

V & S HEALTHCARE (PRIVATE) LIMITED
T/A FIVET ANIMAL HEALTH
versus
SIFELANI MUNGWARI

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 13, 14 & 17 September 2018 & 10 July 2019

Civil Trial

R. Zakeo, for plaintiff
J. Zviuya, for defendant

MUSAKWA J: The plaintiff issued summons for the following relief:

- (a) Payment of \$14 859.45
- (b) Interest at the prescribed rate calculated from 14 October 2016 until payment in full.
- (c) Costs of suit.

On the other hand the defendant counter-claimed and sought the following relief:

- (a) Payment of \$20 596.00 comprising lost income and wasted costs.
- (b) Interest at the prescribed rate from the date of summons to the date of payment in full.
- (c) Costs of suit.

It is common cause that the plaintiff supplied the defendant with 10 000 broiler chicks on credit. The contract also entailed the supply of equipment (in the form of drinkers and feeders), feed and medication. The repayment terms were that the defendant signed a cession document with MD DE Chassart & Sons t/a Surrey Huku (hereinafter referred to as Surrey Huku). This entailed that upon delivery of the mature chickens to Surrey Huku, they would be slaughtered and weighed. The amount due to the plaintiff would be deducted, with the balance being paid to the defendant. The plaintiff's claim is that the defendant failed to pay the amount due within fourteen days. On the other hand the defendant claims that the plaintiff supplied her with defective chicks and feed. As a result, the defendant was only able to supply half the reared chickens to Surrey Huku and thus incurred a loss as a result.

Evidence for the plaintiff was led from two witnesses; Dunstan Gosho (hereinafter referred to as Dunstan), a veterinary nurse and Shadreck Tendai Magonziwa (hereinafter referred to as doctor Magonziwa), a veterinary doctor. Dunstan made five site visits to the

defendant's farm. He was present when the chicks were delivered. After a week he made another visit. According to him, for up to three weeks the birds were normal. At three weeks the birds started to show some cracks/scars. There was overcrowding and the defendant was advised accordingly. The defendant was also advised to provide additional feeders and drinkers. In that regard they extended the defendant further credit. The additional equipment was procured on 3 May 2016. Although the defendant disputed it, there was not enough space because the defendant was also rearing layer chickens. Cannibalism amongst the birds started at five weeks. The birds were also pecking at each other, as reported by the workers. Despite the provision of additional equipment there was no immediate improvement on the problem of cannibalism. This is because cannibalism is difficult to eradicate. Dunstan also claimed that he had established through the defendant's employees that water was not adequate as the one borehole available was malfunctioning. This aspect was hotly disputed by the defendant.

Dunstan prepared a report which he said was for the plaintiff's personnel's internal consumption. The purpose was to highlight the problem of cannibalism and the cause. He told the court that the plaintiff had no obligation to provide after-sales service to the defendant.

Doctor Magonziwa got involved in the matter at four weeks. He conducted post-mortems examinations on five birds. The history was provided by Dunstan as he himself did not make site visits to the defendant's farm. He justified that on the basis that he is a consultant for other chicken breeders. As such he could not do site visits on account of bio-safety considerations.

This witness gave a lot of technical details on the whole process of chicken rearing. This covered pre-placement preparations, placement, housing requirements and stocking density. He also explained how housing density and the adequacy or lack of equipment can affect the physiology of a bird. The approval of a credit facility in favour of the defendant was not dependant on technical site visit. In any event site visits are not an obligation but advisory.

According to doctor Magonziwa different factors led to cannibalism. In his report he listed all six possible causes. A definite conclusion would have required a test. He outsourced the testing of feed to National Foods Limited. He disputed that the feed was defective. He also made checks with the supplier of the chicks and buyers of the same batch and did not get reports of similar problems. Thus he ruled out genetic defect as that would not have manifested only in the chicks supplied to the defendant. He further stated that breeders lay eggs for eighty weeks. If there were any defects these would have persisted and been detected throughout the laying period. He singled out that there was an emergency purchase of equipment in the evening

of 3 May 2016 by the defendant. This preceded the visit to the defendant's farm by another veterinarian, doctor Magoba who testified for the defence.

Evidence for the defence was led from the defendant and doctor Magoba. According to the defendant prior to the delivery of the chicks Dunstan visited the farm. They measured the houses and came up with 1083 square metres. According to her they used three of the five houses that were available. She disputed that there were layer chickens in the other houses. When chicks were delivered on 1st April Dunstan was present. Dunstan visited the farm a week later. About two and a half to three weeks later she noticed that the chickens had less feathers compared to other flocks. She advised Dunstan. At three weeks there was reddening of the chickens' bellies. She again advised Dunstan who informed her that he was alone at their office and could not attend. After three days she observed cracks. She again contacted Dunstan and this time he attended. He recommended the application of tar on the cracks but there was no improvement. When she again advised Dunstan he appeared out of depth on the issue. One hundred birds then died.

At four and a half weeks the mortality increased. Having advised doctor Magoba, they extracted thirteen bags from the feed that was in storage for purposes of testing. On the assumption that there could be overcrowding or that the equipment was inadequate, she purchased new equipment for the birds that had been moved to another house.

Doctor Magoba got involved on 4th May 2016 when the defendant brought in slightly more than one hundred broiler carcasses. The birds had cracks. She conducted post-mortem examinations. There were no signs of disease. She made a site visit on the same day. The major cause of cannibalism is overcrowding. Hence the visit to the defendant's farm. At the defendant's farm she did not detect any overcrowding as the birds moved freely. The birds had cracks on the same side and there was pecking on the cracks. The other cause of pecking is insufficient equipment. There were sufficient feeders and drinkers.

The other cause of cannibalism is nutrient deficiency. They took thirteen bags of feed from which samples were taken for analysis. Nutrients are vital for broiler production and they should not be too high or too low. She noted that some birds pecked on walls which is a sign of nutrient deficiency. There is no uniformity in the nutrient content of the thirteen bags. She could not rule out genetic defects on account of the uniform distribution of cracks on the birds. She concluded that the cause of cannibalism was the cracks and nutrient deficiency.

Analysis

The plaintiff's claim is that it extended the defendant credit, the terms of which were payment within fourteen days of invoice. In her plea the defendant denied the existence of such a contractual arrangement. However, the defendant's defence shifted as in her summary of evidence she confirmed the credit arrangement. That is why the defendant concluded a cession agreement with Surrey Huku. The cession agreement also acknowledges the plaintiff as the creditor to whom \$27 854.10 would be paid by Surrey Huku. This was subject to the defendant delivering chickens to Surrey Huku. Thus on 19 May 2016 the defendant supplied 5 030 chickens which were valued at \$19 147, 17.

The plaintiff quoted the defendant the sum of \$27 854.10. This was on 21 March 2016. On 11 October 2016 the plaintiff issued a statement showing that the amount due from the defendant was \$14 859.45.

The contract between the parties was purely a credit arrangement. The plaintiff denied that it was obliged to provide after-sales services. The visits made were out of the need to maintain customer loyalty. In light of the nature of the contract this is understandable. Different considerations would apply if the contractual relationship was that of a contractor and grower as there would be shared responsibilities between the parties. The defendant did not seek to argue that the provision of after-sales service was implied in the contract.

On the evidence before me the plaintiff's claim can only fail if it can be held that the plaintiff breached the contract by delivering defective chicks and feed. In such a case the counter claim would then succeed.

Ordinarily in every contract there is an implied warranty against latent defects. In this respect see the case of *Crest Poultry Group (Private) Limited (t/a Hubbard Zimbabwe) v Godwills Masimirembwa* HH 14-11. In that case PATEL J had this to say at p 7:

“Additionally, quite apart from the chart, every contract of sale carries an implied warranty of merchantable quality and fitness for the purpose for which the *res vendita* is intended to be used, *viz.* an implied warranty against latent defects. See *Crawley v Frank Pepper (Pty) Ltd* 1970 (1) SA 29 (N). In order to invoke the warranty, it is not necessary to prove that the seller had any knowledge of the defect, so long as the buyer proves that the defect existed at the time of sale. See Christie: *Business Law in Zimbabwe* at pp. 166-167.”

No evidence was led that the chicks that were supplied to the defendant were defective. All that doctor Magoba opined was that genetic defects could not be ruled out on account of the development of cracks on similar parts of the birds. However, the cause of the cracks was not scientifically proven. No genetic tests were conducted. No evidence was led that farmers who purchased chicks from the same batch experienced a similar challenge with their birds.

It is also not in dispute that the defendant did not have adequate equipment. That is why she purchased 25 feeders and 25 drinkers on 3 May 2016. In addition, she moved some chickens to another house. Her justification was that she did so in order to salvage the chickens that were not affected. The exact numbers were not specified. This does not gel with doctor Mgoba's post-mortem report in which was noted that a few chickens (again the actual number not specified) with problem legs were in a different house.

The parties were not agreed on the state of stocking of the chicken houses. According to Dunstan's report, there was overcrowding. His undated report noted that the houses with the chickens measured 350 and 400 square metres which gave a stocking density of 13 birds per square metre. This was considered too high a stocking density. According to doctor Magonziwa the ideal stocking density should have been 10 birds or less per square metre.

On the other hand the defendant claimed that there was altogether 1 883 square metres of space. Out of the 5 houses she claimed to have used 3. Unfortunately she did not specify their dimensions. She also did not specify if she used the same houses throughout. This is because mature birds occupy more space than day old chicks. Even if doctor Magoba noted that the birds moved freely and thus there was no overcrowding, sight must not be lost that she paid the visit after defendant had moved some birds.

Coming to the feed, the plaintiff submitted it for analysis to National Foods. The defendant made issue of this primarily on the basis that the analysis may be biased. This is because the plaintiff chose an analyst who is engaged in the same business of manufacture of stock feeds as itself. Assuming one is not persuaded by this contention, the analysis by National Foods has one major blemish. This is the fact that the sample that was analysed did not come from the actual feed that the defendant was using. It was not specifically stated so by doctor Magonziwa who is based in Harare and did not visit the defendant's farm in Mutare. Even the quantity of the sample that was taken is not specified in the report. This is relevant when one considers the provisions of the Farm Feeds Regulations, Statutory Instrument 162/2014. I am mindful that the analysis by National Foods was not conducted in terms of the Regulations, but it is proper to make that observation.

The samples that were taken by doctor Magoba were conducted by the Fertilizer Farm Feeds And Remedies Institute which falls under the Ministry of Agriculture. Analytical reports were generated in respect of each sample. Doctor Magoba did not specify whether the samples she took were done in terms of s 11 of the Regulations which prescribes the sampling procedure. Section 11 (2) provides the taking of samples by means of a sampling probe. What

immediately comes to mind is that a sampling probe is used in order to minimise contamination.

The other criticism of the analytical reports is that they do not wholly conform with the First Schedule of the regulations. Apart from noting the actual results of the analysis, the analyst is expected to make observations. In this context, he/she should comment on the results. All the analytical reports are blank on the portion for remarks. Therefore a doubt remains whether the results of analysis accord the specifications of the plaintiff's registered feed. It matters not that doctor Magoba testified that some of the results may have exceeded the minimum thresholds. This was disputed by doctor Magonziwa. Neither of the veterinary doctors is not a nutritionist. The best evidence should have been led from an animal nutritionist.

Disposition

The plaintiff managed to prove its claim. On the other hand the defendant did not manage to prove her counter claim. Accordingly it is ordered the defendant shall pay the plaintiff's claim as follows:

- (a) Payment of US\$14 859.45
- (b) Interest at the prescribed rate calculated from 14 October 2016 until payment in full.
- (c) Costs of suit.
- (d) Absolution from the instance with costs is ordered in respect of the counter claim.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners
Messrs Bere Brothers, defendant's legal practitioners