Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates:	NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST PROVINCIAL DIVISION, MAHIKENG

Case No.: 324/2014

In the matter between:

DE HEUS (PTY) LTD **Plaintiff**

and

RG KEENY t/a RAYNEL RANCHES **Defendant**

JUDGMENT

DIBETSO-BODIBE AJ

INTRODUCTION

[1] Agreements for farming purposes, as in the present case, concerning agricultural businesses including the manufacturing and supply of chicken feed, on the one hand, and the rearing and selling of broiler chickens to available markets, on the other hand, are no ordinary agreements, they are peculiar and should be

crafted meticulously and comprehensively with clear terms and reciprocal obligations to avoid insurmountable hurdles in the wake of unforeseen circumstances.

[2] Prior to the commencement of trial in this matter, and as per the court order of 16 August 2023, the Court was required to make a ruling in terms of Rule 39(11) provides that *"Either party may apply at the opening of the trial for a ruling by the Court upon the onus of adducing evidence, and the Court after hearing argument may give a ruling as to the party upon whom such onus lies: Provided that such ruling may thereafter be altered to prevent injustice."*

THE PARTIES' PLEADINGS

[3] On 10 March 2014 the Plaintiff, the producer and supplier of chicken feed, instituted an action against the Defendant, engaged in the rearing and selling of broiler chickens for breach of contract and payment of the outstanding balance of R440 971.11 plus interest calculated at 2% above prime interest rate as per the credit agreement between the Parties.

[4] The genesis of the Parties' relationship according to the Particulars of Claim is 07 June 2012 when the Defendant made an application to purchase feed and related products on credit as per annexures "A1" and "A2" to the pleadings. The credit agreement was subject to *"Standaard Voorwaardes van Besigheid"* (the standard conditions of business) being annexures "B1" and "B2" to the pleadings.

[5] The Defendant alleges that the Plaintiff failed to sign the credit application ("A1" & "A2"), that the Defendant made amendments to

"B1" and "B2" of the standard conditions, denied the Plaintiff's alleged period of payment as being 30 days and stated that 60 days was the agreed period of payment. I must state though that from the Plaintiff's heads of argument, a period of 60 days within which payment should be made has been conceded to.

[6] In response to the Plaintiff's Particulars of Claim, the Defendant served the Plaintiff with a Counterclaim alleging that the chicken feed supplied was defective and/or sub-standard resulting in the chickens not growing according to required standards and Plaintiff suffering damages in the amount of R382 657.12 as a result.

[7] Much of the remainder of the Defendant's Counterclaim is based on the allegations that, as a result of the alleged defective chicken feed, the Plaintiff failed to comply with the relevant provisions of the Consumer Protection Act No. 68 of 2008, Section 48(1) read with Section 51(1) which dealt with the right to fair, just and reasonable terms and conditions, basically attacking the annexures "B1" and "B2", the main agreement between the Parties which stipulates the standard conditions concerning the sale of chicken feed.

THE PARTIES' CONTENTIONS AS TO WHO HAS THE DUTY TO BEGIN TO ADDUCE EVIDENCE

[8] The main issue in dispute between the Parties which led to the application in terms of Rule 39(11) is whether the chicken feed supplied by the Plaintiff for the period between December 2012 and February 2013 was defective or not, an issue which first emerged from the Defendant's Counterclaim. Both Parties have filed expert summaries in terms of Rule 36(9) of the Uniform Rules of Court

and intend to call the witnesses to come and enlighten the Court concerning the extent and/or otherwise of the standard of the chicken feed alleged to have been defective.

[9] Integral to the dispute, the following questions were posed by the Defendant:-

[9.1] *"Whether it was an implied term(s) of the agreement, alternatively a statutory obligation, that the Plaintiff shall provide feed: (i) … of such good quality that the broiler chickens as a consequence of the use thereof shall attain slaughter weight, in the time as generally acceptable in the broiler production industry, and/or (ii) … which shall enable a broiler to attain a minimum generally acceptable mass within the generally acceptable production period,*

[9.2] *Whether the feed was defective,*

[9.3] *As to the Counterclaim, "whether (i) the feed was defective, (ii) the Defendant actually suffered damages, (iii) the defective feed was the cause of the damages suffered, (iv) the Defendant had a duty to and could have limited his damages, (v) the Defendant did limit his damages, as well as (vi) the damages sustained, and (vii) the quantum thereof.*

[9.4] *In the premises, the main issue for the trial court to decide is whether the feed was defective."*

[10] In conclusion the Plaintiff concluded that *"It is then only logical that the Defendant should first adduce evidence of what the nature and extent of the result (damage) was and to its cause (defect), to*

enable the court and the Plaintiff to understand the complaint and for the Plaintiff to start adducing evidence accordingly."

[11] In reply the Defendant contended that:

[11.1] *"as the Plaintiff's performance is determined by the terms of agreement the issue of "defective performance" (defect) (and by extent the right to withhold reciprocal performances) is dependent upon findings and rulings as to what the applicable terms and conditions ("terms") in fact were and as the terms are still in issue (the Plaintiff bearing the onus to prove) the defects can't first be ascertained – hence the conclusion of the cart before the horse.*

[11.2] *Leaving for a minute the dispute as to who bears the onus to prove what terms the sale contained, something which the court must ultimately decide (or confirm) after all evidence being led – it is undeniable that the "terms" and the "defect" forms an integral part of each other to be enlightened by the same witnesses (principally the feed experts) who must tell the court what the problem and the cause thereof was (if any) and only then whether this identified defect should be regarded as a defect per the terms of the agreement or be implied in the agreement due to the norm or statutory provisions in the poultry feed industry. The cart in fact pushing the horse, being pulled by it."*

APPLICABLE LAW

[12] *"Something must next be said generally about onus of proof in civil actions,… "The characteristic of this burden of proof (in the sense of a risk of nonpersuasion) in legal controversies is that the law divides the process into stages and apportions definitely to each*

party the specific facts which will in turn fall on him as the prerequisites of obtaining action in his favour by the tribunal. It is this apportionment which forms the most important element of controversy for legal purposes. Each party wishes to know of what facts he has the risk of nonpersuasion. By what considerations is this apportionment determined? Is there any single principle or rule which will solve all cases and afford a general test for ascertaining the incidence of this risk? By no means. It is often said that the burden is upon the party having in form the affirmative allegation. But this is not an invariable test not even always a significant circumstance, the burden is often on one who has a negative assertion to prove… It is sometimes said that it is upon the party to whose case the fact is essential. This is correct enough, but it merely advances the inquiry one step, we must then ask whether there is any general principle which determines to what party's case a fact is essential: Still another consideration has often been advanced as a special test for solving a limited class of cases, i.e. the burden of proving a fact is said to be put on a party who presumably has peculiar means of knowledge enabling him to prove its falsity if it is false… But this consideration, furnishes no universal working rule… This consideration, after all, merely takes its place among other considerations of fairness and experience as a most important one to be kept in mind in apportioning the burden of proof in a specific case. The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in different situations… There is… no one principle, or a set of harmonious principles, which afford a sure and universal test for the solution of a given class of cases. The logic of the situation does not demand such a test, it would be useless to attempt to discover or invent one, and the state of the law does not justify us in saying that it has accepted

any. There are merely specific rules for specific classes of cases, resting for their ultimate bases upon broad reasons of experience and fairness."[1]

[13] *"... Our common law likewise contains no comprehensive rule on the onus of proof in civil proceedings which is inflexible free from exceptions. Here too the onus does not always lie upon the Plaintiff asserting the claim but, on issues peculiar to the nature of the case, is sometimes borne by the Defendant in his or her resistance to that. One thinks, for instance, of issues raised when self-defence is pleaded in answer to a claim for damages suffered as a result of an assault, when a contract admitted or proved is said in an action for its enforcement to have been cancelled or novated, when some special defence is presented as a means of escape from liability on a bill of exchange, and when a host of other situations arise in which confessions and avoidances are familiar."*[2]

[14] *"In our adversarial system of civil litigation one side or the other has to bear the onus of proof. Differentiation between the parties in that regard is thus inevitable. So is the disadvantage under which the side carrying the load often labours. Its location for specific issues depends not on doctrinaire considerations, but on wholly pragmatic ones."*[3]

[15] *"the word onus has often been used to denote, inter alia, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is*

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[1] Prinsloo v Van der Linde and another (CCT4/196) [1977] ZACC 5 (18 April 1977) (Prinsloo) at para [55]. Per Didcott J (concurring) quoting Wigmore in his treatise on evidence from Chadbourn revision: vol. IX para 2486 at 287 – 92 and acknowledging that he "quoted at length from the book because the state of affairs existing in South Africa echoes exactly, in all its force and resonance, that description of the American One." At para [55]

[2] Prinsloo ibid at para [55]

[3] Prinsloo ibid at para [56]

entitled to succeed on his claim or defence, as the case may be, and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents the onus in its original sense... or "the overall onus". In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ('weerleggingslas'). This may shift, or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other."[4]

ANALYSIS

[16] Perhaps it is apt, for ease of analysis of the issues in the present case concerning the determination of the duty to begin to adduce evidence and the onus of proof, to extract salient points from the case of Prinsloo[5]. The Apex Court outlined certain considerations for the determination of apportionment of the evidential burden (American risk of non-persuasion) with emphasis that no universal rule or single principle and therefore no general test exists for ascertaining the apportionment of the evidential burden.

[17] The following considerations, that the evidential burden is often upon a party:-

(a) having in form the affirmative (positive) allegation,

(b) who has a negative assertion to prove,

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[4] South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977(3) SA 534 (A) at 548 per Cobett JA relying on Krishana v Pillay & Another 1946 AD at 952-3 to distinguish the concepts 'burden of proof properly so-called and the evidential burden

[5] See paragraphs 12, 13 and 14 above. Citation at footnote no. 1

(c) to whose case the fact is essential, and

(d) who presumably has a peculiar means of knowledge enabling him to prove its falsity, if it is false

were not to be held steadfast, instead, policy and fairness based on experience should dictate the appropriate apportionment in a given case.

[18] Regarding the burden of proof or onus of proof, the Apex Court stated that this burden *"does not always lie upon the Plaintiff asserting the claim but on issues peculiar to the nature of the case, is sometimes borne by the Defendant in his or her resistance to that... for instance, of the issues raised when self-defence is pleaded in answer to a claim for damages suffered as a result of an assault, when a contract admitted or proved is said in action for its enforcement to have been cancelled or novated, when some special defence is presented as a means of escape from liability on a bill of exchange, and when a host of other situations arise in which confessions and avoidances are familiar."*

[19] It is trite law that the duty to begin and onus of proof (burden of proof) must be determined with reference to the allegations in the pleadings. The Plaintiff's Claim is the existence of a contract and a breach thereof by the Defendant – the Plaintiff having sold chicken feed to the Defendant and then being in default of the outstanding balance in respect of the chicken feed delivered during the period between December 2012 and February 2013.

[20] On the other hand, the Defendant's version is that there is no breach of the contract as the chicken feed that was sold to it was

defective and of sub-standard and that the Defendant's standard conditions of business failed to comply with the relevant provisions of the Consumer Protection Act 68 of 2008 as a result of which it suffered damages in that the broiler chickens did not attain proper growth and required mass in accordance with the set standards in the broiler production industry.

[21] Ordinarily, the burden of proof, and therefore, the duty to begin would be on the Plaintiff to show that there is a contract between the Parties and that there is non-performance (indebtedness) by the Defendant. However, the burden of load in terms of the Defendant's version seem more heavier as to tip the scale of onus of proof and therefore the duty to begin to adduce evidence to shift on its side.

[22] The Court will be commencing on the wrong footing if the Plaintiff were to first adduce evidence on the disputed issue that the chicken feed was defective which is a negative assertion by the Defendant peculiar and knowledgeable to the Defendant. The Plaintiff cannot, in the circumstances, be expected to lead positive evidence on the defectiveness of the chicken feed, a case which is knowledgeable and asserted by the Defendant.

[23] It follows, in my opinion, that in as far as the issue in dispute being that the chicken feed was defective, the duty to begin and the onus of proof is accordingly placed on the Defendant.

ORDER

[24] I, accordingly, grant the following order:

The Defendant shall, in terms of Rule 39(11) of the Uniform Rules of Court, bear the onus of proof and the duty to begin on the disputed issue of the apparent defectiveness of the chicken feed whereafter the Plaintiff shall bear the onus of proof concerning the breach of contract and indebtedness to it by the Defendant.

O.Y DIBETSO-BODIBE
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

Delivered: This judgment is prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties or their legal representatives by email and by release to SAFLII

DATE OF HEARING:	**16 August 2023**
DATE OF JUDGMENT:	**18 December 2024**

APPEARANCES

FOR THE PLAINTIFF:	**O'Connell Attorneys** **c/o Smith Neethling Inc**
FOR THE DEFENDANT:	**Van Velden-Duffey Inc** **c/o Van Rooyen Tlhapi Wessels**