

IN THE SUPREME COURT OF SEYCHELLES

Civil Suit No. 15 of 2012

[2013]SCSC

DAVID ESSACK

Plaintiff

Versus

SEYCHELLES FARMERS MARKETING COOPERATIVE

Defendant

Filed: 28 June 2012
Heard: 25 January 2013
Counsel: Basil Hoareau for the Plaintiff
 Danny Lucas for the Defendant
Delivered: 21 March 2013

JUDGMENT

Egonda-Ntende CJ

- [1] The plaintiff is seeking to recover from the defendant the sum of SR966,189.35 together with interest and costs. The defendant denies that the said sum or any portion thereof is due and owing to the plaintiff and contends that this claim should be dismissed with costs.
- [2] The plaintiff contends that on 7th July 2011 he purchased 15,000 young chicks from the defendant. The plaintiff later bought finisher feed from the defendant which turned out to be of such poor quality and or unfit for feeding chicks leading to the death of 10,000 chicks, and causing the plaintiff financial loss of SR481,000.00. The plaintiff claims an additional sum of SR485,189.35 being the value of chicken supplied to the defendant in August and October 2011 which the defendant has never paid.
- [3] The defendant admits the fact of purchase of both the chicks and feeds save that they were on credit terms and denies the rest of the averments with regard to poor quality or being unfit for feeding chicks and the plaintiff was put to strict proof. The defendant further contends that the plaintiff purchased the feeds on credit terms, having agreed that payment

by the plaintiff to the defendant for the chicken feed and the young hatchery or meat chicks supplied by the defendant to the plaintiff would be paid or offset against the value of the chicken meat supplied by the plaintiff, with the balance in value, if any, to be settled by money payments.

[4] It was further contended for the defendant that the amount claimed by the plaintiff in this action was partly paid to the plaintiff or partly offset against the amount owed by the plaintiff to the defendant. The plaintiff still owes the defendant the sum of SR324,770.00 being the unpaid balance of the chicken feed and young meat and hatchery chicks supplied to the plaintiff by the defendant. The defendant denied all other averments in the plaintiff's plaint, putting him to strict proof thereof.

[5] The plaintiff called three witnesses including himself. The defendant called one witness and closed its case. The plaintiff has made two separate claims in this case. Firstly it is for the loss arising out of the death of 10 000 chicken. Secondly it is the claim for chicken sold to the defendant worth SR485,189.35 which remains unpaid. I will take each claim separately.

Loss of 10,000 Chicks

[6] The plaintiff testified that he had purchased 15,000 chicks from the defendant and then at some point the chicks started dying. He was abroad at the time and had been notified by his manager. When he came back he found the chicks dying every day. They were pecking the backside of each other and pulling out the stomachs. That is why they were dying. 10,000 chicks died. The cause of death was the feed which lacked soya. It was just maize and some fish meal. The chicken would have sold at SR28.30 per kg and would weigh on average 1.7Kgs. The plaintiff further testified that he should have been able to sell about 14,000 chicken as there are bound to be some losses but the loss could not have been 10,000 chicks.

[7] In cross examination the plaintiff admitted that he was new to the business of rearing chicks having taken over the business from some one else. He stated that he had the Agriculture Department carry out an analysis of the inferior feed and the documents in relation to the same were with Agriculture. Prior to July 2011 he had not encountered any problem with the feed and neither did he encounter any problems with the feed after July 2011.

[8] The plaintiff's manager was Mr Eddie Hoareau. He testified that the chicks started eating

each other and not eating the feed. It was obvious there was a problem with the feed. 10,000 chicks died. Average of finished product would be 1.7kgs or 1.8kgs. It would be sold to the defendant.

- [9] In cross examination he admitted that he had no previous experience with poultry farming prior to being hired for this job in 2011. He admitted that neither the dying or dead chicks nor the feed was ever examined or analysed by experts. He counted the dead chicks. They were 10,000.00.
- [10] PW3 was Sandra Moumou, a livestock officer with the Seychelles Agricultural Agency. She had worked with the Ministry of Agriculture on poultry production. She provided extension services to farmers. She has received some training in Japan, Israel and Egypt in the area of poultry production. She initially trained at the Seychelles Polytechnic for 2 years in Agriculture. She specialised in Animal Husbandry in 1989. She stated that she visited the plaintiff's farm and found that it was well managed. There was a problem as the chicks had their intestines out. The chicks were pecking each other. She examined the drink and the food. After feeling the food she concluded that it was lacking some essential nutrients. It contained rice and a little maize. There was no fishmeal or soya. She concluded that the feed was deficient and the cause of the problem.
- [11] In cross examination, Ms Moumou admitted that she had no expertise in analysis of food products. She was not authorised to carry out laboratory tests. That could only be done by the Standards Bureau. Part of her cross examination is reproduced below.
- ‘Q: Essentially all that you are telling us is that when you felt the feed it appeared to you as if there was only rice and maize?
A: Yes.
Q: You have no expertise whatsoever in the analysis of food products in order to determine the various components of that product?
A: No.
Q: None whatsoever?
A: None.’
- [12] During re-examination she testified that a laboratory test regarding food was a necessity but it could not be carried out by extension officers.
- [13] In order for the plaintiff to succeed on this claim it must prove on a balance of probability

that the defendant supplied to it finisher feed that was deficient as a finisher feed and that the death of the plaintiff's chicks was the result of this deficient feed. If the plaintiff succeeds to that extent he would then have to prove the loss and damages flowing from that scenario. That the 10,000 chicks died as a consequence thereof and as a result suffered a loss to the extent of the sum claimed.

[14] This obligation of a claimant was discussed in Ebrahim Suleman and others v Marie-Therese Joubert and others SCA No.27 of 2010 in which Twomey, JA, stated,

'12. In such circumstances applying evidentiary rules we need to find that the Respondents discharged both their evidentiary or burden of proof as is required by law. The maxim "he who avers must prove" obtains and prove he must on a balance of probabilities. In Re B [2008] UKHL 35, Lord Hoffman using a mathematical analogy explaining the burden of proof stated:

"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates on a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."

[15] As I consider the evidence before me it is worthwhile having in mind the words of Lord Goddard, C.J. in Bonham-Carter v Hyde Park Hotel Ltd. (1948) 64 TLR 177 at page 178, that:

"Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it."

[16] Similarly it may be important to bear in mind the words of Bowen LJ in Ratcliffe v Evans (1892) 2 QB 524 at page 532:

"As much certainty and particularity must be insisted on both in pleading and proof of damages as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage was done. To insist upon less would be to

relax old and intelligible principles. To insist upon more would be the vainest pedantry."

- [17] It is not in dispute that the finisher feed that the plaintiff was using at his farm in July 2011 was finisher feed that he had purchased from the defendant. The question before me is whether it has been established that it was deficient. No analysis was carried out on the feed even if there have been aspersions cast against its proficiency. The plaintiff and his manager, PW2, were not in a position to establish this fact or have not done so by their testimony. Both were novices in the poultry industry. The plaintiff had testified that tests were carried out by the agricultural department. And that they would come and testify. PW3 from the Agricultural Services Agency stated that the tests were necessary. No such tests were done and she was not authorised to do them. The Agency to do that was the Standards Bureau.
- [18] Much as Ms Moumou had opined that the cause of the chicks pecking each other was the deficiency of the food she admitted that food analysis was not her speciality. It may well be possible that there was a deficiency in the food but to infer this only from the behaviour of the chicks rather than from an examination of the feed itself does not amount to sufficient proof of deficiency of the feed. As Ms Moumou acknowledged her examination of the food was superficial. The fact that she was not aware of other causes for chicks pecking each other did not mean there were no other causes for this phenomena. No post mortem was done on any of the chicks to establish cause of death.
- [19] The plaintiff has not explained why the Standards Bureau or other competent organisation was not approached to analyse the feed. In the absence of a proper feed analysis by a competent authority I am unable to find that the finisher feed was deficient as alleged. Given that finding this head of claim fails.
- [20] Notwithstanding the foregoing had the plaintiff established that the feed supplied was deficient as alleged to establish liability of the defendant it would still have had the obligation to prove the damage and loss suffered under this head of liability. It appears to me that the evidence of the plaintiff is still quite lacking in this area. He has claimed the value of 10000 chicks had they been sold at 6 to 8 weeks. The chicks appear to have died in July 2011. No evidence has been produced showing stock of chicks received, and when exactly the chicks started dying. Neither when they stopped dying. Details of the dates on which they died and the numbers so as to add up to 10,000 dead chicks are lacking.

- [21] The plaintiff was a merchant in terms of this business and was required under article 8 of the Commercial Code of Seychelles to keep books for his business. A stock book showing daily balances of chicks, including a record of deaths, would ordinarily be kept in order to keep track of numbers, especially given the high numbers of chicks kept. No books were produced that kept track of the numbers of chicks.
- [22] It appears to me that all the plaintiff has done in this case is to come to court and say, ‘I have lost 10,000 chicks’ without offering any proof as to actual number of dead chicks. Details of the dates on which the chicks died and the numbers that died each day, including the records kept, would have gone a long way in proving that 10,000 chicks died and not 8,000 or 2,000 only. What was the period over which the deaths occurred? This is not known.
- [23] The Plaintiff in his testimony stated that he would have expected some loss of chicks and had figured that he would be able to raise to maturity 14,000 chicken. If that is so then his claim now does not take into account the accepted mortality in the industry and is in excess by at least 1000 since he was able to sell 5,000 of this stock.
- [24] All in all the plaintiff’s evidence to support the claim that 10,000 chicks died is insufficient in the circumstances of this case. I would dismiss this claim with costs.

Claim for SR485,189.35 for Chicken Meat Supplied to Defendant

- [25] The plaintiff claims that it sold a total of 17,144.50 kg of chicken meat at the price of SR28.30 during the months of August and October 2011 as a result of which the defendant owes it SR485,189.35 which was due and payable by the 30th November 2011. The defendant has failed to pay the said amount. The defendant has denied each and every averment related to this claim and has proceeded to set up a set off claiming that sales of the defendant’s products to the plaintiff were on credit and it had been agreed that these would be set off from the supplies of the plaintiff to the defendant.
- [26] The only evidence with regard to this claim that has been adduced by the plaintiff are exhibits P2 and P3 only in addition to the testimony that the price of one kilo of chicken meat was SR28.30. Exhibit P2 and P3 are batch reports for the chicken supplied to the defendant by the plaintiff. The combined weight [12,989 kgs] comes to significantly less than the claimed weight of 17,144.50 kgs. The claim for 17,144.50 kgs of chicken supplied by the plaintiff to the defendant in August and October 2011 is unsupported by the testimony

of Plaintiff or of PW2, his manager.

- [27] The available records produced by the plaintiff show that only 12,989 kgs were delivered during the period in question. It is also clear that the claim that the chicken meat is SR28.30 per kg does not take into account the charges that the defendant would impose for its own services. Examining P2 and P3 it is clear that the charges the plaintiff would incur on the meat supplied would be to the tune of SR 92,215.90 as charges for slaughter fees, packing and freezing.
- [28] At most what has been proven is that the plaintiff is entitled to SR275,372.80, being the value of 12,989 kgs of chicken meat at the price of SR28.30 less slaughter fees, packing and freezing charges of the defendant which is SR92,215.90 if P2 and P3 are to be relied upon.
- [29] The defendant claims that it is entitled to offset what the plaintiff owes it which would be in excess of what the plaintiff demands from it. Though the defendant's witness explained that in case credit had been advanced to the plaintiff the plaintiff would have to sign some documents, no document was produced that would prove that the plaintiff had indeed incurred credit purchases and signed for the same. Producing statements of account without the documents that originated the transactions recorded in the statement did not discharge the burden on the defendant to prove that the plaintiff had taken credit.
- [30] I would find that the defendant has failed to prove that it is entitled to a set off. However since it did not pursue a counter claim in this matter it may well still be open to it to pursue this claim against the plaintiff separately.
- [31] I would enter judgment for the plaintiff in the sum of SR275,372.80 only. Given that a substantial part of the plaintiff's claim has failed I would allow them only one third of their costs in this matter. As the defendant has succeeded in defeating a substantial part of the plaintiff's claim I award it half of its costs in defending in this matter.

Signed, dated and delivered at Victoria this 21st day of March 2013

FMS Egonda-Ntende
Chief Justice