IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No.737/2009

In the matter between

MERSHACK LANGWENYA **PLAINTIFF**

and

SWAZI POULTRY (PTY) LTD **DEFENDANT**

Neutral citation:	***Meshack Langwenya vs Swazi Poultry (Pty) Ltd* (737/2009) 2012 [SZHC] 139**
Coram:	**OTA J.**
Heard:	**27th April 2012**
Delivered:	**26th June 2012**
Summary:	**Absolution from the instance: Breach of contract: Whether damages can be estimated: General damages need not be strictly proved.**

JUDGMENT ON ABSOLUTION FROM THE INSTANCE

OTA J.

[1] The Plaintiff instituted proceedings against the Defendant under two heads of claim as follows:-

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A

---- the Plaintiff claims in terms of clam I as against Defendant:-

1. *Payment of the sum of E500,000 00 (Five Hundred Thousand Emalangeni)*
2. *Interest thereon at the rate of 9% a tempore morae,*
3. *Costs of suit*
4. *Further and / or alternative relief*

B

-----the Plaintiff claims in terms of claim 2 as against Defendant

1. *A payment of the sum of E25,503.17 (Twenty Five Thousand Five Hundred and Three and Seventeen cents Emalangeni)*
2. *Interest thereon at the rate of 9% a tempore morae*
3. *Costs of suit*

Further and / or alternative relief."

[2] The Plaintiffs claim as per his pleadings, is that on or about September 2005, Plaintiff and Defendant entered into an oral contract. That Plaintiff represented himself and the Defendant was represented by Deon – Henri Van Wyk.

[3] That the material terms of the agreement were that Plaintiff will construct chicken sheds at his own expense for purposes of growing chickens to supply to the Defendant. That Plaintiff would construct the chicken sheds specifically for the purpose of growing one day old chicks, which upon a certain age and mass determinable by the Defendant, would be delivered by Plaintiff to Defendant. That the Plaintiff would for a period of 3 months, be subjected to scrutiny in terms of Defendant's standards pertaining to the growth and subsequent delivery of the chickens. That the Defendant would

deduct Processing levy from Plaintiff's payments during the 3 month period of scrutiny and such processing levy was meant to qualify Plaintiff to the scheme of contracted growers.

[4] That the Plaintiff would construct said chicken sheds, and the Defendant would determine the quality and suitability of the accommodation for the chickens. That the Defendant would provide to the Plaintiff, the configurations and a specification regarding the construction of the chicken sheds. That the Plaintiff would construct three chicken sheds, as determined by the Defendant for the purposes of the agreement. That the Plaintiff would at his own costs construct said chicken sheds at Mbekelweni, in the Manzini Region. That upon the specific directions and instructions of the Defendant, the Plaintiff having constructed the said chicken sheds, and on the Defendants instructions, would thereafter install equipment and fittings in the said sheds. That it was an underlying term of the agreement that the Plaintiff having constructed the chicken sheds and installed equipments as per the agreement would employ persons as workers. That the Plaintiff with the assistant of the Defendant would procure one day old chickens and grow the said chickens to the age and height required by Defendant.

[5] That it was also a mutual term of the agreement that the Plaintiff would upon having performed in accordance with the terms of the agreement, become a contract grower of chicken for Defendant as per the letter of intent dated 26th September 2005, annexure MI. That pursuant to annexure Ml the Defendant prepared and presented to Plaintiff a draft memorandum of agreement, M2.

[6] In respect of claim I, the Plaintiff alleged, that pursuant to annexures M1 and M2, he proceeded to construct 3 chicken sheds which cost an amount in excess of E150,000=00, in material and labour at the specification of Defendant. Plaintiff also alleged that he installed equipment and fittings in the chicken sheds which was for a value in excess of E150,00=00. Plaintiff further alleged that he employed workers and procured one day old chicks and grew them for the purposes of the agreement.

[7] It is further Plaintiffs case, that at the expiry of 3 months, the Defendant failed to present and sign annexure M2. That despite failing to sign annexure M2, the Defendant continued to demand from Plaintiff supply of chickens for a period in excess of 2 years, despite that Defendant had to

supply to Plaintiff the one day old chicks, feed and other necessities in terms of the agreement evidenced by annexure M2. The Defendant failed to do so in the whole period of supply to the Plaintiff.

[8] Plaintiff alleged that in consequence of the Defendants breach of the agreement, he suffered damages in excess of the amount of E500,000=00 made up as follows:-

(a) Constructions of 3 chicken sheds	- E150,000=00
(b) Installing equipments and fittings	- E150,000=00
(c) Wages of labourers	- E 96,000=00
(d) General, inclusive of water and electricity	- E104,000=00
Total	- E500,000=00

[9] In respect of claim B, the Plaintiff alleged that from the month of February 2006, to June 2008, he supplied the Defendant with chicks as shown in annexures 2 (a) to 2 (n). That the Defendant in all the supplies made by the Plaintiff, deducted various amounts of money as processing levy. That the

processing levy in terms of the agreement was to aid Plaintiff to become a contract grower and to be supplied with all that was necessary to grow the chickens. That the Defendant failed to assist or supply the Plaintiff with such necessities, despite demand, The Plaintiff alleged that the processing levy deducted by the defendant totaled the sum of E25,503.17.

[10] In proof of the facts alleged in his pleadings, the Plaintiff testified and called three other witnesses, PW2, Patrick Kekane, PW3, Jeremiah Hlophe and PW4, Sandile Ginindza. These witnesses were duly crossexamined. At the close of the case for the Plaintiff, defence counsel Mr Henwood, moved an application for absolution from the instance, pursuant to Rule 39 (6) of the rules of the High Court. That legislation states as follows:-

"At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one counsel on his behalf may address the court and plaintiff or one counsel on his behalf may reply. The defendant or one counsel on his behalf may thereupon reply on any matter arising out of the address of the plaintiff or his counsel."

[11] Mr Henwood and Mr M S Dlamini for the Plaintiff, tendered copious arguments for and against this application. At the end of the day the take home message from the argument from both sides is that this application can only be granted, if at the close of the case for the Plaintiff, there is no evidence upon which the court could or might reasonably find for the Plaintiff. This is the test advocated by case law on this subject matter, as captured by the court in the case of **United All Carries (Pty) Ltd v Jarman 1994 (2) Z LR 341 (S.C.), where Gubbay CJ,** stated as follows:-

"A plaintiff will successfully withstand an application if, at the close of his case there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him".

[12] This test has be followed repeatedly by courts in this jurisdiction For instance in the case of **TWK Agricultural Ltd v SM1 Ltd, and another Civil Trial 4263/05,** the court stated as follows:-

" The learned Judge of Appeal advocated for a test where the court trying the case (and not some other court or person), brings its own judgment to bear on the evidence adduced before it and decides whether the Plaintiff has at the close of its case, made out a case such that that court could or might find for it, even in the absence of the defendant's evidence at that stage. If it could find for the plaintiff on that evidence, then the defendant ought to be put to its defence. If not, then. Cadit quaestio that constituted a proper case for the grant of absolution from the instance ---"

Similarly, in the case of **Mandla Ngwenya v The Commissioner of Police and another Civil Trial No. 2700/07, para 12 and 14,** the court stated as follows:-

"12 *The overriding consideration for granting absolution from the instance at the end of the Plaintiff's case is that it is considered unnecessary in the interest of justice to allow the case to continue any longer in the absence of a prima facie case having been made out by the Plaintiff.*

14 *The test for absolution to be applied by a trial court at the end of the Plaintiff's case was formulated in* ***Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409 G-H*** *in these terms*

"----- when absolution from the instance is sought at the close of the Plaintiff's case, the test to be applied is not whether the evidence led by the Plaintiff established what would finally be required to be established but whether there is evidence upon which a court applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the Plaintiff ***(Gascoyne v Paul and Hunter Supra, Ruto Flour Mills (Pty) Ltd v Adlson (Z) 9958 (4) SA 307 (T)"***

See **Putter v Provincial Insurance Co Ltd and Another 1963 (4) SA 771 (W). Also Adecor Pty Ltd v Quality Caterers (Pty) Ltd 1973 (3) 1037 (N) 1078 F.**

[13] In the final analysis, the test from a preponderance of case law, is, at the close of the case for the Plaintiff, if there is no evidence upon which the court could or might reasonably find for the Plaintiff, then the court should grant absolution from the instance. The overriding consideration in such an application made at the close of the case for the Plaintiff is therefore whether, taking together the totality of the evidence led, a prima facie case is made out against the Defendant. See **Gascoyne v PAUL Hunter (supra**).

[14] Now, Mr Henwood contends that there is no evidence adduced by the Plaintiff and his witnesses, upon which this court could reasonably find for the Plaintiff. His stanze is that the Plaintiff has failed to prove the existence of any contract with the Defendant and that he has also failed to prove any of the amounts claimed as damages or the nexus between the breach and the damages. Mr Henwood also complained that the Plaintiff failed to mitigate his loss. Mr. Dlamini for his part contends, that the Plaintiff has proved the existence of the contract between the parties as this fact was admitted in the Defendant's plea. He submitted that Plaintiff has proved the breach of the contract by the Defendant resulting in the said damages. Mr Dlamini conceded that the Plaintiff failed to produce documentary evidence in proof

of the sums claimed as damages, but urged that, notwithstanding, the court can award an estimated amount from the totality of the evidence tendered.

[15] From the totality of submissions of counsel, the inquiry before the court is as follows:-

1) Whether there is any prima facie evidence made out of any contract, whether oral or written between the parties?
2) If there is evidence of such contract, whether there is any prima facie evidence, that the Defendant breached the contract and that the Plaintiff suffered damages as a result of the breach?
3) Whether there is any prima facie evidence of any loss or damages suffered?

[16] Before going into the evidence to discover the answers to the questions above, I deem it expedient, to detail briefly what must weigh in the mind of the court in answering the 2nd poser to wit: whether there is prima facie

evidence that the Defendant breached the contract and the Plaintiff suffered damages as a result of the breach.

[17] On this question, the enquiry is basically the same both in the law of delict and the law of contract. The principles call for a two edged inquiry. The first stage deals with the factual causation and the second stage deals with the legal causation. To establish factual causation, it must be shown that the breach was the *causa sine qua non* of the loss, this simply involves applying the **"but for test,"** i.e whether the Plaintiff would have suffered the loss but for the Defendant's breach. A plaintiff is not expected to show the causal link with certainly. A plaintiff who can show that there is a probability that he would not have suffered the loss but for the breach would succeed, except the Defendant can discharged the onus of proving that there is no such probability. As the court said in the case of **Minister of Safety and Security v Van Duivenboden 2002 6 SA 431**, a plaintiff:-

"is not required to establish the causal link with certainty, but only to establish that the wrongful conduct (or breach of contract) was probably a cause of the loss, which calls for a sensible retrospective analysis of what

would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary cause of human affairs, rather than an exercise in metaphysics"

[18] If the Plaintiff's claim passes the "**but for test**", then the second stage – which is the legal causation will come into play. This stage is explained by **Corbett CJ,** in the case of **International Shipping Co (Pty) Ltd v Bentley 1990 1 SA 680 A 700$ - 701A,** as follows:-

"The second enquiry then arises, viz whether the wrongful act, is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said the loss is not remote. This is basically a judicial problem in the solution of which considerations of policy play a part. This is sometimes called legal causation"

[19] Having established the foregoing, let me now detail the evidence tendered by the Plaintiff in proof of the claim, to ascertain whether it meets the requirement that would save it from the absolution sought.

[20] In proof of his claim, the Plaintiff in his evidence told the court, that he entered into an oral agreement with the Defendant who was represented by Deon Henri – Van Wyk. That under the contract the Plaintiff was to supply chickens to the Defendant and the Defendant would pay the Plaintiff after deducting a processing levy of 15 cents per kilo of chicken. That this agreement was what led to the Defendant giving the Plaintiff the letter of intent contained in exhibit A (annexure M1). That the processing levy which the defendant has admitted in its plea, that it was deducting from the Plaintiff, was to go to the Plaintiffs account towards the purchase of shares to become a contract grower. That it was agreed that after 3 cycles of supply by the Plaintiff to the Defendant, that the parties would sign the contract contained in ext B (annexure M2) which will qualify him as a contract grower.

[21] Plaintiff told the court, that based on this agreement with the Defendant, he constructed 3 chicken sheds of the dimension of 22 meters by 12 meters, and capacity of 10,000 chickens. That the construction of the chicken sheds was under the specification and supervision of the Defendants, which supervision was carried out by PW2 Patrick Kekane. Thereafter, he installed machines and fittings / equipment which were according to the Defendant's

specifications, in the chicken sheds, and also employed 2 staff to work in the chicken sheds. The Plaintiff told the court that after he completed 3 cycles, he demanded that the Defendant signs exhibit B, which will qualify him as a contract grower. The Defendant failed to do so. That the Plaintiff then demanded that Defendant repays all the processing levy, as evidenced by annexures 2(a) to 2 (n), which the Defendant had been deducting from him, but the Defendant also failed to do so, but rather eventually fired him bringing to an end the contract between the parties

[22] Plaintiff stated that he suffered damages in that he would not have expended a lot of money, about E150,000=00 constructing the chicken sheds and installing equipment for about E150,000=00 or employing staff, but for the agreement with the Defendant, that he would become a contract grower. That he expended a lot of money on these ventures, but his documentation relating to his expenses were lost when the briefcase in which he kept his important documents, including these ones, were stolen by armed bandits. Plaintiff told the court that in the wake of the termination of the contract with the Defendant, he could not continue with the business as he had no source or cutlet for the chickens, without the Defendant. This is because it was the Defendant that instructed National Chicks to supply him with the

chicks, which Plaintiff then bred and sold to the Defendant. Therefore, he could not continue with chicken breeding without an agreement with the Defendant. More to this is that the chicken sheds and equipment were tailored specifically to breeding chickens for the Defendant and no other concern.

[23] It was also Plaintiff's testimony, that becoming a contract grower pursuant to exhibit B, would have accorded the Plaintiff a lot of benefits and leeway in breeding the chickens. This is because being a contract grower would have entitled the Plaintiff to be assisted by the Defendant, in purchasing the chicks, feeds as well as medication for the chicks, which will be deducted from the Plaintiff by the Defendant, over a period of time. That Plaintiff would no longer use his own vehicle to transport the feeds. Plaintiff will no longer pay transportation fees to the Defendant for transporting the chickens and any time the Plaintiff decided to quit he will be refunded for his shares.

[24] PW2 Patrick Kekane corroborated the Plaintiff's evidence that Plaintiff had a contract with the Defendant for the delivery of said chickens. He told the court that Plaintiff specifically constructed the chicken sheds because he

wanted to get a contract with the Defendant. That Plaintiff was not allowed to use the chicken shed he already had, because it was not up to the Defendant's standards and specifications. PW2 told the court that he personally supervised and assisted the Plaintiff in constructing the 3 chicken sheds to the Defendant's specification. He said that he did this on the instructions of the Defendant, as this was part of his schedule of duties as an employee in the Defendant's concern at that material point in time. He said Ext A was signed after constructing the chicken sheds.

[25] PW2 told the court that, Defendant used to deduct 15 cents per kilo of the chickens supplied to it by the Plaintiff as processing levy. That the processing levy was to go to the account of the Plaintiff towards purchase of shares in the Defendants concern, which will qualify the Plaintiff to become a contract grower. Under cross examination, PW2 told the court, that after 3 cycles, if a non contract grower like the Plaintiff passed the performance test, he automatically became entitled to sign the contract contained in exhibit B, which will qualify him as a contract grower and a member of the Kikilikiki scheme, with the concomitant benefits. PW2 further told the court that he does not know why the Plaintiff was not made a member of the scheme, after he completed 3 cycles.

[26] PW3 and PW4 for their part told the court that they were employed by the Plaintiff as labourers for about 3 years, to man the chicken sheds and that the Plaintiff paid them a salary of E800 each per month. That Plaintiff also contributed the sum of E50.00 per month for each of them, towards the pensions scheme. That they both lived in the Plaintiff's house and were fed by him free of charge.

[27] To my mind a summary of the facts that emerge from the evidence tendered in proof of the Plaintiffs case are as follows:-

(1) The Plaintiff entered into an oral agreement to supply chickens to the Defendant. Exhibit A the letter of intent emanated from the oral agreement.

(2) Based on the agreement, the Plaintiff constructed chicken sheds and installed equipment and fittings therein, specifically to the standard and specification of Defendant, with the purpose of entering into the agreement evidenced by exhibit B, which will qualify him as a contract grower.

(3) The Plaintiff supplied chickens to the Defendant, with the purpose of entering into the agreement evidenced by exhibit B.

(4) The Defendant deducted 15 cents per kilo of chickens supplied by the Plaintiff as processing levy. Annexures 2 (a) to 2 (n) respectively

(5) The processing levy was to be kept in the Plaintiff's account to assist him in the purchase of shares in Defendant's concern, to become a contract grower.

(6) Plaintiff employed staff in pursuance of the agreement.

(7) At the end of 3 cycles, the parties would sign the contract contained in ext B, which will qualify the Plaintiff as a contract grower.

(8) At the completion of 3 cycles, the Plaintiff demanded that Defendant signs ext B, but the Defendant refused to do so, which led to the termination of the agreement between the parties.

(9) The Plaintiff experienced loss by reason of the termination of the agreement as follows:-

(a) He did not become a contract grower, therefore lost all the benefits associated with it

(b) Defendant refused to repay him all the amounts it deducted as processing levy, which was to qualify him as a contract grower.

(c) He could not use the chicken sheds or equipment / fittings to grow chickens for any other concerns, since they were tailored to the specification and standards of the Defendant.

(d) Plaintiff therefore had no source or outlet for the chickens in the absence of any agreement with the Defendant.

[28] Without going into any detailed analysis of the evidence led, which to my mind is not required at this stage, I hold the view, that on the totality of the evidence tendered by the Plaintiff in proof of his case, he has made out a prima facie case of the alleged contract with the Defendant, breach of the said contract and the loss or damages flowing therefrom, premised on facts which are within the knowledge of the Defendant. It appears to me, that this state of affairs requires some answer from the Defendant. As **Herbstein and Van Winsen stated in the text the Civil Practice of the Supreme court of South Africa, 4th edition at page 682:-**

" If the defence is something peculiarly within the knowledge of a defendant and the Plaintiff has made out some case to answer, then the Plaintiff should not lightly be deprived of his remedy without first hearing what the defendant has to say"

See **Supreme Services Station (1969) (Pvt) Ltd v Fox Goodridge (Pvt) Ltd 1971 (4) SA 90 (RA) at 93**

[29] Furthermore, Mr Henwood's contention that the evidence of Plaintiff and PW2, Patrick Kekane are contradicting, cannot avail this application. This is because there is authority to the effect that absolution from the instance should not be granted, merely because the evidence led on behalf of the Plaintiff contains contradictions. See **Herbstein etal (supra) page 682, Marine and Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 38**

[30] Mr Dlamini has urged the court to estimate the damages allegedly suffered by the Plaintiff, if at the end of the day the court comes to the finding that the Plaintiff suffered damages. Mr Dlamini's submission is premised on the fact that the Plaintiff tendered no documentary evidence in proof of the

amounts claimed as damages. Mr Henwood for his part expressed a view au contraire, which is that the damages alleged cannot be estimated, but required strict proof, therefore the court should grant the absolution from the instance sought.

[31] Now, in practice, if it is obvious that a contemplated loss did occur but it is incapable of strict proof , the court can award general or nominal damages for such loss. This is because it will be unfair to the Plaintiff and unjust to suggest, that he should remain without remedy because the loss cannot be proved with arithmetic exactitude. Therefore, the mere fact that the Plaintiff failed to tender any documentary evidence in proof of the sums claimed as damages is not a *sine qua non* to a grant of absolution from the instance. The court is quite competent, if at the end of the day it comes to the conclusion that the Plaintiff did suffer loss as alleged, to award him general or nominal damages.

[32] In the light of the totality of the foregoing, I come to the conclusion, that this is not a proper case for the Defendant to be absolved from the instance. The

application for absolution from the instance, is therefore not sustainable. It fails and is dismissed accordingly. Costs to follow the event.

For the Plaintiff: **M. S. Dlamini**

For the Respondent: **J. Henwood**

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE ……. DAY OF ……. 2012

OTA J.

JUDGE OF THE HIGH COURT