribution. Dzigagwe tendered a medicines book into evidence, as exhibit 2, which contained information about various other vaccines distributed to the different sections.

The information specified the type of medication dispatched, the dosage, the period of administration. Counsel for the Defendant's objection to the admission of the medicines book into evidence on the basis that such admission was contrary to the best evidence rule was overruled by the court, which agreed with counsel for the Plaintiff that business records were admissible into evidence in terms of the Civil Evidence Act, which stipulates that such books did

not have to be produced by their actual author, as long as they were compiled in the course of business. They could be produced by any person in authority in that business, who had a general knowledge of their content, acquired in a supervisory capacity.

The witness told the court that no other drugs were administered to the birds during the period when Tiamulin was being administered, except vitamins. She said that the Tiamulin was administered through mixing it with the drinking water in each section, in accordance with the dosage prescribed by Dr. Hwingwiri, the Plaintiff's Group veterinarian, of one gramme per litre. The dosage instructions were written on an instruction leaflet which was inside the packet of Tiamulin, which was introduced into evidence as exhibit three. The leaflet read as follows: "Tiamulin 12.5% Poultry, Dosage and Administration, Prevention: 1g/1L water. Treat 3-4 days, Treatment: 2g/1L water. Treat 4-5 days

Ms Dzigagwe explained that there was a weighing scale in each section for the weighing of feed and that generally, whenever anything was delivered to each section it would be weighed before it was used. Same with the Tiamulin. First it was weighed to confirm if the sachet was indeed one kilogramme. There are 500liter water tanks in each section. A dosage of 500 grammes of Tiamulin was mixed with each 500 litre tank of water.

Ms Dzigagwe told the court that they administered the prevention dosage, not the treatment dosage, on instruction by the Group Veterinarian. She testified that none of the birds were sick prior to the administration of Tiamulin, and that there were no coccidiostats in the bird feed, at the time that the Tiamulin was administered, because generally broiler and breeder feeds contain no coccidiostats. Lastly, the witness testified that the birds were not given the full dose of Tiamulin because on the second day of its administration, high mortality rates began to be seen. She said that each section recorded its mortalities on a daily basis, from house to house. The mortality books were admitted into evidence as exhibits four and five after counsel for the defendant's objection to their admission was overruled. The witness took the court through both mortality books, which contained evidence of the number of birds that died per day, in two sections, during the period in question. The court also heard evidence of the mortality rate of the birds in those two sections before and after the period under consideration.

The witness testified that, after Tiamulin was administered the birds displayed symptoms such as refusing to take feed, failure to walk to feed and water, weakness, sitting on hocks, splayed feet. She said that the Tiamulin had different effects on the different sections, those sections with birds laying eggs and in peak production, that took more water, experienced higher mortality rates. She introduced into evidence Flock History Files, as exhibits 6, 7, 8, 9, 10, 11, 12, 13 and 14. These exhibits contained dates, age and number remaining in those sections that had experienced high mortality rates after Tiamulin was administered. The witness testified that the evidence contained in these exhibits pointed to cumulative high mortality during the period in question, in regards to the sections in question Dzigagwe produced graphs to demonstrate the general egg production rate before, during and after Tiamulin was administered to the sections under consideration. The eggs produced per week dropped significantly in number during the period under consideration, 2-4 December 2010.

Poultry History Files were produced as exhibits 14, 16, 17, 18, 19. They showed reduction in production of eggs during the period when Tiamulin was administered. According to Dzigagwe, the information and the numbers recorded in the exhibits demonstrated that, production dropped by 2%. Exhibit 20 is a schedule of the mortality rates for all the affected sites, compiled by Dzigagwe and the team under her supervision, based on the information contained in the Flock History Files, and the Mortality books. She testified that the schedule showed high levels of mortality only in the sections where Tiamulin was administered, during the period of administration and shortly thereafter.

Under cross examination, Dzigagwe performed generally well. Her demeanor was confident, and relaxed. She was articulate, and inspired confidence that she was familiar with the subject matter under discussion, that she knew all the procedures used by her subordinates who ran the sections on a day to day basis. The court is satisfied that this witness told the court the truth, to the best of her ability. She admitted, in a somewhat distressed manner, that it was not feasible to claim that she was physically present, in all the sections and houses, at all times, every time Tiamulin was administered. She also admitted to not being physically present each time the entries in the various books produced in evidence were made, by her subordinates. In my view, these admissions clearly caused her a measure of professional embarrassment, in light of her

claims during her evidence in chief, but demonstrated her willingness to tell the truth whatever the consequences. I am satisfied, that she supervised the sections and houses in question to the best of her ability.

The second witness to testify on behalf of the Plaintiff was Law Hungwe. Shee told the court that she has a bachelor of science in Livestock and Wildlife management, and that has been employed by the Plaintiff as an assistant manager, since August 2008. In December 2010, at the time that the cause of action arose, she was an assistant manager responsible for monitoring bird nutrition, bird health, and other day to day activities on Plaintiff's breeder farm, in the Grandparents' site, managing the import sections. She reported directly to the operations manager, Plaintiff's 1<sup>st</sup> witness Dzigagwe. She testified that she was not at work during 2-5 December 2010 when Tiamulin was administered to certain sections on the breeder farm.

She said that she returned to the breeder farm on the 6<sup>th</sup> of December 2010 and received reports from her overseer in the Import sections that high bird mortality rates had been experienced while she was away. A meeting was held with Dzigagwe, and Dr. Hwingwiri, the Group veterinarian, and a site visit of Import 4 conducted. The witness told the court that the symptoms of the birds in import 4, on 6 December 2010, included, sitting on hocks, weakness, inability to walk to feed and water. She said Dr. Hwingwiri instructed that strips of khaki paper be laid on the floor where the feed would be sprinkled to allow birds unable to walk access to feed. The drinkers were also lowered to enable the affected birds to drink water. Hungwe told the court that these symptoms persisted for a three week period.

The witness confirmed that she kept the records for the Import section such as the mortality books, egg production books, and feed received and distributed books, drugs received and administered books, and that she was responsible for collating and recording the information in some of the books admitted into evidence. She said the actual recording of the information in those books is done by clerks under her direct supervision. She checks the books daily, or at worst once a week. She tendered the mortality book for the Import section into evidence as exhibit 21. Counsel for the defendant's objection to the admission of that book into evidence was overruled on the basis that section 14 of the Civil Evidence Act [cap 8:01] allowed business records to be referred to or produced by a person in a position of authority in that business,

provided the document forms part of the records of that business. The court also found that the exhibits produced on behalf of the Plaintiff had been discovered in terms of the rules of this court and were admissible. Counsel for the Defendant was at liberty to call for the inspection of all the books, after discovery had been affected and prior to the commencement of trial. If he did not do so he is precluded from crying foul at this stage.

Hungwe testified that those flocks which were in peak production were most affected in the import section. Those are the birds which will have started laying eggs, which means they take in more water, at 24 weeks. She told the court that the eggs produced during the period in question, 2-23 December 2010, did not hatch which meant that they had lost their fertility. She relied on her Import section Feed record books, Production books, Flock History files for these conclusions. Lastly she testified that the feed administered to her flock was the correct feed. She knows this because the feed comes with tags inside which identify it. Her flock was on broiler breeder feed, which she stated, did not contain coccidiostats. My assessment of this witness is that she was telling the truth. She was articulate and confident, but dispassionate, just a professional giving her opinion and version of events with no vested interest in the outcome of the matter. She remained steadfast, clear and concise under cross examination, and her evidence in chief was not eroded in any significant way.

Plaintiff's third witness, Nomquele Dube, is employed as an assistant breeder manager. She holds a Bachelor of Science degree in Livestock and Wildlife Management. She told the court that in December 2010, she worked for Plaintiff as a graduate trainee. Her duties included monitoring the activities in the Parent section, houses D, G, and E. She was present when Tiamulin was administered to the Parent section. She testified that the Tiamulin was administered by the foreman, with the assistance of the overseer. She said that on 2 December 2010, in the morning, she was in Parent G and present when the Tiamulin was weighed using a 5 kilogram hanging scale. 500 grammes of Tiamulin was weighed and put into a 500 litre yellow drinker of water and mixed thoroughly. Her evidence was that she did not go to the parents section on 3 and 4 December, she returned there on 6 December 2010. She witnessed high mortalities in Parent section D, which she reported to the Parent Breeder Manager. The symptoms she saw included splayed legs, weakness, not feeding and not taking in water. The

witness was present when Dr Hwingwiri carried out postmortems on some of the dead birds from her section. Initially the doctor instructed her to quarantine the birds in Parent section D, and Herself, because he suspected that the birds might have been infected by Newcastle disease, which is highly contagious. She was instructed to spray the birds' drinkers with Varacil as a precaution.

The witness relied on the flock history files, production books, mortality books to bolster her evidence. According to those books, the birds in her parent section were not sick when she last saw them on 2 December 2010, during the administration of the first dose of Tiamulin. On 6 December 2010, when she returned, she observed the symptoms stated above, which appeared similar to the symptoms of Newcastle disease. Dube told the court that she checked the section books once a week. She said the books tendered into evidence show that there was a drop in the production of eggs in the parent section, a drop in the number of eggs that hatched. She said these symptoms lasted for a period of three weeks. She testified that the birds in her section are fed on broiler breeder feed, which does not contain coccidiostats. Under cross examination, the witness told the court that she was in charge of eighteen houses in Parents sections, D and G. She said that she normally did two site visits per day once early in the morning then after lunch. She said she witnessed the mixing of Tiamulin with water in the tanks of all eighteen houses on 2 December 2010 when it was first administered. She admitted that she was not present for the entire period when Tiamulin was administered, and that she was not present when the instructions were given to the foreman on how to administer it. She told the court that she did not know if all of the twelve people in each section were present when the foreman was given instructions on how to administer the Tiamulin. Dube told the court that she had been present in October 2010 when Tiamulin was administered and that to her knowledge, the mortality rates did not increase dramatically as they had in December 2010. The court found the witness credible. Her evidence of what took place on the ground on the first day Tiamulin was administered in the parents section was not shaken or discredited during cross examination.

Dr Anxious Takaindisa Hwingwiri was the fourth person to give evidence on behalf of the Plaintiff, in his capacity as its group veterinarian since 1 June 2009, to date. He told the court that he holds a Bachelor of Veterinary Science degree, and that he used to work at the

government referral laboratory as the national veterinarian pathologist, before joining Plaintiff. That position entailed disease diagnostics through postmortems. His duties with the Plaintiff include the design of health monitoring programmes, and their implementation, checking and ensuring that the birds are in good health, doing routine farm visits, performing post mortems.

The witness told the court that the Tiamulin supplied by the Defendant caused high mortality rates in the birds at Hubbard, which is a wholly owned subsidiary of the Plaintiff. He stated that Tiamulin is a drug used in the treatment and prevention of a disease that occurs in poultry by affecting the respiratory system, known as microplasmosis. He said that Plaintiff decided to use Tiamulin on its flock in August 2010, to prevent microplasmosis. It was administered in August, October, and December 2010. In August, the Tiamulin was imported from Innovet Services in South Africa. In October, the Tiamulin was sourced from the Defendant, as well as in December. When Tiamulin was administered to the birds in August, no alarming side effects were detected. In August, mild symptoms were detected from the first batch of the Tiamulin supplied by the Defendant. The symptoms included mild leg paralysis, sitting with legs splayed outwards and backwards, and mild mortalities.

Dr. Hwingwiri told the court that the Tiamulin initially sourced from South Africa was a feed additive, and that defendant introduced Plaintiff to the water additive version of the drug. Defendant was the only local supplier of Tiamulin. He testified that in both August and October, Tiamulin was administered for five days, but he reduced the dosage to four days in December to counter the mild symptoms experienced in October. He told the court that he instructed the Tiamulin to be administered 500 grammes per litre for four days to all members of staff in a memorandum dated 25 October 2010, which he produced as evidence. He told the court that all vaccinations were withheld during the period when Tiamulin was administered to the bird flocks. Vitamins continued to be given, because they are not classified as vaccines/medications.

The witness testified that on 5 December 2010, he was called by Dzigagwe, the 1<sup>st</sup> witness, who advised him that the birds were dying and failing to drink water. He went to Hubbard and saw birds sitting on their hocks, legs paralyzed and splayed outwards and backwards, increased mortality. He wrote a Farm Visit report on 10 December 2012, in which he included the results of the post mortems that he carried out on the site. The post mortems showed

that the birds had necrotic spots on their livers, small round spots that indicate liver damage. Liver damage is caused by chemical toxicity. The witness also found evidence of mucoid enteritis and mild hemorrhage (the inside of the bird's intestines was irritated and bleeding, hence increased mucous production inside the intestines). Basically there was evidence that the bird's intestines were irritated and bleeding, and their whole digestive system was affected. The birds' ceacal tonsils, part of their digestive system, which fight infection, were enlarged. Some of the birds had egg bindings and some did not. This means that some of the birds had failed to lay eggs, and that the eggs had remained stuck inside.

Dr. Hwingwiri told the court that he eliminated his initial diagnosis of Newcastle disease and or feed poisoning. He said that none of the clinical signs supported a diagnosis of Newcastle disease, which has never been known to cause leg paralysis in poultry; it causes neck paralysis, which was absent. There was no respiratory distress; the birds were not dull and depressed. He told the court that all the birds had been properly vaccinated against Newcastle every six weeks. He ruled out feed poisoning because the affected birds were at different stages of production and on different types of feed. Finally, he told the court that he ordered the preventive dose of Tiamulin to be administered because the birds were not exhibiting signs of microplasmiasis prior to Tiamulin being administered. He also said that the birds did not die of microplasmiasis and he had confirmed this by sending samples to a laboratory in South Africa, after the high mortalities occurred in December.

The witness told the court that coccidiostats are chemicals and drugs used to prevent a disease known as coccidiosis, in poultry. The disease attacks birds in the fourth week of production and affects the digestive system. If coccidiostats are administered at the same time as Tiamulin, the drug interactions will result in reactions that will cause high mortalities in the birds. The witness confirmed that none of the birds that he administered Tiamulin to were on Coccidiostats. He confirmed that there were no coccidiostats in the feed given to the birds which were on Tiamulin. Finally the witness told the court that when the Tiamulin was sourced from the Defendant, he was not aware that it was not registered with the Medicines Control Authority of Zimbabwe (MCAZ).

This was confirmed in a letter dated 14 February 2011, written by the Medicines Control Authority of Zimbabwe (hereinafter referred to as MCAZ). He said that the MCAZ refused to carry out clinical tests on Defendant's Tiamulin because it was not registered with them and that only that organization, locally, had the capacity to carry out those tests. Dr Hwingwiri admitted that no independent post mortems were conducted, and that the Tiamulin sourced from Defendant was never independently tested. He said that after December 2010, Plaintiff used a product known as Tiamulin 45 %, which he sourced from a different supplier, and no increased bird mortality was experienced. Under cross examination, Dr Hwingwiri gave new meaning to the term "courage under fire". The questioning was vigorous. He maintained his composure. The questions were repeated. He remained steadfast. All in all, he was an impressive witness for the Plaintiff and gave a measure of tangible data and information which greatly assisted the Plaintiff in making its claim. I accepted his evidence as balanced, honest, fair, and not overly biased in favor of his employer.

The last witness for the Plaintiff was Idai Musuka. She testified and told the court that: she is employed by the Crest Poultry group as a Finance Director of the Poultry Division, based at Suncrest. She has worked for the Plaintiff for the last four and a half years. Her qualifications are Fellow of the Institute of Chartered Certified Accountants. Her duties include overseeing the finance function of the group, financial reporting management, product pricing, compliance with statutory requirements, internal compliance with group policies, ensuring integrity of IT system, and managing and training finance staff. She said that the Plaintiff had brought these proceedings against the Defendant in order to recover financial losses suffered as a result of the death of a large quantity of its birds. She personally quantified the loss.

She compiled a schedule after receiving figures from Dr. Pachena. The finance schedule was admitted into evidence. On the first page was a summary of the high mortality and losses claim breakdown. The schedule demonstrated that each bird should lay up to 127 eggs in total during the productive period. A reject percentage of 10% was factored in. Using those figures the total number of eggs that Plaintiff was legitimately expecting from the dead birds was 951 127 (nine hundred and fifty one thousand one hundred and twenty seven). The value of each egg is thirty two cents, which brings the total value of the expected eggs to US\$304 000, 00 (three

hundred and four thousand United States dollars) the costs amount to US\$136 172, 00(one hundred and thirty six thousand one hundred and seventy two United States dollars). After costs are subtracted the figure of total value of the expected eggs stands at US\$167 828, 00. Similar figures were compiled for both Parent G and Import 14 sections. The total loss in both Parents G and Import 14 amounted to US\$178 294, 00(one hundred and seventy eight thousand two hundred and ninety four United States dollars).

Musuka told the court that Plaintiff did not quantify the loss of day old chicks. Under cross examination, she stated that the figures she relied on were given to her by Dr. Pachena who compiled those figures together with the finance manager. Both are no longer in Plaintiff's employ. She admitted that there was no independent counting of the birds lost, and that her claim in regards to the eggs was based on potential loss. This witness's evidence was clear, concise, and easy to follow. At this juncture, the Plaintiff closed its case.

#### Defendant's Case.

Mr. John Alexander Cameron testified and gave evidence on behalf of the Defendant, in his capacity as its managing director. He told the court that Defendant is in the business of supplying stock feed to farmers, as well as feed mixers. He denied that the Tiamulin supplied by Defendant to Plaintiff was lethal, or that it caused damage to Plaintiffs birds and eggs, or that it had a negative effect on egg fertility. He said that he became aware of the problem in January 2012, when Dr. Pachena and Dr. Hwingwiri, of Plaintiff came to see him. He requested a sample of the Tiamulin that he had supplied to Plaintiff, and some of the affected birds for independent analysis, and none were availed to him.

Mr. Cameron told the court that he had carried out his own clinical trials using a batch of Tiamulin left over from the Tiamulin supplied to the Plaintiff. The result of his privately conducted trials did not lead to high mortality rates, or to reduced egg production, or to reduced egg fertility. He said that Plaintiff refused to accept the results of his tests on the basis that they were biased because Plaintiff had not been involved in them. He told the court that Plaintiff subsequently refused to conduct joint tests with the Defendant. The parties tried to get the Medicines Control Authority to conduct the tests in conjunction with both of them, but the MCAZ declined their request. The witness gave evidence to the effect that Dr. Pachena and Dr.

Hwingwiri refused to avail samples of the affected birds to him to allow him to arrange independent post mortems.

The witness told the court that there was no independent chemical analysis of the feed to determine the presence or absence of coccidiostats. He stated that his batch of Tiamulin most certainly did not cause the high mortality rates, decreased egg production or reduced egg fertility. During cross examination, the witness admitted that he manufactured the Tiamulin and that he neglected to register it with the Medicines Control Authority of Zimbabwe. He admitted that he had an obligation to ensure that the drug, which he manufactured, was registered with the MCAZ. The witness also admitted that he omitted to advise the Plaintiff that the Tiamulin was not registered with the MCAZ. He stated that Tiamulin itself is not lethal to poultry, but stated that when it is manufactured, it is possible for poison to contaminate it. He said that his batch of Tiamulin was not contaminated by poison of any sort.

Under cross examination, Mr. Cameron conceded that a letter had been written to his Legal Practitioners of record, which he received, around 17 December 2012, in which the results of Dr. Hwingwiri' post mortems were set out. During re-examination, the witness told the court that the cause of spots on the liver of poultry can only be to indicate the presence of toxins in the bird's body. He attributed the source of the toxins to the feed. The Defendant closed its case. The court did not believe this witness's professed lack of knowledge or insight on the cause of the high mortality in the birds. He is a self professed expert in poultry. He admitted that the spots on the birds' livers exposed by post mortem examination pointed to chemical toxicity in the birds. He told the court that Tiamulin on its own was not harmful to Poultry. So where did the toxin come from? The witness's prevarication on this point did not impress the court. He was not being candid with the court.

I then directed the parties to file written closing submissions. Plaintiff duly complied, within the stipulated date. Defendant filed its closing submissions six weeks after the agreed date, and advised the court that this was due circumstances beyond its control.

The Law

The court relied on the Civil Evidence Act to determine the issue of admissibility of the business records tendered into evidence by the Plaintiff. S14 Civil Evidence Act [cap 8; 01] provides that:

**14 Business records**

(1) In this section—

“business” includes a trade, profession or calling or any other such occupation or activity.

(2) A statement contained in a document shall be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible if—

(a) the document is or forms part of the records appertaining to or kept by or for a business or at any time formed part of such records; and

(b) the statement in the document was made, or may reasonably be supposed to have been made, in the ordinary course of or for the normal purposes of the business—

(i) by a person who had or may reasonably be supposed to have had personal knowledge of the fact concerned; or

(ii) on the basis of information supplied directly or indirectly by a person who had or might reasonably be supposed to have had personal knowledge of the fact concerned.

(3) **A document which is admissible under this section may be produced in evidence by any person who for the time being has custody of the document or is responsible for managing the business for which the document was produced.**

Counsel for the Defendant objected to the production of various exhibits throughout the course of the trial on the basis that all of those books ought to be introduced into evidence by the person who actually authored them. The evidence of the Plaintiff was that these books were kept in the ordinary course of business, and authored by several of its employees at different times. Exhibits one through to twenty two were produced by Emildah Dzigagwe, the operations Manager at Plaintiff’s farm. The rest of the exhibits were produced by Managers, the Group Veterinarian, and the Finance Director. It was not disputed that these various witnesses had custody of the documents for the time being. It was not disputed that these witnesses were responsible for managing the business for which the documents were produced.

Mr. Cameron, who testified on behalf of the Defendant, confirmed that the Tiamulin which Defendant sold to the Plaintiff was not registered as required by section 30 of the

Medicines and Allied Substances Control Act. In essence, the safety, quality and therapeutic effect on the health of Poultry of that drug was never scrutinized.

S30 of the Medicines and Allied Substances Control Act [cap 15; 03] provides for the factors that the authority must consider in registering medicine, as follows:

### **30 Registrability of medicines**

- (1) The Authority shall approve the registration of a medicine if it considers that—
- (a) the availability of that medicine is in the public interest; and
  - (b) the safety, quality and therapeutic efficacy of that medicine—
    - (i) in the case of a medicine which is not a veterinary medicine, in relation to its effect on the health of man;
    - (ii) in the case of a veterinary medicine, in relation to its effect on the health of animals; warrant its registration; and
  - (c) in the case of a medicine manufactured in Zimbabwe, the premises at which it is manufactured and all processes of manufacture are satisfactory.

The first cause of action is predicated on a breach of contract between Plaintiff and Defendant, in terms of which Defendant sold Tiamulin 12.5% to Plaintiff. Plaintiff paid the purchase price in full and Defendant delivered the Tiamulin 12.5%. The parties never expressly discussed the question of whether the Tiamulin 12.5% was free from latent defects. If it is accepted that Defendant's drug, not being an approved drug, was potentially unsound and possibly defective, would that amount to breach of contract on the part of the Defendant?

“Even when there is no express warranty of soundness, the law implies such a warranty”. *JW Wessels The Law of Contract in South Africa 2<sup>nd</sup> ed (1951) Butterworth: Durban at p903, see Erasmus v Russel's Executor 1904 T.S 365*

Dr. Hwingwiri, Plaintiff's Group Veterinarian, told the court that the Tiamulin 12.5% was purchased and administered for the purpose of preventing microplasmiasis in Plaintiff's flock. The purpose was to reduce mortality rates caused by a disease common in poultry, not to cause or increase mortality rates. Defendant, in his evidence in chief, stated quite clearly that he is an expert in poultry and that he manufactured the Tiamulin 21.5% himself. Can it be said that

Defendant, an expert manufacturer of veterinarian drugs that relate to poultry, could reasonably foresee that the supply of unregistered and potentially defective drugs could result in death or adverse damage to plaintiff's flock? If it was reasonably foreseeable, should Defendant be held liable for the consequential damages suffered by the Plaintiff as a result of the breach of contract?

“...where an article has been sold for a specific purpose or where it is sold by a manufacturer or expert...in such cases the seller will be liable not only for the difference in value between a similar sound article and the defective one delivers, but also for such consequential damages as could reasonably have been foreseen...”*Wessels supra at p904, see Voet 21.1.10*

It is trite law that the burden of proof in a civil trial is on a balance of probabilities. It has been held that:

“In a civil case, where the court seeks to draw inferences from the facts, it may, by balancing probabilities, select a conclusion which seems to be more natural or plausible (in the sense of credible) conclusion from among several conceivable ones, even though that conclusion is not the only reasonable one”. see *Ebrahim v Pittman NO 1995 (1) ZLR 176(H) at p176*

Emildah Dzigagwe's evidence, together with that of Law Hungwe, Nomquele Dube and Dr Hwingwiri, was to the cumulative effect that the administration of Defendant's Tiamulin 12.5% to Plaintiff's flock appeared to cause a spike in the flock's mortality rate, as well as a decrease in egg production, and cock fertility.

### Disposition

The question that the court must determine, is whether all the evidence supports a conclusion that the administration of Tiamulin 12.5% supplied by Defendant, to Plaintiff's flock, caused a spike in flock mortality rate, reduced egg production, and reduced cock fertility, which resulted in loss to Plaintiff, which loss was properly quantified by Idayi Musuka, Plaintiffs finance director. The court must decide whether the conclusion that defective Tiamulin was the cause of the mortalities and loss of production is the only reasonable one, or if not, the most plausible one, given that the abnormally high mortality and loss of production appeared to arise directly after the administration of the Tiamulin to the flocks.

The Plaintiff called five witnesses in support of its case and produced documentary exhibits to buttress its claim. In the closing submissions, the Defendant admits that the exhibits produced by the Plaintiff show that:

“... there was indeed death, reduction in cock fertility and egg production...”

In my view this admission disposes of the question of the admissibility of business records by a person who currently has custody of them. I had already upheld the submission by the Plaintiff that such records are admissible in terms of section 14 of the Civil Evidence Act. The Defendant submitted that no tangible evidence or proof was placed before the court, to show that the cause of increased mortality, reduced cock fertility and reduced egg production was the Tiamulin supplied by the Defendant to the Plaintiff. In my view, by drawing inferences from the facts, and, by balancing probabilities, it would be a natural, plausible and credible conclusion from among several conceivable ones, that the Tiamulin supplied by the Defendant caused Plaintiff's loss. It may not be the only reasonable conclusion, for purposes of determining liability; it just has to be credible, believable. *Ebrahim v Pittman supra*.

Let us examine the facts further.

The evidence given on behalf of the Plaintiff by Dr. Hwingwiri, an unchallenged expert on poultry, was that Plaintiff had administered Tiamulin before, in August, and September 2010. The batch administered in August was imported from South Africa, and a feed additive, and did not result in any problems. The evidence was that, Plaintiff approached Defendant, who publicly held himself out to be an expert in the manufacture of vaccines and medicines for poultry, for the supply of water additive Tiamulin, as opposed to the feed additive type used in August, which was not available locally. In October, the first Batch of Tiamulin supplied by Defendant caused mild problems, which made Dr. Hwingwiri reduce the number of days for the administration of the drug, from five days to three. All the symptoms of chemical toxicity experienced in October 2010 were experienced in December, except that in October the symptoms were mild. In December, a second batch of Tiamulin supplied by Defendant was administered to Plaintiff's flock. This time, there was increased mortality, the birds were sitting on their hocks and not taking feed or water, their legs were splayed, there was reduced cock fertility and reduced egg production.

The post mortem results showed spots on the birds' liver, increased mucous and bleeding in the birds intestines, swelling of the lymph nodes in the intestines, all symptoms of chemical toxicity. Dr. Hwingwiri's expertise in these matters was not questioned. His credentials are impeccable, and his experience vast. His evidence was accepted by the court in its entirety, and the submission that there was no independent post mortem does not detract from his findings, in my view. Mr. Cameron Defendant's managing director, conceded under cross examination that the birds' symptoms pointed to chemical toxicity, as did the spotted livers revealed during post mortem. He is a self professed expert on poultry, so the court gave weight to his admission. So what was the source of this poisonous chemical that caused the birds to exhibit such symptoms each time Tiamulin was administered in October and December 2010?

Attempts were made, on behalf of the Defendant, to speculate as to the possible other sources of chemical toxicity that could have contaminated the birds' digestive systems. Defendant suggested six:

- (a) The drug was incorrectly administered
- (b) The birds were sick before the drug was administered
- (c) The dosage given was too small resulting in the chickens falling sick
- (d) Other drugs were administered at the same time as the Tiamulin
- (e) The stock feed given to the birds was contaminated with coccidiostats.

Defendant submitted that proper tests ought to have been conducted to establish the chemical content of the Tiamulin, of the stock feed, and of the dead birds' intestines. Mr. Cameron for the Defendant, in his evidence in chief, merely stated that the cause of mortality was not Tiamulin. He did not lay any facts other than the bald assertions contained in the six other possible causes of chemical toxicity in the birds. He confirmed that he had manufactured the Tiamulin supplied to the Plaintiff, and that he had not bothered to register it, although he was aware that he was required to do so, at law. I find that there was no basis, prima facie or otherwise, on which the Defendant's witness could have ruled out the possibility of its batch of Tiamulin as the cause of chemical toxicity in Plaintiff's birds.

S30 of the Medicines and Allied Substances Control Act requires that medicines be registered in order that their safety, quality, and therapeutic effect on the health of animals, be

tested. Defendant's Tiamulin was not tested. Mr. Cameron testified that Tiamulin was not toxic to poultry. He admitted during cross examination that it was possible for Tiamulin to be contaminated by toxins which are harmful to poultry during its manufacture. The requirement that such drugs be registered is designed to prevent or regulate the environment in which the drugs are manufactured in order to minimize the possibility of contamination by harmful substances.

I find that the defense witness did not give any evidence of substance and did not aver, let alone show, on a prima facie basis, any probable alternative source of mortality, which emulates symptoms of chemical toxicity, whether in the feed, or water. Diseases such as Newcastle and microplasmosis were ruled out by Plaintiff's evidence, which I accepted as true, accurate and correct. I find that Defendant was notified of the results of the post mortems carried out by Dr Hwingwiri in a letter dated 17 December 2010. The results conclusively showed the cause of death to be chemical toxicity. Plaintiff's evidence that no other vaccines or medicines were issued to the flock while Tiamulin was being administered was accepted by the court. Plaintiff demonstrated that it is a meticulous and credible record keeper. Its books show a record of all the drugs that were issued to the different poultry houses during the period in question.

I find that Plaintiff's cause of action is predicated on a breach of the contract of sale. I find that, even though there was no express warranty of soundness, the law implied such a warranty. See *Erasmus v Russel's Executor supra*. I find that Mr. Cameron for the Defendant's admission that he or Defendant or both, were experts on poultry and in the manufacture of drugs or medicines for poultry, rendered Defendant liable for the consequential damage. I find that, by supplying Tiamulin for a specific purpose, knowing full well the Tiamulin had not been subject to the stringent requirements of registration, more probably than not, resulted in contaminated batches being sold and to damage being caused to Plaintiff's poultry when those contaminated batches were administered.

In the result, Plaintiff's claim is allowed with costs.

IT IS HEREBY ORDERED THAT: Defendant, shall pay to Plaintiff,

1. The sum of US\$178 294,00 (one hundred and seventy eight thousand two hundred and ninety four United States Dollars), being damages suffered by Plaintiff as a consequence of defective goods sold to Plaintiff, by Defendant, in or about December 2010.
2. Interest at the prescribed rate, calculated from 15 April 2011, being the date of demand, to the date of payment in full.
3. Costs of suit.

*Messrs Honey & Blanckenberg*, Plaintiff's Legal Practitioners  
*Messrs Venturas & Samukange*, Defendant's Legal Practitioners