HH 639 /16
HC 7625/11

MUZ PRINTERS (PVT) LTD
versus
WINDMILL (PVT) LTD

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE 13, 14, 15, 28 & 29 NOVEMBER 2013; 2 – 3 FEBRUARY 2015;
9 MARCH 2015 & 2 NOVEMBER 2016

Civil Trial

R. Harvey for the plaintiff
E. T. Moyo for the defendant

TAKUVA J**:** The failure to thrive of 35 000 chicken led to a turbulent relationship that culminated in plaintiff instituting summons action against the defendant on 5 August 2011. Plaintiff's claim is for:

> "(a) Payment of the sum of $134 600,00 being consequential damages resulting from breach of contract by defendant.
> (b) Payment of interest on the principal amount claimed above at the prescribed rate of 5% per annum starting from the date of summons.
> (c) Costs of suit on a higher scale."

The plaintiff is *inter alia* engaged in the business of rearing and selling chicken to various markets and other interested customers, while the defendant is a dealer specializing in agricultural businesses including the supply of chicken feeds to available markets. Sometime in March 2011 plaintiff and defendant entered into a contract wherein plaintiff bought and defendant supplied chicken feed in the form of growers mesh. Plaintiff required the feed supplied by defendant to feed 35 000 chicken to maturity within six (6) weeks. The chicken however, took longer to mature and be ready for market. Plaintiff enquired from poultry experts and was advised expertly that the chicken could not mature in time as a result of the feed supplied by defendant which was said to be poor and had low energy and poor protein content.

Plaintiff's contention was that the defendant was in breach of contract resulting in him suffering material financial loss or consequential damages in the sum of $134 600,00.

The defendant averred in paragraphs 3 – 8 of its plea as follows:

"… 3. The defendant denies that it was the sole and exclusive supplier of feed to the plaintiff.
4. It is further denied that at any rate the under growth of the plaintiff's chicken was due to a defect in the quality of the feed supplied by it and the plaintiff is put to the strict proof thereof.
5. The defendant will state that the feed supplied by it was subjected to thorough quality checks to ensure that it meets the required standard.
6. In any event, the plaintiff should be stopped from disputing the quality of the defendant's product as it continued to order further supplies despite its alleged discontent over the quality of the feed.
7. The defendant denies the alleged breach of contract and the alleged liability for consequential damages and puts the plaintiff to the strict proof thereof.
8. Further and in any event the alleged quantum of damages if at all due which is denied, is disputed and the plaintiff again is put to strict proof thereof.

Wherefore the defendant prays that the plaintiff's claim be dismissed with costs on a higher scale."

Further, defendant filed a counter claim as follows:

"1. For purposes of convenience, the parties herein shall be cited and referred to as in the claim in convention with the defendant in the claim in reconvention being the plaintiff in convention and the plaintiff in reconvention being the defendant in the claim in convention.
2. The defendant's claim against the plaintiff is for payment of the sum of US$132 209,75 due and owing in respect of chicken feed sold and delivered to the plaintiff at the plaintiff's special instance and request sometime between January 2011 to April 2011 consequent to an agreement between the parties.
3. The plaintiff has failed and/or neglected to pay for the said feed and is currently indebted to the defendant in respect of the said amount.
4. Despite demand the plaintiff has refused and/or neglected to pay the said amount.
Wherefore the defendant claims against the plaintiff:-
(a) Payment of the sum of UD$132 209,75 due and owing in respect of goods sold and delivered to the plaintiff by the defendant.
(b) Interest on the aforesaid amount at the prescribed rate of interest calculated from the 1st of March 2011 to the date of full and final payment both dates inclusive.

(c) Costs of suit on an attorney and client scale."

Plaintiff's plea to the defendant's counter-claim is couched in the following terms:

"1. Ad par. 2-4

There is no basis for the defendant to claim the sum of US$132 209,75. The stock feed delivered to the plaintiff by the defendant was sub-standard and caused loss to the plaintiff. The defendant cannot be paid for causing loss. The claim of US$132 209,75 is therefore unfounded and lack basis.

Wherefore the plaintiff prays that the defendant's counter claim be dismissed with costs."

Plaintiff opened its case by leading evidence from its managing director one Mabasa Muza (Muza). His evidence is that plaintiff is in the business of rearing and selling chickens. Before dealing with defendant, he used to buy chicken feed from Agrifoods. At the same time his company was printing documents for the defendant and he was informed by one Revesayi an employee of the defendant that defendant was also in the business of selling stock feed. He became interested and he was advised that he could acquire stock feed on credit wherein the purchase price would be due and payable after 60 days of delivery of the feed. He found this deal very attractive in that it would enable him to pay after the sale of chickens. Before engaging defendant, he had raised 25 000 chicken on Agrifoods stock feed without encountering any problems with the growth or weight of the chickens.

Muza then had an account with defendant whereby it started supplying plaintiff with stock feed. Initially he bought feed for 1 000 chickens and he did not experience any problems. He then bought feed sufficient to raised 5 000 chickens and this time the weight of the birds was not good. When he informed defendant's employees of low weight, defendant deducted $3 600,00 from the total cost of this batch of feed on the basis that they had detected some anomaly with their feed. Plaintiff then bought 35 000 chicks from Irvines Zimbabwe which were delivered on different dates ranging from the 22nd of February to the 15th of March 2011. Muza obtained the 3 course feed, namely, Starter, Grower and Finisher from the defendant. This supply was sufficient to feed 35 000 chickens up to six weeks. This is common cause.

For the 1st 18 days, Muza fed the chickens on Starter mash and the weight was good. Thereafter, he fed them with Growers mesh but after 7 days he discovered that the weight had not changed. Muza then took ten chickens as samples from six different fowl runs to the Veterinary Department where Mr Munyanyi, a poultry pathologist conducted a post mortem examination on the 4 week old birds. This was after Munyanyi visited the farm where the chickens were being reared. Later, Munyanyi compiled a post mortem report which was produced on page 4 of exhibit one which is plaintiff's bundle of documents. In that report, the pathologist recommended *inter alia* that the feed should be sent for full feed analysis as the poor development of the vital organs were suggestive of poor feed with low energy and poor protein content.

Startled by this finding Muza on the same day he received the report, went to the respondent where he discussed the report with Claudius, a sales representative and one Revesai Tichaona) Revesai). After informing the two that the chickens had a problem Claudius was dispatched to the farm to carry out investigations. At the farm Claudius examined all the fowl runs and weighed chickens from each fowl run. He indicated that the chickens were feed well and there was sufficient water. However, he pointed out that he "might not trust his stock feed" and instructed Muza not to continue feeding them on Growers but instead they should extend the finishing period by two weeks.

Since Muza had feed for only six (6) weeks, he enquired from Claudius where he was going to acquire the extra feed, and Claudius advised him that respondent will supply the extra feed for free. Claudius invited Muza to Windmill where they met Revesai and a Mrs Dunford. After Claudius explained to these two what had happened Muza was given an order for 40 tonnes Finisher mesh. Subsequently Claudius visited the farm twice a week for 3 weeks to check the weight of the chickens. As they were getting into the 7th week, the feed ran out and Muza suggested to Claudius that they should have the feed tested. Claudius agreed and he took one bag each from starter, grower and finisher while Muza took a similar sample.

After agreeing to compare the results at the end of the investigations, Muza took his sample to ZIMVET who released the feed analysis report on page 5 of the plaintiff's bundle of documents. Although he was told that the results were not good, they also informed him that they were not nutritionists and they gave him Dr Holness's contact number. Muza took the report to Revesai and told him that he intended to take the results to Dr Holness for further analysis. He contacted Dr Holness who released the results after three days and Muza showed them to Claudius. Claudius gave Muza an order for 30 tonnes which he took to the farm. Thereafter, Claudius followed to check on the weight and Muza asked him about the results of the 3 bags he earlier took but Claudius said they tested them at their work place and found out that, "their feed was good". He then told Muza that it was Revesai's responsibility but the problem was that nobody wanted to accept that they erred as no company would readily accept a loss.

According to Muza all the feed he took was not tested before collection, contrary to the accepted practice where feed is tested 7 days before delivery or collection. His suggestion to experiment by feeding 300 birds on the remaining bags of starter, grower and finisher was spurned by Revesai and Claudius on the grounds that they were not in the business of chicken rearing and they could lose their jobs in the event that what they did was exposed. Muza unsuccessfully appealed to the defendant's managing director, one Mr Rundozo who simply declined to visit plaintiff's farm and referred him back to Revesai and others. Later Muza sold some of the affected chicken to Surrey Abattoir while the rest of the rejects were bought by Max Meats at a lower price. After these sales, he compiled the receipts and took them to the defendant who ignored him, forcing him to seek legal advice.

Muza was adamant that Dr Holness had to prepare his report without respondent's recipe because Revesai refused to divulge it to him. He chose Dr Holness after he had been recommended by many institutions. On 12 May 2011, he wrote a letter to defendant highlighting the problems and consequences arising from the use of defendant's feed. The quantification of the loss is on pages 16 – 17 of exhibit 1 which is plaintiff's bundle of documents. On page 17, the plaintiff has demonstrated how he calculated the damages in the sum of US$ 60 245,00. He

confirmed that the plaintiff's counter claim is for the cost of feed supplied to him including extra tones and interest since his chickens had passed the 60 day period. He however disputed the whole claim on the basis that defendant's feed was substandard. On inspections carried out by defendant's employees at the farm he said he was never supplied with a single written report or document containing a critic of his farming methods. Further, he was never shown the result of their feed tests. He categorically denied receiving any supply of feed from somewhere else.

Under cross-examination the witness denied defendant's suggestion that before dealing with it, he had no prior experience in chicken farming. He also said he was told by Mrs Dunford and Tichaona that they had deducted $3 600,00 from his account. When it was pointed out to him that the statements issued by the defendant do not reflect that deduction, he said that was so because both knew why they had deducted it. In other words, they did not want the reasons to be known. Muza agreed that there are many variables that account for poor weight, but was quick to point out that in this case the problem was with the feed as indicated by the experts. He denied that other factors like poor health, poor dosage of medicines, smoke and or bio security caused growth deficiency in his chickens. Muza refuted the claim that he inflated his labour costs and that the loss was caused by the depressed market environment prevailing at the time.

Further, he said since he had received a total of 4 180 bags or 209 tonnes of feed from the defendant to feed 35 000 chickens, he could not abandon them midstream for another supplier of feed. To do so, would have been costly since defendant insisted that they wanted to be paid for the product supplied to it. He then went along with defendant's idea of extending the period by two or so weeks on condition he got extra feed for free. Asked why he kept on saying figures sent to defendant that are on pages 36 – 37 of exhibit 2 were incorrect, the witness explained that the 1st set of figures were done by his friend who is not qualified, while the second set of papers were done by an external accountant.

Muza set out his calculation for damages in the sum of US$60 245,00 on page 17 of exhibit 1 which is the plaintiff's bundle of documents. He referred to the following items in his evidence;

(a) Item 16 of plaintiff's bundle of documents which explains the extra costs incurred amounting to US$54 554,00
(b) Item 8a – Z and 8aa - 8ab in plaintiff's bundle which refer to the chickens accepted by Surrey chickens and sold to that concern in terms of a contract to supply
(c) Item 9a – 9b which shows the sale of underweight chickens to Max Meats in May 2011
(d) Item 10 shows the Veterinary costs incurred
(e) Item 3a – b which are receipts for 35 700 day old chicks
(f) Item 1 of plaintiff's bundle of documents being the Windmill guide to raise chickens, which guide he used to raise his chickens

The second witness for the plaintiff was one Tarusenga Munyanyi (Munyanyi) who is a poultry specialist in the Ministry of Agriculture under the Veterinary Department. His qualifications are:

(1) Diploma in Animal Health and Production – Mazoe Veterinary College 1991
(2) Diploma in Applied Biology from Harare Polytechnical College in 1996
(3) A Post Graduate Diploma in AVIAN Pathology from Melbourne University, Australia in 2005

He has been with the Zimbabwe Veterinary Services as a civil servant for 15 years. Munyanyi's duties are *inter alia* diagnosis of poultry diseases, regulating exportation of poultry from Zimbabwe to SADC region and importations, dissecting and conducting post mortem reports, registering and authorising poultry feeds including defendant's feeds. His further responsibilities include registration and inspection of butcheries, monitoring feeds and trials. Munyanyi knows Claudius as defendant's employee working in the feed section. According to him Claudius holds a Bsc Hons degree in Agriculture in Animal Science which is a general qualification in agriculture. He has no qualification relating to animal health. Revesayi is a holder of a Masters Degree in Animal Science which makes him knowledgeable about animal science but not their health. He told the court that Muza brought ten chickens for examination on

15 April 2011. After examination, he noted that they were underweight as their normal weight at 28 days should have been between 1.2 – 1.4kgs. He performed autopsies on them and noted as a gross pathological finding that:-

(a) the bones were fragile
(b) there was poor development of vital lymphnode organs namely the liver, spleen and pancreas. These organs are responsible for defending the body against infection. The feed was not able to develop these organs due to its poor quality. The result was immunosuppressant wherein the body is unable to fight infection as what got into the body could not be controlled.

After the post mortem examination, he visited the farm where he noticed the following:-

(i) the mash was a bit fine and tended to get into the nasal conches causing inflammation of the nasal sinuses.
(ii) there was nothing to suggest there was coal dust contamination
(iii) there was nothing wrong with the farming methods
(iv) he saw only bags of feed manufactured by the defendant in the store room at the farm.

From his observations at the farm and the autopsy results, he concluded that the problem was feed deficiency. Consequently, he recommended that the feed be sent for analysis and that the plaintiff should try pellets instead of mash. When the feed was analysed, the results turned out to be in concurrence with his findings in the post mortem report. In his opinion, if defendant wanted to counter his observations or the other reports, it should have taken samples of chicken feed and conducted their own tests and made reports. Under cross-examination, he said he was a pathologist and one does not have to be a veterinary surgeon to be a pathologist. Further, he stated that the infection he observed on the 4 week old birds was due to malnutrition.

For reasons that will follow, it is instructive to reproduce the whole report that appears on page 4 of exhibit 1. It states:-

"Attention Mr Muza

Post Mortem for 4 weeks broilers

The birds that were brought for post mortem were live birds. They were 4 weeks of age on the day of the post mortem.

Post Mortem Findings

The birds were too small for the age weighing less than 5/10 400 grams although some were larger with weight of 4/10 700 grams. The gross pathological findings were consistent with poor weights, fragile bones, poor development of the vital organs which are the liver, spleen and pancreas. This is suggestive of feed with low energy and poor protein content.

Immunosuppression was noted as a result of poor nutritional content leading to many infections like chronic respiratory disease (CRD) and other infections which make the bird not fight infections.

A farm visit was done on the same day and the same findings were noted on the farm. The feed was in mash form and beat fine affect sinusitis because the feed will stick in the sinuses leading to sinusitis which inflammation of the sinuses.

Recommendations

Send your feed for full feed analysis. Also another feed that is in pellet form on the other batch of bird like Profeeds or National Foods."

The report is signed by Munyanyi a Poultry pathologist in the Poultry Unit in the Department of Veterinary Technical Services, Harare. It is dated 15 April 2011.

When asked while giving *viva voce* evidence to explain the quality control procedure, the witness said first one should test the raw material and then test the feed before dispatch. A sample of the tested feed should be retained in order to deal with complaints from customers. Where it is suspected that contamination occurred outside the factory, that feed must be tested and the results juxtaposed against the sample that remained in the workshop. In casu, he said his report is not scientifically challenged because defendant failed to test the feed. He also explained why some birds were bigger than others while feeding on the same feed. According to him this depends on the genetics of a bird in that some have superior genes while others do not. The

normal result will be that they would be different sizes. As regards his qualifications, he said he is allowed to prescribe medicines because he holds a diploma in animal health. However, he is not a Veterinary Surgeon and he is not a member of the Council of Veterinary Surgeons of Zimbabwe.

Plaintiff's third and last witness was Mr Lovemore Mtetwa a nutritional expert and consultant in livestock nutrition and in poultry. He has a Bsc in Animal Science, Msc in Animal Science and Msc in Animal and Broiler nutrition. He commented on exhibit 5 and 7 of plaintiff's bundle namely the ZimVet Stockfeed Analysis, Agrilab Report and Agrilab Test Certificates. As regards the Agrilad Test Certificate exhibit 7, he commented that the crude protein of 24.6 on the protein column was high as well as the Ash content which was double the norm. According to him, this was indicative of mixing of the feed and there was contamination in making the feed. He also noted that there was an oversupply of protein and this imbalance would result in low energy levels which takes away the energy from the "N.D.F."

Further, the report showed that the "Ash" was supposed to be around 4% but the analysed feed had 9.5% which is more than double the normal level. When asked about the effects of this, the witness said there was an imbalance in the minerals level, meaning that there was contamination of feed caused by mixing of chicken and beef feeds. All in all he said there are 21 minerals responsible for the growth of a bird and a failure to have them in the correct ratios might cause mineral toxicosis in chickens. This condition may result in fatalities or chicken not to grow properly, developing brittle bones, poor growth and low appetite. He added that some minerals can cause poor organ development involving the liver and pancreas etc. The witness explained that minerals interact, that is they do not work in isolation but in ratios in that an excess in one can cause a deficiency in the other. This imbalance can make infection by diseases very easy.

Asked about the possibility of poor growth having been caused by "poor quality chicks" the witness said if that had been the case, then the chicks would have died within 7 – 10 days from leg or respiratory distress. Once they reach age 3 – 4 weeks this question of poor chicks

does not arise. Commenting on the results on page 7 he stressed that the ME level of 11.82mj/kg on the Broiler Mesh is on the lower side compared to the normal range of 12 – 13mj/kg.

On the question of pumping in more feed, the witness said this worsens the situation in that the more they ate, the more the problem was compounded. In his view, the old feed should have been retrieved and new feed introduced. As regards in house procedure to control raw materials, he said big companies have their internal laboratories which test feed before dispatch. The feed must pass the lab test. He said Dr Holness is the founder of Agrilabs which is used by companies like Agrifoods and National Foods.

When it was suggested to him under cross-examination that the defendant could not carry out its own "tests" because the feed complained of had been used up and that plaintiff could not supply batch numbers, he said the normal procedure is that batch numbers should be on the invoice and delivery notes. A copy is then given to the customer. When asked about the accuracy of Dr Holness' results, he said they were in his view 99% correct and therefore valid. It is immaterial that he is not the one who personally carried out the tests. He also stated that it does not follow that if feed is defective it would affect the birds equally because it is individualistic in that the effect depends on the bird's immunity and reserves. This also applied to chicks from the same hatchery since the healthy ones will still make it despite feed lacking minerals.

Finally, the witness said in his view, the plaintiff's problems started with the Grower feed. However, he said it would have assisted if plaintiff had used more of Grower instead of Finisher. As to the nature and content of the minerals, he said "Ash" is the total of all those 21 minerals present in the feed.

The defendant led evidence from its credit manager, Joan Dunford who narrated how plaintiff negotiated credit facilities with defendant. The account was approved leading to the supply of feed shown on pages 4 and 7 of the defendant's bundle of documents. The total due is reflected on page 9 of the same bundle as $132 209,75. According to her, the amount was overdue. She agreed with Muza that defendant supplied him with more feed although she said

this was not free feed which could only be given upon approval by the Chief Executive Officer. The extra 70 tonnes appeared in plaintiff's account meaning that this was not a donation.

This witness' testimony is mainly common cause except on the issue of whether or not she was involved in negotiations to give plaintiff free feed. She said that would be resolved by the technical people yet under re-examination she said free feed would not have been given to the plaintiff without her knowledge. This contrasts sharply with her earlier testimony that if the issue was resolved, she would not know about the outcome.

Defendant's next witness was Claudius Ndabambi (Claudius) who is employed by defendant as a sales manager holding the following qualifications; Bsc and Msc in Animal Science. His duties include product production and giving advice to farmers and companies. All in all he had 11 years of experience as an animal nutritionist. Seven of those years, he was working at Gwebi Agricultural College as a lecturer and 4 years at Windmill. According to him the possibility of contamination of product during the production process is zero because the product goes through computer testing after which it is fed into a clean bag. Batches are sampled and sent to the laboratory for analysis after which the results are sent to a nutritionist for matching with the recipe. The product is then authorized for dispatch. He emphasised that the product is never dispatched without a laboratory test being conducted first. The results are then kept for four months. In order to track a particular bag of feed, a batch number is required. Once they locate the batch number, it will assist them to link a bag to the laboratory results.

After receiving a complaint from Muza, he visited the sites where the chickens were kept. He found Muza present at Taisekwa Farm and he did not observe any problems except a few shortfalls on bio-security and multiple tenancy. However, when he moved to the second site (Bremma) he noticed that the birds were in a poor state, poor bedding of wood shavings which was too fine and dusty. He claimed that Muza told him that he had a power cut for a week, resulting in lighting and heating problems coupled with feed shortcomings on the Growers Mesh. Since the farmer had used all the growers feed and was now using Finisher, he could not find a sample of the grower he had used. He also failed to secure an empty bag with a batch number

and he left. Later, he was shown post mortem results by Muza but the analysis report came from their lawyers.

Commenting on the analysis results, he agreed that the Ash content was too high but attributed this to contamination either at the farm or during sampling. He denied that Muza only used feed from the defendant. For that reason, he said defendant does not accept responsibility for the poor growth. Further, he denied that he acknowledged that their feed was defective and also denied agreeing to supply extra feed for free. According to him the lab results for the feed are not reliable because they give different results.

Under cross-examination, Claudius stated that although batching is done and can be traced electronically, if one does not have a batch number from a bag, it will not be possible to trace supplies using invoices. He said batch numbers are not put on invoices. Despite being advised of the complaint in the Growers Feed and being shown the post mortem results, he did not investigate the matter further by either taking a few birds for a post mortem or assist in the examination of the feed. All he did was to give the farmer "technical advice" which he did not specify.

Asked about the cause of the poor growth, the witness said it was access to feed and not the quality of the feed. On the advice he gave Muza on what feed to buy in order to rectify the problem, he said he told him to buy more of grower as finisher would stop the growth totally. However, when it was put to him that the invoice shows that respondent supplied Muza more finisher at that stage he said it implied that Muza disregarded his advice to buy more growers mash.

In answer to a specific question relating to 3 bags he was given by Muza as samples, his answer was "It is not necessary to take 3 bags." He admitted that respondent frequently used Agrilabs and they were satisfied with the findings. However, in this case he said he did not know whether he sample was from Windmill or not. On the issue of contamination at the factory, he said it was possible but could be "minimized". Later he said, "it was possible but it could be picked up before the feed left the factory". Apart from allowing Muza to see the

marketing manager, he did not make a formal report to the respondent about this case. He criticised Munyanyi's findings as inconclusive in that the existence of fragile bones is not suggestive of birds not getting proper feed.

According to Claudious, Munyanyi is not registered as a "practicing pathologist" since he does not hold a Bsc Veterinary Degree. Consequently, so the argument went, Munyanyi is not qualified to perform and sign a post mortem report. He referred to a letter from the Registrar of the Council of Veterinary Surgeons. When it was put to him that the restriction he is talking about does not apply to Munyanyi by virtue of the fact that he is a civil servant employed by the State in the Veterinary Department, his answer was "he should not practice." He however, conceded that section 42 of the Veterinary Surgeons Act Chapter 27:15 only applies to private veterinary surgeons. Also he conceded that the teller from the Registrar of the Council of Veterinary Surgeons was written at his instigation in order to "seek whether he (Munyanyi) was operating within the laws of the country."

Claudious admitted that there was something wrong with Muza's birds and since this meant that they were not likely to receive payment, they decided to give him 70 tonnes of finisher mash to "see off his birds" in order to minimize the risk of non-payment. The 70 tonnes were however not for free as Muza was supposed to pay for it. Under re-examination he said from the volumes plaintiff was buying, it was not practicable to "enumerate batch numbers on invoices." He also said it was not the practice to put batch numbers on invoices. On the reason for his visit to the farm he confirmed that it was to collect a sample of the feed and a batch number after Muza had complained and showed him the post mortem report. He however agreed that he did not do a written report on his findings from the visit to the farm.

Finally, the witness said he did not see any other bags from a different producer at the farm or any other sign of feed mixing. Defendant's last witness was Dr Masimba Ndengu who is a lecturer in the Department of Veterinary Science at the University of Zimbabwe. His qualifications are:

(a) Bachelor of Veterinary Science UZ

(b) Msc Veterinary in Food Animal Medicine

He is also a member of the Royal College of Veterinary Surgeons and Chairman of the Council of Veterinary Surgeons of Zimbabwe. He has written 21 articles pertaining to poultry.

When asked how he knows Munyanyi he said he saw him for the 1st time the previous day in court but had dealt with him in his capacity as Chairman of the Council because Munyanyi was doing work he was not supposed to do. Council was requested to spell out Munyanyi's status and the Registrar did a letter on 10 January 2012. According to this witness Munyanyi is not qualified to compile a post mortem report. Not only that, he also said Munyanyi is not allowed by law to compile such a report. In his view, the report is null and void since its authenticity is dubious.

The witness then tore into the report, criticizing its format, terminology grammar and findings. According to him if feed was deficient then the other birds should not have grown big. What was more plausible in his view was that the food the birds ate was not being digested for one reason or the other. Asked about the effect of high levels of Ash, he said there would be no effect whatsoever on development of the chicken.

It was his view that the findings on the post mortem report and those of the feed analysis were contradictory in that if feed was a problem as mentioned in the post mortem report then the feed analysis should tally with it. However, this is not the case as the feed report shows low energy levels while the post mortem does not refer to any finding consistent with low energy in the feed. Further, he said disease or overstocking was more consistent with the post mortem results.

Under cross-examination, the witness said he has heard of a Dr Hollness. He indicated that he could not challenge Dr Hollness' report which is a summary of laboratory results. When it was put to him that Munyanyi, as a civil servant, was exempted from registering as a Veterinary Surgeon before carrying out post mortems, the witness said all of them must be registered and despite the fact that Munyanyi holds a diploma in Pathology he is unable to make

scientific observations and his report confirms that he is incompetent. The witness stated that he disagreed with Dr Mtetwa, Dr Hollness and Munyanyi's assessments as what they did "was not science". However, on the issue of variations in "bird growth", he agreed with Dr Mtetwa that it depends on the individual bird's feed conversion and efficiency.

The witness insisted that in terms of the law i.e. section 42 of the Veterinary Surgeons Act, Mr Munyanyi is not allowed to carry on work that only veterinary surgeons could do. He further contended that even the exemption in section 43 does not cover him because there was no authorization. Questioned about how defendant's complaint had reached his office, he confirmed that indeed Claudious wrote the letter inquiring about Munyanyi's status. He admitted that prior to this he knew, Claudious very well as he taught him at Masters level and they subsequently met in 2013 when he was informed of this case.

When it was put to the witness that Dr Mtetwa said if contamination from source had occurred at the farm, it would have been noticed at analysis sage, the witness said this depends on the level of contamination. Finally, the witness said all post mortems should be conducted under the management of a Veterinary Doctor and this is why he concluded that Munyanyi's report was both unlawful and unscientific. This witness' testimony concluded the defence case.

The Law:

R.H. Christie in *Business Law in Zimbabwe* Second Edition, Juta & Co. Ltd 1998 at page 167, states:

> "Consequential damages for loss resulting from the defect, as remarked above, must be distinguished from aestimatorian damages. A buyer who, as a result of a defect in the property, has suffered loss other than the diminished value of the property itself, is entitled to damages as compensation for that loss only in three circumstances. First, if the existence of the defect amounts to a breach of an express warranty or tacit term, the buyer is not obliged to confine himself to his aedilitian remedies but is entitled to damages for the breach of contract in accordance with the general principles of contract. Second, a seller who knows of a defect and either misrepresents its absence or does not disclose its presence is guilty of fraud, and again the buyer is not obliged to confine himself to his aedilitian remedies but is entitled to delictual damages for the fraud. Third, by an extension of the aedilitian remedies, the buyer is entitled to damages resulting (subject to the general principles of remoteness of damage in contract) from the defect if the seller manufactured the article, or makes it his business to deal in such articles is or is publicly professes to be an expert in such articles. Thus in *Lockie* v *Wightman & Co Ltd* 1949 SR 216, a race horse owner who bought fodder from a dealer in fodder was awarded damages for the death of a horse resulting from the presence of arsenic in the fodder …" (my emphasis)

See also *Delta Operations (Pvt) Ltd t/a National Breweries* v *Charles Maraura* SC 106/99 where it was observed that the liability of the manufacturer is not absolute. A two pronged inquiry is necessary, namely;

1. absence of interference after the article left the factory, and
2. whether the manufacturer took reasonable steps to avoid contamination

The agreed issues as captured in the pre-trial conference memorandum are;

(1) Was the defendant the sole and exclusive supplier of feed to the plaintiff, and if so whether plaintiff adhered to defendant's feeding scheme?
(2) Whether the defendant's feed was the sole cause of the under growth of the plaintiff's chickens?
(3) Whether the defendant is liable for payment of damages to the plaintiff as claimed or at all and the quantum thereof?
(4) Whether the plaintiff in turn is also liable to pay the defendant the sum of US132 209,75 in respect of the feed sold and delivered to the plaintiff but was not paid?

(1) Whether the defendant was the sole and exclusive supplier of feed to the plaintiff and if the plaintiff adhered to the defendant's feeding scheme?

Defendant's contention was that plaintiff used feed from other producers. It should be noted that defendant did not lead any evidence to prove this averment other than relying on a letter from plaintiff to defendant dated 2 February 2011 in which plaintiff mentioned a "mixture of stock feeds from Windmill and Profeeds". Plaintiff explained that his letter has nothing to do with the current project involving 35 000 chickens, but related to his first two trial batches using defendant's feed. He raised 2 batches of 5 000 chickens each using a two phase method of starter and finisher and problems arose resulting in the $3 600,00 credit in his amount. Plaintiff's explanation is buttressed by the fact that as at 2 February 2011 the 35 000 chicks had not yet been delivered to the plaintiff by Irvines Zimbabwe (Pvt) Ltd. The deliveries commenced on 22 February 2011 ending on 21 March 2011. Also plaintiff's denial that he mixed feed is supported by Claudiuos' evidence that on those numerous occasions he visited the farm, he did not see any feed from any other supplier. This is also confirmed by Munyanyi's denial of having seen feed from other suppliers at the same farm. In any case Munyanyi would not have advised Muza to try feed from another suppler if there was evidence that chickens were being fed on feed from a different supplier.

The probabilities also favour plaintiff's version in that it would have been uneconomic for him to source and purchase extra feed when he had sufficient supplies from the defendant on credit. It is common cause that defendant supplied plaintiff with enough feed to feed the entire flock of 35 000 birds beforehand. Further, defendant was alerted to the problem of its feed by Muza as early as 12 May 2011 but it did not respond to the letter of complaint. Prior to that, Muza had raised serious misgivings about the quality of feed. Although defendant dispatched Claudious to the farm, no formal response in terms of written reports were compiled and submitted to the plaintiff by Claudious. It is indeed common cause that Claudious simply did not compile a single report. In his evidence in chief Claudious, while disputing Muza's narration admitted that he visited the farm pursuant to plaintiff's letter of the 26th April 2011.

This letter appears on page 33 of defendant's bundle of documents. It is useful to reproduce a portion of it here. It states; "… When we switched to broiler finisher at day 28, there was improvement on weights and growth. This means that these birds were not infected with any disease. If there was a disease, there was not going to be an improvement on weights and growth. What this means from a layman's point is that the grower feed was poor in performance, it means it was poor quality." (my emphasis)

Now, what is surprising about Claudious' conduct is that despite being informed in the letter of a specific complaint relating to the quality of the grower feed supplied by the defendant and the consequent lack of growth, he did not think it wise to conduct a feed test. Instead he focused on what he termed "management issues" like poor lighting, bio-security and over-crowding. Even on these issues, it is common cause that he did not produce any form of report in which he recorded his findings. Also hard to believe is Claudious assertion that at the time he visited the farm there was not a single bag of Growers mesh left. At this stage the birds were being fed on growers mesh and according to the delivery schedules which are common cause, the plaintiff had been supplied with more than a thousand bags of growers mash. It is therefore most unlikely that Claudious would fail to find a single bag of growers mesh at the farm. This in my view is highly improbable.

I find that Claudious' averment that plaintiff was mixing feed to be both untrue, belated and an after-thought. Surely if it were true, this fact should have been mentioned by Claudious at an early stage when the exhibit in the form of the feed itself from other suppliers was there for all to see. He chose not to divulge such a critical factor in the whole matrix. I take the view that it would have been foolhardy and illogical for Muza to raise a complaint about poor quality feed when he knew that he was mixing feed and such evidence was in abundance at the farm.

In my view, Muza gave a clear version of a series of events that marked the unsuccessful culmination of a chicken project anchored on feed solely supplied by the defendant. Muza was an impressive witness whose demeanour was good. I have no reason to disbelieve his evidence. Consequently, I accept his evidence whenever it conflicts with that of Claudious.

As regards compliance with defendant's feeding scheme, the defendant did not lead even a shred of evidence to prove this. It was incumbent upon defendant to prove its allegations on a balance of probabilities. It has failed and I find that the defendant was the sole and exclusive supplier of chicken feed to the plaintiff and that the latter adhered to the former's feeding scheme.

2. Whether the defendant's feed was the sole cause of the undergrowth of the plaintiff's chickens?

The answer to this question is to be found in a close examination of expert evidence led during the trial. Section 22 of the Civil Evidence Act Chapter 8:01 regulates the use of expert evidence. It states;

> "22. Expert and lay Opinion Evidence
>
> (1) The opinion of a person who is an expert on any subject, that is to say, of a person who possesses special knowledge or skill in the subject, shall be admissible in civil proceedings to prove any fact relating to that subject which is relevant to an issue in the proceedings.
> (2) The opinion of a person who is not an expert as provided in subsection (1) shall be admissible to prove any fact relevant to an issue in civil proceedings if –
> (a) his opinion is based on what he saw, heard or otherwise perceived; and
> (b) his opinion is helpful to a clear understanding of his evidence or to the determination of that issue.
> (3) A court shall not be bound by the opinion of any person referred to in subsection (1) or (2), but may have regard to the person's opinion in reaching its decision."

Schwikkard Van Der Merwe, *Principles of Evidence* 3rd Edition, Juta 2012 at page 93, explain the role of an expert witness thus:

> "There are issues which simply cannot be decided without expert guidance … The true and practical test of admissibility of the opinion of a skilled witness is whether or not the court can receive 'appreciable help' from that witness on the particular issue."

The need for the expert witness to lay a foundation was emphasised by ADDLESON J in *Menday* v *Protea Assurance Co. Ltd* 1976 (1) SA 565 (E) at 569 in the following terms;

> "In essence the function of an expert is to assist the court to reach a conclusion on matters on which the court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the court that, because of his special skill, training or experience, the reasons for the opinion which he expresses are acceptable … However eminent an expert may be in a general field, he does not constitute an expert in a particular sphere unless by special study or experience he is qualified to express an opinion on that topic. The danger of holding otherwise … of being overawed by a recital of degrees and diplomas – are obvious, the court has then no way of being satisfied that it is not being blinded by pure 'theory' untested by knowledge or practice. The expert must either himself have knowledge or experience in the special field on which he testifies (whatever general knowledge he may also have inpure theory) or he must rely on the knowledge or experience of others who themselves are shown to be acceptable experts in that field." (my emphasis)

It should also be noted that for an opinion of an expert to carry any probative value, the expert must advance valid and proper reasons in support of an opinion. In *Coopers (South Africa) Pty* v *Deutsche MBL* 1976 (3) SA 352 (A) 371F – H the court stated that;

> "An expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds are disclosed by the expert." (my emphasis)

Further observations in respect to expert evidence are that, for it to be admissible, it should not be based on some hypothetical situation which has no relation to the facts in issue or which is entirely inconsistent with the facts found proved. Also, an expert witness should remain objective despite the fact that he is called by a party to testify in support of his case. His opinion will be of little value where the expert witness is partisan and consistently asserts the cause of the party who calls him.

In our jurisdiction, the approach was authoritatively stated by HLATSHWAYO JA in *S* v *Ndzombane* 2014 (2) ZLR 197 (S) as follows:

> "… that expert opinion evidence is admitted to assist the court to reach a just decision by guiding the court and clarifying issues not within the court's general knowledge. It is not the mere opinion of the expert witness which is decisive, but the expert's ability to satisfy the court that, because of his or her special skill, training and opinion expressed are acceptable. However, in the final analysis, the court itself must draw its own conclusions from the expert opinion and must not be overawed y the proffered opinion and simply adopt it without questioning or testing it against known parameters. The expertise of a professional witness should not be elevated to such heights that sight is lost of the court's own capabilities and responsibilities in drawing inferences from the evidence. … A court errs when it merely adopts the conclusion of an expert report without exercising its mind on it by, for example calling for oral testimony or drawing the necessary inferences from the evidence."

Bearing these legal principles in mind, I now consider the evidence of experts in this case. It is crystal clear from Munyanyi's training and experience that he possesses special knowledge and skill in animal health and pathology. Consequently, he is therefore an expert witness as defined in section 22 of the Civil Evidence Act. In any event Munyanyi's evidence is admissible even if he is not an expert, in that the same section in subsection 2 (a) (b) allows its admissibility, as his opinion is based on what he saw and perceived. The opinion is obviously helpful in the determination of the issue before the court.

It should be noted from the outset that defendant did not call a pathologist. What it did was to mount a spirited criticism of Munyanyi's capacity and competence to compile a post mortem examination coupled with an attack on the report itself. It was submitted that he is not legally authorized to do what he did. This turned out to be incorrect as the section relied upon i.e. section 42 of the Veterinary Surgeons Act Chapter 27:15 does not assist defendant's case in that the provisions of the schedule clearly exempt Munyanyi from registering as a Veterinary Surgeon before conducting post mortem examinations.

Section 42 states:

> "<u>Certain certificates, etc, invalid if signed by unregistered persons</u>
>
> Subject to subsection (2) of section forty-six, no certificate, prescription or order required by law from a Veterinary Surgeon shall be valid unless the person signing such certificate, prescription or order is registered in terms of section twenty-eight".

Section 43 states:

"Unregistered persons practising as or representing themselves to be Veterinary Surgeons

(1) No person shall –
    (a) practice veterinary surgery and medicine; or
    (b) hold himself out or allow himself to be held out as a veterinary surgeon; unless he is registered, temporarily registered in terms of section twenty-eight or exempted from registration in terms of section forty-six.
(2) Nothing in subsection (1) shall be construed as precluding an unregistered person from performing, giving or providing, in accordance with the schedule or regulations made under this Act, any operation, treatment, test, advice, diagnosis or attendance which is specified in the Schedule or those regulations as the case may be.
(3) …"

The Schedule states:

"Operations, Treatments, Tests, Advice, Diagnosis and Attendances which may be performed, given or provided by unregistered persons

The following operations, treatments, tests, advice, diagnosis and attendances may be performed by unregistered persons –

(a) …
(b) …
(c) anything done in the course of his duties by a person employed by the state:
(d) …
(e) …
(f) …
(g) …
(h) …
(i) …" (my emphasis)

In view of the above, the suggestion that Munyanyi's post mortem report is invalid is based on a misreading of the provisions of the Act.

As regards the contents of the report I find nothing unscientific about it. Questions of "form" and "grammar" are certainly not fatal to the plaintiff's case. The report in my view is in scientifically accurate terms. More significantly it is corroborated by Dr Mtetwa (a nutritionist and poultry expert) in the following material respects;

(a) the tested feed contained low energy levels

(b) the poor quality feed could have caused mineral toxicity
(c) mineral toxicity is responsible for poor growth and brittle bones
(d) the mineral imbalance shown by the test results led to mineral toxicity.
(e) the mineral imbalance can cause poor organ developments involving the liver, pancreas etc.

Munyanyi observed poor growth, brittle bones and poor organ development affecting the liver, spleen and pancreas during the post mortem examination. For these reasons, I find that Munyanyi is an expert witness whose scientific findings were not controverted by the defendant. He did not exhibit any bias in favour of the plaintiff or any hostility towards the defendant despite sustained criticism from defendant's counsel. The witness remained firm and objective explaining that defendant should have (a) kept test results in the laboratory (b) submitted samples of the questioned feed for analysis and (c) should have had the live chickens tested by a pathologist of their choice. It is common cause that they did nothing on all the above issues.

In the final analysis, I find Munyanyi to be a credible witness whose report I accept as showing the scientific results of the chickens he examined.

Plaintiff's last expert witness was Dr Lovemore Mtetwa a consultant in animal nutrition whose testimony was not seriously challenged by the defendant. In fact Mr Ndengu indicated that he was constrained to challenge this witness testimony. His evidence centered on the "Feed Analyses Report" and Dr Holness' Agrilab's report. In simple English the witness explained that there was a possibility of contamination which he explained as mixing beef and poultry feed. It must be noted that this contamination could not, on the evidence before me, have occurred at plaintiff's farm because the sample bags were sealed. The only place where this contamination could have occurred is at defendant's factory during manufacturing. Dr Mtetwa explained what "ash" is composed of and the effect of such a high percentage in the feed. According to him, there was "mineral imbalance" resulting in low energy levels which in turn caused a glitch in both the growth of the chickens and their vital organs' development. He discounted the

possibility that plaintiff bought poor quality chicks by stating that if this had been the case, the birds would not have lived up to 3 or 4 weeks.

This witness gave his evidence in a calm and composed manner. His analysis reveals objectivity and lack of bias. He explained that the normal procedure is that batch numbers are endorsed on the invoice with a copy being carried by the customer. He was extremely surprised that *in casu*, the defendant did not have a record of the batch numbers. He was equally surprised that the defendant could not produce "test results" of the feed which was supposed to have been done before the feed left the factory. The results were supposed to have been kept in defendant's laboratory as per standard procedure. It should be noted that this witness' evidence discredits Claudious' testimony that defendant could not link the feed tested to that manufactured by it and supplied to the plaintiff. Surely, defendant could have used the dates the feed was dispatched as a starting point. Also, since batch numbers are electronically generated, one is left wondering why defendant could not retrieve all the batch numbers relating to that period and to the plaintiff. Compared to Claudious' evidence on batch numbers and laboratory results Dr Mtetwa's evidence makes a lot of factual sense. Ultimately, I find Dr Mtetwa to be a credible witness whose evidence I accept *in toto*. That he is an expert in poultry nutrition is beyond question. As for Dr Holness it was accepted by both parties that he is a renowned nutritionist.

As pointed out above, defendant relied on the evidence of Dr Ndengu's evidence. What is noteworthy here is that while Dr Ndengu is a qualified Veterinary Surgeon, he is neither a pathologist nor a nutritionist expert, although at times he performs pathology. Notwithstanding this shortcoming, he spoke authoritatively in lampooning Munyanyi, Dr Mtetwa and Dr Holness' evidence and reports. According to his interpretation, the totality of the evidence does rule out feed as the problem. His demeanour was very poor and was clearly biased against plaintiff's case simply because Munyanyi had conducted a post mortem report. Not only was this witness pompous and pretentious, he also exhibited his extreme dislike of Munyanyi who he described as "a mere diploma holder who masquerades as a doctor."

According to this witness Munyanyi should be arrested and prosecuted for what he terms "criminal conduct". He rubbished all reports produced by plaintiff as "inconclusive, unscientific and unlawful". Notwithstanding the clear provisions of the law exempting Munyanyi, the witness incessantly alleged that he was committing crimes, despite the fact that the Veterinary Council Act of Zimbabwe failed to report him to the police. This, in my view, is just but one example of the witness' irrationality and lack of objectivity. Although Dr Ndengu did not examine the birds, tested the feed nor visited the farm, he insisted that there are "other possibilities". In his testimony, he revealed an intense hatred of Munyanyi by the Council of Veterinary Surgeons of Zimbabwe. It appears that his quest to jealously guard and insulate this profession made him lose objectivity and the last straw was when his associate Claudious wrote to Council requesting for Munyanyi's "status".

On the contents of the reports, I do not agree with Dr Ndengu's conclusion that Dr Holness' report and the post mortem report do not marry. In my view there is convergence rather than divergence between the two reports in that while Munyanyi speaks of immune suppression, Dr Mtetwa speaks of 'mineral toxicity". What is crucial here is that both can be caused by defective feed with minerals that do not balance. I also do not agree with Dr Ndengu's conclusion that Munyanyi's report is as a result of a rash diagnosis simply because no blood sample was taken before concluding that there was immune suppression. The reason is that upon opening the carcasses, Munyanyi observed that the lymphatic system's organs were smaller than usual.

In my view, the factors I have outlined above impact negatively on the impartiality and credibility of this witness' "expert views". I find that Dr Ndengu is neither an expert in pathology nor nutrition. For reasons outlined above, his scientific views are unreliable and therefore unacceptable. I will disregard his views wherever they contradict those of Munyanyi, Dr Mtetwa and Dr Holness.

I come to the conclusion that plaintiff has established on a balance of probabilities that defendant's feed was the sole cause of the stunted growth in plaintiff's chickens. The other

"possibilities" are purely speculative as they are not supported by the evidence. The plaintiff has established its case on a balance of probabilities.

3. Whether the defendant is liable for payment of damages to the plaintiff as claimed or at all, and the quantum thereof

As pointed out in the Delta Operations' case *supra*, the liability of a manufacturer is not absolute. In casu, the defendant did not lead any credible evidence to show that the feed was interfered with after it left the factory. Claudious' evidence is vague, speculative and hypothetical. In par. 2.6 of defendant's summary there is an oblique reference to his observations on the farm. He is alleged to have made observations on the farm … "that could have a bearing on the growth of the chickens and vulnerability to illness …" If there was some form of interference with the feed on the farm, why is it that Claudious did not produce a single report or correspondence on adverse farming practices by the plaintiff during the numerous visits to the farm. By contrast, Munyanyi gave evidence to the effect that he simultaneously with Claudious, took feed manufactured by defendant for testing. It should be noted that he said he took sealed bags and not left-overs from the trough for testing. In my view his version is supported by probabilities in that it would have been unwise to say the least, for him to take the "wrong feed" well knowing that Claudious had taken some feed for testing. I say so because his trick could have been easily exposed on their scheduled meeting for comparison of the results. Also, there is no evidence that these three bags taken to ZimVet and Agrilabs by plaintiff were contaminated whilst in the custody of the experts there. It should also be noted that defendant does not dispute the results of the tests but merely their interpretation. I find therefore that there was no interference or contamination that occurred after the feed left defendant's premises.

As regards the second rung of the inquiry, namely, whether the defendant took reasonable steps to avoid contamination, it is Claudious' evidence that the stock-feed was produced through a continuous process through a closed plant. He therefore suggested there could be no contamination from external sources. The problem with Claudious' evidence on this point is that he prevaricated from "zero" possibility to one that "could be minimised" and finally that

contamination could be "picked before the feed left the factory." Claudious not only failed to produce comparative results but any sort of results from their laboratory to corroborate his testimony. He even refused to give Dr Holness their ingredients claiming their recipe was a trade secret. Claudious' evidence is hard to believe in view of Dr Mtetwa's opinion that the imbalance in minerals was "indicative of contamination in making the feed." (my emphasis)

This is more probable in that high levels of "crude protein" could certainly not have originated from soil. In my view, the probabilities coupled with Dr Mtetwa's evidence favour a finding that defendant failed to take reasonable steps to prevent contamination at the time of manufacturing. Alternatively since defendant refused to divulge its recipe, there is a real possibility that it relied on a defective recipe with unknown ingredients to produce a defective product.

For these reasons I find that the defendant is liable for payment of damages to the plaintiff as claimed.

As regards the quantum, it is agreed that plaintiff initially claimed in its summons an amount of US$134 600,00, which amount was later reduced to US$60 245,00 as calculated and set out on page 17 of exhibit 1, plaintiff's bundle of documents. The latter figure was explained in the evidence of plaintiff's director one Muza. Defendant attacked the plaintiff's method of calculating its losses. It was suggested that there is clearly a disturbing "inflation of figures" in that plaintiff kept on revising its figures. As regards the set-off it was submitted that plaintiff was approbating and reprobating at the same time. Plaintiff admitted that he initially presented figures that were different but was quick to attribute this to ignorance of accounting principles. He said he later sought advice from an accountant who then assisted him to compile meaningful figures. What is critical in my view are the documents he produced in a bid to prove his claim. Those documents i.e. items 8a – z, 8aa – 8ab and item 9a – b in plaintiff's bundle of documents clearly show the methodology. Finally the synthesis of this quantification exercise is to be found on page 17 of the plaintiff's bundle of documents. In my view, the mathematical formular used

makes sense. It should be remembered that the defendant's challenge is not that these figures are without basis but that they are not the original figures.

I find therefore, that the plaintiff's loss has been properly quantified.

4. Whether the plaintiff in turn is also liable to pay the defendant the sum of US$132 209,75 in respect of the feed sold and delivered to the plaintiff but was not paid?

As regards the counter-claim, the only issue is whether plaintiff is liable to pay defendant for the feed supplied but not paid for, which feed caused poor growth in plaintiff's chicken.

Plaintiff's defence is that defendant supplied feed that had latent defects. In that regard plaintiff is relying on aedilitian remedies as a defence. Specifically, the plaintiff seeks protection under the *actio redhibitoria* not *actio quanti minoris* in that it is plaintiff's case that the defect was so serious as to render the feed unfit for the purpose for which it was sold and bought.

Defendant argued that the aedilitian remedies are not available to the plaintiff as a defence to the counter-claim in that plaintiff has not tendered restitution of the subject matter of the sale. He relied on A J Kerr in *The Law of Sale and Lease* 2nd edition; *Theron* v *Africa* (1893) 10 SC 246; *Purull* v *Marils Ltd* 1920 CPD 17 at page 20, R. H. Christie, *Business Law in Zimbabwe*, Juta & Co Ltd 1998 at page 165.

I do not agree with counsel's submission. What he has stated is the general rule whose exceptions he has omitted to state – see for example *Romla Products (Pvt) Ltd* v *Crick* [1973] (3) SA 578, where BECK J stated that:

> "In certain exceptional circumstances the purchaser's right to rescission will not be defeated by his inability to make any, or complete restitution of the thing bought. Instances of this are, where the goods have perished by reason of the vice complained of (*Marks Ltd* v *Laughton* 1920 AD 12); where they have been consumed in the course of normal user – without knowledge of the defect – to which the seller knew they were to be applied (*African Organic Fertilizers & Associated Industrial Ltd* v *Sieling* 1949 (2) SA 131 (W); where the property has perished through *vis* major (*Pothier* v *Vent* 220); or where the property has deteriorated through fair wear and tear when the obligation to make complete restitution is complied with by restoring the property in its deteriorated form (*Schwarzer* v *John Roderick Motors (Pty) Ltd* 1940 OPD 170)." (my emphasis)

In casu, the goods were wholly consumed by normal use in the intended manner known to the defendant. In fact the cause of action arose from such use of the feed. Therefore, the question of restoring the property to the defendant does not arise at all. In any case the plaintiff has deducted the cost of the feed from the total amount he claims as damages – see page 17 of the plaintiff's bundle of documents. There appears to be an acceptance by the plaintiff that there is a reciprocity of debts.

For these reasons, I would dismiss the counter-claim.

In the circumstances, I make the following order:

1. The defendant be and is hereby ordered to pay to the plaintiff the sum of US$60 245 being consequential damages resulting from breach of contract by the defendant.
2. The defendant be and is hereby ordered to pay interest on the principal amount at the prescribed rate of 5% per annum starting from the date of summons.
3. The defendant be and is hereby ordered to pay costs of suit.

Granger & Harvey, plaintiff's legal practitioners
Scanlen & Holderness, defendant's legal practitioners