CREST POULTRY GROUP (PRIVATE) LIMITED
(t/a HUBBARD ZIMBABWE)
versus
GODWILLS MASIMIREMBWA

HIGH COURT OF ZIMBABWE
PATEL J

Civil Trial

HARARE, 12 to 14 October 2010 and 18 January 2011

M.C. Mukome, for the plaintiff
M. Kamdefwere, for the defendant

PATEL J: The plaintiff claims a total sum US$14,875 being the balance due in respect of two batches of broiler chicks delivered to the defendant in October 2008 and February 2009. The defendant disputes the principal claim on several grounds and counterclaims damages in reconvention for the payment of US$9,331 in addition to set-off of the total amount claimed by the plaintiff.

Evidence for the Plaintiff

Dr. Hope Tariro Pachena is presently the Managing Director of Hubbard Zimbabwe. He testified as follows. The plaintiff obtained a licence from the Reserve Bank of Zimbabwe to trade in foreign currency as from the 26th of September 2008 [Exhibit 4]. On the 30th of October 2008, the plaintiff supplied 15,000 broiler chicks to the defendant for US$7,875 [Exhibit 1] and, on the 21st of February 2009, it supplied a further 10,000 chicks for US$7,500 [Exhibit 2]. In January 2009, the plaintiff paid a sum of US$500 in respect of the first batch [Exhibit 3]. Since then, the defendant has refused to pay the balances outstanding on both batches, citing poor quality in respect of the second batch.

Soon after the second batch was delivered, on the 26th of February, the plaintiff sent its technical specialist (Munyaradzi Nyambiya) to the defendant's farm. The specialist, who has since

left the plaintiff's service, compiled a technical visit report, dated the 4th of March 2009 [Exhibit 5]. The witness admitted that the date of the visit and the date of the report, as they appear on the report, are incorrect. According to this report, there was inadequate equipment and heating as well as other deficiencies in the defendant's chicken runs. There were signs of dehydration, yolk sac infection and physical deformities among the chicks. Yolk sac infection normally occurs within one week after birth. It could occur either at the plaintiff's hatchery or at the customer's farm. The second batch was delivered a day after the chicks were born. The mortality rate in this case was abnormally high and those chicks that survived showed poor growth. This was attributable to poor management on the farm. No problems were encountered with the batches delivered to other customers on the same day.

Under cross-examination, the witness explained that at the material time he was based at the plaintiff's subsidiary company in South Africa. He was therefore not aware of the specific or special terms relating to the plaintiff's contracts with the defendant. He accepted the possibility that, because the defendant was a long standing customer, the plaintiff might have delivered the second batch to enable him to recover his losses on the first batch. He also conceded that Exhibit 5 was not signed by the technical specialist or by the defendant as having been received by him or any of his employees. He could not explain the dating errors on the report or the absence of its author's signature. He was also unable to explain why the report was not mentioned in the plaintiff's Plea in Reconvention. With reference to the plaintiff's Flex Broiler Chart [Exhibit 6], this shows an undressed weight of 2.4 kg at 42 days and 2.9 kg at 49 days. Ideally, retailers should sell the chicks at 42 days. There is an implied warranty that the genetic potential or weights stated in the chart will be achieved, but this is subject to the disclaimer clause at the bottom of the chart relative to differing conditions. He acknowledged that the plaintiff had received the

defendant's letter of the 25th of March 2009 regarding the high mortality rate in the second batch [Exhibit 7]. The plaintiff did not respond to it because the chicks were already four weeks old. As regards the defendant's letter of the 23rd of April 2009 stating the extent of the damage suffered by the defendant [Exhibit 8], the witness was not certain that it had been received by the plaintiff.

Evidence for the Defendant

Godwills Masimirembwa, the defendant, testified as follows. He has been doing business with the plaintiff on his farm since 2004. He purchased the first batch of chicks from the plaintiff in October 2008 in anticipation of being licensed to trade in foreign currency. The plaintiff was aware of this. It was verbally agreed that he would obtain the batch on credit and would pay the plaintiff in foreign currency from the proceeds of sale. He failed to obtain the requisite licence from the Reserve Bank of Zimbabwe. He then acquired the second batch in February 2009 also on credit, having agreed with the then Managing Director of the plaintiff that he would pay for both batches in foreign currency from the proceeds of sale of the second batch.

The second batch was defective with a very high mortality rate of 1702 chicks from the 21st of February to the 22nd of March (as shown on the table attached to Exhibit 7). He told his Manager to take a sample of dead chicks to the plaintiff for veterinary examination. On the 2nd of March, the plaintiff's technical representative (Nyambiya) came to the farm and said that there was a hatchery problem due to yolk sac infection. He advised the Manager to treat the surviving chicks with Teranox but, despite his advice having been followed, the high mortality rate continued. The Manager then sent the letter of the 25th of March [Exhibit 7] to the plaintiff.

The defendant's farm has standard poultry runs and the plaintiff has over the years provided a general support service,

including veterinary examination and technical advice on the set-up of equipment. The farm has the capacity to manage about 50,000 chicks, but the full capacity has never been used. According to the defendant, the contents of Exhibit 5 are completely untrue and he never received this report. It was probably created after Nyambuya had left the plaintiff's service. If it did exist, the plaintiff would have responded to Exhibit 7 with a copy of the report. On the 23rd of April, after the remainder of the second batch had been slaughtered, the defendant wrote to the plaintiff detailing his loss and claiming compensation [Exhibits 8 and 9].

As a rule, the defendant slaughters his chicks at 49 days, not at 42 days, in order to meet his market for larger chickens. The computation of the defendant's loss appears from Exhibit 9. A total of 5700 chicks were slaughtered at the abattoir of Fathson Enterprises between the 15th and 17th of April with a yield of 6040 kg [Exhibit 10]. The remaining 957 smaller chicks were slaughtered at the farm and yielded 300 kg. The selling price of US$2.70 per kg was the retail price prevailing at that time.

The plaintiff supplied Exhibit 6 when the defendant moved from the Crest breed to the Hubbard breed and said that the stipulated weights could be achieved under normal conditions. Over the years, the defendant has duly achieved the weights specified in Exhibit 6. Only the February 2009 batch has failed with under-weight chicks and a high mortality rate.

Blessing Mashambanaka has been employed as the defendant's farm Manager since 2004. He generally corroborated the defendant's evidence. He confirmed that he took samples of the dead chicks to the plaintiff on the 27th of February 2009. He was advised to treat the live chicks with Teranox but there was still no improvement. The technical specialist (Nyambiya) came to the farm on the 2nd of March to inspect the chicken runs and equipment. He was satisfied with the set-up and said that the chicks had a problem originating from the plaintiff's hatchery. Nyambiya undertook to

write a report but the witness never received any report from Nyambiya or from anyone else employed by the plaintiff. He had not seen Exhibit 5 before the trial and its contents are not truthful and contrary to what Nyambiya actually said. He wrote Exhibit 7 to the plaintiff on the 25th of March but did not receive any written or verbal response to his letter.

Between 2008 and 2010, the witness handled 10 other batches of Hubbard chicks supplied by the plaintiff. He encountered no problems with any of these batches and achieved optimal weights from them, plus or minus 0.5 kg. He only had a problem with the batch supplied in February 2009, even though he gave the proper quality and amount of feed to the chicks. Acting on Nyambiya's advice, he took full measures to save and enlarge the chicks. The total mortality figure in that batch was 3343 and the defendant lost about 9 tons of feed on the dead chicks (as shown on Exhibits 8 and 9). He normally slaughters the chicks at 42 days (and not 49 days as stated by the defendant). The faulty batch was slaughtered at 56 days at Fathson Enterprises and at the farm. The retail price prevailing at that time ranged between US$2.70 and US$3.00 per kg. The defendant sells his chicks within that price range.

Findings

The parties have been in business with each other from 2004 to 2010. In October 2008 and February 2009 they concluded two contracts for the sale of 15,000 and 10,000 chicks respectively. The chicks were duly delivered on credit and were to be paid for in foreign currency in terms of the applicable exchange control laws. Following delivery of the first batch, the defendant failed to obtain a licence to trade in foreign currency. It was therefore verbally agreed that he be supplied with the second batch from the proceeds of which he would pay for both batches in foreign currency. The defendant paid US$500 towards the first batch but has thereafter

refused to pay the outstanding balances on both batches because of the excessively high mortality rate experienced on the second batch.

After the plaintiff was made aware of the problem encountered with the second batch, it despatched its technical specialist to the defendant's farm. The specialist inspected the defendant's chicken runs and equipment and was satisfied with the conditions on the farm. He accepted that the problem originated at the plaintiff's hatchery. Despite his advice on the way forward, the batch continued to suffer from an abnormal mortality rate and under-weight chicks. The defendant's Manager then wrote to the plaintiff but received no written or verbal response. About two months after the date of delivery, the defendant had the remainder of the chicks slaughtered and sold. A few days later, he wrote to the plaintiff claiming compensation for his loss but received no reply to his claim.

At the trial, the plaintiff produced what purported to be its specialist's report on his technical visit to the defendant's farm [Exhibit 5]. The dates shown on this report are admittedly incorrect and nonsensical. Apart from these obvious anomalies, the report was not signed by the technical specialist. Equally significantly, the report was never forwarded to the defendant and was not mentioned at all in the plaintiff's pleadings. From this evidence, I am satisfied that Exhibit 5 was not compiled at the relevant time, but was fabricated by the plaintiff much later in order to counter the defendant's claim in reconvention.

The defendant has adequate capacity and equipment on his farm to handle *circa* 50,000 chicks at any given time. The chicks in the second batch were reared and treated under normal and proper conditions, *i.e.* with appropriate equipment and adequate feed. The loss suffered by the defendant on this batch was not attributable to poor management on his part but to the hatch problem admitted by the plaintiff's technical specialist.

Disposition

It is indisputably clear that the two contracts *in casu* were entered into pursuant to the plaintiff's licence to trade in foreign currency [Exhibit 4]. I am therefore unable to perceive any sound basis for questioning their legality under the prevailing exchange control laws or otherwise. It follows that both contracts were validly concluded and, barring any valid defence to the plaintiff's claim, they are legally binding and enforceable.

Turning to the Flex Broiler Chart, Mr. *Mukome* submits that the specifications on the chart do not constitute a warranty, as is explicitly stipulated in the disclaimer clause *in fine*, but are simply guidelines to customers on achieving maximum results. On the other hand, Mr. *Kamdefwere* contends that the disclaimer clause should be struck down as being unfair in terms of sections 4 and 5 of the Consumer Contracts Act [*Chapter 8:03*] as read with paragraphs 2 and 4 of the Schedule to the Act.

There is no doubt that the disclaimer clause is clear and specific and relatively unambiguous in its terms and that, as such, it would *ex facie* negate any express or implied warranty contained in the chart. See *Agricultural Supply Association* v *Olivier* 1952 (2) SA 661 (T). However, I shall revert to this issue later. As for the scope of the Consumer Contracts Act, its provisions are clearly confined to stipulations embodied in consumer contracts. The term "consumer contract" is defined in section 2 of the Act as:

> "a contract for the sale or supply of goods or services or both, in which the seller or supplier is dealing in the course of business and the purchaser or user is not, …".

It is abundantly clear that the Act only applies to a contract of sale where the purchaser is **not** dealing in the course of business. In the instant case, there is no doubt whatsoever that both the plaintiff and the defendant were dealing in the course of business. The defendant was obviously in the business of retailing chickens for profit and was clearly not a consumer at the relevant time. It follows

that there was no "consumer contract" within the meaning of the Act and that the argument for its application in this case is entirely untenable.

In any event, notwithstanding what I have stated above, I take the view that the plaintiff cannot rely upon the disclaimer clause in the Flex Broiler Chart to exonerate itself from liability for the following reasons. Firstly, the unchallenged evidence of the defendant is that the plaintiff furnished the chart to the plaintiff with the representation that the weights stipulated in the chart could be achieved under normal conditions. This representation was in effect a *dictum et promissum*, which was defined in *Phame (Pty) Ltd* v *Paizes* 1973 (3) SA 397 (A) at 418 as:

> "a material statement made by the seller to the buyer during the negotiations, bearing on the quality of the *res vendita* and going beyond mere praise and commendation".

Secondly, it was not disputed that, between 2008 and 2010, the defendant obtained 10 other batches of Hubbard chicks from the plaintiff. No problems were encountered with any of these batches and optimal weights were achieved from them. Only the batch supplied in February 2009 failed to achieve as expected, even though the chicks were given the proper quality and amount of feed. On these facts, by virtue of the plaintiff's material representation at the outset, coupled with contractual usage between the parties over the years, it seems to me that the genetic potential specified in the chart formed an integral term or condition of the contract concluded in February 2009. In effect, the disclaimer contained in the chart was superseded and rendered nugatory in the contractual relationship between the parties.

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. In the instant case, the evidence shows that the chicks in the second batch were infected and deformed *ab initio*, before they were delivered to the defendant. This in itself constituted a fundamental breach of contract, over and above any failure to achieve the genetic potential delineated in the chart.

It follows from all of the foregoing that the plaintiff's claim must be dismissed and that the defendant's counterclaim in reconvention must be allowed. The defendant is entitled to recover the loss that he incurred on the second batch. He is further entitled to claim set-off against the sums outstanding on both batches. What remains is to determine the quantum of damages due to the defendant.

Apart from the Fathson tax invoices, the defendant did not produce any other invoices, receipts or documentary evidence in support of the figures and calculations set out in Exhibit 9. Nevertheless, his evidence and that of his witness in this regard was not meaningfully challenged and remains uncontroverted. I am satisfied that it constitutes a sound and acceptable basis for quantifying the defendant's claim. See *Ebrahim* v *Pittman N.O.* 1995 (1) ZLR 176 (H) at 187-188.

The only aspect that I would modify is the appropriate date for slaughter under normal conditions. Having regard to the testimony of Pachena and Mashambanaka, which is contrary to that of the defendant, I am inclined to adopt the optimal date for slaughter as 42 days and not 49 days. On this basis, the defendant's loss may be computed as follows:

> 6657 (chicks) x 2.401 kg (weight at 42 days) = 15983.457 kg x 70% (expected dressed weight) = 11188.4199 kg x $2.70 (minimum retail price) = $30,208.73 (expected gross income).

6340 kg (actual dressed weight) x $2.70 (retail price) = $17,118.00 (actual gross income).

$30,208.73 (expected gross income) – $17,118.00 (actual gross income) = $13.090.73 (loss on slaughtered chicks) + $4,409.22 (loss of feed on dead chicks) = $17,499.95 (total loss).

$17,499.95 (total loss) – $7,500.00 (sum due on second batch) = $9,999.95 – $7375.00 (sum owing on first batch) = $2,624.95 (net loss).

As regards costs, the plaintiff's conduct as a litigant in relation to the *ex post facto* concoction of Exhibit 5 is certainly reprehensible. In my view, it warrants a punitive award of costs in the particular circumstances of this case. See *Ndlovu* v *Murandu* 1999 (2) ZLR 341 (S) at 350-351.

In the result, it is ordered that:

(i) The plaintiff's claim be and is hereby dismissed.

(ii) The plaintiff shall pay the defendant the sum of US$2,624.95 (being the loss suffered by the defendant after set-off of the sums due to the plaintiff).

(iii) The plaintiff shall pay the costs of suit on a legal practitioner and client scale.

Muvingi, Mugadza & Mukome, plaintiff's legal practitioners
Muringi Kamdefwere, defendant's legal practitioners