

TAKABVAKURE MUTUNHU
versus
CREST POULTRY GROUP (PVT) LTD

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 18 November 2015 & 28 June 2017

Trial action: contract law: anticipatory breach: prevention of performance: damages: costs on a higher scale.

Z. Chadambuka, for the plaintiff
E. Dzoro, for the defendant

MUSHORE J: This is a trial action in which the plaintiff is suing the defendant for:

- (i) Payment of the sum of US\$2985-00;
- (ii) US\$ 100,850-00 in damages for breach of contract;
- (iii) Interest and costs.

The claim for damages by the plaintiff is based upon the defendant's alleged breach of a contract. It is common cause that the parties entered into a Grower's Contract in which it was agreed that the plaintiff would rear Day Old Chicks [hereinafter "DOCs"] supplied by a sister company to the defendant. The agreement stipulated that the plaintiff would rear the chicks and that if and when the chicks had reached a certain size, age and weight; within a specified period of time, defendant would collect the adult birds from plaintiff. Upon collection, defendant would then inspect the birds to determine whether the birds were healthy and disease free. The birds would then be taken for slaughter at an agreed price dependant on their weight and quality as particularised in the Grower's contract. The Growers Contracts (of which they were two as I will elaborate upon later in this judgment) contain detailed terms, conditions and procedures which the contractants were bound by, including the usual clauses for breach and termination *et al.*

In the plaintiff's declaration, the plaintiff pleaded that on 9 July 2017, he entered into a Grower's Contract of three months duration with the defendant. According to him, the parties agreed that the defendant would place 20,000 DOCs with the plaintiff for growth to maturity within a 35 day period or cycle. After the birds were collected and examined;

slaughtered and sold, any profits thereon would accrue to the plaintiff. Plaintiff stated that he had represented himself during the course of the negotiations and that the defendant was represented by its Production Director; a certain Mr Langton Mautsa.

The plaintiff pleaded that the contracts precluded him from raising any other poultry besides that of the defendant, and also that he was bound by the contract to use feed and products sold by the defendant and its partner companies.

He alleges that defendant breached an implied term in the contract by its failure to place chicks with him 'at any time that he, (the plaintiff), had capacity to raise them. (My emphasis), He stated that defendant had failed to place chicks with the plaintiff throughout the 6 month period of the contract. As a result of defendant's breach therefore, the plaintiff alleges that he suffered loss of income which he listed as follows:

Declaration p 4 record – (loss of income).

- “7. The plaintiff duly raised chickens and delivered them to the defendant on or about the 26th October 2011.
8. Upon receipt of the chickens, the defendant became indebted to the plaintiff in the sum of US\$2,985-91.

Declaration p 5 record (damages)

18. Plaintiff consequently suffered damages which are calculated on estimated income of US\$5,000-00 per batch of 10,000-00 chickens and enumerated as follows;
 - 18.1 US\$20,000-00 due to failure to place first allocation of 4 batches;
 - 18.2 US\$27,500-00 due to failure to place a second allocation of 9 batches calculated as US\$30,000-00 in income less production costs saved of US\$2500-00;
 - 18.3 US\$ 17, 630-00 due to failure to place a third allocation of 9 batches calculated at US\$45,000-00 in income less production costs saved of US\$27,379-00; and
 - 18.4 US\$ 35,720-00 due to failure to place allocation of 9 batches calculated as US\$45,000-00 in income less production costs saved of US\$9,280-00.”

The above amounts total US\$100,850-00.

In its plea, the defendant denied being indebted to the plaintiff, and averred that plaintiff's claim does not conform to the terms of the contract. The defendant pleaded that such an implied term never existed in the agreement between itself and the plaintiff, and that the implied term mentioned by the plaintiff, is at odds with the terms of the written contract and the obligations of the parties. The defendant averred that it cannot be implied into the

contract, that the defendant was obligated to place chicks with the plaintiff '*when the plaintiff had capacity to raise them*'. The defendant admitted that if and when the plaintiff delivered healthy birds after a cycle within the terms set out in the contract, then it was contractually bound to buy the chicks and that any money accruing to the plaintiff would have been arrived at after deducting the costs of inputs, (such as feed and medication) which had been advanced to the plaintiff. The defendant averred that if the costs of inputs exceeded the value of the birds purchased by the defendant, then the plaintiff would owe the defendant the difference.

The defendant also stated that contrary to the plaintiff's averment, in terms of the agreement, the plaintiff was at liberty to buy chicks from Hubbard and raise them at his own expense for sale to third parties.

The defendant informed in his plea that plaintiff suffered a catastrophic loss on the first cycle delivered to it, because the mortality rate of the birds was exceedingly high and some of the birds delivered for slaughter were underweight because of plaintiff's failure to raise the chickens properly. Thus after the first cycle, the plaintiff ended up owing the defendant US\$20,367-00.

The defendant stated that after the first cycle, the parties deliberated on the way-forward and upon certain commitments having been made by the plaintiff to make good his financial losses, the defendant then acceded to replacing the initial 3 month contract with a 6 month contract, to give the plaintiff a second chance at production. In its plea the defendant stated that thereafter, a second batch of 20,000-00 chicks were placed with the plaintiff in accordance with the extended and amended agreement which was signed by the parties on 15 September 2011 and that the plaintiff realised a profit of US2,985-91 therefrom.

The defendant stated that the contract did not oblige it to merely place DOCs with the plaintiff willy nilly, but that it was the plaintiff's duty to order the next batch of day old chicks from Hubbard (a sister company to the defendant), after which the defendant would check its production scheduling and then give the plaintiff the go ahead to have the DOCs delivered to him. Thus according to the defendant, any new placements were to be instigated by the plaintiff, subject to the defendant's discretion. It was also the defendant's version that after delivery of a batch of birds, the chicken coops would have to be sanitised and cleaned before any further placements.

The defendant filed a plea in reconvention, claiming that despite the plaintiff undertaking to clear his debts before further batches were delivered to him, defendant had to resort to litigation to recover the US20, 367-70 owed to it by the plaintiff's losses made on 18

August 2011; and that the US\$20,367-70 owed to it was eventually paid on 22 April 2013. Defendant is now counterclaiming the interest which accrued on the debt from the 18th August 2011 to the 22nd April 2013 in the amount of US\$1,697-24. In addition to that the defendant is claiming the 10% collection commission (US\$2,037-00) which it incurred when it was recovering the sum of the US\$20,367-70 from the plaintiff.

The joint PTC minute was framed as follows.

Record p 65, 66

“ISSUES IN THE MAIN.

1. Whether or not the defendant was in breach of the contract between it and the plaintiff?
2. Whether or not damages from breach of contract, suits of suit, and interest are due to the plaintiff as claimed?
3. Whether or not plaintiff is entitled to payment of USD 2,985-91 from the defendant?

ISSUES IN RECONVENTION

1. Whether or not defendant entitled to collection commission, interest and costs of suit as claimed?
2. Whether or not there should be set off?”

Implied terms in contract law.

As aforementioned, the current matter is premised on the defendant’s alleged breach of an implied term of the contract which the plaintiff alleges and the defendant denies. In the present matter, the contractants were bound to the terms of the contract which could only be varied in writing.

Clauses 12 and 13 read:

Record p 14

“12. **WHOLE AGREEMENT.**

The parties agree that this document comprises the entire agreement between them and:-

- 12.1. no warranty or representation or warranty or undertaking has been given or made by either party to the other, except those recorded in this agreement;

- 12.2 There are no conditions precedent suspending the operation of this agreement;
- 12.3 No variation of this agreement shall be valid unless reduced to writing and signed on behalf of both parties

13. **INDULGENCES**

No relaxation, extension of time or latitude or indulgence which either party may show, grant or allow to the other shall in no way constitute a waiver by the grantor of any of the grantor's rights in terms of this agreement and the grantor shall not thereby be prevented or stopped from exercising any of its rights against the grantee which may already have arisen or which may arise thereafter."

Ex lege, terms of a contract ultimately depend on the will of the parties at the time that the contract was entered into. *Naturalia*, which are terms attached by law to a contract of a particular case, can be implied by the court into a contract, but only in circumstances where they do not impinge on the individual autonomy of any person who entered into a clear and express contract, understood by the parties and apparent from the language used. Terms can be implied by the law or by statute. Terms implied by the courts must be reasonable, obvious and necessary. But the application of an implied term by the court cannot be read into the contract, if it is not necessary such as in circumstances where the contract is clear and unequivocal.

It is important to recognise that a term in a contract will not be implied if one of the parties is ignorant of the matter to be applied. See: *Sethia (1944) Ltd v Partmabull Rameshshwar* [1950] 1 All ER 51 CA.

At p 63 of Professor Christie's book entitled *Business Law in Zimbabwe* 1st Ed [Juta] states:

"Because the court is seeking to elucidate what the parties have agreed but not expressed, it follows that no term can be implied if it would **contradict** an express term of the contract". (My emphasis)

See *Bardwell & Company (Pvt) Ltd* 1966 RLR 655 pp 660, 1967 (1) SA 4 pp 7 where the point was made to the court and accepted by it that the parties cannot imply a term into a contract, where the parties to the contract had put their minds to and expressly agreed on how it was to be understood, so express was it in its language and meaning.

The court referred in this connexion to *Paddock Motors (Pty.) Ltd v Igesund*, 1975 (3) SA 294 (D & CLD) at 297E when it said:

"The answer to this, I think, lies over the page at 298C, where MISER, J, says:

‘But the *exceptio doli*, although it may have been designed to afford relief to one who would otherwise be oppressed by unconscionable conduct on the part of his adversary, was not designed to enable a party who suffered hardship because of the operation of the very terms to which he had expressly agreed, to approach the court for, in effect, amelioration or modification or amendment of such terms of the contract.”

Thus a court should try and make its determination from the conduct of the parties.

Typically, when determining whether a consensus exists, the test applied by a court is an objective one, as has been firmly established both in South African and Zimbabwean law. INNES, J., in *Pieters & Co v Salomon*, 1911 AD 121, in an appeal from the High Court of Southern Rhodesia stated the law in the following terms at p. 137:

“When a man makes an offer in plain and unambiguous language, which is understood in its ordinary sense by the person to whom it is addressed, and accepted by him *bona fide* in that sense, then there is a concluded contract. Any unexpressed reservations hidden in the mind of the promisor are in such circumstances irrelevant. He cannot be heard to say that he meant his promise to be subject to a condition which he omitted to mention, and of which the other party was unaware”

The statement made by WESSELS, J.A., in *South African Railways & Harbours v National Bank of South Africa, Ltd.*, 1924 AD 704 at pp. 715 – 716 is of the same effect:

“The law does not concern itself with the working of the minds of the parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which Courts of law can determine the terms of a contract”.

This latter statement was approved by the Federal Supreme Court in an appeal from the Southern Rhodesia High Court (see *Levy v Banket Holdings (Private) Ltd v R. & N.* 98 at p. 105 (see also 1956 (3) SA 558 (FC)).

What can be construed from the contract itself; the facts and evidence; and the conduct of the parties *in casu*?

The agreement

The parties entered into two Contract Growers Agreements. The first agreement was signed on 19 July 2011. Its duration was three months. The second agreement which replaced the first agreement was entered into on 15 September 2011 and expired on 15 March 2012. The agreements are virtually the same. In the following extracts, for ease of reference I have bolded over the additional clauses which appear in the second agreement, but which do not

materially change the agreement between the contractants. The clauses in the contract governing the manner in which the delivery of DOCs, raising of DOCs, costs of inputs and consequences upon delivery are outlined in the agreements as follows:

“Record pages 19, 20 and 21

3. PLACING OF DOCS ON THE SITE

- 3.1. The Grower shall be notified of the placing date at least two weeks prior to placing and shall ensure that there is experienced personnel on site whilst the placement is done.
- 3.2. The grower will be liable for the cost of the DOC if they make a cancellation after agreeing to place and after eggs have been set.
- 3.3. Liability of 3.2 above will be waived if the cancellation was due to a natural disaster or some unforeseeable circumstances according to section 14.

4. PURCHASE OF DOC

- 4.1. The Grower shall, from time to time, and in accordance with schedules and programmes produced by Suncrest, place orders for DOCs exclusively with Hubbard, which should be approved by Suncrest.
- 4.2. The Grower agrees and undertakes to purchase from Hubbard the DOC at such prices and upon such terms for credit as shall be in Suncrest’s normal prices and terms at the time of purchase.
- 4.3. The Grower shall be responsible at all times for settling the purchase price of DOCs at the time of slaughter which will be deducted by Suncrest from the price to be paid for the slaughtered birds in terms of clause 7 below.

5. RAISING THE DOC

- 5.1.1. **The grower shall;**
- 5.1.1 **Maintain the premises in a tidy state and in good repair.**
- 5.1.2 **Ensure that sudden increases in mortality above 0.3% per day are reported in writing to Suncrest/Vetco.**
- 5.1.3 **Maintain accurate charts in respect of the chicks on the basis specified by Suncrest. (Each house to have its own chart with accurate weekly mortality as well as feed usage) The charts shall be delivered to Suncrest simultaneously with the last delivery of birds.**

5.1.4 Maintain all roads to the site where the chicks are kept in good state.’

5.1.5. Provide a suitable perimeter fence around the area where the chicks are kept.

5.1.6 Not allow unauthorised visitors into the site and keep a register of all visitors and the purpose of their visits

5.1.7. Shall provide Suncrest accurate weekly mortality and rates for each shed within 24 hours of the broilers having reached that age.

Providing inaccurate information may attract a penalty depending on the prejudice that Suncrest would have suffered as a result of inaccurate information.

5.2. The Grower shall efficiently and in accordance with good management and husbandry raise the DOC to slaughter weight and corresponding slaughter age as determined by Suncrest from time to time, and shall liaise with Suncrest concerning the raising of the birds.

5.3. In raising the DOC the grower shall only utilise feed from Agrifoods or any other feed supplier nominated by Suncrest. The grower shall purchase the feed at such at such prices and terms of credit as shall be Agrifood’s normal prices and terms at the time of purchase.

Provided that if the Grower may obtain feed of good quality at more competitive prices, it may purchase such feed and shall give Suncrest written notice of its intention to purchase such alternative feed.

5.4. In maintaining the health of the birds, the Grower shall utilise livestock products from Vetco or any other supplier appointed by Suncrest.

5.5. The grower shall purchase the products at such prices and upon such terms of credit as shall be Vetco’s normal prices at the time of purchase.

5.6. During the raising of the DOC, the Grower shall furnish Suncrest with such productions statistics, as are specified by the Suncrest or Vetco technical team on a weekly basis.

5.7. The grower is expected to maintain a mortality of not more than eight percent (8%) throughout the growing cycle of the flock, i.e. to slaughter at the stipulated grow-out period. Any mortality above 8% will attract a penalty in accordance with the penalty computation in operation at Suncrest. The

mortality to be obtained is however subject to review from time to time and the grower shall accordingly be advised in advance of review.

- 5.8. The grower is expected to grow the birds to an average weight of 1.5kg at/or less than 35 days. The minimum acceptable slaughter weight shall be 1kg. A penalty can be charged for birds exceeding 1.8kg. Suncrest reserves the right to call for early slaughter before the 35 days and the right to extend slaughter beyond the thirty five days.
- 5.9. The grower is expected to maintain a Feed Conversion Ratio (FCR) of 1.9 and any FCR for more than 1.9 will lead to a penalty in accordance with the Grower Payment Model in operation. The FCR during the growing cycle of the flock is more fully detailed table Annexure 'A'.
- 5.10. Feed deliveries will be adjusted in accordance to the mortality figures supplied by the grower to Suncrest or Vetco Technical Team. Feed left over from each growth stage during the life of the flock remains the property of Suncrest and Suncrest reserves the right to either credit the grower or collect the feed within seven (7) days or authorise its use on the next flock

6. SLAUGHTER

- 6.1. Suncrest shall communicate with the grower regarding the slaughter date in the week prior to expected slaughter.
- 6.2. Suncrest shall arrange for the prompt collection of the birds from the poultry site for the slaughter thereof at Suncrest.
- 6.3. Suncrest shall be responsible for loading the birds onto the vehicles provided by Suncrest, at a rate of at least four thousand (4000) birds per hour.
- 6.4. The grower undertakes and warrants that, upon collection for slaughter, the birds shall be healthy and disease free. A pre-slaughter inspection shall be conducted by Vetco Technical Team to certify the birds to be fit for slaughter. If the birds on the other hand have to be picked up to mitigate a health issue/situation, the Dead on Arrivals (DOAs) shall be for the account of the grower.
- 6.5. DOAs will be on account of Suncrest upon proof that the birds were in good health upon collection. If it is proved through a post-mortem by the Veterinarian that the birds had a disease on collection, the DOAs shall be on account of the grower.
- 6.6. Birds below the acceptable minimum weight of 1kg shall be collected but paid on a discounted price to be determined by Suncrest.

6.7. The grower undertakes and warrants that, upon collection for slaughter the birds have no feed in crops. Failure to withhold feed prior to collection results in birds dying of thirst at the abattoir before they are slaughtered or the carcass being spoiled with the feed during dressing. Any losses caused by this will be for the account of the grower.

6.8. Any downgrading of feed from prime to economy price due to "FOOT PAD INFECTION" will be charged to the grower.

7. PAYMENT.

7.1. Suncrest shall advise the grower from time to time of the price to be paid for the slaughtered birds on the day of processing and the grower agrees to accept the price payable by Suncrest. The current price at the time of execution is One United State Dollars and ninety cents (US1, 90) per kg live weight collected by Suncrest or One United States dollar and ninety five cents (\$UD1, 95) live weight delivered to Suncrest.

7.2. Payment for the slaughtered birds shall be effected by Suncrest to the grower within thirty (30) working days following the slaughter of the last bird in any one consignment. Suncrest reserves the right to process early payment to the grower upon request.

7.3. For the avoidance of doubt, subject to the provisions of clauses 3.4; 4.3 the payment shall be effected by Suncrest to the grower in terms of section 7.2. above shall be less the amounts owed by the grower to Hubbard , Agrifoods and Vetco to satisfy and discharge any indebtedness of the grower to Hubbard, Vetco, Agrifoods and consents to Hubbard, Vetco and Agrifoods each setting off the proceeds received from the sale of slaughtered birds from Suncrest to discharge the growers indebtedness to each of them. Suncrest shall render an itemised account showing the deductions made when payment to the grower is affected."

Thus from the above clauses, clause 4.1 expressly states that it was the plaintiff's responsibility to place orders for the placement of DOCs with Hubbard. The implied term which plaintiff adverted cannot be implied into the contract as it cannot co-exist with such an express term. Further the agreement is clear that any future placements were dependent upon the plaintiff first meeting his financial obligations to Hubbard, Vetco and Agrifoods. Hubbard supplied the birds on credit to the plaintiff and anticipated being paid for those birds

after the delivery and slaughter of the first batch. The plaintiff admitted when giving evidence that he did not meet his financial obligations for the inputs provided by Hubbard, Agrifoods and Vetco. It is improbable and unreasonable to accept the plaintiff's contention that after the first financially disastrous cycle after which he became indebted to the defendant, that the defendant or Hubbard would proceed to place more birds with the plaintiff in circumstances where plaintiff had not met his projected targets and therefore had been unable to afford payment for the very first birds. It doesn't make practical or business sense and it is unrealistic to assume that Hubbard would lack the business acumen to place more birds with the plaintiff in circumstances where the plaintiff had not paid them for the first batch of birds.

Further, when the plaintiff instituted summons in this action, he stated in his declaration that he was "*bound to use feed and other products sold by defendant and its partner companies in raising the chickens*". The statement is misleading because from the wording in the second and applicable Grower's Contract, he was at liberty to buy DOCs from Hubbard and feed them with his own inputs and thereafter he was permitted to sell such birds to any third party. Clause 2 of the Growers Agreement reads as follows:

Record p 4 , 24

"2. EXCLUSIVE SLAUGHTER ARRANGEMENT

- 2.1. On the terms and conditions and during the currency of the agreement, The Grower, shall purchase day-old chicks ("DOCs") from Hubbard Zimbabwe, raise them to slaughter weight as specified by Suncrest from time to time and place them for slaughter with Suncrest: ownership of the birds shall rest with The Grower until after slaughter.
- 2.2. For the avoidance of doubt, it is recorded that the Grower shall raise birds only and exclusively for slaughter by Suncrest and shall not under any circumstances whatsoever sell birds to any other person, company, partnership or syndicate.

Provided however in the event that if the production volumes of Suncrest change and its position does not at that particular point in time allow for the placing of DOCs with the Grower at that time, then the Grower shall be allowed to purchase its DOCs from Hubbard and raise them to slaughter weight using its own inputs and place them for slaughter and sell to any other third party. The Grower shall be notified in advance by Suncrest where such a situation arises, and for the avoidance of doubt this provision will only apply for the period as specified by Suncrest from time to time"

The bolded over portion was added to and agreed to by both parties and appears in the second and applicable agreement. Thus plaintiff ought to have been more truthful on this important aspect, because it relates to plaintiff's obligation at law to have mitigated his damages.

Plaintiff's testimony

The plaintiff was his only witness in the trial. The plaintiff made a very poor impression when he was giving his testimony and often appeared unsure of himself. When he was being cross-examined, he struggled to establish his case or point to the defendant's alleged breach of contract.

Transcript p 26

Cross-examination of plaintiff

“Q. May you please show me since you are the one who signed that agreement you are familiar with what is in the agreement?”

A. Yes

Q. May you show me the term that was breached in the agreement?

A. I will explain to you.

Q. Yes or no?

A. I cannot answer yes or no I will explain.

Q. Is there a term in that agreement that you say, no the defendant breached clause 2 of the agreement?

A. Yes, non-delivery

Q. Can you show me and read to me the term?

A. Page 54 where it says this agreement shall remain in force for six months and then the next one the defendant shall deliver.

Q. Confirm that that term that you say was breached was not written in the agreement.

A. They were supposed to deliver and they did not, that is breach.

Q. Confirm that the term they were supposed to deliver is not written in the agreement?

A. They were supposed to deliver.

Q. If I may refer you also to paragraph 18. May you please read the entire paragraph?

A. “The parties agree that this document constitutes the entire contract between them and no warranty or representation or promise or undertaking had been given or made by either party to the other except those recorded in this agreement. There are no conditions precedent suspending the operation of this agreement. No variation of this agreement shall be valid unless reduced to writing and signed on behalf of both parties hereon”

Q. Having read that yes or no are you able to show me where it says defendant was supposed to deliver to you birds?

A.silence.....”

The conduct of the parties

The pre-contractual procedures which the plaintiff had bound himself to perform before being considered by the defendant as a suitable candidate for a Grower’s Contract are of significance in establishing the intent between the contract which I will go on to discuss.

The first of these was a form which plaintiff was required to fill in which plaintiff had to supply defendant with proof of collateral security and a loan agreement with a line of credit in the form of a bank guarantee. The bank guarantee was to apply to “*any claim made upon the Bank*” under such 30 day guarantee and thereby enabling the plaintiff to pay any amounts owing by the plaintiff within the time period of thirty days.

In casu plaintiff obtained a bank guarantee from FBC bank, in the amount of US\$30,000-00 on 7 June 2011.

The second requirement was that plaintiff list the types of collateral security he intended to avail the defendant for any money owing to it and unpaid by the plaintiff.

The correspondence in the bundle corroborated the defendant’s averments regarding its understanding of the terms of the contract. When plaintiff had incurred a loss from the first cycle, plaintiff requested to continue working on the chicken project and wrote to defendant offering a payment plan for the losses incurred. [Exh ‘1’, bundle p 12]. In that letter dated 27th September 2011, he totalled the debt owing to defendant and itemised in detail the losses he had incurred to the tune of US\$ 20,367-00. His payment plan went as follows:

Letter from plaintiff to defendant [p 12, Exh ‘1’ bundle]

“PAYMENT PLAN TO CLEAR DEBT.

DATE	ACCOUNT
30 th November 2011	US\$6,000-00
31 January 2012	US\$ 9,500-00
31 st March 2012	US\$ 4867/2011”

Plaintiff’ closed off his proposal letter with the following words:

“The potential to pay the debt earlier exists given the possibility of increasing the number of chicken houses being utilized at the site.”

On 30 September 2011, the defendant responded unfavourably to his request by letter as follows: [p 10, Exh ‘1’bundle]:

Letter from defendant to plaintiff

DEBT REPAYMENT PLAN-MIMISA SITE/T.E. MUTUNHU

“I am in receipt of your payment plan which you ae proposing to pay us by the 31st March 2012. I regret to inform you that it is unacceptable due to the following reasons:

1. 31 March 2012 is **6 months** from now, which in terms of cash flow is not sustainable by flocks placed on the 23rd June 2011, effectively making this 238 days of credit terms. We have no capacity to carry this as we have to pay creditors.
2. You plan to pay Vetco on the 30th November for goods supplied on the 27th July 2011 which is 125 days later. That is not sustainable from a business point of view as we also need to pay our suppliers. We request you to consider your payment plan in view of issues raised above.”

In a further letter written by the plaintiff and addressed to the defendant, plaintiff confirms that he was aware that the onus lay upon him to pay his debt before being supplied more DOCs.

Letter from plaintiff to defendant [Exh ‘1”, bundle, p 21]

“On the communication side, I appreciate the revelation for the first time in your letter that the outstanding debt as the *raison d’etre* for non-placement of the chickens. Though the notice came late, it is an improvement for future planning purposes of the contract grower.

The clearance of outstanding payment is acknowledged.” (My emphasis)

The letter dated 27th September 2011 points the breach specifically at the plaintiff *in casu*.

The correspondence quoted above negates plaintiff's contention that there was an implied terms in the contract that the defendant was obligated to place chicks with plaintiff for growth 'at any time that the plaintiff had capacity to raise them'. The correspondence demonstrates that plaintiff was well aware of his obligations in terms of the contract and that he took no issue with the requirement to pay the debts due first, before the second placement.

Because the plaintiff was aware that the costs needed to be paid first, he made two further proposals for payment of his debt. On 17 October 2011 and then on 24 November 2011 he wrote:

Letter from plaintiff to defendant 17/10/11 [Exh '1', Bundle p 16]

"Please find below the latest revised payment plan to clear the outstanding debt of US\$20,367-70:-

1. Immediate cash payment of US\$10,000-00.
2. Suncrest retention of US\$2958-91 from my chicken sales credit.
3. The remaining balance payable by no later than the 31st January 2012.
4. Replacement of existing bank Guarantee of US\$30,000-00 with a new one of US\$10,000-00."

This plan was accepted by the defendant in the letter that followed to plaintiff and written on the 25th November 2011.

[Exh '1', Bundle p 17]

- "1. The immediate cash payment plan of US\$10,000-00 is accepted. Pay in Suncrest Standard Bank Account number 8700218887005, Africa Unity Square branch.
2. The retention of US\$2,985-91 is also accepted.
3. The remaining balance of US\$7,381-79 as the debt in November is 88 days old and we are not charging interest. We will be happy if it set off the current \$30,000-00 guarantee we are holding. If we extend to 31st January 2012 we can only do so at an agreed interest rate on the balance. A new guarantee of \$10,000-00 will be for the business going business."

When the plaintiff was being cross-examined, he admitted that he knew that defendant intended to claim the sums due to it by plaintiff, by setting the sum off against the bank guarantee which he had to obtain in order to secure the contract with the defendant:

P 31 transcript

“Q. Please read paragraph 8.6.

A. The security deposit will be used and cover Suncrest in case the grower make some losses during the period of the contract, that money will be used to recover the loss, in case where the loss is higher than the security deposit. The Grower is expected to pay the difference. However, such security deposits fee is refundable in the event that the contract is terminated by Suncrest without any losses encountered during the period of the contract”

Q. So you had no problem with Suncrest calling upon the bank guarantee?

A. No.”

Despite his promise to settle as stated by him in his 24th November letter, the plaintiff did not follow through with his own promises. Further he cancelled the US\$30,000-00 bank guarantee held by FBC Bank on 6 December 2011 [bundle p 30] making it impossible for defendant to off-set the liability against the bank guarantee. To that end he created ‘a prevention to performance’, and thereby he breached the contract.

In fact it is common cause that ultimately defendant had to resort to suing plaintiff for payment of the debt of US\$20,367-70 which the defendant then received almost two years later on 22 April 2013. Due to his non-performance the plaintiff is not in a position to complain, or for that matter claim that the defendants breached the contract. Instead it was plaintiff who breached the contract.

The defendant’s plea is an accurate recording of the irrefutable fact that it had no obligation to place checks with the plaintiff, when and if the plaintiff required such a placement, without plaintiff discharging his obligation first. In its plea defendant averred as follows:

Record p 33

“Para 19

This is denied in *toto*. It is expressly stated that the parties that in the proviso to paragraph 2.2. of the agreement dated 15th September 2011 that the parties contemplated a scenario wherein the defendant could not place DOCs with the plaintiff regardless of the plaintiff’s capacity and incorporated a remedy for such an eventuality. Therefore it was not an implied term that the Defendant would place DOCs with the plaintiff at any time that the plaintiff had the capacity to raise them. It also depended on the capacity of the Defendant to produce and place the DOCs.”

I am in agreement with the defendant that the implied term adverted to by the plaintiff cannot be implied into the contract. The basis of this suit, (that being that the defendant breached the agreement by not placing checks with him irrespective of his obligation to clear the outstanding amount) is directly contradicted by plaintiff's own written acknowledgement that he had an obligation to pay the outstanding sums, before the business relationship existent between him and the defendant continued.

The legal classification of the plaintiff's self-created conundrum is described as negative malperformance by a debtor or *mora debitoris*. As enunciated by Van Der Merwe; Van Huyssteen; Rienecke and Lubbe in the 4th ed of their book entitled "*Contract; General Principles*" at p 291:

"*Mora* occurs where the debtor either fails to timeously tender the performance owed by him in terms of a particular obligation or timeously tenders incomplete or defective performance which is lawfully rejected by the creditor. *Mora* can only occur in terms of positive obligations.....

Delay as a form of breach of contract relates only to the time when performance must take place and can only occur if performance remains possible. Where the time and contents of a performance are so closely linked that performance after the due date and time would be meaningless, delay by the debtor will normally amount to prevention of performance."

The plaintiff's prevention of performance, which placed him in *mora*, is classified as "anticipatory breach of contract by a debtor".

Van Den Merwe and his co-authors explain:

"There are two forms of anticipatory breach of contract, namely repudiation and prevention of performance. In the first case eventual malperformance is predicted with reasonable certainty (for example where the debtor denies the validity of the contract) while prevention of performance indicates eventual malperformance with absolute certainty,

Anticipatory breach of contract is not restricted to breach that occurs before performance is due. It can occur at any time before the performance actually takes place, in other words before, or at, or even after the time for performance stipulated in the contract or determined by a demand. If the debtor has performed, he may nevertheless commit anticipatory breach in respect of duty, which he may have in his capacity as creditor, to co-operate towards receiving counter-performance from his co-contractant.

By committing anticipatory breach of contract, the defendant creates either uncertainty as to whether he is going to perform or certainty that he is not going to perform. Clearly there is a need to treat such conduct summarily as breach of contract even if the time for performance has not yet arrived and the predicted malperformance has materialised. Accordingly the plaintiff can enforce his remedies for breach of contract immediately after the breach. Inasmuch as anticipatory breach did not exist in Roman-Dutch law it must be seen as a welcome addition to South African law."

In casu, the plaintiff made his promise to clear his debts by the 31st January 2012 and

did not do so. Even after the elapse of the second 6 month contract entered into in 15th September 2011 and which terminated on 15 March 2012, the plaintiff had not cleared his debt obligations.

The plaintiff's claim is for an award of damages from the defendant. However, because the claim is lacking in basis and not founded in fact, it is my finding that the claim for damages is an attempt by the plaintiff to unjustly enrich himself to the tune of US\$100,850-00 at the defendant's expense.

Because of the plaintiff's breach, the defendant has a right to the damages sought in its counterclaim. The defendant counterclaimed for payment of legal costs in the amount US\$2,037-00 and interest on the debt in the sum of US1, 697-24.

I am inclined to award defendant its damages.

Costs on a higher scale

The defendant has sought an award of damages on a higher scale.

It is settled law that an award on an attorney/client scale is likely to be granted if the conduct of the litigant from which such an award is sought amounted to an abuse of the court process and that his actions thereby bought additional and unwarranted expenses to the other party. The leading case on the issue is *Nel v Waterbuurg Landbouwers Ko-operatie Vereeniging* 1946 AD 54 where the court found that the party ought not to be put out of pocket for unnecessary proceedings. Also see *Mudzimu v Municipality of Chinhoyi and Samuriwo* 1986 (1) ZLR 12 (HC) where REYNOLDS J found that one party was put through considerable inconvenience by virtue of the respondent's unreasonable objections and behaviour.

The current case is such a case for an order of costs on a higher scale against the plaintiff. Clearly the current proceedings are unwarranted. The plaintiff filed the current suit knowing fully that he had understood the need to have cleared his debt and with the knowledge that had he done so, the contractual relationship would have continued. The reason for the entire muddle in the performance of the contract falls plainly on the plaintiff's shoulders. This case had been brought unnecessarily and at an inconvenience to both the defendant and the court. Further, the plaintiff knew that he had the option of purchasing chicks from Hubbard which he was allowed to grow and then sell to third parties independently during the currency of the agreement, if he wanted to. In his declaration, he dishonestly gave the impression that everything that he was allowed to do was at the instance of the defendant, which is not an accurate statement to have made. In fact his failure to make

such an honest disclosure, and his failure to have raised chicks independently of the plaintiff for sale to other parties shows that plaintiff lacked the desire to mitigate his damages. The plaintiff's conduct amounts to an abuse of this Honourable Court.

The defendant has made out a case for costs on a higher scale.

In the result, I accordingly order as follows:

1. Plaintiff's claim be and is hereby dismissed.
2. Defendants counterclaim is granted.
3. Plaintiff be and is hereby ordered to pay damages to the defendant in the amount of US1, 697-24 being the amount of interest accrued on the debt of US\$20, 367-70.
4. Plaintiff be and is hereby ordered to pay defendant the sum of US\$2,037-00 which amount is the collection commission incurred by the defendant.
5. Plaintiff is ordered to pay on the interest on the sums referred to in paragraphs 3 and 4 (supra) at the prescribed rate calculated from the 9th June 2017 to the date of payment.
6. Plaintiff is ordered to pay the defendant's costs on a higher scale.

V.S. Nyangulu & Associates, plaintiff's legal practitioners
Dzoro and Partners, defendant's legal practitioners