



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No. 510/2012

In the matter between:

**NGWANE MILLS (PTY) LTD t/a  
FEEDMASTER SWAZILAND**

**Plaintiff**

And

**JABULANI ANTHONY SOKO t/a  
MAWANDLA INVESTMENTS**

**Defendant**

**Neutral citation:** *Ngwane Mills (PTY) LTD t/a Feedmaster v Jabulani Anthony Soko t/a Mawandla Investments (510/2012) [2014] SZHC 77 (27 June 2014)*

**Coram:** **M. Dlamini J.**

**Heard:** **28<sup>th</sup> April 2014**

**Delivered:** **27<sup>th</sup> June 2014**

*Counter claim – meaning thereof, claim by plaintiff cannot be added to make up figure for counterclaim – loss alleged must be outside plaintiff's*

*claim, where evidence once put on the scales of justice is at equilibrium, court is to look at other evidence in order to have the scales of justice tilting.*

Summary: Action proceedings for a claim of E742,212.60 were instituted by means of combined summons on behalf of plaintiff. This claim is in respect of goods sold and delivered to the defendant. Defendant has raised a counter-claim of the sum of E754,290.00 as a plea.

### **The Parties**

[1] The plaintiff is a company registered in terms of the company laws of Swaziland with its principal place of business in Matsapha Industrial Site. It manufactures animal feed and related products. Its trading name is Feedmaster Swaziland. The defendant is an adult Swazi male, operating a business styled Mawandla Investment at Ekudzeni area, in the Manzini region. The business rears chicken for sale to the general public.

### **Prelude**

[2] The plaintiff and defendant had a contractual relationship dating 2009. The plaintiff would supply feed and related incidentals to defendant. In June 2009, plaintiff and defendant entered into a credit agreement where plaintiff would supply defendant with stock and would pay within thirty days.

[3] The defendant, having placed orders, was supplied with stock to the total tune of E742,212.60. Defendant does not deny the supply of stock for the said value. Defendant contends that the feed supplied in the second stage

of its chick rearing was defective and therefore detrimental to his yield. Defendant in turn claims for a loss in business of the sum of E754,290.00.

### **Evidence on counter-claim**

#### **Mr. Soko**

[4] The defendant on oath informed the court that he maintains three sheds in his place of business. Each consignment of broiler chicks is put into the first two sheds which are adjacent to each other by a distance of twenty metres. At the age of fifteen to sixteen days the chicks are then taken into the three sheds with the third shed being about forty to fifty metres away. Once the fowls are fully grown, they are sold, starting with the ones from shed one and two. The next stage is to clean the sheds. They are cleaned and disinfected and left for ventilation for a period of a number of days.

[5] Broiler feed chicken is divided into three types in accordance with the three stages of the fowls. Defendant receives his one day old chicks from National Chicks, a business that deals mainly with hatching and supplying chicks in the country. He places them in the sheds which by then are well disinfected and heated to the required standard. This heating system is then adjusted according to the age of the chicks. He purchased the heating device in 2008 whereas prior he was using coal stoves. At the first stage, the chicks are fed with starter feed. It is at this stage also in which vitamins are added to the water in-take. After fourteen to fifteen days the chicks are then fed with grower feed until they are twenty six - twenty seven days old. The last feed is the finisher. The fowls are ready for sale at around thirty two and thirty five days. However, feed manufacturers would calculate the quantity of feed per each stage and the farmers will not wait for the number

of days to lapse in order to move to the next feed stage. Once the first stage feed is finished, the farmer would then feed the chicks with the next feed regardless of the age of the chicks. During the feeding process, technicians and materials in a form of charts, guide the farmer. The technicians from the feed manufacturer would from time to time visit the farmer to monitor the growth of the birds. The birds are weighed every seven days.

[6] The plaintiff and defendants first had a business relationship in 2000. Between 2000 to 2008, the defendant was a contract grower. He would rear the birds and deliver them to Swazi Poultry Processors (Pty) Ltd who would pay the feed manufacturer. During this period, his stock performed very well. The manager of plaintiff was a nutritionist who later left. It is then that the relationship between plaintiff and defendant were strained. Defendant who was previously purchasing charcoal on credit, was told to buy it on cash basis. He decided to terminate the contractual relationship. He concluded a similar contract with Crane Feed, another manufacturer of feed. He later experienced difficulty servicing his credit facility with this manufacturer. He requested to return to plaintiff. On 4<sup>th</sup> June 2009, the duo signed a credit agreement for the supply of chicken feed, treatment and coal. The relationship progressed smoothly until 2011 when defendant experienced difficulty in servicing his credit facility. He wrote a number of correspondences to the plaintiff requesting for an extended payment period. The plaintiff acceded to the request and granted him extension.

[7] On 25<sup>th</sup> July 2011 he placed a new consignment of chicks in his sheds. This was after he had “*removed the saw-dust, swept the floor, cleaned using water, pressure-washer and then put in new saw-dust – disinfected and waited for the chicks*” so went the evidence. He used disinfectant such as pharm guard mixed with diesel to disinfect the earth floors as per **Dr.**

**Henderson's** instruction who is from plaintiff. He waited for some time and the chicks arrived on 25<sup>th</sup> July, 2011. They were about 22,500 in number, the capacity of his shed which is 15,000 for fully grown chicken. This consignment was fed a starter for a period of fifteen days. They were then given a grower feed. They ate a little of the grower and spilled the rest. He then called the technician who took the bags of grower away. The technician said he would conduct an analysis on the feed. He came back with grower food and defendant was not sure whether they were different bags of feed from the ones taken prior. However, the problem persisted. The technician, Mr. Nathi Dlamini, compiled a report after a week. I shall refer to the details of this report later in this judgment. Another expert sent by plaintiff by the name of Dr. Dirk Greyling came to defendant's farm to investigate the spillage. By this time, the chicks were twenty days old. He too compiled a report on 19<sup>th</sup> September 2011. It was defendant's evidence that Dr. Greyling could not detect the cause of the spillage. All that his report alluded to were possible causes of the spillage.

[8] Mr. Dlamini advised him to feed the birds with a finisher as they were rejecting the grower. At first he declined to do so but upon realising that Mr. Dlamini was the technician, he changed his mind and complied. To his surprise, the birds ate the finisher although it was of the same size as the grower. This however, affected his business as the fowls ate the finisher for an extended period following that they did not eat the grower. The time for selling lapsed. Mr. Dlamini weighed the birds and found that they were far below the expected weight. He had to sell the birds at a low price of E23, E20, E19 and E18 instead of E28.00 and E29.00. This witness was cross examined at length and I shall refer to his cross examination when I analyse the evidence as a whole.

**Mr. Nicholas Mabuza**

[9] The second witness on behalf of defendant was **Mr. Nicholas Mabuza**. He gave evidence under oath. He informed the court that he was self-employed as an accountant. He identified defendant as his client since 2003 having been referred to him by Standard Bank. He assessed the damage caused by plaintiff's feed. He thereafter prepared the counter claim. It was his evidence that prior, defendant had a credit facility with plaintiff. Initially the facility was for E360,000. This was increased early 2011 to E700,000. The increase was after a letter by defendant to plaintiff requesting the same. It was his evidence further that defendant was in the habit of signing blank documents as he did in relation to the credit facility. He then referred the court to a credit facility reflecting E570,000 although they had requested one for E700,000. However, plaintiff would allow defendant to take goods beyond the amount permitted by credit facility. He corroborated **Mr. Soko's** evidence that defendant left Crane and went back to plaintiff. This was in November 2010. Their relationship was good until July 2011. It was his evidence that in June 2011 although the relationship was still good, defendant experienced a loss in the business because of high mortality rate and low prices with a bad market. In this period defendant took long to sell his birds and mortality rate increased. In April 2011, the mortality was lower, thus the profit made. In July 2011 the market prices were good, with low mortality rate and defendant scored a profit.

[10] However, in August 2011, the size of the birds were small and this meant that defendant had to sell for a long time and as the buyers go inside the shed to pick up chicken, if you open it for a long time the mortality rate increases, so stated **Mr. Mabuza**. In the months of August, September, October and November defendant's chickens were very small. In August,

he sold at an average of E23.00, in September at E20,00, October at E19,00 and November E20,00 due to the small size chickens compared to others in the market.

[11] In August 2011 he had a meeting with plaintiff where he informed him that defendant's chickens were underweight. As a result, defendant was incurring a loss. He informed plaintiff to get defendant an overdraft as a solution. The plaintiff refused. He enquired as to what plaintiff was doing about its grower as it was the cause of the slow growth of the birds. Plaintiff, through the voice of Mr. Wellemse, stated that such was strange as other farmers were not experiencing the spillage. Plaintiff, however, undertook to send a doctor to defendant's farm. It was his evidence that at that time of the conversation, he believed Mr. Wellemse and Mr. Nathi Dlamini that the spillage was only happening at **Mr. Soko's** farm. Plaintiff did send Dr. Greyling. He was present when Dr. Greyling came to defendant's farm. Dr. Greyling inspected the farm and tested its water. He took the grower, chewed it and suggested that it should be grinded. **Mr. Mabuza** then asked Dr. Greyling to compile a report. He did receive a report by Dr. Greyling. This report mentioned the possible causes of the spillage and he mentioned them in court. He was also informed that **Dr. Henderson** would come to the farm. He missed him but he was informed that he did come earlier. He did receive a report by **Dr. Henderson** which was not very different from Dr Greyling's although it expanded more on chick size. By the time **Dr. Henderson** came, he had advised defendant to buy grower from another manufacturer, Crane Feeds (Pty) Ltd. They then mixed the grower from Crane Feeds and one from plaintiff. The chickens performed very well. This was the December batch. It was his evidence further that they did not comply with **Dr. Henderson's** instructions who

found that the farm was bug loaded. They simply mixed plaintiff's grower with Crane Feeds and the chicken performed very well.

[12] It was his evidence that after receiving Dr. Greyling's report, he did his own investigations and found that defendant was not the only one experiencing feed spillage. There was **Mr. Sibandze** as well. He then wrote a letter to plaintiff inviting it to come for a meeting in order to discuss its fraudulent misrepresentation. However, plaintiff declined to honour the invitation. Plaintiff in turn invited them into a meeting where defendant was requested to sign an acknowledgment of debt. Defendant refused on the basis that he suffered loss due to the plaintiff's defective feed. Before leaving the meeting, he requested plaintiff to absorb part of the loss but plaintiff insisted on the full amount.

[13] In computing the amount of the counter claim, his evidence was that he used tax returns for 2011 and 2012. They considered the months of August to November. They multiplied the result with turnover for 2011. They also considered actual loss as represented by expenses incurred within the same period. The totality of this method is called ratio formula.

[14] This witness was cross examined extensively, and I will refer to his cross examination later.

**Mandla Joseph Sibandze**

[15] DW3 was **Mandla Joseph Sibandze** who on oath informed the court that he was a poultry farmer. He had been purchasing his feed from plaintiff since 2007 to December 2012. In September 2010, his birds spilled grower feed from plaintiff. Plaintiff's technician came and took samples. He gave



him a report. Again in the following year, 2011, his birds spilled feed for the whole year. Mr. Willemse came to his farm and promised to help him. A number of correspondences were written by him to plaintiff on the spillage. In November to December 2011 Mr. Willemse of plaintiff, wrote a correspondence to him stating that due to high cost of yellow maize, he substituted it with white maize and therefore the feed became less pelleted. The cause of feed spillage was that the feed was not properly manufactured. The plaintiff had informed this witness that he was the only one experiencing spillage. He later instituted proceedings before this court against defendant.

**Dr. John Fisher Mupangwa**

[16] DW4 was **Dr. John Fisher Mupangwa**, a PHD graduate in animal nutrition from the University of Zimbabwe. He obtained his Masters of Science at the University of Reading in the United Kingdom and his first degree in animal science from his home country University of Zimbabwe. He commenced his career by working under the Ministry of Agriculture commercial stock farming, assisting both small and large scale farmers in Zimbabwe from 1986 to 2000. From 2000 to 2006 he was with University of Bindura, Science Education in the department of animal science. In 2007, he left to establish Ruanda Unitara Polytechnic University and worked as a lecturer in animal science and further assisted community farmers. In 2011, he joined the University of Swaziland, Luyengo Campus in the Faculty of Agriculture, animal science department. During the years of his career, he specialised in animal feed and production. He has, as a result, produced a number of publications in this field.

[17] While in Swaziland, he started a research programme on poultry. He worked closely with Swazi Secret, a company that crushes marula seed to produce various cosmetic products. He collected the residue of marula, that is, marula cake, and used it as an experiment in feeding livestock such as broiler, layer chickens, goats and pigs. This cake was mixed with other ingredients. Knowing that marula cake had high quality of protein, they fed broiler chickens. The birds rejected the marula cake. They spilled the feed as they were scratching. This stalled their growth rate and feathering ability. They then took the marula cake for laboratory testing in South Africa. The result was that there was an anti nutrient content in it. From this experiment, his conclusion was that one sitting in a laboratory or office cannot tell whether the birds would consume a certain feed. One must actually test it by feeding the birds.

[18] In Swaziland, there are three stages of broiler chickens *viz.* starter, grower and finisher. Each takes two weeks, with a distinct nutrition stage. More proteins are needed in the starter stage. This is to assist with rapid growth of muscles and feathers. 22% of the total nutrients consist of protein. The grower stage is influenced by the starter phase. Here the flesh develops and so at the finisher phase. Proteins drop to 16%. At finisher stage the bird should weigh 2kg. Their marula cake broiler weighed 1.7kg or less at finisher. Although there are three stages, this is one programme because each phase is linked to the other.

[19] In broiler chickens, the formulation of the feed should consist of protein and energy. For energy, the feed should have soya beans meal, oil or full fat meal, maize for carbohydrates with additives such as minerals and vitamins. High fibre is unnecessary when rearing poultry. Maize, whether white or yellow is a source of energy. The colour of the maize only goes

for carotene and does not play any role in its growth. Although carotene enhances vision, additives such as vitamins and minerals cater for vision. Sunflower is one of the ingredients of feed. It comes into three different forms viz. first sunflower as can be viewed from the shelves. Secondly, oil extracts from the seed. Again oil can be extracted in two ways namely by removing the seed coat and extract oil direct or secondly by crushing the whole seed to produce a cake. It was his evidence that the best ingredient for the birds is from extracting the oil from the seed. As the residue (cake) contains fibre which slows down digestion in the bird, it was advisable to use the oil extract method. The doctor then addressed the question of pelletability. I shall refer to his evidence later in this judgment.

[20] On the assertion that plaintiff was Hazard Analysis Critical Control Point (HACCP) compliance, this witness informed the court that one needed to hear this not only from internal but external auditors of plaintiff as per Article 6.

[21] On the question of down time, he defined this as a period of open pens meant for cleaning and disinfection. There was a minimum and maximum period for down time. He however, stated that as he was not a veterinary, he would not comment on it. However, if one does not observe the period of down-time, there is danger of bacteria infection buildup which tends to affect the birds.

**Mr. Khuphuka Thulasizwe Dlamini**

[22] The fifth witness on behalf of defendant was **Khuphuka Thulasizwe Dlamini**. He testified on oath that he held a diploma in animal health and

post degree at the University of North West, South Africa in Mafikeng Campus.

[23] In 2002 he worked at Simunye cattle company as head of production of feed. In 2003 he worked for Arrow feed as a technician to its client. He was mainly advising farmers on how to grow birds and further monitored them. He did his internship with Arrowfeed, a company running similar core business as plaintiff. When he obtained his degree, he worked for it until 2011. In this period, he was in charge of animal feed production department until 2011. He then moved to the Ministry of Agriculture where he is livestock extension officer responsible for beef farmers.

[24] He narrated to this court that raw materials for animal feed are imported into Swaziland and kept in silos. A recipe is then formulated and given a code. A mixer is programmed according to the code so one may produce grower with different codes. The feed comes out of the mixer in a mash form. It is then taken either for bagging or pelletized.

[25] At pelleting, there are different sizes of dices which determines the size of a pellet. Once the mesh is in the dice, it passes through a steam which is controlled by an operator. Here the operator controls the number of molecules into the feed. It is then taken to a cooler to absorb moisture. From there, it goes for bagging. Every feed which comes out of the mix is accompanied by a printout which gives one the time, date, quantity and ingredients.

[26] The rationale behind pelleting is to bind together the ingredients so that the broiler bird consumes the feed which consists of all the various nutrients as

a unit. One would only be able to tell whether feed has been well pelleted by the birds eating the same. If not, the birds would spill.

[27] This witness informed the court that he has never made a recipe but has substituted ingredients. For instance, soya bean for bran and yellow maize with white maize. As Swaziland does not have raw materials, he has, owing to customers' demand, found himself having to improvise. It was his evidence that where he had to improvise, he encountered problems. Where a farmer has complaints about feed, they recall it and re-mix it. They do not destroy it. All the feed manufacturers in the country do not have dump site for feed. He has approached or has been approached by plaintiff to borrow certain raw materials. Arrow-feed would however take feed from farmers to Pretoria for testing.

Defendant closed his case.

[28] The plaintiff in rebuttal, called two witnesses.

**Dr. Barend Pretorius**

**Dr. Barend Pretorius** on oath, informed the court that he had a degree, Barchelor of Science in animal agriculture. He specialised on husbandry and nutrition. He first worked in a pigs' farm. In 2007, he worked for a subsidiary of Dutch feed company, De-Heus Feed as a nutritionist, formulating feed. He started working for plaintiff in 2010 and is still under its employ. The core business of plaintiff is producing feed and selling it to the farmers. It produces feed for mono gastric livestock. Plaintiff also advises farmers in the process.

[29] He informed the court that plaintiff was a member of Hazard Analysis Critical Control Point (HACCP) and has been certified as such. He handed evidence showing that plaintiff was compliant and audit reports from South African Bureau Standard (SABS), a body accredited by HACCP. The reports reflected that plaintiff was compliant. Various reports were submitted by this witness who attested that they were all indicative of compliance with the international standards as set by HACCP.

[30] This witness then moved on to inform the court about formulation of the feed for 13<sup>th</sup> July 2011, the period under issue. It was his evidence that during this period, raw material feed prices continued to escalate, otherwise the ingredients remained the same. He also referred the court to documents indicating feed formulation in the whole period of June to December 2011. I shall refer to his evidence in finer details later under sub title adjudication.

[31] He feeds into the computer the minimum and maximum bounds for each ingredient. The computer reads codes, so that every formulation has a code. Once the code is fed into the computer which is the manufacturing system, it begins to manufacture the feed in accordance with the code. One cannot at that stage interfere with the formulation as it is computerized.

[32] On identifying the product, he informed the court that where a farmer for instance orders twenty tones of grower feed, the operator of the mill, will assign a lot number to the twenty tones of grower. This lot however, will have a number of batch numbers. Every batch will have a production report. The production report however will not be the same for every batch. However, this is monitored by studying the report and if ingredients are within tolerance range, that batch will pass to the market. However, the

computer itself is programmed in such a way that where it exceeds minimum or maximum bounds, it will raise an alarm.

[33] Depending on the reason, one overrides the computer and feed in the information to have that particular missing ingredient added. Where it reads that certain raw material is in excess the whole batch is rejected. Once rejected, it is removed from the mill product register and registered in the raw material registry as a re-mix. This batch does not go to the market.

[34] Previously, there were instances where in the absence of certain raw materials, plaintiff would do a substitute. In such case, he would go back to the original formulation to make necessary adjustment in order to accommodate the substitute. However, they have since discarded the process of substituting a product. They always test raw materials for quality.

[35] They do receive complaints from farmers. They prepare a report on the complaints. They then test the product by use of near infrared spectrophotometry (NIR). They did check feed supplied in 20 July to December 2011 and found that it was within specification. They did also check the pellet hardness by looking at its durability. The ideal pellet should be within 80-90% limit. He was aware of pellet binders which were used in the industry to manipulate hardness of the pellet. However, at plaintiff's, binders were never used. They control pellet hardness by having the correct amount of raw material in the formulation. Anything below or above is rejected. It was his evidence that once they complete production and before dispatching a lot to the public, it is tested by the use of NIR.

[36] On the use of white and yellow maize, he corroborated **Dr. Mupangwa** that the yellow colour in yellow maize was of no nutritional value. The nutrition value of white maize and yellow maize was the same. Gluton was a by-product of maize and was used for nutrition purpose in chicken as well. It was his further evidence that the raw materials used in producing starter are also used in grower and finisher. The difference lies in the bounds.

[37] On **Mr. Soko's** evidence that he was supplied with layer grower feed instead of broiler, this witness told the court that plaintiff does produce layer feed but always come in mash form and never pelletized. The two products can easily be differentiated on eye sight as pellet comes in a form of spaghetti while in mash all the raw materials are visible as particles. There was never a mash delivered to defendant. What happened is that an error occurred during packaging. The batch was wrongly numbered. He noted that this was in respect of August batch only and wondered how defendant would then claim for the other months.

[38] This witness then analysed defendant's house records on down-time. He stated that the open period from last bird to new consignment was nine days. From the records there was never a period when there was not a bird placed in any of the houses. It was further his evidence that the house records failed to divulge certain information which would assist in analysing what happened in defendant's pens. For instance, it did not in the space provided inform of how much bags of feed were utilized during the said period, no information on temperature of the shed. Looking at the records of defendant on mortality rate, one learns that mortality rose after three weeks and therefore from the nutritionist point of view, it was highly unlikely that wrong feed could cause the high rate of death in the birds. It



was his evidence further that during the period in issue, a high rise in the market was met with a high rise in costs and plaintiff feed costs rose during the period under issue. It was his evidence also that unpaid grower feed was E239,898.60 while unpaid other non-grower products were E402,314.00.

[39] The statement by **Dr. Mupangwa** to the effect that the test is in the pudding was correct in so far as the feed they produce is as a result of years of trial by error. They produce product which is liked by the birds. However, what was produced by plaintiff was what has already been attested internationally. He denied any fraud on the part of plaintiff. He denied that it was brought to his attention that other farmers had a problem with feed. Further, other farmers had tested their feed before by soliciting an independent tester and defendant was at liberty to do so.

[40] He was cross examined at length. He was asked his role in advising farmers and he said that he goes out to the farmers, do routine investigations on productions, bio-security and feed space. He also refers a farmer to vet health consultancies on diseases, who advise the farmer accordingly. They sometimes bring the consultant to the farmer. He was quizzed on packaging and he stated that the packaging staff select various weight bags and pack the product. They mark it and seal it. In the instance case, the feed was tested and found to be Pb1310, a broiler grower feed in pelleted form and when the bag label number was investigated, it corresponded to a layer product. In order to find out the cause of spillage, plaintiff called **Dr. Henderson** after checking the analysis on the feed. He read the printout which reflected the pelletability of the grower as 89.4% and this confirmed that this wrongly marked batch was for broiler chick and not layer. Further 14.58 protein and 3.2% calcium further confirms that this

was broiler chicken feed. He was asked whether he ever produced feed that was rejected by farmers and he responded to the positive. This was after 2011 and not in respect of the disputed period. They did for instance, advised **Mr. Sibandze** once that they had problem with feed. He emphasised that this was for a period outside the present one. This was borne out by correspondences between plaintiff and **Mr. Sibandze**.

[41] He has been to defendant's farm between the period August to November 2011. He was accompanied by Mr. Nathi Dlamini, a technician. The reason was to ascertain the cause of spillage as Mr. Nathi Dlamini himself failed to detect it. He did not make a report though. They however called the veterinary to find out the cause of spillage. He explained that Mr. Dlamini was at the time of compiling the report inexperienced. It was put to him that Mr. Dlamini was well experienced as he was before a teacher for three years rearing poultry and pigs at Malunge High School. It was further put to him that there were no management issues at defendant's farm otherwise Mr. Dlamini would have noted them in his report. He denied this. This witness was cross examined at length on **Mr. Sibandze's** spillage and on correspondences pertaining to **Mr. Sibandze**. He replied that he could not remember as he was not **Mr. Sibandze's** technical adviser. He was asked how he handled customers' complaints. He maintained his evidence in chief. It was his evidence that HACCP monitored how they handle complaints. He was asked whether he has ever admitted to a client that his feed was incorrect and he responded to the positive and they do compensate their client. The compensation is calculated by considering the feed not consumed and ascertaining weight lost. It was his evidence further that whenever faced with a claim, he checks whether the feed supplied is within specification or not and farmers read specifications from labels attached on each feed bag.

**Dr. Christopher Henderson**

[42] The second witness on behalf of plaintiff was **Dr. Christopher Henderson** who testified under oath. He identified himself as a veterinary consultant specializing on management of commercial poultry operations. He did his vet surgery at University of Pretoria in 1981. He worked in various feed companies and in 1985, he established his own practice. He is a director of C4 Africa Poultry Consultancy. He deals with intensive farming in the poultry industry. His work extends to Southern and Eastern Africa. He is accredited to South Veterinary Council where he submits yearly reports on exposure of latest development in the industry.

[43] It was his evidence that subsequent to receiving a brief from plaintiff, he proceeded to defendant's farm. He inspected the sheds and consulted with defendant. His main brief from plaintiff was to establish the cause of grower spillage from defendant's farm.

[44] It was his evidence that one feeds broiler starter at day one to fourteen, a broiler grower at day fourteen to twenty five or twenty six and finisher until slaughter or sale date. A mash is never fed to broilers.

[45] When he carried out his brief, he noted firstly that at no stage was the farm totally depleted of poultry. Secondly, the floors were earthed and therefore disinfection could not be 100%. Thirdly, the down-time of sheds was eight to ten days. Fourthly, the birds examined were small for their age. There were no weight facilities on site. Fifthly, there was overstocking with insufficient number of feeders and drinkers. One hundred and twenty five birds shared a feeder and drinker instead of fifty. There was bug loading. He defined down time as the period commencing after all "*litter, waste, dirt,*

*dust through washing with detergents and followed by effective application of disinfectant has been completed and runs into the day chicks are placed into the house”.*

[46] In Africa, down time of a house with concrete floors was ten days while on earth floors, three and a half weeks. Reduced down time negatively affects chick growth. Similarly, overstocking and insufficient supply of feeding and drinking equipments. He observed a number of small birds in the sheds. He examined them and discovered low weight. They were on a grower pellet at that time. This pellet is physically larger in size than a starter. They had difficulty in consuming the pellet. It is for this reason as observed, the birds searched for smaller particles. On the basis of this, he advised defendant to feed the birds a grower crumble instead of a pellet. This was to match their current size with the crumble. He also advised on down time and use of antibiotics to deal with bacteria.

[47] During the cause of the present case hearing, he analysed defendant’s house records on mortality. He identified from record that there were five cycles. He noticed an increase in mortality rate after day twenty eight. He placed it on record that the house records on weekly weights were not available during the time of his visit and defendant only produced same when he was so ordered by the court for purposes of this trial. His conclusion was that the grower feed was rejected because the birds were underweight or small to consume pellet grower.

[48] It was his evidence that chicks by their nature scratch for food on the ground. When they meet up with bugs in their early days, the bugs are consumed into their abdomen and create bug ingestion. The bugs pass down the track into their intestine and the body reacts by bug loading. The

cells of the intestine swell. The chicks will not die but the body resists the bug by creating a thick wall. This thick wall on track will reduce nutrients from passing down into the blood stream for morbidity. There is resistance in absorption of nutrients. The result is that the body will need more energy in order to create allergic response. Instead of the energy being utilised to bring growth on the bird, it would be used to fight allergy. This startles growth. This bug continues to grow within the body of the chick and is later excreted into bedding of the chick. A cycle of bug intake is repeated at this stage as the birds continue to scratch the ground. The end result is that the bugs will develop into organism which cause clinical sickness on the birds. It is for this reason that mortality rate in the chicken will rise at a later stage. The witness further demonstrated this position in a graph form. Down time was therefore essential to immunize bug loading according to this witness. Earth floors needed more time as they were impossible to clean following their organic nature. There were previous correspondences written to defendant advising him of downtime.

[49] He disputed defendant's evidence that the birds rejected the grower pellets due to wrong formulation for the reason that when he crumbed the grower pellet, the birds ate it without manipulating the formulation. He visited a number of other farmers using the same grower pellet formulation and they did not experience spillage. It was his evidence that the disadvantage of a live market was that members of the public and their motor vehicles are generally not clean. They transport bugs into the sheds. As they are pathogenic, they add to the bugs already in the farm. It was his evidence further that the birds ate the pellets by scratching for smaller or broken particles. If they did not, they would all have died. He explained further the reason birds ate pellets from the floor. He stated that the birds had no option but to consume pellet from the floor. When given on the pens, they

flipped the pellet around until it dropped and searched for smaller ones to consume. This witness narrated how season change had a bearing on bug loading. Farmers have a tendency to curtail heating costs in winter. They create a small space for the chicks as heating a large space is costly. This reduces oxygen circulation and increases CO<sub>2</sub>. As a result bug loading increases. He agreed with **Dr. Mupangwa's** evidence that wrong formulation of feed would not play any role in chicken mortality.

[50] This witness handed documents showing result of some of plaintiff's clients who used their feed. The feed produced good yield during the period under issue.

[51] It was his evidence further that his opinion was independent as can be seen in **Rainbow v Protea SA** case where he found against his client and substantial amounts awarded to the other party.

[52] **Dr. Henderson** was cross examined. It was put to him that Mr. Packard, the client he attested to as performing very well assisted plaintiff with obtaining a loan worth millions of Emalangeni and that he played a managerial role in plaintiff. The witness stated that he was not aware of such except that Mr. Packard used plaintiff's feed and performed very well. This witness was then attacked on practicing in Swaziland without a licence and a number of incriminating innuendoes put to him. This court in its powers of regulating and controlling proceedings had to intervene and admonished defendant's Counsel that this court was not the forum to address such damning allegations against the witness. Counsel quickly toured the line.

[53]

This witness defined “*dirt encrusted surfaces*” as a place where organic matter was present. Defendant operated earth floors consistent with “*dirt encrusted surfaces*”. He was asked if he appreciated that defendant’s floors were compacted and soil encrusted to which he responded that they were still earth floors. He explained that in earth floors if one applies a detergent or disinfectant, the washer breaks into the floor and it becomes organic matter (mud). This was disputed on behalf of defendant as scientifically incorrect. He insisted as correct. This witness was given a document which he informed the court that as it appears on the face of the document, it refers to earth floor at the Mediterranean where the climate is different from Africa and also to an index calculation of the soil. He challenged defendant to produce his index of his soil. He was challenged that he could not attest to defendant’s floor wash as he never witnessed it. He maintained that defendant’s floor could not withstand detergent washers. Reference was made to his report and put to him that it was silent on defendant’s earth floor. He stated that earth floors *per se* do not pose as risk unless not managed accordingly. He stated that there should be a thorough dry cleaning of earth floors, drenched soaked with a concentrated phenolic solution sometimes mixed with diesel and an extensive downtime of two and a half to three weeks. It was put to him that **Dr. Mupangwa** informed the court that he visited defendant’s farm and did not find anything wrong. He replied that there was an issue in management. He was asked his authority and he stated that his thirty years of experience has taught him that earth floors must be managed accordingly. He repeated his evidence that he found **Mr. Soko** when he visited his farm and birds extremely crammed together, with inadequate feeders and drinkers. The birds were about four to five days in November when he visited the farm. He requested for weight for birds in house number 3 which were about to be sold but was not supplied. He was shown documents indicating weights

and he informed court that the weights and scale were not availed to him when he visited the site. He then disputed as an impossibility that a bird at seven days old would weigh 900g. It would, according to him, weigh 150g. It was put to him that he was hardly five minutes in the farm. He disputed that. It was his evidence that when he wrote the report he did not have recourse to Dr. Greyling's report who was his employee. He repeated his observation under cross examination.

[54] It was put to this witness that as an expert witness, he was not impartial but favoured plaintiff as can be seen from correspondences addressed to plaintiff during application for summary judgment. This witness replied that he wrote correspondence requesting to meet with **Dr. Mupangwa** on the basis that he wanted to get the full view of the matter and advice plaintiff accordingly. He was asked as to why he failed to comment on the water quantity as Dr. Greyling did. He replied that he was privy to plaintiff's formulation of feed. On evidence by **Dr. Mupangwa** that the grower pellet was hard hence the birds could not swallow it, this witness responded that if it were so, the birds would not have swallowed it when crumbled as the formulation remained the same. On **Dr. Mupangwa's** view that when the pellet fell on the bedding owing to the moisture, the pellet became soft for the bird to eat, he stated that at day fourteen, the bedding is still dry as there is no litter otherwise if so, they will be a further problem of bug loading. Further **Dr. Muphangwa** was not a specialist as per his curriculum vitae in mono gastric intensive poultry nutrition as he was. He maintained that the feed was formulated according to international specification. When cross examined on Mr. Nathi Dlamini's report that the feed supplied was for layer chicks, he replied that he was surprised that a farmer as **Mr. Soko** of thirteen years would not see with his naked eye feed for layer which comes in a mash form and pointed out that defendant



referred to the feed as pellet and not mash. He attested further that documents in exhibit C, D and J were actual production reports and not summaries. He was asked why he failed to advise defendant against use of earth floors in as early as 2009. He replied that the earth floors were used throughout Africa. What was vital in their use was management. He divulged that when he visited defendant's farm in 2009, he was to advice him of his chicks which had travelled from Petermaritzburg and were dehydrated and not about his farm.

[55] Defendant took up issue on evidence in chief adduced by **Dr. Henderson** on method of computing a claim on the basis that it was not included in his summary of evidence. By consent of the plaintiff, **Dr. Henderson's** evidence in this regard was expunged from the record. Both parties however, agreed that the cross examination on computing method shall remain. He was asked how he computed claims. He stated that he finds a norm by considering three periods viz. the disputed period, the period prior and after the disputed period. He considers the weight and number of birds to get average on the market prices. He was informed that his method of calculating the claim was flawed because it failed to consider other factors which contributed to the loss such as depreciation. He replied that it considered loss due to defective feed and nothing else. He was challenged that as the feed was a programme, other factors ought to be considered even if one stage feed was defective. He said the method took care of that. It was put to him further that defendant lost business as five consecutive crops failed to bring a good yield. He disputed that as defendant's evidence was that his December crop did well and he sold it and therefore it cannot be said he lost business. Further, the evidence showed that he sold his other crops although at low costs. Therefore, he never lost business and if there was evidence that he lost business, he would have advised his client to

settle. It was his evidence that Mr. Nathi Dlamini was not competent to opine on issues of bug loading because he lacked the necessary qualification. He further noted that Mr. Nathi Dlamini failed to come up with the possible causes of the spillage. When quizzed why his report was different from the two experts sent by plaintiff, he pointed out that Dr. Greyling's report also reflects; "*bio security generally poor, earth floors will build up bacterial load that will lead to stunted growth and mortalities*".

### **Legal Principles**

[56] **Cloete J in Brunette v Stanford, 3 Searle 225** stated:

*"By looking at the text books I think it will be found clearly laid down that the principle of reconventional claims was introduced into Dutch law simply because it was for the interest of the State, ut finis litium. When an action was therefore brought against a defendant, if he had any kind of cross-action of whatever the nature, against the same party who brought the original suit, it was competent for him at once in pleading to make his claims in reconvention, so that the pleadings would go on pari passu to the day of trial, and prevent the plaintiff from getting judgment against the defendant when that defendant might have otherwise meritorious claims as a valid set-off. These reconventional claims by being thus pleaded at once, prevented the necessity of defendants taking out fresh summonses, or beginning other proceedings which really might lead to very great injury."* (SA Judicial Dictionary by J.J.L. Sisson, QC.)

### **Common cause**

[57] From the evidence adduced and cross examination of witnesses, it is common cause that:

- (i) The plaintiff and defendant had a contractual relationship where plaintiff would supply defendant with broiler poultry feed on credit;
- (ii) That commencing with stock of July 2011 to November 2011, the defendant's birds rejected the plaintiff's grower feed;
- (iii) That during this period plaintiff supplied defendant with stock worth E742,212.60;
- (iv) That this amount remains outstanding but defendant raises a counter claim of E754,290.00;

### **Issue**

[58] What was the cause of grower pellet spillage? Was the spillage due to the wrong formulation? Was it caused by bug loading? These are the questions for determination.

### **Defendant's case**

[59] In establishing that the grower pellet spillage was as a result of wrong formulation of feed the defendant led the following evidence:

*Mr. Soko: "Our relationship with plaintiff was very good until July 2011. Plaintiff sold feed, vaccination treatment and coal. The crop performed very well up until July 2011. I had a problem with feed in July, 2011. The chicks that were brought on 25<sup>th</sup> July 2011 consumed the starter and when they were to eat the grower, they rejected it. They would eat very little and reject the grower. I called the technician from plaintiff. He realised that the chicks were rejecting the feed. He entered the sheds and was surprised. He indicated that he will make a report which he did."*

He also states:

*“Between the time he came to the farm and the report, the chickens threw the grower and continued until he was confused on what he would do.”*

It was his evidence further:

*“The bags which were not used were taken back. Seventy five and two hundred plus five bags were returned for analysis. The bags brought for replacement were still rejected by the chickens. There was no difference. The chicks spilled it.”*

It was his evidence that the technician compiled a report. He then read the report which reflects:

*“On 11<sup>th</sup> August 2011 Mr. Soko called and reported a spillage in his farm. Immediate attention was given to him and the technical advisor went with the lab technician (Raymond Mabuza) to Mr. Soko’s farm and a sample of the feed was taken to the lab. There [sic] feed was Pb 1310, batch 4032, manufacturing date 07/08/11.*

*An arrangement was made to take the bags which were in the farm and replace them with a new feed from the mill and this was done on the same day, there was a return of about 124 bags of Pb 1310, the grower had the following manufacturing dates 05/08/11, 07/08/11 and 08/08/11.*

*On the 12<sup>th</sup> August 2011 the batch number was searched in the lab and only showed that it was a laying feed. The technical adviser and the lab technician went to the Production Manager to verify the batch number but we got the same results. It was a layer feed.”*

To the above, **Mr. Soko** concluded:

*“It was discovered that the feed given to me was one for chick layer and not broiler.”*

He proceeds:

*“Feed for layer chickens and broiler are different.”*

Dr. Greyling's report reads:

*“Remaining possibilities may include chick size too small for pelleted grower ration and additive effect of water quality and feed formula.”(Mr. Soko's emphasis)*

He continues after referring to Dr. Greyling's report:

*“The Doctor was sent by the plaintiff and the chicks had reached twenty days in age. All this time they were eating very little food. Dr. Greyling could not detect the cause of the problem. He estimated three different causes. Bullet number 3 from bottom Dr. Greyling says: ‘ the chicks were too small to consume grower pellet’. I do not agree that chickens were small as my experience is that the chicks eats pellet. I agree with him on feed formula.”*

He continued:

*“When the chicks spilled the grower, Mr. Dlamini, the technician, advised that I should feed them with the finisher. At first, I refused. However, as he was the technician, I agreed. They ate the finisher without any problem. I failed to understand as the pellets were of the same size. They ate the finisher for a long time as they had not grown due to non eating of the grower. The time for selling them lapsed. I decided to sell the chickens trying to mitigate costs as the finisher was costing me money. I had to sell the chickens at a loss as they were small in size. I sold them for E23, E20, E19 and E18 instead of E28 and E29”.*

He then concludes:

*“On analysis of all the sales record during period 25 July to 30 November 2011 there was a plunge in my sales.”*

He also stated:

*Defendant's Counsel:*

*Did plaintiff ascertain real cause of the spillage?*

*Mr. Soko:*

*There is nothing plaintiff told me about except that in their computer the food was fine for the chicks. They also told me that the chicks were spilling in my farm only and not with other*

*farmers. However, I did my own investigation and discovered that there was a spillage.”*

He then referred the court to his accountant on the question as to how much loss he sustained.

[60] Then the court heard evidence of the accountant in support of **Mr. Soko**. He stated:

*“We met with Mr. Willemse early August at start of the problem and I told him that defendant’ chickens are under weighted and this is driving defendant to a loss. I asked him what he was doing about his grower feed as it was a major factor startling the growth. Willemse said it was strange as the spillage was happening at Soko’s farm.”*

He stated of Dr. Greyling’s report:

*“I understood the following: He reduced possibilities to three (i) chick size – it was small at the time it had to take grower pellet and it couldn’t swallow it; (ii) water addictives effect, that is, water that is salty; (iii) feed formulation and that is the feed itself.*

He continued:

*“When Dr. Henderson came to the farm, there were no chickens in the farm, the very farm he claimed to have serious bug loading. They were in the houses. Those chickens at the end of the starter against defendant’s approval, I ordered that he buys grower feed from Crane. At first, we gave grower feed from Crane. The chicks ate the grower. I then suggested that he mix feed from plaintiff as we didn’t have money to buy with cash. These chicken did very well and this was December batch.”*

Both witnesses were cross examined extensively on the cause of spillage.

*Plaintiff’s Counsel: Did plaintiff rectify the problem of the feed formula?*

*Mr. Soko: They didn’t do anything.*

*Plaintiff's Counsel:* Do you believe plaintiff rectified the error.

*Mr. Soko:* My attorney made a mistake.

[61] In his affidavit resisting summary judgment, defendant stated that the plaintiff rectified his feed and this is in variance with his *viva voce* evidence where he stated that plaintiff never did anything to his feed.

[62] This is a hurdle. **Joseph Mabhalane Masuku v Swaziland Water Services Corporation 50/2012 SZSC 48 [2012] (30 November 2012)** is authority that “*where evidence led is in conflict with the pleadings filed*” that evidence stands to be rejected. The rationale for this proposition is clearly that the party builds his case as it progresses and what he later or earlier advances is nothing but an imagination of his mind. As it is not factual, it cannot be relied upon by a court of law.

[63] Mr. Soko was cross examined:

*Plaintiff's Counsel:* “When Dr. Henderson attended your farm in 2011 what did he tell you?”

*Mr. Soko:* “He said my sheds were infected with diseases I placed chicks within 8-10 days therefore chicks were not growing well.”

*Plaintiff's Counsel:* “What is the period of down time?”

*Mr. Soko:* “8 – 15 days”

*Plaintiff's Counsel:* “So you put chicks after 8 days?”

*Mr. Soko:* “Yes depending on a certain circumstance.”

*Plaintiff's Counsel:* “Between March to December 2011 you didn't even once have a period as long as 15 days as down town? Shed 1, 2 and 3 were analysed. Shed 3 was once 13 days?”

Mr. Soko:

*“I agree if our records read so.”*

[64] From the above responses, one can safely conclude as also supported by defendant’s in-house records and from his response that down time was never fifteen or more days. That as it may, nothing much turns on this period because defendant maintained that even if down time was less, his chickens have been performing over the years and are still performing up today with the same down time.

[65] **Dr. Mupangwa**, analysing the behavior of birds and drawing conclusions from the experiment with marula cake concluded in support of defendant’s version that the birds rejected the feed because of the wrong formulation. He stated:

*“One cannot test pelletability in a laboratory but in feeding the birds. A typical problem of pelletability was our marula cake as the birds were not eating it or there was difficulty with the movement of the feed into their system. They tell you the pelletability as in our marula cake which had chemicals. Once you crush it, then the particles flow down. They will take it except where there are chemical.”*

[66] **Dr. Mupangwa** described the chemical in marula cake as an “anti nutrient” composition. The learned Dr. then concluded:

*“The test is in the pudding.”*

It was his evidence further that:

*“Gelatin in maize provides binding or one could add artificial binders.”*

He was led:

*Defendant’s Counsel: “Defendant said when chicks rejected grower pellet but they ate the finisher.”*



*Dr. Mupangwa: There was something wrong with the grower pellets because if they rejected the grower and at finisher, the only explanation is that there was something wrong with the grower.”*

[67] **Dr. Mupangwa** then lamented the absence of printout of the formulation in order to enable him to ascertain exactly what was wrong with the feed. Under cross examination, he was referred to the NIR reports and the following put to him:

*Plaintiff’s Counsel: “They conducted all tests and looking at recipe, NIR reports, crystal reports, durability tests, there was nothing wrong with the feed supplied in July – November 2011.”*

*Dr. Mupangwa: “These are standard procedures. However, there is a system which they ought to have used which they did not. I need to see the non conformity reports (NCR) and so far there is no such report.”*

*Plaintiff’s Counsel: “Such a report would be based on the reports or tests mentioned here.”*

*Dr. Mupangwa: “Yes and the feed where it is used.”*

*Plaintiff’s Counsel: “Whether NCR was done or not, there is nothing shown that there was anything wrong with the feed?”*

*Dr. Mupangwa: “Yes for feed manufacturing, there was no problem.”*

[68] This last response caught the attention of plaintiff as he testified in chief by the evidence of **Dr. Pretorius**:

*“Dr. Mupangwa did not find anything wrong with our specification.”*

[69] From **Dr. Mupangwa’s** reply, he conceded that there was nothing wrong with the “*feed manufacturing*”. However, despite this he later stated:

*Plaintiff's Counsel:* "Dr. Henderson says the bug loading would overcome minimum immunity and mortality would rise typically slightly in the late production cycle."

*Dr. Mupangwa:* "That is his opinion, the birds didn't die at grower stage. I am not a vet."

*Plaintiff's Counsel:* "Dr. Henderson can explain mortality."

*Dr. Mupangwa:* "They could eat finisher pellet. That means the bugs run away when it is finisher."

*Plaintiff's Counsel:* "The birds did grow but less than what was expected and Dr. Henderson says it is because they had grown."

*Dr. Mupangwa:* "The reason they ate grower from the floor is because of moisture on the floor. They (pellets) were much softer therefore they ate."

However, **Dr. Mupangwa** concludes before re-examination:

*Plaintiff's Counsel:* "Would weights been important to come to our opinion?"

*Dr. Mapangwa:* yes, they were important because it didn't make sense why they ate finisher and refused grower."

[70] We know from Mr. Soko's evidence on the evidence pertaining to weights as he stated in his evidence in chief:

*"I decided to sell the chickens trying to mitigate costs as the finisher was costing me money. I didn't weigh them."*

The evidence that he did not weigh them was repeated even under cross examination. From **Dr. Mupangwa's** evidence it did not come out clearly that the feed formulation was wrong, thus the spillage. There is wavering. He himself states:

*“Defendant did not keep the grower pellet, otherwise I would have tested it.”*

### **Plaintiff’s case**

[71] Plaintiff supported this same view as **Mr. Pretorius** stated:

*“Nothing prevented defendant from having feed tested by 3<sup>rd</sup> party. Other farmers have from time to time tested our feed. We supply them with samples so as to test them should issues arise.”*

[72] The plaintiff on the other hand was very adamant that the feed spillage was caused by bug loading. **Dr. Christopher Henderson** explained as follows:

*“Chickens by their nature scratch on the floor bedding and this proximity of beak of bird to a high bug load leads to early abdominal indigestion of bugs. The bugs pass down to the track into intestine. The body’s reaction is immediately called into reaction into bug loading. These are foreign organism to the one day or young chick. The body starts having allergic reaction. The cells in the intestine will swell. It does not kill them but have a thickened intestine wall. Three consequences happen.*

- 1. The thicken cell wall reduces passing of nutrients into the blood stream for morbidity. The feed in the intestine is not as readily absolved as in a normal intestine.*
- 2. The body in order to respond utilizes energy in excess to create the allergic response so there is less energy for growth going forward.*
- 3. The bugs can continue to multiply and growth of bugs. If you start with a high loading then growth is slow. As they grow (bugs) they are excreted to the bedding through faeces. This is again absolved by the next chicks. The cycle continues.*

*This bug growth eventually will reach a number of bug organism at which birds would become clinically sick. The early reaction day one to -twelve to fourteen is microscopic and require constant examination which are still researched today. Once bug count gets to critical point that we can not see clinical changes with physical eye. The birds mortality then rises.”*

*Plaintiff's Counsel:* "Defendant said chickens did not eat pellet due to formulation."

*Dr. Henderson:* I do not agree with the statement due to the following:

1. When we roughly crumbled grower pellet, the birds ate the product which was identical formulation.
2. I visited a number of other plaintiff's farmers utilizing same formulation – They did not present a similar problem."

He also stated:

*"We did check feed from July to December 2011 and we found that our feed was done correctly."*

## **Adjudication**

### **Cause of spillage**

[73] This is the evidence faced by this court upon which I am called upon to draw factual findings on the cause of the spillage. My duty at this stage is as per **Ota JA** in **James Ncongwane v Water Services Corporation (52/20120 [2313] SZCS 65** where she eloquently states:

*"...the court is required to first of all put the totality of the testimony adduced by both parties on an imaginary scale. It will put the evidence adduced by the plaintiff on the one side of the scale and that of the defendant on the other side and weigh them together. It will then see which is heavier not by the number of witnesses called by each party but the quality or the probative value of the testimony of those witnesses. In determining which is heavier, the Judge will naturally have regard to whether the evidence is admissible, relevant, conclusive and more probable than that given by the other party. Evidence that was rejected by the trial judge should, therefore not be put in this imaginary scale.*

*This is because although civil cases are on a preponderance of evidence, yet it has to be preponderance of admissibility, relevant and credible evidence that is*

*conclusive, and that commands such probability that is in keeping with the surrounding circumstances of the particular case. The totality of the evidence before court however, must be considered to determine which has weight and which has no weight.”*

[74] Firstly, I have already demonstrated that when **Dr. Mupangwa**, an expert in animal nutrition was shown the formulation by plaintiff under cross examination responded:

*“Yes, for feed manufacturing there was no problem.”*

[75] However, this response was not conclusive as **Dr. Mupangwa** soon lamented when informed that spillage was due to bug loading:

*“They eat the finisher pellet. Does that mean the bugs run away when it was finisher?”*

[76] The plaintiff confronted him with evidence that when they ate the finisher pellet, their weight was higher than when they were first fed grower pellet. To this **Dr. Mupangwa** agreed with plaintiff that weights would be important to verify plaintiff’s assertion. We know from **Mr. Soko**, defendant, that there were no weights taken as he stated that he used his experience to judge that the chickens were underweight. Even few scanty available weights were said to be unreliable. This is attested by the records where weight at seven days was said to be 900g and **Dr. Mupangwa** testified that such was impossible. No wonder the weight records came very late during the trial. In the final analysis, and due to absence of consistent weights, one cannot make a factual finding of the cause of spillage as can be deduced from the plaintiff’s and defendant’s expert witnesses. In other words, putting on the scales of justice the evidence of both **Dr. Mupangwa** and that of *Dr. Henderson*, it is my considered view that the scales of justice balance at equilibrium as they both agree that weights were critical in coming up with a conclusive opinion on the cause

of spillage of the grower feed by the fowls. Where the scales of justice are at equilibrium, the court must look at other evidence in order to tilt the scales. I am compelled to find an answer outside the two experts' evidence.

[77] Defendant called **Mr. Mandla Joseph Sibandze**. He informed the court that as a broiler farmer he purchased his feed from plaintiff since 2007 to December 2012. He then stated:

*“but in 2010 the birds spilled the feed.”*

He continued:

*“It was in September 2010 when the birds spilled the grower and again in the following year it spilled for the whole year in 2011.”*

[78] This evidence was startling in the following manner: A same farmer as defendant experienced spillage of same feed (grower). What is at variance however, is the period of spillage. He started experiencing the problem of spillage in 2010 and the whole year 2011. I compare and contrast this evidence with that of **Mr. Soko**, the defendant who attested in chief:

*“The chicks that were brought on 25<sup>th</sup> July 2011 they consumed the starter and when they were to eat grower, they rejected it.”*

He states again in chief:

*“spillage started on 25<sup>th</sup> July 2011 and this was my first time to see it.”*

He had testified earlier:

*“The crop performed very well up until July, 2011”*

[79] The evidence of **Mr. Sibandze** is that, his chicks spilled the grower pellet from January to December 2011, while **Mr. Soko**, the defendant, testified that he had a good crop in January to June 2011. He only experienced spillage from July 2011. He never experienced feed spillage in September 2010 while **Mr. Sibandze** did. Now, logic suggests that if the problem was in the feed formulation, both broiler farmers, that is, **Mr. Soko** and **Mr. Sibandze** who both sourced their grower feed from the same manufacturer, plaintiff *in casu*, would have had grower feed spillage at similar periods. By reason that they did not experience this problem simultaneously in January to June 2011 or September 2010, the evidence that the grower pellet feed was wrongly formulated stands to be rejected. The evidence by **Dr. Mupangwa** who after having been shown the plaintiff's feed formulation, stated that "*for feed manufacturing there was no problem,*" must be accepted as established facts. It follows therefore that the corroborating evidence by **Dr. Henderson** that "*there was nothing wrong with the feed*" stands to be accepted. Further, it reaffirms that the spillage was due to factors peculiar to each clients', that is, **Mr. Soko** and **Mr. Sibandze**, circumstance. Whatever it was, it was certainly not due to wrong formulation as demonstrated herein.

[80] I appreciate that defendant submitted correspondence authored by plaintiff directed to **Mr. Sibandze** where it reflected:

*"... it is apparent that these levels of sunflower inclusion may have resulted in the feed becoming less palatable to the birds."*

[81] This correspondence was written on 23<sup>rd</sup> January 2012 and evidence before court by Mr. Sibandze was for the cycle of November, December 2011. We heard from defendant's witness, **Mr. Soko** and **Mr. Mabuza** that they did not experience any spillage in the cycle of November, December 2011.

I appreciate that they testified that the reason was because they mixed plaintiff's feed with that of Crane. However, they did not first feed the birds with plaintiff's grower before manipulating it. In other words, it cannot be said that they first experienced spillage before they manipulated the feed. One cannot tell whether the November, December cycle would have spilled the grower pellet but for the manipulation. One therefore has to consider this period as outside the problematic time in so far as defendant is concerned. For this reason this correspondence therefore cannot be interpreted in favour of defendant in the present case.

[82] What of the two reports viz. by Mr. Nathi Dlamini and Dr. Greyling whom defendant urged the court to rely on? Mr. Nathi Dlamini's report reads:

*“Feed and Management*

- *On the 11<sup>th</sup> of August 2011, Mr. Soko called and reported a spillage in his farm. Immediate attention was given to him and the technical advisor went with the lab technician (**Raymond Mabuzza**) to Mr. Soko's farm and a sample of the feed was taken to the lab. There feed was Pb1310, batch 4032, manufacturing date 07/08/11.*
- *An arrangement was made to take back the bags which were in the farm and replace them with a new feed from the mill and this was done on the same day there was a return of about 124 bags of pb 1310, the grower had the following manufacturing dates 05/08/11, 07/08/11 and 08/08/11.*
- *On the 12<sup>th</sup> of August 2011 the batch number was searched in the lab and only showed that it was a laying feed. The technical advisor and the lab technician went to the Production Manager to verify the batch number but we got the same results it was a layer feed.*
- *On the 14<sup>th</sup> of August 2011 another call was received with the attention that even the new feed was spilling, again immediate attention was given to Mr. Soko and the farm was visited. During the visit a high spillage was noticed and Mr. Soko was advised to lift up the feeders so that the chicks would feed on the feed on the ground.*
- *The chicks did pick up the feed but on availability of the feeders the spillage began again.*



- *On the 16<sup>th</sup> August 2011 there was another visit at Mr. Soko's with the SA technical advisor, the spillage was still continuing and again Mr. Soko was advised to lift up the feeders so that the chicks would feed on the feed which is on the ground. The SA technical advisor also advised him to put the feeders at the recommended height to prevent the spillage however this did not help the spillage continued. Again there was a replacement of feed about 75 bags with new feed from the mill.*
- *Before dispatch of the feed the lab technician did all the required analysis and the feed showed to be okay or within spec. then this feed was sent to Mr. Soko's farm.*
- *The within spec. feed however also had the same spillage problem despite the arrangement of the feeders at the right height.*
- *On the 19<sup>th</sup> August 2011 on day 25 of the birds I recommended that Mr. Soko should move to using the finisher Pb1410.*
- *On the introduction of the finisher in the feeders there was no spillage observed and this raised questions why with the customer since the grower was spilling.*
- *On the 29<sup>th</sup> August 2011 the technical advisor went to Mr. Soko's farm to take weights at 29 days the average weight achieved was 1.190kg less than even the expected weight at 28 day of 1.412 kg. The customer was very angry at the weight but he was calmed down as he even said the company had made him lose a potential market for the reed dance.*
- *What should be noted though is that the same feed was given to other customers and on visit to their farms there was no spillage and this was communicated with the customer. I stated to Mr. Soko that I don't understand the cause of spillage in his farm as this was only happening with him but the same feed was being used by other customers and we had no complaints as well as no spillage in their farms."*

[83]

It was defendant's evidence that Mr. Nathi Dlamini found that he was supplied with layer feed instead of broiler feed. Plaintiff refuted this by pointing out that layer feed comes in a mash. This was corroborated by **Dr. Mupangwa**, defendant's witness, who testified after he was referred to Mr.

Nathi Dlamini's report by defendant's Counsel and asked to comment on the effect of feeding broiler feed:

*"The quality of feed is different. This is feed fed to birds which are sixteen to seventeen weeks to lay birds. The nutrient content is different from broiler feed. It is feed formulated for specific type of a bird."*

The learned expert continued in chief:

*"Layer feed comes in a mash feed and not in a pellet feed. This means that it was a production company. Layer feed will bring retarded growth. It could be within line of production. It could be where they put the batch number."*

The plaintiff in chief stated:

*Plaintiff's Counsel: "Mr. Soko said food given to him was layer feed."*

*Mr. Pretorius: "Plaintiff does produce layer feed but in a mash formate. Visible pellet in spaghetti type pieces but short. Whereas a mash, one would see raw materials, flour type and one would see particles e.g. mealie meal. A layman would see the difference. First, there was never a mash delivered to defendant. The bag was incorrectly labeled and when investigation was made, the code did not correspond to the product. It was a grower."*

[84] It was not in issue that the feed delivered to defendant was in a pellet form. **Mr. Soko** himself stated when he informed the court that he wondered as to the reason the birds would consume the finisher pellet as:

*"the grower and finisher are pellets of the same size."*

Under cross on this point he was asked:

*Plaintiff's Counsel: "Plaintiff never supplied you with a mash?"*

*Mr. Soko:* “I meant crumble feed – correct.”

While **Dr. Mupangwa** was questioned:

*Plaintiff’s Counsel:* “See layer feed vs grower feed: In your experience layer feed is always a mash?”

*Dr. Mupangwa:* “yes, in this country.”

[85] For the evidence of **Dr. Mupangwa** and defendant, I accept that the “bags were wrongly labeled” as per plaintiff’s evidence, “where they put the batch number” as testified by **Dr. Mupangwa**, defendant’s witness. The evidence that defendant was supplied with layer feed stands to fall therefore.

Loss incurred

[86] If my findings on the reason for spillage are incorrect, there are other aspects of the case one should investigate from the evidence presented. Defendant claimed the sum of E754,290.00 on the basis that he incurred loss due to the birds underweight and rise in mortality rate. The result was that he had to sell the birds at a low price.

weight loss

[87] I have already alluded to the evidence by **Mr. Soko**, the defendant, that the birds were sold without weights taken. I have also pointed out some irregularity in the weight as attested by **Dr. Mupangwa** that the reading of 900g in seven days to 418g in fourteen weeks was an impossibility. However, as the evidence demonstrated, there were weights taken although not consistently as per National Chick chart. In his evidence in chief, **Mr. Soko** compared the weights of June and July cycles. He submitted house

records which he informed the court under cross examination that he personally recorded the weights.

*“Date placed: 20.06.2011  
7 days: 191g  
21 days: 903g  
28 days: 159g*

*“Date placed: 25.07.2011  
7 days: 180g  
14 days: 458g  
29 days: 1.19kg*

[88] From his own evidence in chief, the weight in July at the critical age, that is 29 days nearing sale period was higher than the undisputed period viz. June 2011. In the analysis, loss of weight therefore cannot be attributed to loss of profit as attested by defendant for the reason there was no loss in weight as per the records that **Mr. Soko** asked the court to look at in support of his evidence in chief.

mortality rate increase

[89] It was further defendant’s evidence that as a result of wrong formulation feed, mortality rate increased and therefore he incurred loss of profit. **Dr. Mupangwa** was cross examined and referred to a number of pages recording mortality as follows:

*Plaintiff’s Counsel: “At page 25?”*

*Dr. Mupangwa: “There was a sharp rise.”*

*Plaintiff’s Counsel: “At page 27 to 28? At day 28, 49 died while at page 28, at day 23 more than 2000?”*

*Dr. Mupangwa: “Yes a sharp increase”*

*Plaintiff's Counsel:* "At page 35 at day 28, 351 died while 43 died and 15 days later over 2,500?"

**Dr. Mupangwa:** "Yes"

*Plaintiff's Counsel:* "why such sharp rise?"

**Dr. Mupangwa:** "I wouldn't know"

*Plaintiff's Counsel:* "Can we assume that the probabilities of the mortality rate rise was due to mismanagement?"

**Dr. Mupangwa:** "It could be. I see heat wave, but those who were there should have done postmortem."

[90] In his evidence in chief, **Dr. Mupangwa** stated:

*Defence Counsel:* "What are general causes of mortality in broiler birds?"

*Dr. Mupangwa:* "Diseases, temperature."

*Defence Counsel:* "Look at pages 33 to 34: Mortality at day 33 is high?"

*Dr. Mupangwa:* "Here the cause was heat wave and mortality high rate started at that stage of heat wave."

*Defence Counsel:* "In the scenario which you put, that is, there was a problem with the grower but they ate the finisher?"

*Dr. Mupangwa:* "I don't expect them to die. At any rate I expect mortality rate to be high at starter feed stage. Heat wave is more killing to broiler birds. Immune system would have fully developed at grower stage. Therefore, I don't expect them to die at grower stage."

[91] From the evidence of defendant's expert witness, it is clear that wrong feed could not have any influence in mortality rate rise at later stage and therefore plaintiff cannot be held liable in this regard.

low sales

[92] Defendant testified that as a result of wrong feed formulation, he sold his birds at a low price. He informs the court in chief that for the cycle of 25<sup>th</sup> July 2011 he sold it at E23, E20, E19 and E18 instead of E28 or E29.00. Under cross examination, it was put to him that in terms of his profit and loss account, in April 2011 he sold his chickens at average price of E22.00. He agreed. In May 2011 at E21.00 while in June 2011 at E22.00. He agreed. This was during the undisputed period. In July, the disputed period, it was E23.00 so was August. At this stage the defendant requested that all questions pertaining to accounting including the amount in the counter claim should be directed to his accountant who was well vest with his books.

[93] **Mr. Mabuza**, defendant's accountant, also gave evidence on the loss incurred. It was put to him:

*Plaintiff's Counsel:* "In September 2011 at page 104F the average selling price was E20. If there was any loss, the court should know the market price to know what defendant would have sold the bird in order to calculate loss."

*Mr. Mabuza:* "Yes."

[94] It is common cause that no evidence of market price was tendered. In fact, **Mr. Mabuza** when quizzed on market price responded that he could still check market price. It goes without saying that one ought to have

ascertained the market price of the disputed period as the basis for the counter claim figure. In the absence of market prices one had to compare previous and post months sells with the disputed period. This comparison, as the record bears out, proved that in the disputed period, an average sale per chicken was higher than months preceding the disputed period. There were no records of average sale per chicken for months immediately after the disputed period.

#### Counter claim amount

[95] The plaintiff requested further particulars on the amount of sales per cycle. The defendant supplied the same under exhibit B12. He attached supporting documents reflecting sales per cycle under exhibit G. However, on cross examination, it was revealed that the supporting documents did not tally to the figures highlighted in the request for further particulars. The supporting documents revealed less figures. It was then put to him:

*Plaintiff's Counsel:* "You do calculations based on what defendant gives you?"

*Mr. Mabuza:* "Yes."

*Plaintiff's Counsel:* "First problem you face is that defendant may not give you all information you need?"

*Mr. Mabuza:* "Yes."

[96] One considers the above in light of defendant's first assertion as viewed from his affidavit resisting summary judgment that:

*"I humbly submit that as a result of the supply, by Plaintiff, of the wrong formulated feed, I have sustained loss in an amount in excess of E850,000.00 (Eight Hundred and Fifty Thousand Emalangen) of which amount the Plaintiff is liable to compensate me.*

*I wrote that in further particulars there are errors but did not amount to prejudice but affected loss from high amount to low.”*

[97] With due respect to this witness, if the claim against plaintiff dwindles upon more documents availed and escalates on less documents tendered there is prejudice which ever way.

credit facility:

[98] **Mr. Soko’s** evidence was that due to the ever increasing costs of rearing chickens, he requested for an increase in his credit facility from E570,000 to E700,000. **Mr. Mabuza** on behalf of defendant testified:

*“We went to apply for credit facility with plaintiff. This was in October 2010. In November 2010 defendant was granted credit facility. There was a further credit facility between plaintiff and defendant. This was due to escalating prices at plaintiff. I can’t recall the date but it was early 2011. The credit facility was increased to E700,000.00.”*

[99] From the documents submitted (A20) the increase was on 17<sup>th</sup> May 2011. Plaintiff through cross examination, of both **Mr. Soko** and **Mr. Mabuza** demonstrated through defendant’s financial statements in court that since **Mr. Soko**, the defendant, ventured into the live market business, he has struggled to make profit. An analysis of his financial statements do reflect a loss prior to the period under issue. It was put to **Mr. Mabuza**:

*Plaintiff’s Counsel: “I suggest to you that the more accurate method would have been to use April, May and June 2011 as it is the period preceding the problematic period.”*

**Mr. Mabuza:** *While your observation may be prudent however, there were circumstances operating in 2011 in respect of the*



*rocketing feed, and the reason defendant left SPP emanated from these reasons; the growing costs of inputs, the stagnant price at which SPP was buying its chicks. All things being equal as the factors common and consistent in 2010 and in 2011.*

He continued:

*“The principles are since 2008 increase in input and stagnation in market and this was experienced in 2011.”*

[100] The above led defendant to request for increase in his credit facility. It is therefore very difficult to understand how defendant expected to make profit in light of his own evidence that costs prices increased significantly owing to, as he stated: *“sky rocketing feed”* and *“stagnation in market”* as these *“factors common and consistent in 2010 and 2011”*, that is, inclusive of period under issue.

[101] What further compounds defendant’s case is that having discovered that plaintiff’s grower feed was problematic, he continued to place orders under the credit facility. Nineteen orders were placed with plaintiff for five consecutive cycles of birds. One wonders how an astute business man could continue doing so if the reason for failure to yield profit was due to wrong formulation of feed. **Mr. Mabuza** explained this by stating that they believed plaintiff that the problem was only incurring in defendant’s farm. They realized that this was not so upon receiving Dr. Greyling’s report. However, that as it may, if they sincerely experienced a problem with plaintiff’s feed continuously as they state so in evidence, it was immaterial whether other farmers were doing well, business efficacy dictated that they ought to have mitigated their loss by stopping ordering plaintiff’s grower feed. Moreover, Dr. Greyling’s report arrived in November 2011.

Defendant only pulled out of plaintiff in 2012 when plaintiff demanded that defendant liquidate the present debt.

[102] Defendant informed the court that by correspondence, he demanded compensation for the excess 51 bags of grower and 273 bags of finisher. It is not clear then why defendant decided to change and demand the present sum in the counter claim.

[103] I bear in mind that defendant, through **Mr. Mabuza**, sought to deny the increased credit facility. The court wonders at this piece of evidence in view of **Mr. Soko's** evidence in chief that he requested for increase in credit facility to E700,000 and this was granted to him. Further **Mr. Mabuza** himself in his evidence in chief, corroborated **Mr. Soko's** evidence that due to increase in input costs, they requested for increase in credit facility to E700,000. At any rate that **Mr. Soko** ordered and received goods from plaintiff to the total value of E742,212.60 was not in issue.

counter claim *per se*:

[104] In **Esterhuizen v Holmes 1947 (4) SA 789** at **790** their Lordships held:

*“... as the defendant's claim was not liquid claim it was not capable of being a set off and consequently the amendment, if allowed, could not have been of assistance to the defendant.”*

[105] From the above, it is trite that the nature of a counter claim is that it should set off plaintiff's claim. *In casu*, **Mr. Mabuza** was asked after informing the court that in computing defendant's claim he considered invoices, debts, expenses and other variables. On expenses he explained that it included all

expenses such as depreciation of motor vehicle, plant, cell phone bills etcetera.

He was cross examined:

*Plaintiff's Counsel:* "Is it common cause that invoices of the amount of E742,212.60 have not been paid by defendant? When you calculated all defendant's expenses, did you include plaintiff's debt?"

*Mr. Mabuza:* "Yes, the ratio takes care of all that."

[106] On this response, the counter claim by defendant was for E754,290.00. When one subtracts plaintiff's claim viz. as expenses as considered by **Mr. Mabuza**, the balance is E12,077.40. This amount represents loss incurred by defendant outside plaintiff's expenses. It cannot by any stretch of imagination work as a set off. The basis for this conclusion is that the set off claimed by defendant consist of plaintiff's claim as without it, there is no set off by reason that the sum of E12,077.40 is too meager to set off the plaintiff's claim. I pause to mention that the meager amount as loss must have been appreciated by **Mr. Soko** as he first claimed for the excess feed bag used instead of loss of business. **Mr. Mabuza** himself informed the court that in the meeting they held with plaintiff, he demanded that plaintiff

*"Absorb part of the damage because he was responsible".*

However, this is contrary to the present counter claim said to have been computed by **Mr. Mabuza** where he claims for the entire loss of business. It could be that both **Mr. Soko** and **Mr. Mabuza** realized this misnomer and thus **Mr. Soko** deposed earlier in his affidavit resisting summary judgment that:

*“I humbly submit that as a result of the supply, by Plaintiff, of the wrong formulated feed, I have sustained loss in an amount in excess of E850 000 of which amount the Plaintiff is liable to compensate me.”*

It is therefore my considered view that from the definition of a counter claim, the amount alleged should not include the claim by plaintiff. It should be outside plaintiff's claim.

[107] It would be remiss of me not to point out that during the trial, at the end of cross-examination, defendant, through his Counsel, having realized that there were a number of missing documents before court which would substantiate defendant's counter claim, applied to bring further documents in order to rectify the errors admitted by **Mr. Mabuza**. The court declined the application by reason firstly, as the record bears testimony, when **Mr. Mabuza** was giving evidence, he kept on referring to data which was not before court. The court *mero motu* and in the interest of justice, granted him leave to bring to court all documents in support of defendant's claim. Although, he was in the witness stand for a number of days, **Mr. Mabuza** failed to do so. Secondly, these documents were said to have been belonging to defendant, **Mr. Soko**. **Mr. Soko** had testified and it was not submitted that the said documents were not there before **Mr. Soko's** testimony in order to justify **Mr. Soko's** recalling as a witness. Thirdly, the plaintiff, well before the trial, requested further particulars from defendant. It requested that defendant set out how its claim was computed and attach supporting documents to the same. That opportunity was not used by defendant but only sought to do so after **Mr. Mabuza** had been cross examined. In the light of these circumstances, it was my considered view that allowing defendant's application would be prejudicial to the interest of justice in this case.

### **Conclusion**

[108] It was not in issue that plaintiff delivered on credit the goods as evidenced in invoices presented before court by defendant at the special instance and request of defendant. In this regard, I am satisfied that the sum of E742,212.60 is due and owing by defendant to plaintiff.

[109] I am also satisfied as demonstrated in this judgment that defendant has failed to establish his counter claim on the balance of probabilities. The scales of justice tilt in favour of plaintiff.

[110] In the final analysis, I enter the following orders.

1. Defendant's counter claim is dismissed.
2. Defendant is ordered to:
  - 2.1 pay plaintiff the sum of E742,212.60;
  - 2.2 interest thereon at the agreed rate of prime plus 3% per annum from date of issue of summons to date of final payment;
  - 2.3 Costs of suit on attorney client scale including certified costs of Senior Counsel.

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**M. DLAMINI  
JUDGE**

**For Plaintiff:** Snr Counsel P. Van der Berg instructed by Robinson Bertram

**For Defendants:** M. Nkomonde of Nkomonde Attorneys