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

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 1768/2018
Heard: 09-12/11/2021;06-09/06/2022; 13-15/06/2022
Argued: 10/11/2022
Delivered: 14/04/2023

In the matter between:

HATARI GAME BREEDERS CC Plaintiff

and

DE BEERS CONSOLIDATED MINES (PTY) LTD Defendant

JUDGMENT

Mamosebo J

[1] Plaintiff, Hatari Game Breeders CC (Hatari), instituted this action against the defendant, De Beers Consolidated Mines (Pty) Ltd (De Beers), for damages suffered as a result of De Beers' admitted misrepresentations. At the commencement of the trial, the parties agreed that the question of liability should be decided separately from damages as contemplated in Rule 33(4) of the Uniform Rules of Court for the trial to proceed on merits only. Adv. PJJ Zietsman

SC represented the plaintiff and Adv. M Majozi (with him Adv A Ngidi) appeared for the defendant.

[2] The issues that stand for determination are the following:

2.1 Whether Hatari, as undisclosed principal, acting through its agent Mr Richard de Vos of Seacow Properties (Pty) Ltd, purchased Lusaka, a bull with the name tag Y09 at the auction; and

2.2 Whether De Beers negligently represented that Lusaka was sired by a Sable bull known as Y1 Inglewood.

[3] An auction was held by Xtreme Auction 2015 at Bona Bona Game Lodge, Klerksdorp, Northwest Province, on 06 June 2015. Prior to the day of the auction, a catalogue annexed to the papers, was disseminated to potential buyers. The Auctioneer was Vleissentraal Bosveld (Pty) Ltd. The auction was conducted subject to the Auctioneer's Rules of Auction which, upon the fall of the hammer, became the binding terms and conditions. In the second pre-trial conference minute held on 29 October 2021 De Beers admitted the contents of the catalogue in as far as it relates to Lusaka.

[4] The plaintiff pleaded the following at para 3 of its particulars of claim:

"3.1 Defendant, at its June 2015 Xtreme auction held at Klerksdorp inter alia offered Lot15B, a certain Bull with the nametag Y09, named Lusaka (hereafter "Lusaka"), for purchase to prospective game buyers.

3.2 In so offering Lusaka for purchase the defendant, in its Xtreme Auction Catalogue, made the following material representations to prospective buyers, including plaintiff:

3.2.1 Name/Tag: Y09

3.2.2 Microchip 4A5E706623
3.2.3 DNA: Tested Zambian
3.2.4 Sire: Y1 Inglewood
3.2.5 Date of birth: 10.03.2010 (5 years)
3.2.6 Horn Length (left): 43.250”
3.2.7 Horn length (right): 44.500”
3.2.8 Tip to tip: 31.5”
3.2.9 Base (left): 10”
3.2.10 Base (right) 10”

3.3 An extract copy from the defendant’s Xtreme Auction Catalogue is appended marked “H1”.

3.4 The defendant knew, alternatively ought reasonably to have known, that:

3.4.1 Y1 Inglewood’s male descendants are highly sought after in the market as a result of Inglewood’s outstanding genetic pedigree and, as a result, they yield a much higher price than the average breeding sable bull;
3.4.2 Lusaka would be used by its buyer in his/her/its sable breeding programme because of the fact that its sire is Y1 Inglewood;
3.4.3 Lusaka’s offspring, being genetic descendants from Y1 Inglewood, would also be sought after in the market and, as a result, yield a much higher price than the market average.

[5] At para 6 of the particulars of claim the following is pleaded regarding the misrepresentation by De Beers:

“During May 2017 the plaintiff discovered that the representations made by the defendant, as pleaded at paragraph 3, were false, in that:

6.1 Y1 Inglewood was not Lusaka’s sire;
6.2 W1 Zorro, a cross Sable, not of pure Zambian DNA, was Lusaka’s sire.”

Plaintiff’s evidence and case

[6] Hatari led the evidence of two factual witnesses, Mr Marius Eksteen (Eksteen) and Mr Richard de Vos (De Vos) and two expert witnesses, Dr Morné de la Rey, a veterinarian surgeon and Mr Reuben Saaiman, a game breeder, in support of its case. It abandoned the report compiled by Dr Laubscher, which is not

integral to this matter. Hatari's case is the following. Eksteen, a director of Hatari, operates a farming business and farms in mielies, irrigation farming and game breeding. He also operates a hardware store called DIY Super Store. Hatari has been breeding in sables since 2008.

[7] Eksteen operates a 12 000-hectare game breeding farm. He received the auction catalogue two to three weeks prior to the auction. He showed an interest in Lusaka (Lot 15B). The date for the Xtreme Auction did not suit him. He consequently arranged with a friend, De Vos, also a game breeder with a farm at Kwaggafontein, to bid for Lusaka on behalf of Hatari and to be in telephonic contact when Lusaka was called. He produced a copy of the itemised bill[1] to substantiate the allegation that he and De Vos were in constant telephonic contact before and during the auction in order to give De Vos proper instructions. Eksteen could hear the auctioneer over the phone which must have been on speaker mode. Lusaka was placed in a boma. He explained that when the animal is placed in a boma it means that it could be viewed before the commencement of the auction. De Vos sent him and their brothers two photographs of Lusaka via whatsapp communication before the auction. De Vos then purchased Lusaka for Hatari.

[8] After the auction and without verifying with De Vos for the transportation of Lusaka, a delivery note, made out by Wintershoek Wild, was addressed to "*Mr Nico de Vos, Kwaggafontein, Colesberg*". De Vos testified that Nico de Vos is his brother. According to De Vos the transport company did not liaise with him prior to their departure from Klerksdorp but evidently assumed that Lusaka was to be transported to Colesberg. It is only upon realising that Lusaka was in transit to Colesberg that he redirected the transporter to Hatari's farm in Bloemfontein, where De Vos signed for the delivery. Wintershoek initially invoiced transportation for

[1] Page 585 and 586 of the trial bundle

762km from Bona Bona to Colesberg and from Colesberg to Bloemfontein but subsequently amended it after engagement to reflect Bona Bona to Bloemfontein. Hatari bought Lusaka (Y09) for breeding purposes.

[9] De Vos testified that he is a director at Seacow Properties (Pty) Ltd (Seacow) and was a regular at auctions throughout the country during the period 2014 to 2016. He estimates that he may have purchased game for approximately R80 to R90 million at different auctions. He is well-known within the industry and by the Vleissentraal auctioneers. He elucidated to how the auctioneers would sometimes call him beforehand and invite him to the auctions, including attendance of the pre-auction functions. The relationship he had with the auctioneers enabled him to register telephonically or Vleissentraal would even pre-register him the night before an auction. For the auction of 06 June 2015, he was pre-registered by Neil or Okkie Goosen. De Vos confirmed that Eksteen mandated him to bid for Lusaka and the rest of the evidence related to him until the fall of the hammer at R29,000.00. De Vos added that during the period 2012 to 2016 he acted as agent and purchased game for various other principals at auctions held by Vleissentraal.

[10] On 03 February 2017 De Vos, following a telephonic conversation with Mr Piet Oosthuizen, a retired employee of De Beers in the Ecology Department since 2010, transmitted an email to Oosthuizen requesting Inglewood's DNA. De Vos and Eksteen testified that Eksteen requested De Vos to obtain the DNA information from De Beers because De Vos not only knew the story involving Lusaka, but also had a good relationship with people at De Beers. In the email De Vos portrayed himself as the owner of Lusaka and explained that the information was to update the history of the offspring. He conceded his misrepresentation as the

owner of Lusaka in the email but explained that he needed to protect his reputation in the gaming industry.

[11] Eksteen testified that Hatari has a breeding programme. Before acquiring Lusaka, Hatari had purchased twenty (20) female Zambian sables for breeding with a Sable bull with DNA that will be sought after in the market. Lusaka impregnated all the 20 females or cows. Hatari thereafter concluded a contract with Elgondor 102 (Pty) Ltd (Elgondor) (annexed to the papers as "H3") for the purchase of the 20 pregnant Sable Cows for R9,000,000.00 (Nine Million Rand), subject to the condition precedent that Hatari shall provide Elgondor with the genetic proof that the Sable Cows were impregnated by Lusaka and that Lusaka was sired by Y1 Inglewood. Put differently, that Lusaka is the offspring of Y1 Inglewood. Hatari and De Beers agreed that Mr Maurius Eksteen signed the agreement. Hatari later used the same profile of Lusaka when selling Lusaka to Thaba Property Trust, who purchased Lusaka for R250,000.00. It was contended that Hatari could not comply with the condition precedent in its agreement with Elgondor and has resultantly suffered damages to the total amount of R7,390,540.00 (Seven Million Three Hundred and Ninety Thousand and Five Hundred and Forty Rand).

[12] Dr Morné de la Rey testified that he is a veterinarian surgeon and a game breeder who has been working with sable antelope since 1998. He is also a renown fertility expert. His knowledge and expertise were not disputed. According to him sable forms a herd of 15 to 20 cows led by a single dominant bull which will be able to impregnate the herd (cows and heifers), during a breeding season. A normal breeding season is a period of about three months during summer when the nutrition is good and the day length is long which stimulates the cows to be on heat and this is when a female mammal in the mating period of the sexual cycle is ready to be covered by a bull. Covering happens every 24 to 28 days. Should

a cow not be impregnated then, she will cycle again within 24 to 28 days. The normal period of pregnancy of a sable cow is nine months.

[13] De la Rey put forth the general proposition that a sable bull reaches sexual maturity at the age of 18 to 20 months, with the exception of others reaching maturity at a younger age of 13 to 14 months. Sexual maturity as he explained, is when a bull has enough testosterone to produce sperm, to be able to have an erection and willingness to jump and impregnate a cow. Certain types of behaviour can be observed from a bull that has reached sexual maturity like infighting between the bulls; the dominant bull spending time to keep the young bulls away from the herd; with regards to the younger bull, it will start showing interest in the cows and make moves on the younger cows and heifers in the herd. De la Rey pointedly remarked that, at least with game farmers, the younger bulls, not as a norm, but frequently, cover heifers in the herd, and, to avoid such an occurrence, it is crucial for a game farmer to put a management system in place.

[14] In as far as specific management practices are concerned, De la Rey testified that[2] weaning must be done bi-annually or at least three times a year to avoid animals reaching an age where they start covering cows. Where there is frequent weaning in a management system, infighting will be observed. From that observation, a dominant bull will be noticed having a clash with the younger bulls, fighting and pushing them out. Observation will also show the young bull teasing and eventually mating the cows. The observation is humanly done.

[15] De la Rey was referred to items 59 and 60 of De Beers' pleaded case annexed to the papers at p555 of the trial bundle. Item 60 shows the five male offspring sired by Inglewood Jnr (Zorro) (SBL

[2] Page 154 of the record

Y09, SBL Y08, SBL Y07, SBL Y06 and SBL Y010) all born in 2010. Lusaka is one of the five.

[16] De la Rey was asked to comment on De Beers' case that when it said Lusaka was sired by Y1 Inglewood it made an innocent misstatement. De la Rey's opinion is the following in that regard[3]:

"Ja, that appears to be that he [Zorro] appears to be that he is sexual[ly] mature because if he could sire 5 offspring, it meant he jumped and conceived, so there is fertility, testosterone, semen production, libido is all intact, it concurs for me more with the fact that he is 22 months old ….to note the fact that those 3 animals were born all three on the 10th of March, I do not think in terms of management they are necessarily born on the same day and you also get variants, because it means sometimes they are born over a 2 or 3 or 4 days period, but then you note it down as the same day, so that is not abnormal for me, but still, it meant that he was sexually mature 9 months before that birth date of those animals, that he could [have] alternatively covered in that week 5 animals, the fact that there is five males is also interesting because normally we have a 60/40 spread male/female ratio, there might have been a few more females, but that we can check with other data, but yes, that is sexually mature……..observation back at your point earlier, what do you see in terms of observation, you would have seen then the dominant bull, a dominant bull, this bull started mating the cows, that there would be infighting or you would see this animal teasing the cows."

[17] The last witness to testify for the plaintiff was Mr Ruben Jan Saayman, whose qualifications are not disputed. He lectured Zoology which entailed subjects like ecology, reproduction and taxonomy. They also had advisory services for game ranchers starting farming or breeding with game called Wildlife Advisory Services. He has been in the Advisory Services since 1992. Initially the advisory service was on a commercial scale and later as the industry evolved to stud breeding. Saayman has been a stud breeder since 1998, breeding in buffalo, sable antelope and roan and has acquired about 30 years in the gaming industry with 25 years thereof in breeding. He is a stud game breeder.

[3] Page 165 -166 of the record

[18] On 10 November 2021, Saayman concluded a joint minute with Mr Richard Morton, the defendant's expert and stud game breeder with over 17 years' experience. Morton is a director of Tembani Wild Life Proprietary Limited (Tembani Wildlife). It is convenient to deal with their joint minute at this stage. Their discussions focused on the following topics:

(i) Management of a breeding programme and how management is to be conducted in an intensive, semi-intensive and extensive breeding programme;

(ii) At what age a young Sable bull reaches sexual maturity, i.e the time when a Sable bull is able to cover a female Sable;

(iii) How regularly and at what age young Sable bulls are to be weaned from the herd before they reach sexual maturity;

(iv) The possibility that a dominant breeding adult Sable bull will allow a sub-adult bull to cover a Sable cow or heifer and not be able to fight off the sub-adult bulls from jumping or covering the Sable cows or heifers; and

(v) What is generally accepted practice of a Sable breeding programme.

[19] According to Saayman a sub-adult bull can cover a Sable cow or heifer as early as 13 months which necessitates breeders to ensure weaning at the right age. Morton, on the other hand, stated that his generally accepted practice is to wean the sub-adult bulls once their horns have developed their first rings to avoid them developing a stress ring. He also weans them once there are enough sub-adult herds to form a group. While Morton's camps comprise one mature breeding bull with 20 - 25 breeding cows in a 40-hectares area, Saayman, on the other hand, commented that where the breeder implements an extensive breeding programme

in bigger camps and observing the sables once or twice a week, then your monitoring is not hands on. Should you leave the sub-adult bulls to attain the age of 20 – 23 months then in his own words "you do not have a '*good eye'* or *'grip'* on your management practice.

[20] Morton commented that Dr Morné de la Rey is the fertility expert and they will have to go with his opinion on when a bull is sexually mature. That will therefore mean that one weans before that age to secure absolute guarantee on paternity. Saayman agreed. According to Morton the industry average to wean a young bull is 18 months. However, should the dominant (breeding) bull be removed for whatever reason, for example, if he is sick, the younger bulls may take their chances and cover the herd. Saayman agreed. With the grouping he will select the young sub-adults (18 months old) from the different camps to form a new young juvenile weaned bull herd. This he does to avoid, as far as possible, any negative influence on their development and horn growth as weaning will always affect horn growth because of some level of stress on the young animals. Saayman agreed. They further agreed on their view regarding stud breeding and commercial breeding. Morton pointed out that De Beers had a 225 hectares camp which can be classified as semi-intensive, but left that aspect to Saayman as he operates in a similar veld. Saayman's view was that the minute the animals do not sustain themselves and supplementary feeding is provided it becomes an intensive programme. Saayman concurred with Morton on the issue that in the current market an exceptional Sable is a bull 50-inches and bigger with proven parentage, from a pure line (pure Matetsi or pure Zambian).

[21] Saayman testified that in some instances younger bulls become sexually active and keep the dominant bull busy and because they

are becoming sexually mature the dominant bull has to fend them off all the time. It causes him to be weak and tired.

[22] During the proceedings the parties agreed on the following:

22.1 That Mr Marius Eksteen signed the agreement between Hatari and Elgondor annexed to the particulars of claim as "H3". It is agreed that plaintiff concluded that agreement through the signature of Mr Eksteen;

22.2 That the emails in the trial bundle sent and received by Ms Anita Conradie were sent or received on instruction of Mr Marius Eksteen of Hatari and therefore Ms Conradie would not be called to testify;

22.3 That the emails in the trial bundle sent and received by Ms Carina Brits, Assistant Accountant at De Beers, were sent and received on instructions of De Beers and Ms Brits would not be called for purposes of proving the emails; and

22.4 Hatari concedes the expert summary of Prof. Bettine Jansen van Vuuren, a Zoology and Molecular Ecology Specialist.

The Defendant's case

[23] The defendant, De Beers Consolidated Mines (Pty) Ltd, called three witnesses to testify on its behalf, Dr Emma Franklin Rambert, a veterinarian surgeon, Mr Richard Morton, a game breeder, and Mr Piet Oosthuizen, a retired employee of De Beers.

[24] The defendant denies that it knowingly or purposefully misrepresented to the plaintiff that Lusaka was a descendant of Inglewood. It pleaded that it sold Lusaka to Seacow and not to the plaintiff and denies knowledge that Seacow was acting as the plaintiff's agent. Neither the defendant nor the Auctioneer

marketed or promoted Inglewood or his descendants as being bulls of an outstanding pedigree. The defendant maintains that it was under a mistaken but *bona fide* belief to declare that Lusaka was sired by Inglewood. Phrased differently, De Beers pleaded innocent misstatement. Lusaka is a descendant of Inglewood sired by Inglewood Junior. The sale was concluded based on a mutual mistake by the parties, it was proffered.

[25] This is De Beers' pleaded case pertaining to its alleged innocent misstatement. Lusaka was born on 10 March 2010 in cluster 2 camp 2, a breeding camp on the Farm Inglewood, a section of Dronfield reserve. Lusaka's Dam (mother) is a Sable cow named Y4, an active production cow in cluster 2, camp 2 until 09 February 2017. Y1 Inglewood was the active breeding bull in cluster 2 camp 2 until 17 July 2013. Lusaka's Dam was covered by Inglewood junior during the period June to July 2009. Inglewood Junior was born during 2007 and at the time of covering (impregnating) Y4, Lusaka's Dam, around March to June 2009, he was a fledging bull that shared cluster 2 camp 2 with Y1 Inglewood.

[26] Prof. Van Vuuren's uncontested views in her Expert Summary are that she has more than 20 years' experience in genetics and has been involved in conducting research on sable antelope since 2003. Her qualifications are: BSc Zoology; Genetics; BSc Hons Zoology; MSc Zoology; PhD Zoology all obtained from the University of Pretoria. According to her, Mitochondrial DNA is inherited through maternal lineage. The inclusion of nuclear DNA in genetic screening only started in November 2015. It is found in the nucleus of cells and passed on from mother and father and provides information about parentage, relatedness membership of specific individuals to different genetic groups. Parentage can only be determined using nuclear markers and there was no objective scientific method to determine who Lusaka's sire was prior to his

sale outside of DNA testing. Y1 Inglewood, Inglewood Junior and Lusaka belong to the same mitochondrial lineage.

[27] Dr Emma Rambert testified that she was contracted by De Beers from time to time. She is an independent wildlife veterinarian surgeon with over 22 years of experience in wildlife but her field of specialty is the capture of African species like sable, roan and rhino. Her expertise in this field was not disputed. She explained the distinction between a semi-extensive and semi-intensive system from a background of a person whose work emanated mainly from the Northern Cape, Wintershoek, but she has also worked in all the provinces in South Africa. There is a herd system with a dominant breeding bull. According to her, generally a sable bull reaches sexual maturity and becomes sexually active between the ages of 18 and 24 months. The defendant weans its sub-adult bulls bi-annually between the ages of 14 to 18 months with some slightly younger and others slightly older. The dominant bull will prevent the sub-adult bulls from covering the cows and will discipline them using its aggression. When asked about a sub-adult bull taken away from the herd her response was[4]:

"One that is capable of covering, the sperm, Dr De La Rey I think would have explained that he is the expert, I am not a fertility expert."

She again agrees with Dr De La Rey and refers to him as the fertility expert in defining a sub-adult bull. According to her, monitoring can cover all the behavioural aspects and daily monitoring of the herd can assist in identifying the traits, that is, observe a juvenile bull becoming sexually active or is already sexually mature. If a breeder intends to breed offspring from a particular dominant bull it will immediately remove the young bulls.

[4] Record p 876

[28] In cross-examination Mr Zietsman put this statement to Dr Rambert: De Beers knew when these bulls are reaching the ages of 18 to 24 months they are becoming sexually active. Not necessarily covering but becoming sexually active. Her response was that they have potential and in her opinion 24 is generalising and that 24 months is late to take out or wean a bull. Mr Zietsman pressed with the question that the red light comes on from 18 to 24 months and that is the period when the Sable breeder must realise the danger of the bull having the tools to cover. She agreed.

[29] Dr Rambert opined that with monitoring, all behavioural aspects of the herd structure can be covered. If the herd is monitored daily one is able to see abhorrent behaviour. The aggressive behaviour and the testosterone characteristics can be witnessed on a young bull of between 22 -24 months old. She was not part of De Beers' management and monitoring but only dealt with the movement of the animals. De Beers' records presented to Dr Rambert shows that Inglewood Junior (Zorro) covered a dam referred to as Y04 and sired Lusaka in Cluster 2, Camp 2 breeding farm Inglewood and that he was born on 10 March 2010. That would mean that Inglewood Junior must have been either 22 or 23 months old when he covered the dam.

[30] Dr Rambert was further referred to the activity sheet at p272 of the record and the following was asked at page 932 of the record:

"Mr Zietsman: Dr Rambert it was put to Mr Saayman that this activity sheet that you see on page 272 was after weaning....

Dr Rambert: I had nothing to do with the data capturing. ..... But if I looked at that I would assume that yes, there are no animals 1 to 2 years old.

Mr Zietsman: ...In other words there is no male animals, between the 1 and 2 year bracket, we have established covering

must have taken place when Inglewood junior was 22 or 23 months old, and he does not appear there.

Dr Rambert: Correct.

Mr Zietsman: The point is there is no bull or male sable in the 12 to 24-month bracket, correct?

Dr Rambert: Yes.

Mr Zietsman: Now what was put to Mr Saayman is that the bulls that were weaned from Inglewood camp 1, were moved to the big camp. Now if you look at that same activity sheet on the 31st of July, you will see for instance, there are 3 males, 1 to 2 years old in big camp.

Dr Rambert: Yes

Mr Zietsman: The other important aspect is, so we can then take it, if we know that Inglewood Junior covered Lusaka's dam whilst he was in camp 1 with Inglewood, Inglewood now being the male dominant bull, he must have been running with at least 6 female cows and the 14 cows/heifers in the 2 to 4-year-old bracket, correct?

Dr Rambert: Correct, on this form, yes.

Mr Zietsman: And if De Beers says that they have weaned and moved those, after weaning they moved the Sable to big camp, if we look at big camp there [are] 3 adult males and 3 males between the ages of 1 to 2 years old, correct?

Dr Rambert: Correct.

Mr Zietsman: So they did not wean off any female Sable, between the, 1 to 2 year old, correct?

Dr Rambert: No, I cannot pass comment, they could have sold some heifers I do not know, I cannot comment."

[31] What was further extrapolated from the evidence of Dr Rambert based on the information contained at page 555 of the trial bundle, a document from De Beers which was discovered, was that Inglewood Junior was sexually active in camp 1 and covered the dam of Lusaka. Inglewood Junior sired Y09, Y08, Y07 (date of birth for these offspring 10 March 2010) and two others Y06 and Y010 with date of birth as 2010. Dr Rambert confirmed that all this

happened while Inglewood Junior was in the same camp with Inglewood Senior. It was put to her that with daily monitoring De Beers would have picked up that Inglewood Junior was sexually active to which she agreed and added that a further consideration was the size of the horns.

[32] The witness Mr Richard Morton is a director at Tembani Wildlife Proprietary Limited which is a breeding operation focusing on genetics and 'stud' potential. He holds a Bachelor of Commerce (B. Com) in Accounting and Information Systems. Morton is a stud breeder with more than 17 years' experience. His company was one of the first to start intensive breeding of Sable antelope in a camp system. That is, the sable will be fenced off in an area and the animals will be provided with supplementary feed because of their restricted movement. His views are encapsulated in the joint minute with Saayman and will not be repeated here.

[33] Mr Pieter Hendrik Oosthuizen is a retired employee, having worked for De Beers from July 1989 - November 2019, in different financial roles and later moved to head its ecology department in October 2010, succeeding Mr Johan Kruger. This department comprises four different properties over 97 000 hectares. Each property has its own manager with four to ten workers reporting to them. The property in issue is the Dronfield property initially managed by a certain Dr Corné Anderson, later replaced by Dr Charles Hall with the late Mr John Barkley, with eight to ten subordinates, reporting as the supervisor under them. According to Oosthuizen, John Barkley was the key role-player. This therefore implied that Oosthuizen lacked personal knowledge because his testimony was based on information received from these former employees since he was not directly responsible for the Dronfield farm prior to 01 October 2010. None of these employees were called to testify. Despite that, Oosthuizen was responsible for the compilation of the Xtreme Auction catalogue.

[34] He testified that De Beers implemented the extensive management practices from 2005 on an 8000-hectare property and the Sables were roaming freely. This was changed to semi-intensive systems in 2010 and there was Inglewood camps 1, 2 and 4 where the animals were fed from the month of May until the first rains started. The size of the semi-intensive camps were about 200 hectares. There were four camps, camp 1 and 2 and 4 kept Sables while camp 3 was for Roan. There was daily monitoring of the animals in 2010 until the first rains, thereafter, weekly monitoring followed.

[35] According to Oosthuizen, weaning was done not later than 18 months. He testified that an assumption was made by De Beers that Y1 Inglewood was the sire because of the camp where the bull was born. Oosthuizen confirmed to the auctioneer that Lusaka was Zambian but that De Beers does not have pure Zambian animals and that it was a cross-bull. The bidder was Mr Richard de Vos. Inglewood moved between camps 1 and 2. It is apparent that Oosthuizen's testimony pertaining to the assumption about Inglewood being the sire directly contradicts what was pleaded by De Beers at para 12.5 to this effect:

"The parentage of Lusaka was determined prior to nuclear DNA testing through observing the active breeding bull in cluster 2, camp 2, which was Y1 Inglewood."

De Beers did not call any other factual witnesses on the observations made during the 2009 mating season. There is further no evidence by De Beers to substantiate its allegation that Y1 Inglewood was in fact the active breeding bull in the camp.

[36] Oosthuizen confirmed receiving a telephone call after the auction from Richard de Vos and asked him to send an email. Their conversation was over a Sable bull which he had bought at the auction and now needed to obtain its DNA data. This was followed

by emails from Ms Carina Brits and Mr Richard de Vos. At a subsequent auction held in Colesberg he, Oosthuizen, was informed that there was a problem with Lusaka and was advised by De Vos to attempt to resolve the problem amicably. He was informed at that auction that Lusaka was sold to Hatari. Since he could not recall any sale to Hatari he enquired if the people from Hatari were present and was shown Mr Marius Eksteen, his brother and father who were at the back of the hall. He did not have any prior interaction with Hatari or its representatives and did not remember selling a bull to Hatari. He was aware of the emails exchanged between Carina and De Beers but explained that he was shocked when he received a letter of demand dated 19 February 2018 from Hatari's attorneys.

[37] Oosthuizen conceded that nowhere in the documents is it recorded that daily monitoring and good husbandry practices started in 2011. Although he testified that the bidding for Lusaka started at R500,000.00 but when there was no interest, the auctioneer went down to R100,000.00 and then it gained interest until it was sold for R290,000.00, he could not explain why the transcript transferred from voice into a written document discovered by De Beers (page 249) did not contain such information but he was adamant that the transcript was incorrect.

[38] Mr Zietsman repeated the question to Oosthuizen whether Carina reverted to him reporting the problem with the sire of Y1 Inglewood, to which he said *"she would have reverted but he could not recall".* Oosthuizen was referred to the email from Carina dated 10 February 2017 to Anita and Danie Dames of Clinomics and an email from Clinomics to Anita informing that Y4 and Zorro were the parents of Y09 (Lusaka) dated 24 March 2017 at 08:09. On 28 March 2017 Carina also wanted feedback on the outcome. Counsel therefore put it to Oosthuizen that at least by May 2017 Carina must have had discussions with him around the issue of

Lusaka. On 08 May 2017 at 08:24 Carina sent an email to Anita informing her that Y09 sire is not Y1 Inglewood but Zorro and furnished Zorro's photo. Counsel suggested that Oosthuizen could therefore not have been shocked in November 2017 that there was a problem with the sire. It remains unclear and inexplicable why, if ever, Oosthuizen was shocked.

[39] The first question that stands to be answered is whether Hatari, as the plaintiff, and undisclosed principal acting through its agent, Mr Richard De Vos of Seacow, can sue De Beers, as the defendant, for damages suffered.

[40] The plaintiff pleaded the following in its Particulars of Claim pertaining to the aspect of agency of De Vos:

> *"4.2.2 Mr Richard de Vos of Seacow Properties (Pty) Ltd (hereafter Seacow) was acting as the plaintiff's duly authorised agent and represented the plaintiff, as buyer, at the auction.*
>
> *4.3 The auction was conducted subject to the Auctioneer's Rules of Auction, which, upon the fall of the hammer, became the binding terms and conditions of the sale agreement between the plaintiff and the defendant. Copies of the Rule of Auction are appended marked "H2" ("the Rules"). The relevant material terms are found in the following clauses:*
>
> *4.3.1 Clause 6: "All goods and livestock (hereinafter referred to as the 'assets') are sold by the Auctioneer as agent on behalf of the Seller, who hereby authorizes the Auctioneer to collect the purchase price from the Buyer and the seller do hereby cede to the Auctioneer all the seller's rights, title and interest in and to its claim for payment of the purchase price against the purchaser which [c]ession the Auctioneer do hereby accept.*
>
> *Clause 16: The Seller warrants that there are no encumbrances on such assets, that the said assets are the property of the Seller, and that the Seller is competent and legally entitled to dispose of the*

assets. The Seller further warrants as against the Buyer that the assets are free of any patents or latent defects.

Clause 17: The Seller, who offers the assets for sale, accepts all liability regarding the information furnished as to the pedigrees, ages, dates of service, state of health or gestation or any other particulars which might be incorrect. In the event of any dispute the Buyer shall only have a claim against the Seller and not against the Auctioneer.

Clause 18: The Seller warrants as against the Auctioneer that the assets are free of patent and latent defects and that any right or claim ceded to the Auctioneer in terms of these Rules of Auction is free of any defect or right of deduction or set-off, and that the said right or claim is fully and immediately enforceable against the buyer.

4.4 Plaintiff, through its aforesaid agent, acting on the correctness of the defendant's representations as aforesaid, purchased Lusaka at the Auction for R290,000.00."

[41] The defendant pleaded as follows to the Particulars:

"4.1 At all material times preceding the sale of Lusaka to Seacow Properties (Pty) Limited, the defendant was under the bona fide but mistaken belief that Lusaka was sired by Y1 Inglewood.

4.2 The sale was concluded as a result of a mutual mistake.

4.3 Lusaka tested Zambian under the mitochondrial testing.

5.1 At no point during the auction or any time preceding the sale of Lusaka, did the defendant or its agents market, promote or advertise –

5.1.1 Y1 Inglewood, or his male descendants as Sable bulls of an outstanding pedigree that yielded a much higher price than an "average" breeding Sable.

5.1.2 That the descendants of Y1 Inglewood, would be suitable for a breeding program by virtue of being sired by Y1 Inglewood.

5.1.3 That Lusaka's offspring, as genuine descendants of Y1 Inglewood, would be sought after in the market and yield a much higher price.

8.2. There was a sale between the defendant and Mr Richard de Vos of Seacow Properties (Pty) Limited, who acquired Lusaka.

9.2 Lusaka was purchased by Richard de Vos of Seacow Properties (Pty) Limited for R290,000.00"

[42] The plaintiff does not dispute that De Vos did not disclose to Vleissentraal, the Auctioneer, that he was acting on its behalf at the auction. An allegation that a certain person '*acted on behalf of a party*' is a sufficient allegation of agency. See *Lind v Spicer Bros (Africa)*[5]*.* But because the defendant persistently challenges the plaintiff's averment that De Vos was acting as Hatari's authorised agent who represented Hatari at the auction it is necessary to consider the law pertaining to the undisclosed principal.

[43] However, I deal first with clauses 25 and 26 of the Rules of Auction. Mr Majozi, for the defendant, and relying on these clauses, submitted that Hatari is ill-suited and on exception taken by the defendant, therefore if the Court is with De Beers this point alone is dispositive of the matter and the action falls to be dismissed with costs. Clauses 25 and 26 stipulate:

"25. Any person who purchases on behalf of a Principal (i.e natural person) must furnish the Auctioneer with a written signed Power of Attorney, prior to the commencement of the Auction, ***failing which*** ***he/she will be personally liable for payment of any purchases made by him/her.*** *The person bidding on behalf of or signing any document on behalf of the purchaser pursuant to a successful bid hereby* ***binds himself/herself personally as co-principal debtor with the Buyer for payment of the purchase price and personally guarantees all the obligations of the Buyer under this Rules of Auction.***

26. A person who attends the auction, to bid and to sign the bidder's record, on behalf of another person (i.e. ***on behalf of a company or legal entity) must produce a signed letter of authority*** *that expressly authorises him or her to bid or sign the bidder's record on behalf of that person.*

[5] 1917 AD 147

> *Where a person is bidding on behalf of another entity the letter of authority must appear on the letterhead of the entity and must be accompanied by a certified copy of the resolution,* ***if required****, authorizing him or her to bid on behalf of the entity.* ***The person bidding on behalf of or signing any document on behalf of the Buyer pursuant to a successful bid thereby binds himself personally as co-principal debtor with the Buyer for payment of the purchase price and personally guarantees all the obligations of the Buyer under these Rules of Auction****." (*Own emphasis added)

[44] It was contended on behalf of De Beers that since De Vos did not furnish the Auctioneer with either a Power of Attorney or a signed Letter of Authority to confirm that he was an agent acting on behalf of Eksteen or Hatari and even sent an email to De Beers purporting to be the owner of Lusaka requesting information, the action must fail because there is no *lis* between Hatari and De Beers.

[45] In *Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Koöperasie Bpk*[6] an appeal was noted against the order of the Judge-President of the Northern Cape Division who upheld certain exceptions and ordered that certain impugned parts of the defence and counterclaim be struck out. The contention by the defendant was that, although he concluded the agreement of sale with the plaintiff for 3 000 boxes of seed potatoes (saadaartappels), he in fact acted on his own behalf and on behalf of two undisclosed principals. Potgieter JA remarked[7]:

> *"In passing it may be pointed out that the rule does not appear to have created unfair or unjust consequences for contracting parties. In fact, even though this doctrine has been criticized even in American and English law, it is also accepted that, as far as trade is concerned, it works effectively in practice. In Corbyn on Contracts,*

[6] [1972] 2 All SA 1 (A)

[7] "In die verbygaan kan daarop gewys word dat die reël skynbaar nie onbillike of onregverdige gevolge vir kontrakterende partye tot stand gebring het nie. Trouens, ofskoon selfs in die Amerikaanse en Engelse reg daar kritiek uitgeoefen is op dié leerstuk, word tog ook aanvaar dat, vir sover dit die handelsverkeer betref, dit in die praktyk doeltreffend werk. In Corbyn on Contracts, 2de uitg., para.603, bl.623, wat oor die Amerikaanse reg handel, sê die outeur:

2nd ed., para.603, p.623, dealing with American law, the author says:

"The agent who contracts as principal is bound exactly as if he were principal. The other contractor gets everything that he contemplates; somewhat more, indeed, for on disclosure of the agent's principal, he can hold that party also. It is true that the undisclosed principal can also enforce the contract against him. This comes as a surprise, and may give some disagreeable sensations; but this is not regarded as so serious as to cause injustice. The law of agency developed in that fashion in spite of objections often made; and such is the result. The fact that the undisclosed principal can sue on the contract does not change in any way the terms or conditions of the contract. If the contract required a performance by the ostensible principal who made the contract, that requirement persists throughout. The matter is dealt with exactly as it is in the case of assignment; and the undisclosed principal sues exactly as if he were an assignee. No more than in case of assignment is there a mistake of parties.

In Friedman on Agency, wat handel oor die Engelse reg, sê die outeur:

"This anomalous doctrine has been heavily criticised as being 'unsound', 'inconsistent' with elementary principles' and 'unjust'. However, its origin, while uncertain, seems of reasonable antiquity, substantial solidity and eminent judicial respectability."

In the circumstances, the case of *Cullinan* affirms that the doctrine of undisclosed principal has been accepted as part of our law virtually for time immemorial.

[46] Mr Majozi contended that the Rules of Auction are the terms and conditions of the agreement and consequently, because De Vos' action went outside the parameters of the rules, this Court cannot change the terms of the agreement to suit a party. Counsel further submitted that the Rules of Auction expressly prohibited Hatari to assume the position of the undisclosed principal. This submission cannot be correct. It is a question of interpreting both clauses 25 and 26. Wallis JA made these pronouncements in *Natal Joint Pension Fund v Endumeni Municipality*[8] pertaining to the correct approach to interpretation:

[8] 2012 (4) SA 593 (SCA) at para 18

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax..."

[47] Clause 25 makes plain that a Power of Attorney is required from a person who buys on behalf of a principal prior to commencement of the auction. But there is a proviso that should the sale proceed without the Power of Attorney, the buyer/agent, in this instance, De Vos, would be personally liable for payment because he bound himself as co-principal debtor with his principal, Hatari. The same applies to Clause 26. If a person acts on behalf of an entity without a Letter of Authority, he or she would be held personally liable for payment because they bound themselves as co-principal debtor with their principal. I find that the Rules of Auction, properly construed, do not exclude agency as contended for by the defendant.

[48] In *Sasfin Bank Ltd v Soho Unit 14 CC t/a Aventura Eiland and Others*[9] where the plaintiff, relying on a written rental agreement entered into between Sunlyn Investments (Pty) Ltd and the first defendant, claimed an amount of R152,060.91 as arrear rental. The defendants noted an exception to the plaintiff's particulars of claim arguing the absence of any indication in the written agreement that Sunlyn acted in a representative capacity. The following was said in *Sasfin*[10] with which I agree:

"[19] Whatever the true basis and/or justification for the application of the principles of the so-called doctrine of the undisclosed principal might be, it seems to be clear that it is not to be regarded as a variation or an amendment of the agreement entered into between the intermediary (agent)

[9] 2006 (4) SA 513 (T)

[10] Ibid at 519 paras 19 to 21

and the third party. ***The contract is concluded between the intermediary and the third party, and the original obligations (used in the sense described supra), with the respective rights and duties flowing therefrom, remain unchanged and unaffected when the undisclosed principal announces himself.*** *The third party can still sue the intermediary in terms of the contract and, in fact, has the option to, instead thereof, sue the principal which has now come to the fore. The intermediary and the principal therefore become liable to the third party in the alternative, at his choice.*

[20] The contract concluded between the intermediary and the third party is not varied or amended in any way and, ...cannot preclude the plaintiff to enforce the rights as if it were a party to the agreement. This explains why extrinsic evidence will generally be admissible to identify the principal. Muller en 'n Ander v Pienaar 1968 (3) SA 195 (A) at 204. Notably, this also seems to be the position in English law. Chitty on Contracts op cit in para 2253.

[21] The position of the undisclosed principal is, therefore, in my view, similar to the position of a cessionary when he seeks to enforce the right against the third party, which right had been conferred on the intermediary (agent) at the conclusion of the agreement. This equation is also made by Van der Merwe et al Contract: General Principles 2 ed at 243, where it is stated:

'This means, on the one hand, that the mandator may come forward, disclose his identity and claim directly from the third party as if the mandator were the real creditor. In effect, he is treated as a cessionary of his mandatory. On the other hand, it means that, if the third party becomes aware that his co-contractant was actually a mandatory, he may elect as his debtor either the mandator or the mandatory.'"

[49] It is noteworthy that there is no discernible attack by De Beers on the evidence of Eksteen or De Vos' direct evidence pertaining to the oral mandate agreement. The only attack, which was persistent, relates to the contention that Lusaka was sold to De Vos and not to Hatari. The principal, Hatari, has stepped forward to enforce its right, releasing the intermediary, De Vos, from all the rights and duties flowing from the contract because he is substituted by Hatari. Had Hatari not stepped forward, De Vos

would have been liable to De Beers for payment of Lusaka or any other obligation relating to its purchase.

[50] Mr Majozi relied, inter alia, on *Karstein v Moribe and Others*[11] in contending that the Rules of Auction, truly construed, precluded the operation of the doctrine of the undisclosed principal. However, Ackermann J has set out the limitations imposed on the doctrine where the undisclosed principal will be unable to sue the third party at 294D -E: One is where the contract is made with the agent for reasons personal to the agent which induced the other party to contract with the agent. Secondly, where the contract is one in respect of which the agent cannot assign his rights. Thirdly, where the contract is one where the third party is relying on the personal skill (or solvency) of the agent. Summarising these limitations Ackermann J says the following:

'*If the identity of the person with whom the third party is contracting is material to the making of the contract, then the failure to disclose the fact that the agent is acting on behalf of a principal will deprive the principal of the right to sue on the contract.*'

[51] Mr Zietsman submitted that De Beers was selling Lusaka by way of a public auction to the highest bidder, irrespective of the buyer's identity and whether De Vos had disclosed the identity of Hatari prior to the auction to the Auctioneer or not, it would not have prevented him or discouraged De Beers from selling Lusaka to Hatari. I agree.

[52] I am satisfied that the limitations outlined by Ackermann J are not applicable in the present case. Hatari does not acquire the right to sue De Beers by reason of a contract entered into between De Beers and the undisclosed principal but the contract that came into existence between De Beers and De Vos. Hatari acquires the right to sue De Beers *ex lege* or, put differently, by virtue of the

[11] 1982 (2) SA 282 (T)

operation of the undisclosed principal. Hatari's position is the same as that of De Vos (the purchaser) who stepped into the shoes of the agent.

It is for these reasons that I am further satisfied that it is the plaintiff (Hatari) that purchased Lusaka as the undisclosed principal.

[53] Mr Majozi went to great lengths in an effort to discredit De Vos for the incorrect information that Lusaka was his when he requested his DNA information from De Beers. De Vos admitted in cross-examination that the contents of the email were incorrect and furnished this explanation:

> "*…it was a white lie to keep my integrity and reputation about my status in the game industry. We bought a lot for other people, and at auctions, if I am on a telephone, we would get publicity. So if you get publicity, people see you as buyers, and they would support you at auctions.*"

De Vos was asked whether he would lie again to protect his status and, while answering in the negative, added that he is no longer focusing on the game industry. De Vos' other evidence pertaining to his attendance of the Xtreme Auction on the day in question or his buying power in general or attendance at other auctions was not challenged. It is significant to note that De Vos' evidence corroborated the evidence of Eksteen on all other material aspects.

[54] Mr Majozi, relying on *National Employers' General v Jagers*[12] urged me to disregard De Vos' evidence in its entirety as he was not a truthful witness. But this submission overlooks the proper approach to be followed when assessing evidence. In *S v Chabalala*[13] Heher AJA then, made these illuminating remarks:

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[12] 1984 (4) SA 437 (E) at 440E – 441A

[13] 2003 (1) SACR 134 (SCA) at para 15

> *"[15] The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence,* ***taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides*** *and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party …was decisive but that can only be an ex post facto determination and* ***a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence.*** *Once that approach is applied to the evidence in the present matter the solution becomes clear. (Emphasis added).*

This approach, in my view, of assessing the evidence holistically, is equally applicable in civil matters. I therefore find De Vos' evidence not only relevant and credible but also acceptable. It must be borne in mind that he misrepresented the facts on the email but did not lie in court. He commendably admitted his folly.

[55] The second issue for determination is whether the defendant negligently represented to plaintiff that Lusaka was sired by a Sable bull known as Y1 Inglewood, that is, the negligent misstatement.

[56] De Beers pleaded in this manner at para 4.1 of the defendant's plea:

> *"At all material times preceding the sale of Lusaka to Seacow Properties (Pty) Ltd, the defendant was* ***under the bona fide but mistaken belief that Lusaka was sired by Y1 Inglewood."***

The defendant therefore concedes that it offered Lusaka to prospective buyers as a Sable bull sired by Y1 Inglewood. The plaintiff was among the prospective buyers. De Beers does not

deny that the representation is false but qualifies it as a mutual mistake between the parties. So what stands to be determined is whether when making the statement De Beers was negligent, wilful or innocent.

[57] Nugent JA in *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd* 2002 (3) SA 688 (SCA) at 695 para 17 held:

> *"[17] It is well established that a negligent misstatement causing economic loss is actionable in our law. In Bayer South Africa (Pty) Ltd v Frost 1991 (4) SA 559 (A) at 568B - D Corbett CJ set out the requirements of the action as follows:*
>
> *'. . . (A) delictual action for damages is available to a plaintiff who can establish (i) that the defendant, or someone for whom the defendant is vicariously liable, made a misstatement to the plaintiff; (ii) that in making this misstatement the person concerned acted (a) negligently and (b) unlawfully; (iii) that the misstatement caused the plaintiff to sustain loss; and (iv) that the damages claimed represent proper compensation for such loss. (See also Siman and Co (Pty) Ltd v Barclays National Bank Ltd 1984 (2) SA 888 (A) at 911B - C.) The defendant may, of course, have some special defence in law, but the abovestated formulation represents in broad outline what a plaintiff must prove in order to establish prima facie a cause of action on the ground of a negligent misstatement.'"*

[58] Regard must be had to the fact that Hatari is claiming consequential damages flowing from the misstatement and, for it to succeed, it must prove that the statement was made either negligently or wilfully. Hatari's case is based on negligent misstatement. To the contrary, De Beers' pleaded case is based on an innocent misstatement.

[59] In the auction catalogue, which contents relate to Lusaka and which were admitted by De Beers, Lusaka is profiled as its DNA having tested Zambian and sired by Y1 Inglewood (tested Zambian). This matched the specifications sought by Hatari in its breeding programme. For De Beers to make an about turn

claiming that it was a *bona fide* mistake common to both parties is untenable. Notwithstanding De Beers' pleaded case that Lusaka was sired by Y1 Inglewood, Oosthuizen's testimony that the assumption was made because Y1 Inglewood was the dominating bull in the camp, demonstrates negligence on the part of De Beers. According to their testimony, there was daily monitoring of the Sable. If this was the case De Beers would have noticed the behaviour of Inglewood Jnr and weaned him in time from the herd.

[60] The actions by De Beers speaks of an institution acting negligently. Holmes JA succinctly set out the test for liability in *Kruger v Coetzee*[14] as follows:

"For the purposes of liability culpa arises if –

(a) a diligens paterfamilias in the position of the defendant –

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps."

Simply put, the test for negligence is whether a reasonable person in the position of De Beers would have foreseen the harm resulting from its acts or omissions and would have taken steps to guard against the harm.

[61] Evidently, the right age within which to consider weaning the young bulls as propounded by the experts is between 18 and 24 months but that others may become sexually mature and active any time from 13 months of age. I am persuaded that if close scrutiny and monitoring in the camps were carried out De Beers would have foreseen the reasonable possibility that Inglewood Jnr,

[14] 1966 (2) SA 428 (A) at 430E - F

by then not only a sexually mature but also sexually active bull of 22 months, would cover the cows in the sable herd. De Beers should therefore have taken active steps to remove him from the breeding herd to ensure that the profile in the auction catalogue was authentic, namely, that Y1 Inglewood had sired Lusaka.

[62] Undoubtedly, De Beers failed to take reasonable steps to prevent the occurrence. There is nothing in the papers that demonstrates that there were or might have been any steps taken by De Beers to guard against Inglewood Jnr jumping and covering the cows and heifers in the sable herd said to be its father's (Y1 Inglewood) breeding camp. It can therefore not be correct that the misstatement made by De Beers was innocently made because the evidence tilts more towards negligence. De Beers took issue with the aspect of De Vos being the buyer and owner and lying on the email and had urged me to discredit him for that. However, in the context of causation, the criticism levelled against De Vos is of no consequence because it does not relieve De Beers of liability.

[63] The following captions in de Beers' catalogue proclaims excellence and high ethical standards by it:

"Instilled in our management structures is an ethos of sound conservation principles which includes sustainable resource utilisation as well as the breeding of high value game species such as Cape Buffalo, Sable and Roan. Good husbandry practices such as selective breeding, daily monitoring and effective nutritional supplementation of the different herds are all part of our success in breeding fine specimen. …DBCM Ecology Division endeavours to improve on the high standards already set and will continue to supply the market with top quality breeding stock like that which is available here today!"

[64] Unquestionably, De Beers knew that it was supplying breeders with its game hence the statement 'quality *breeding game'.* Lusaka was therefore supplied to Hatari for breeding purposes. De Beers is taking issue with the fact that because Lusaka is the grandsire of

Y1 Inglewood, the challenge that it was not sired by Y1 Inglewood should pale into insignificance. I do not agree. Hatari bought what appeared in the catalogue. That information induced it to buy Lusaka. I am persuaded by the submission that the information pertaining to the sire of a breeding bull is important to the breeding operation of a breeding farmer and should the information be incorrect or misleading, there is bound to be damages suffered as a result thereof. De Beers was under a duty to take reasonable care that the information it supplied to its potential buyers or buyers was correct.

I therefore find that De Beers made the misstatement negligently.

[65] On the question whether the negligent misstatement caused Hatari any loss. As alluded to earlier, the parties agreed that Mr Marius Eksteen signed the agreement between Hatari and Elgondor annexed to the particulars of claim as “H3”. It was further agreed that Hatari concluded that agreement through the signature of Mr Eksteen. This agreement pertains to the sale of 20 sable cows impregnated by Lusaka and sold to Elgondor on the condition precedent that Lusaka’s sire is Y1 Inglewood. The condition precedent in the contract goes hand in hand with the negligent misstatement in that there was reliance placed on Y1 Inglewood being Lusaka’s sire and having tested Zambian. In as far as the element of causation is concerned, the condition precedent was not met. Consequently, Hatari failed to meet the terms of the agreement and suffered consequential damages. In my view, the entire sale was underpinned by the misstatement that Y1 Inglewood had sired Lusaka. Factually, the misstatement caused the loss.

[66] I am therefore satisfied that the plaintiff has established the element of wrongfulness on the part of De Beers. The plaintiff has further satisfied the test for negligence on a balance of

probabilities. In the premises the defendant stands to be held liable for the proven damages suffered by the plaintiff.

[67] In the result, the following order is made:

1. The defendant is liable for all of the plaintiff's proven or agreed damages flowing from the negligent misstatement that Y1 Inglewood is the sire of Lusaka.

2. The defendant is liable to pay the plaintiff's taxed or agreed party and party costs on the High Court scale , until the date of this order, including but not limited to the costs set out hereunder:

   2.1 The costs of senior counsel;

   2.2 The reasonable preparation/qualifying, travelling, accommodation and reservation fees and expenses, if any, of the following expert witnesses:

      2.2.1 Dr M de la Rey;
      2.2.2 Mr RJ Saayman;

   2.3 The costs attendant upon obtaining payment of the amounts referred to in this order.

   2.4 Should the costs not be paid as ordered, within 14 (fourteen) days from the date of the *allocator,* the defendant shall be liable for interest thereon at the prescribed statutory rate, calculated from the date of the allocator until date of payment.

3. Mr Richard de Vos is declared a necessary witness.

M.C. MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the plaintiff:	Adv. PJJ Zietsman SC
Instructed by:	Muller Gonsior Attorneys c/o Engelsman Magabane Inc
For the defendant:	Adv. M Majozi (with him Adv A Ngidi)
Instructed by:	Werkmans Attorneys c/o Duncan & Rothman Attorneys