



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – MAKHANDA)**

CASE NO.: 896/2017

Matter heard on: 18 November 2024

Judgment delivered on: 18 February 2025

In the matter between: -

GIZA TECHNOLOGIES (PTY) LTD

Plaintiff

and

ALBERT DE BUYS

Defendant

JUDGMENT

ROSSI AJ:

[1] This action, which is based in contract, concerns two claims. Claim one is in respect of the sale and delivery of what was supposed to be Damara Springbuck, a breed of Springbuck forming part of the ecotype or subspecies of marsupialis and originating from the Damaraland region in northwest Namibia. Damara Springbuck are a sought after breed given their unique morphological traits¹ and their resilience

¹ Which will be addressed below.

to adverse environmental conditions, and because of this they yield higher purchase prices than their more common counterparts.² Claim two concerns the sale of a King Springbuck ewe certified as pregnant by a Bont Springbuck breeding ram.

[2] On account of my finding that this court is not vested with jurisdiction in relation to claim two, it is necessary for me to pertinently distinguish between the two claims, which I do below.

[3] Prior to engaging in the merits, it must be mentioned that the defendant did not attend the trial. He defended the action and filed a comprehensive plea.³ His attorneys of record, both instructing and correspondent, withdrew on 6 November 2024. The notice of withdrawal indicates that 'In compliance with Rule 7(1) of the Practice Directives, the defendant was informed by email on 6 May 2024 of the trial date, on 18 October 2024 the defendant was once again reminded of the trial date by email and telephonically and during the consultation on 23 October 2024 he instructed his attorneys to withdraw. The defendant is aware of the trial date and is further aware of his rights and obligations and the possible consequences if he fails to further comply with the rule.'⁴

[4] In response to my query raised with the plaintiff's legal representatives in chambers regarding whether the defendant was aware of the trial date, which set down date was received from the registrar in April 2024, the matter stood down. I was later presented with two affidavits.

[5] The first affidavit is deposed to by the defendant's erstwhile attorney of record, Mr Willem Spangenberg, which had as an attachment his email addressed to the defendant's correspondent attorney, Mr Mc Callum. In the said email,⁵ Mr Spangenberg confirmed his discussions with the defendant relating to the impending trial date. The email concludes '...I received instructions from him to withdraw as attorneys of record. Mr de Buys indicated that he does not intend to attend the trial

² For example, the Kalahari Springbuck or the Cape Springbuck.

³ Dated 5 July 2017.

⁴ My own emphasis is added.

⁵ The email is dated 5 November 2024.

on 18 November 2024. Mr de Buys is fully aware of the fact that judgment will probably be given in his absence on 18 November 2024.'

[6] The second affidavit was one deposed to by Mr Wynand Neveling, the plaintiff's attorney of record. The affidavit indicates that Mr Neveling telephonically contacted the defendant on the morning of the trial date and during the said telephonic conversation, the defendant confirmed that he was aware of the trial date and the withdrawal of his attorneys but that he had no intention of attending the trial.

[7] In the circumstances I was satisfied that the defendant was indeed aware of the trial date but had elected not to attend court. In the premise the plaintiff was permitted to proceed.

Claim one: pleadings

[8] Claim one as particularised is as follows:

(a) During or about November/December 2015 and at Port Elizabeth (now Gqeberha), alternatively Phillipstown, the plaintiff (represented by Daniel Tenner) and the defendant (personally) entered into an oral agreement in terms of which the plaintiff purchased from the defendant the following pure bred Damara Springbuck:

- i. 1 Damara Springbuck breeding ram⁶ with horn length of not less than 15 inches;
- ii. 19 mature Damara ewes;⁷
- iii. 11 young Damara ewes (18 months and older); and

⁶ A ram is a male.

⁷ An ewe is a female.

- iv. 15 Damara lambs – under 18 month (the sex of which were yet to be determined).

- (b) The purchase price was R174 420.00 (inclusive of VAT) and an invoice (No. 09/2015) in this amount was issued by the defendant to the plaintiff.⁸

- (c) The purchase price was payable in two equal instalments. A deposit of 50% (the amount of R87 210.00) was payable on acceptance of the invoice and the balance on delivery. The plaintiff paid the deposit on 2 December 2015.

- (d) In breach of the agreement, the defendant only delivered the following Springbuck to the plaintiff, which delivery took place at the Grootvlakte and Schoongesicht farms⁹ situated in Somerset East:
 - i. 10 mature Springbuck ewes (1 of which was dead on arrival, 1 died within 12 hours after arrival and a further 1 died within 7 days thereafter).¹⁰

 - ii. 10 young ewes (18 months or older) (7 of which were ewes and 3 were rams. 1 ewe died shortly after arrival).¹¹

 - iii. 10 lambs (under 18 months) (8 of which were ewes and 2 were rams. 2 lambs died in transit and 2 more lambs died within 24 hours of arrival).¹²

- (e) The defendant failed to deliver the Damara Springbuck breeding ram.

⁸ Which invoice formed part of the trial bundle and is dated 1 December 2015. The description on the invoice reads 'Deposito Damara Springbok Teelgroep' which loosely translates to 'deposit Damara Springbuck breeding group'.

⁹ According to the plaintiff's evidence, delivery took place at the Grootvlakte farm in Somerset East.

¹⁰ A deficit of 9 mature Damara Springbuck.

¹¹ A deficit of 1 ewe.

¹² A deficit of 5 ewes.

- (f) In further material breach of the agreement, the Springbuck delivered to the plaintiff were not Damara Springbuck.
- (g) Pursuant to the material breach of the agreement, the plaintiff elected to cancel the agreement, which it duly did by way of its attorney's letter dated 19 October 2016.
- (h) As presently formulated, the plaintiff's claim is for damages arising from the defendant's breach of the agreement. Damages in the amount of R356 500.00¹³ plus return of the deposit is sought. The amount of R356 500.00 is calculated as follows:
- (i) Springbuck not delivered:
- 8.i.1. Adult ram: R25 000.00 x 1. Total R25 000.00.
- 8.i.2. Adult ewes: R5 000.00 x 9. Total R45 000.00.
- 8.i.3. Young ewes: R3 000.00 x 4. Total R12 000.00 (The quantification of this line item conflicts with an earlier paragraph in the particulars of claim where it is pleaded that 10 young ewes were delivered, not 7. Leaving a short-fall of only 1 young ewe as opposed to the 4 claimed. I shall return to this aspect momentarily).
- 8.i.4. Lambs: R2 500.00 x 5. Total R12 500.00.
Total: R94 500.00.
- (j) Lambs not being born to mature and young ewes: 20 for the year 2016; 20 for the year 2017; and 27 for the year 2018 (Total 67 lambs). A total loss of R207 500.00.¹⁴

¹³ Prior to its amendment on 18 November 2024, claim one was initially for the amount of R1 277 475.00. The proposed amendment, which was presented to me at the hearing of the matter, substantially brought the claim down to R365 500.00. Accordingly, as there could be no prejudice to the defendant, the amendment was duly granted.

¹⁴ R5 000.00 x 20 for the adult ewes: R100 000.00; R2 000.00 for the 20 adult rams: R40 000.00; R2 500.00 for the young ewes and rams: R67 500.00. Total: R207 500.00

- (k) Difference between the mature ewes delivered and the pure bred Damara Springbuck: R3 000.00 x 10. Total R30 000.00.
- (l) Difference between the young ewes delivered and the pure bred Damara Springbuck: R1 500.00 x 7. Total R10 500.00.¹⁵
- (m) Difference between the lamb ewes delivered and the pure bred Damara Springbuck: R1 500.00 x 8. Total R12 000.00.
- (n) Difference between the lamb rams delivered and the pure bred Damara Springbuck: R1 000.00 x 2. Total R2 000.00.
Total: R54 500.00.

Total for claim one: R356 500.00 (and return of the deposit R87 210.00).

[9] The defendant raised a special plea of lack of jurisdiction in identical terms in relation to both claims. Jurisdiction in relation to claim two will be analysed at a later stage. The defendant pleaded that he resides in the Phillipstown, which is in the Northern Cape, and furthermore, that the causes of action arose within the jurisdiction of the Northern Cape.¹⁶ The defendant pleads that the Kimberley High Court, or its Regional Court counterpart, has jurisdiction over the cause of action.

[10] On the merits, the defendant admits that the terms of the agreement as pleaded by the plaintiff but pleads that the agreement was subject to the following additional express terms:

¹⁵ The inconsistency in pleading, and which is referred to above, will be dealt with below.

¹⁶ In the plea and in relation to the conclusion of the agreement the defendant pleads that '[3.2.1] During or about November 2015 the defendant telephonically contracted Mr Daniel [Tenner]. The defendant was on his farm Venterspoort, Philipstown when he spoke to Mr Tenner. During the course of the telephone discussion the defendant offered to sell to Mr [Tenner] the following ... [3.2.2] In the course of the telephonic conversation Mr [Tenner] accepted the defendant's offer.'

- (a) Ownership of the Springbuck and the risk of profit and loss would pass to the purchaser when the Springbuck were loaded onto the vehicle arranged for transport to the plaintiff.¹⁷
- (b) The animals would be caught on the defendant's farm with the use of catching nets and the final purchase price would be calculated, and payable, once delivery had taken place and the number and sex of the animals had been determined.
- (c) The defendant pleaded that it delivered 10 mature Damara Springbuck; 7 young Damara Springbuck ewes; and 8 Damara Springbuck ewe lambs.¹⁸
- (d) On or about 6 July 2016, the defendant informed the plaintiff that the Damara Springbuck breeding ram had died, and a suitable replacement of equal quality would be provided.
- (e) The purchase price for the Springbuck loaded amounts to R105 000.00. R87 210.00 of which has been paid and an amount of R17 790.00 remains outstanding and payable by plaintiff.¹⁹
- (f) The defendant has fulfilled his obligations in terms of the agreement and the plaintiff had no lawful grounds to cancel the agreement.

[11] The plaintiff did not file a replication.

[12] At the trial and in support of the plaintiff's claims, the plaintiff led the evidence of three witnesses, Mr Daniel Tenner, Mr John Hunter (an expert witness) and Mr Jan Jordaan.

¹⁷ This does not appear to be in dispute with reference to the plaintiff's calculation of damages, which excludes the dead animals.

¹⁸ On the defendant's own version there is no dispute that there was a short delivery as per the agreement read together with the invoice.

¹⁹ There is however no counterclaim for this amount.

Claim one: jurisdiction

[13] I shall deal with jurisdiction first. The evidence of Mr Tenner, the owner and managing director of the plaintiff, is that he became involved in game breeding towards the end of 2015. He had met the defendant at an auction a year or two prior and knew that the defendant sold Damara Springbuck. As Mr Tenner was interested in diversifying his breeding groups, as it adds value to one's stock and is appealing to trophy hunters, he contacted the defendant and discussions ensued. This took place during November/early December 2015.

[14] At the time of these discussions, which took place telephonically and via email, the plaintiff was in Gqeberha, and the defendant was in Philipstown. In response to these discussions, the defendant prepared a quotation, and an accompanying email, which he addressed to the plaintiff's professional assistant on 30 November 2015. It sets out the merx of the sale,²⁰ the deposit payable and other incidental issues.²¹ In this instance, the defendant is the offeror, which offer was accepted by the offeree (Mr Tenner) by way of payment of the deposit.

[15] As explained in the authoritative works of Christie's Law of Contract in South Africa²² '(A)nalysis into offer and acceptance is also usually the most satisfactory method of deciding...whether the court has jurisdiction...as a general proposition, agreement is reached when each party is aware that the other is in agreement, which will be when and where the offeror receives communication of the offeree's acceptance from him.'

[16] On the evidence before me, the contract was not entered into in Gqeberha but in Philipstown, because this is where the defendant was when acceptance of the offer was conveyed to him by Mr Tenner. Despite the plaintiff's counsel addressing

²⁰ Which is recorded in paragraph 8(a) above.

²¹ The email formed part of the trial bundle which was utilised for the plaintiff's evidence – pp 1 and 3.

²² GB Bradfield, Christie's Law of Contract in South Africa, 8ed (*'Christie's'*), p 41.

me, both in court and in written submissions and seeking to found jurisdiction based on the conclusion of the contract, I am not bound by an incorrect submission in law.²³

[17] The contract was not concluded within this jurisdiction.²⁴ But is that the end of the enquiry? For the reasons that follow, it is not.

[18] According to Amler's Precedent of Pleadings,²⁵ a contractual cause arises where (a) the contract was entered into; (b) the contract is or was performed, wholly or in part; or (c) the breach of contract upon which the plaintiff relies was performed. A plaintiff has the choice of instituting action in any one of these places.²⁶

[19] Pursuant to the agreement having been reached, and during June 2016, the Springbuck were loaded on the defendant's farm in Venterspoort, Philipstown, and delivered to the plaintiff at the Grootvlakte farm in Somerset East.²⁷ Somerset East falls within the jurisdiction of this court. Accordingly, there was partial performance of the contract within this court's jurisdiction. Enough so to found jurisdiction.²⁸

[20] Additionally, the breach relied upon by the plaintiff also occurred in Somerset East.²⁹ According to Mr Tenner, it was in Somerset West where it was established

²³ Matatiele Municipality & others v President of the RSA & others 2006 (5) SA 47 (CC) para 67. The Constitutional Court added: 'Indeed, in Azanian Peoples Organisation (AZAPO) and others v President of the Republic of South Africa and others, this Court firmly rejected the proposition that it is bound by an incorrect legal concession, holding that "if that concession was wrong in law [it] would have no hesitation whatsoever in rejecting it." Were it to be otherwise, this could lead to an intolerable situation where this Court would be bound by a mistake of law on the part of a litigant. The result would be the certification of law or conduct as consistent with the Constitution when the law or conduct, in fact, is inconsistent with the Constitution. This would be contrary to the provisions of s 2 of the Constitution which provides that the "Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid."'

²⁴ The plaintiff's counsel in addressing me, both in court on this issue, and in written submissions later submitted to me, relies on the contract having been concluded in Gqeberha to found jurisdiction.

²⁵ LTC Harms, Amler's Precedents of Pleadings, 9ed, 105.

²⁶ Ibid.

²⁷ The property of Jac Jordaan – who later gave evidence.

²⁸ This principle is explained in the works of DE Van Loggerenberg, Pollak – The South African Law of Jurisdiction, 3ed, p 42 - 'This principle entails that where one court has jurisdiction over part of a cause, considerations of convenience, justice and good sense justify its exercising jurisdiction over the whole cause. The jurisdiction of a court may therefore be extended by the principle of *causae continentia*.' See also Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd 1962 (4) SA 326 (A).

²⁹ In Christie's supra p 621 the learned author explains – 'A breach is committed in the place where proper performance ought to have been made but was not. So if a party promises in Windhoek that a flat in Muizenberg will be suitable for occupation at a certain date and it is not, the breach is committed in Muizenberg and not in Windhoek where the unfulfilled promise is made.'

that there had been a short-delivery and additionally a malperformance in that Damara Springbuck had not delivered. But more of this later. Accordingly, I find that in respect of claim one, this court is vested with jurisdiction.

Claim one: evidence

[21] Mr Tenner's further evidence was that one day after delivery to Grootvlakte,³⁰ he was informed by Mr Jordaan (who accepted delivery on the plaintiff's behalf) that the Springbuck that had arrived did not appear to be Damara Springbuck.³¹ Mr Tenner instructed Mr Hurter, a wildlife specialist, to assess the herd.

[22] On 19 August 2016³² a letter of concern was sent to the defendant by Mr Tenner. The following is of importance and is replicated hereunder:

'Upon delivery the Damara Springbuck, were in a poor condition, had broken horns and some had injuries. Furthermore, we have engaged an expert, who has advised that in his opinion the Springbuck delivered, are not Damara Springbuck...

...

Then, once again we received the upsetting news that the 15" Breeding Ram was found dead in the veld, I have had some of the "ewes" and no Breeding Ram – it is not just the case that this Ram wasn't delivered, but then the news that he is dead, while all along I am losing a whole season of breeding due to not having him with the herd.

We are going to have to come to some sort of agreement/understanding and or arrangement with these animals, as the current state of affairs and what transpired in the past is unacceptable... We either have to cancel this transaction as a whole, where after you collect the remainder of the alive

³⁰ In anticipation of delivery of the Springbuck, a specific area was cleared out at the Grootvlakte farm.

³¹ As they appeared to be considerably smaller in size and their horn appearance was not as expected of a Damara Springbuck.

³² Trial bundle at pp 9 to 12.

Springbuck and you refund monies paid to date, or you have to provide a suitable alternative solution...³³

[23] The defendant responded on 22 August 2016 undertaking to deliver a replacement breeding ram, and replacement ewes.³⁴ Despite these undertakings, the breach was never remedied. On 19 October 2016 the plaintiff's attorneys addressed a letter of demand in the following terms to the defendant:

'7. Furthermore, upon a proper inspection of the alleged Damara Springbuck, our client became suspicious that same were not in fact Damara Springbuck. In this regard our client engaged a wildlife expert, who confirmed to our client that in his opinion the animals delivered are in fact not Damara Springbuck.

8. We record that it was a material term of the Agreement concluded between Giza and yourself that Giza purchased Damara Springbuck. This is evidenced by the purchase price of the animals.

9. We record that by not delivering pure bred Damara Springbuck to Giza, that you have breached a material term of the Agreement of sale and accordingly, Giza elects to cancel the agreement of sale forthwith and demands payment of the deposit amount, being R87 210.00, paid by it to you.'³⁵

[24] The plaintiff's next witness was Mr John Hurter, whose expert summary³⁶ and field assessment report dated 26 September 2019 forms part of the court file.³⁷ Mr Hurter's evidence is summarised below:

³³ My own emphasis.

³⁴ Trial bundle p 13.

³⁵ My own emphasis.

³⁶ Mr Hurter's professional qualifications, which were confirmed in his evidence, are comprehensively set out in the expert summary. To summarise he has a National Diploma in Nature Conservation (NMU) and has completed more than 30 training programs in the field of ecology and wildlife management, commerce and agribusiness and firearms and professional hunting. He is the founder of the Wild Summit Group and has been engaged in the development and management of game farms and private game reserves for more than 20 years.

³⁷ Trial bundle pp 34 to 50.

- (a) He was approached in 2016 by Mr Tenner to conduct a field assessment of the Springbuck herd located on the Grootvlakte farm. He conducted the assessment, which was then reviewed by his colleague, Mr Danie Jordaan.³⁸
- (b) A field assessment by way of camera trappings was conducted. This is non-detrimental to the animals and also cost effective.³⁹
- (c) The camera trappings were used to establish the shoulder height of the female Springbuck in question, which is a distinguishing feature: 'Damara spring[buck] may be an ecotype or subspecies of *A. marsupialis*, originating from the Damaraland region in northwest Namibia. Sought after because of their particular morphological traits and exceptional resilience to adverse environmental conditions, breeding stock is/was regularly translocated to game farms in South Africa, either to breed in isolation ('pure'), or to interbreed with existing stock.'
- (d) There are two distinguishing features (or morphological traits) of the Damara Springbuck. Firstly, the adult ewes typically have substantially thicker horn bases, which results in Damara ewes being easily mistaken as rams. This trait is observable in the ewes at a young age (i.e 12 months onwards). Secondly, adult ewes have a mean shoulder height of 816mm compared to 714mm (*A.m hofmeyri*/Kalahari Springbuck) and 724mm (*A.m marsupialis*/Cape Springbuck).⁴⁰
- (e) The camera trappings were set up at a water trough from 5 February to 21 March 2019 (45 calendar days).⁴¹ Three cameras were mounted with the centre of their lenses at 700mm above ground level to capture the nominal shoulder height of the ewes. Two mineral/salt licks were placed in view of the cameras to encourage viable capture events. Four purpose-made gauging

³⁸ This is common practice in his field.

³⁹ As opposed to, for example, euthanising the animals.

⁴⁰ The more common Springbuck in South Africa is the Cape Springbuck.

⁴¹ No other water supply was available during the assessment period save for temporary rain water.

rods, with 100mm demarcations, were placed 4 and 8 metres from the camera lenses to gauge the shoulder height.

- (f) Photographs of several viable capture events form part of the report.⁴² The photographs illustrate the ewe's shoulder height in relation to the gauging rod which is shown as an artificial yellow line on the photographs.
- (g) His results read 'A total of 9275 unspoiled photos were collected during the assessment period, averaging 206 activities captured per day...Approximately 300 clear spring[buck] photos were individually assessed, and 47 viable capture events selected for further examination. These 47 events yielded a total of 51 viable samples for realistic estimation of shoulder height. It must be noted that identification of individual animals was not within the scope of this assessment, and duplicate samples may exist. However, the sample is considered sufficient for the purpose of deriving a mean shoulder height for this isolated herd of female spring[buck]. Thirty eight (38) samples were estimated at the 650-700mm increment, while only thirteen (13) are potentially over 700mm shoulder height. Of the thirteen (13) samples in the 700-750mm increment, none are potentially over 750mm. Therefore, the mean shoulder height of the Tenner spring[buck] herd is considered well below the mean of 816mm stated for A.m angolensis, of which Damara spring[buck] are regarded as a representative sub-population. Furthermore, in the entire sample, no evidence was observed of the typical and distinctive horn development (thickened horn bases) of female Damara spring[buck].⁴³
- (h) The report concludes 'Based on the morphological parameters examined in this assessment, there is no evidence to suggest that the Tenner spring[buck] herd (females only) is likely to have originated from the Damara spring[buck] sub-population, or from the A.m angolensis entirely. This position is further supported by the absence of the typical and distinctive enhanced horn development of female Damara spring[buck]. Subsequently, the author is of

⁴² Figures 5 to 8 appearing at pp 43 to 46 of the trial bundle.

⁴³ My own emphasis.

the option that further investigation in respect of the regional origin of the Tenner spring[buck] herd is unlikely to yield different results, and therefore is not warranted.⁴⁴

[25] The plaintiff's last witness was Mr Jan Jordaan, formerly a farmer at the Grootvlakte farm, who now practices as an accountant. Mr Jordaan has over 15 years' experience as a farmer and accepted delivery of the Springbuck on behalf of the plaintiff. His evidence deals with two key aspects. Firstly, his observations relating to the Springbuck, and secondly, the calculation and quantification of the plaintiff's damages. His evidence was that:

- (a) When the Springbuck were delivered, he saw to it that they were isolated from other animals and kept in the Skoongesig and Withek camps (Grootvlakte). Isolation was necessary as the Damara Springbuck are far more valuable than their counterparts and did not want cross-breeding.
- (b) The Springbuck remained separated from other animals whilst the assessment by Mr Hunter was undertaken.
- (c) When he observed the Springbuck, he immediately noticed that they were significantly smaller than anticipated. He consulted a colleague/farmer, Mr Kasper de Klerk, who agreed that they did not appear to be of the Damara variety. He immediately informed Mr Tenner of his observations. This ultimately led to the appointment of Mr Hurter.
- (d) In respect of damages for claim one, he prepared a schedule of calculations. The damages are based on the Damara Springbuck which were not delivered as well as a breeding forecast for the ram. No purpose will be served in repeating the schedule at any great length as it coincides with the plaintiff's amended particulars of claim, which I have dealt with above.

⁴⁴ My own emphasis.

- (e) The schedule reflects of the short-delivery of 1 adult ram;⁴⁵ 9 adult ewes;⁴⁶ 4 young ewes;⁴⁷ and 5 lambs,⁴⁸ which results in a total loss of R94 500.00. Values attached to each line item are the values agreed upon by the parties and recorded in the quotation. (I again reference the inconsistency with the plaintiff's pleaded case.)
- (f) The difference between the value of the Springbuck delivered by the defendant in comparison to the value of Damara Springbuck amounts to a total of R54 500.00.
- (g) He estimates that the 20 lambs would have been born from the adult ewes had the breeding ram been delivered for the 2016 year; 20 for the 2017 year and 27 for the 2018 year. A total loss of 67 lambs, which is a 75% lambing percentage. According to Mr Jordaan this is a conservative estimate.
- (h) The values that Mr Jordaan has used in his calculations are based either on his 15 years' experience as a farmer in the industry, the amounts agreed upon by the parties in the quotation, and the market related prices.

Claim one: analysis

[26] A few remarks stand to be made in relation to the evidence of Mr Hurter. The duties of an expert witness, which, derived from English law have been adopted into our jurisprudence,⁴⁹ are adumbrated in **National Justice Compania Naviera SA v Prudential Assurance Co Ltd ("The Ikarian Reefer")**.⁵⁰ An expert's evidence must be uninfluenced by the exigencies of litigation either in its form or content. An expert must not assume the role of an advocate and must give an unbiased opinion on matters falling within his/her expertise; he/she should state the facts or assumptions

⁴⁵ Which was never delivered.

⁴⁶ Of the 19 agreed upon, only 10 were delivered. A short-fall of 9.

⁴⁷ Of the 11 agreed upon, only 7 were delivered. A short-fall of 4.

⁴⁸ Of the 15 agreed upon, 10 were delivered. A short-fall of 5.

⁴⁹ See for example PriceWaterhouseCoopers Inc and Others v National Potato Co-operative Ltd [2015] ZASCA 2; [2015] 2 All SA 403 (SCA) par 98.

⁵⁰ [1993] Lloyd's Rep 68.

upon which the opinion is based; he/she should not omit to consider matter that would detract from the opinion; he/she should make it clear when a particular question is outside of his/her expertise; if he/she has not fully researched his/her opinion, it must be stated that the opinion is provisional; and if something stated in his/her opinion requires clarification, this must be disclosed.⁵¹

[27] In order to assess the value of an expert's opinion, it is necessary for the expert to disclose the process of reasoning which led to the conclusion reached.⁵² An expert's bald statement of opinion is of no assistance to a court.⁵³ When experts' opinions are in conflict, a court must determine to what extent their opinions are founded on logical reasoning.⁵⁴ This is so because an expert's opinion must represent their reasoned conclusion based on certain facts or data which are either common cause or established by his/her own evidence or that of some other competent witness.⁵⁵

[28] Having regard to the authorities cited above, I accept Mr Hurter's qualifications, as well as his opinion and evidence. I have found his evidence to be of appreciable help and interest to the court. I accept, based on what is before me, that the defendant, in breach of the agreement, delivered to the plaintiff Springbuck which were not of the Damara ecotype.⁵⁶ As there is no dispute on the pleadings as to the merx of the sale, this results in the finding of a material breach of the agreement. The plaintiff was thus entitled to cancel, which it duly did.

[29] What is left is the assessment of the plaintiff's damages, and whether such damages are sufficiently linked to the breach. This involves a two-step enquiry, firstly, into factual causation and then into legal causation.⁵⁷ The factual enquiry is

⁵¹ Ibid.

⁵² *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH* 1976 (3) SA 352 (A) at 371F-H.

⁵³ *Louwrens v Oldwage* 2006 (2) SA 161 (SCA) par 27.

⁵⁴ Ibid.

⁵⁵ *Roman's Transport v Zihwele* [2015] ZASCA 13 (SCA) par 9.

⁵⁶ DF Mostert, DJ Joubert & G Viljoen, *Die Koopkontrak*, p 118, the learned authors state the following 'Die verkoper moet die koopsaak aan die koper lewer. Wanneer 'n besondere saak verkoop is, moet die verkoper daardie besondere saak lewer, en nie 'n ander nie, al is die ander een identies aan die koopsaak, of van 'n beter gehalte of meer doeltreffend'.

⁵⁷ *Christie's* supra p 678.

best understood by applying the 'but-for' test: would the plaintiff have suffered the loss 'but-for' the breach?⁵⁸

[30] The plaintiff who can show no more than a probability that it would not have suffered the loss if the contract had been properly performed will succeed unless the defendant can discharge the onus of proving that there is no such probability.⁵⁹ If the plaintiff meets the 'but-for' test the second enquiry arises which is 'whether the wrongful act (in a contract case, the breach of contract) is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of public policy play a part. This is sometimes called "legal causation".'⁶⁰

[31] Damages for breach of contract are intended to put that party in the position it would have been in if the contract had been properly performed (positive interesse).⁶¹

[32] We can deal with the short-delivery of Damara Springbuck swiftly. On the defendant's own pleadings, there was a short-delivery of Springbuck. Despite the inconsistency in the plaintiff's pleadings regarding the short-delivery of young ewes,⁶² the defendant effectively admits that it delivered 7 young ewes, not 11. This results in a shortfall of 4 young ewes, which is reflected and claimed in the plaintiff's schedule. In terms of the plaintiff's schedule a total loss of R94 500.00 has been suffered by the plaintiff in total under this head of damage. The amount is comprised of the sale values agreed upon by the parties, which are recorded in the quotation. There can be no question that the amount is due, provided that provision is made for

⁵⁸ It is important to remember as Nugent JA aptly said in *Minister of Safety and Security v Duivenboden* 2002 (6) SA 431 (SCA) at 449, a plaintiff 'is not required to establish the causal link with certainty, but only to establish that the wrongful conduct (or breach of contract) was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise of metaphysics.'

⁵⁹ Christie's supra p 679.

⁶⁰ *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700I.

⁶¹ Christie's supra p 680. See also *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 22.

⁶² Pleading that 10 were delivered, and not 7.

payment of the balance of the purchase price. This will be dealt with at a later stage. Factual and legal causation are found to be met.

[33] The next head of damage is the difference in value between the Springbuck delivered and the Damara Springbuck agreed upon. Once again Mr Jordaan uses the purchase price of the Damara Springbuck as per the quotation and deducts the value of the Springbuck delivered, which values he arrives at based on his experience and the market-related prices. I accept these values to be fair and reasonable. There is an appreciable difference in price between the Springbuck delivered (seemingly of the Cape Springbuck ecotype) and Damara Springbuck. This results in a further loss of R54 500.00. My findings already made in the paragraph directly above apply equally to this head of damage.

[34] Lastly, we turn to the loss of the lambs not born during the 2016 to 2018 birthing seasons. The plaintiff claims for the loss of 67 lambs, quantified at R207 500.00. The evidence of Mr Tenner is that he intended to diversify and expand his herd. He naturally sought a return on his investment. Given that the purchase and sale was not only for ewes but for a breeding ram as well, it can hardly come as a surprise that the birthing of future lambs was within the plaintiff's contemplation.⁶³ The defendant, with experience in the sale of game and wildlife, would have been alive to this expectation. For this reason, I do not believe that this damage is too remote. I am satisfied that this head of damage, albeit prospective in form, is a sound one and is recoverable from the defendant on account of the breach. The evidence of Mr Jordaan that a 75% birthing rate is conservative and appropriate is accepted. There is, in any event, no other evidence to countervail what is before me. I am also satisfied that the value ascribed to these lambs, as per the schedule, is fair and reasonable.

[35] These damages will not result in the plaintiff being overcompensated save that the balance of purchase price, being the amount of R87 210.00 should be deducted from the damages awarded. The plaintiff seeks damages in the amount of

⁶³ It is also expressly referenced in the plaintiff's letter of concern dated 19 August 2016.

R356 500.00 as well as a refund of the deposit already paid.⁶⁴ This approbation and reprobation would result in the plaintiff being overcompensated. As the plaintiff is claiming positive interesse, the plaintiff must be taken to have fully performed in terms of the contract. That would involve payment by it of the remaining 50% of the purchase price. To account for this, the amount of R87 210.00 is to be deducted from the amount of R356 500.00.

[36] Accordingly, in respect of claim one an amount of R269 290.00 is awarded to the plaintiff. Interest at the legal rate shall run from date of issue of summons (02 March 2017) and not date of demand (19 October 2016). As the letter of demand calls for the refund of the deposit only, it would, to my mind, be unjust for interest to run from such date.

[37] As the quantum awarded in respect of claim one falls within the Magistrate's Court jurisdiction, costs shall be recoverable on the applicable Magistrate's Court tariff.

Claim two: jurisdiction

[38] The plaintiff's second claim can be dealt with swiftly. Claim two is respect of an oral agreement reached during or about November/December 2015 between the plaintiff (represented by Mr Tenner) and defendant at Port Elizabeth (now Gqeberha) alternatively, Phillipstown for the sale of a King Springbuck ewe certified as pregnant by a Bont Springbuck breeding ram. The purchase price for the King Springbuck ewe was the amount of R342 000.00 (Vat inclusive). The purchase price was duly paid to the defendant on 2 December 2015.

[39] My findings in relation to the contract having been concluded in Phillipstown are equally apposite to claim two. A distinguishing feature of claim two is that, according to the evidence of Mr Tenner, delivery of the King Springbuck ewe never took place. His further evidence was that he does not even think that the ewe was ever even pregnant.

⁶⁴ This is evident from the plaintiff's written submissions.

[40] The plaintiff pleads at paragraph 8.4 of its particulars of claim, in relation to the agreed terms of the agreement, that 'The plaintiff and the defendant agreed that the relevant King Springbuck ewe would remain on the farm in Venterspoort, Phillipstown until she delivered the lamb, alternatively until plaintiff elected to move it to another destination.'⁶⁵

[41] To my mind, based on the pleadings,⁶⁶ delivery had already taken place in Philipstown in accordance with the doctrine of *constitutum possessorium*.⁶⁷ This accords with the defendant's plea.⁶⁸

[42] The plaintiff led no evidence that another destination was chosen and that this was conveyed to the defendant. Nor can any further insight be gleaned from the pleadings.

[43] On the basis of my finding above, it follows that neither the performance (wholly or in part) nor the breach took place within the jurisdiction of this court. It is thus unnecessary for me to discuss the evidence in respect of claim two any further.

[44] Accordingly, the defendant's special plea in respect of claim two is upheld. Claim two is accordingly dismissed with costs on the applicable Magistrate's Court tariff.

[45] In the result, the following order is issued:

- 1. The defendant is ordered to pay to the plaintiff the amount of R269 290.00 in respect of claim one together with interest**

⁶⁵ My own emphasis. It is noteworthy that this is in effect admitted by the defendant in his plea at par 4.2.2 thereof.

⁶⁶ If regard is had to the plaintiff's pleadings.

⁶⁷ H Mostert, P Badenhorst, J Pienaar et al, *The Principles of the Law of Property in South Africa*, p 203, '*Constitutum possessorium* can be used when the parties agree that the transferor will retain possession following transfer, but on the basis of a contractual arrangement between them. In other words, the transferor continues to possess the property, but does so with permission of the transferee (who is now the owner) and in terms of the newly established contractual relationship between them.'

⁶⁸ At paragraph 4.2.7 of the plea, it is pleaded that delivery took place on or about 3 December 2015.

thereon at the legal rate from 02 March 2017 to date of payment in full.

2. The defendant is ordered to pay the plaintiff's costs in respect of claim one on the applicable Magistrate's Court tariff.
3. The defendant's special plea in respect of claim two is upheld and the plaintiff's claim two is dismissed with costs on the applicable Magistrate's Court tariff.

T ROSSI
ACTING JUDGE OF THE HIGH COURT

Appearances:

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Acting personally/ no appearance