IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 2726/1996

In the matter between:

THE MAIZE BOARD Plaintiff

and

TEMPLE ALBERT HART Defendant

CORAM: **HANCKE, J**

HEARD ON: **27, 28 & 30 JANUARY 2004**

DELIVERED ON: **12 FEBRUARY 2004**

The plaintiff is the Control Board referred to in section 6 of the Maize Marketing Scheme published by proclamation R.45 of 1979, and established in terms of the Marketing Act, 1968 (Act No.59 of 1968).

It is common cause that the defendant concluded two written agreements with Rainbow Chicken Farms (Pty) Ltd., ("Rainbow"), a breeder and producer of broiler chickens, which were entitled respectively as a "lease agreement", and a "management agreement". The terms of the lease agreement were to the effect that the defendant let and Rainbow hired for the particular season farmland situated within the Magisterial District of Harrismith and that Rainbow undertook to plant, grow and harvest, *inter alia,* yellow maize, on the said land.

The terms of the management agreement were to the effect that Rainbow appointed the defendant as its manager to manage the farm operations on the land leased by it in terms of the lease agreement, and that the defendant undertook to supply the necessary labour, machinery, equipment, fuel, expertise and to prepare and fertilize the land, plant seed, apply herbicide and insecticide, cultivate, harvest and produce the said crop and arrange the delivery of the crop to a milling company or at such other place as Rainbow may direct. It is also common cause that thereafter the defendant produced and delivered, according to Rainbow's directions, a crop of yellow maize of 409,263 tons.

It is the plaintiff's cause of action that each of the lease and management agreements were simulated and were concluded in their terms with the intention of disguising that the defendant in fact sold, and Rainbow in fact purchased, the yellow maize produced on the land, and of evading the payment of the levies referred to in paragraph 8 below, on the basis that Rainbow was the "producer" of the crop for its own use and thereby exempt from the said levies, whereas in truth and in fact the defendant was in respect of each such crop the "producer" of it, as defined in the said Maize Marketing Scheme, and therefore the entity obliged to pay the levies. According to the plaintiff's particulars of claim, the said levies ought, according to law, to have been paid by the defendant to the plaintiff which defendant failed to do.

The issues between the parties therefore relate to the question as to whether or not the management agreement and the lease agreement are simulated transactions.

Up until now the plaintiff has called three witnesses, the last of which was Mr Rudman, the attorney for the plaintiff, who testified that he obtained certain documents of the Maize Board, Rainbow Chickens and Verus Farms respectively. In view of the objection made by Mr Ploos van Amstel, counsel for the defendant, to the admissibility of the documents handed in by Mr Rudman, Mr Gordon, counsel for the plaintiff, applied for the admission of these documentary evidence contained in Bundle "X" as evidence in the trial.

The said documents consists, firstly, of an agency agreement concluded between Rainbow and Verus Farm Holdings (Pty) Ltd., on 6 September 1994, and appendices to said agency agreement; secondly, memoranda and correspondence, including Verus progress reports, forward buying contracts, Rainbow internal memoranda and other documents of Verus Farms; and, thirdly, Rainbow internal memoranda.

As far as Rainbow's role in the present litigation is concerned, it appears that clause 17.2 of the management agreement provided that the defendant:

> "irrevocably waives any claims or actions which it may have at any time against Rainbow in respect of any claims of actions, whether at law or administrative, which may be brought against the manager by any government authority, statutory board or the like in respect of the land or the farming operations."

Rainbow in the present action, and apparently in all the other actions, has waived that clause and undertaken the defence of each and every action.

An application to set aside *subpoenas duces tecum* issued at the instance of the plaintiff was lodged three days before the commencement of the present trial. In his affidavit herein Mr Stephen Burridge Heath, legal advisor and company secretary of Rainbow, stated that:

> (Rainbow agrees): "in principle to indemnify each of the individual farmer in respect of the claims brought against them by the first respondent (the Maize Board).
>
> Given the vast number of actions brought individually against the various farmers, it was also necessary to consolidate the legal representation of the defendants. All of the defendants are being represented through attorneys MacCullums Inc of Cape Town appointed at the instance of Rainbow Chickens and at its expense ……
>
> During 1995 Rainbow Chickens appointed Verus Farming and Investments (Pty) Ltd ("Verus"), a company based in Brighton Beach, Durban to administer the maize contracts."

Subsequently Rainbow has either itself or through its attorneys directed the defence of the actions, apparently participated in all the necessary discussions with the plaintiff's attorneys and paid the judgments, interests and costs in the broiler cases which have reached finality.

I agree with Mr Gordon's submission that Rainbow has conducted itself as a party to the action and although it is not the defendant *de iure*, it is the *de facto* defendant or the alter ego of the defendant.

The strategy of Rainbow puts itself in a crucial and advantageous position for example, under the guise that the farmer defendants are independent of it, Rainbow directed the defendant to require the plaintiff to prove its own documents, and those of its agents. The most common way to prove the authenticity of the relevant documents would be to call the author or authors, to identify the documents. **The South African Law of Evidence** (formerly Hoffmann & Zeffertt) by Zeffertt, Paizes and Skeen (2003) p.694. Rainbow has therefore placed the plaintiff at an evidential disadvantage to prove the documents to compel the plaintiff to call witnesses who will manifestly be unhelpful, if not hostile, to the plaintiff and give itself the advantage of the ability to sympathetically cross-examine any witness merely called to identify a document.

As far as the common law in this regard is concerned, Human, J stated the following in **HOWARD & DECKER WITKOPPEN AGENCIES AND FOURWAYS ESTATES (PTY) LTD v DE SOUSA 1971 (3) SA 937 (T) on 940E-G:**

> "The law in relation to the proof of private documents is that the document must be identified by a witness who is either (i) the writer or signatory thereof, or (ii) the attesting witness, or (iii) the person in whose lawful custody the

document is, or (iv) the person who found it in possession of the opposite party, or (v) a handwriting expert unless the document is one which proves itself, that is to say unless it:

(1) is produced under a discovery order, or

(2) may be judicially noticed by the court, or
(3) is one which may be handed in from the Bar, or
(4) is produced under a subpoena *duces tecum*, or
(5) is an affidavit in interlocutory proceedings, or

(6) is admitted by the opposite party."

Bewysreg by C.W.H. Schmidt & H. Rademeyer (4th edition) p.339 - 342
In the case of **BOTES v VAN DEVENTER 1966 (3) SA 182 (A),** Williamson, JA stated the following at **204E:**

"In so far as our law of evidence is presently concerned it is clear that it is a principle of the English law, recognised as applicable here, that a relevant extra-judicial statement by a person who has privity or identity of interest with a party to a suit in relation to the matter in issue in the suit, is admissible in evidence against such party."

The phrase in English law is "in privity". 17 **Hallsbury Laws of England**: para 68 p.53 (4th ed.) Both **Hallsbury** and Williamson, JA referred to the case of **In Re: WHITELEY AND ROBERT'S ARBITRATION (1891) 1 Ch 558 at 563:**

"One of them (i.e. exceptions to the hearsay rule) is, when the party against whom the admission is sought to be read has a joint interest with the party making the admission in the subject matter – and the thing to which the admission relates.

IV Wigmore on Evidence section 1077 p.118 (3rd Ed.) writes:

> "So far as one person is privy in obligation with another, i.e. is liable to be effected in his obligation under the substantive law by the acts of the other, there is equal reason for receiving against him such admissions of the other as furnish evidence of the act which charges them equally. Not only as a matter of principle does this seem to follow, since the greater may here be said to include the less; but also as a matter of fairness, since the person who is chargeable in his obligations by the acts of another can hardly object to the use of such evidence as the other may furnish. Moreover, as a matter of probative value, the admissions of a person having virtually the same interests involved and the motive and means for obtaining knowledge will in general be likely to equally worthy of consideration."

Mr Gordon, therefore, submitted that sufficient privity or commonality of interest existed so as to make the statements contained in the documents of Rainbow and Verus Farms admissible against the defendant. In this regard he referred to the fact that the defendant claims to have an identity of interest with Rainbow to endeavour to lawfully achieve the situation where Rainbow became as a matter of fact the producer of the maize to feed its own animals and thereby avoid the levies. The parties also had a mutual and common interest and a legal obligation to enter into a contract of purchase and sale of the maize without payment of the lawful imposed levies.

It is also appropriate to refer to the remarks of **Wigmore** section 1073 (*op.cit.* at p.90) dealing with the admissibility of third party writing found in the possession of a litigant:

> "The party's possession of a document made by a third person may well be evidence of the party's knowledge of its contents; but is it sufficient to justify an inference of assent to the statements contained therein? It is easy to imagine instances in which such an inference would be fallacious. Yet, since the party may always exculpate himself and disown the inference by proving the true reason for this retention of the document, the question remains whether the mere fact of possession ought not to suffice at the outset to make the document receivable, subject to explanation that may later be made."

It is clear from the approach of McCall, J in **ZUNGU NO v MINISTER OF SAFETY AND SECURITY** **2003 (4) SA 87 (D)** that the common law survives in tandem with the statutes.

Mr Gordon submitted that The Law of Evidence Amendment Act, 1988 (Act 45 of 1988) is a statutory intervention authorising the Court to accept the documents in issue as evidence. According to Navsa, JA in **<u>MAKHATHINI v ROAD ACCIDENT FUND</u> 2002 (1) SA 511 (SCA)** the purpose of the Act is:

> "to allow the admission of hearsay evidence in circumstances where justice dictates its reception."

(p.**521I-J**).

In this regard Van Schalkwyk, J stated the following in **<u>METEDAD v NATIONAL EMPLOYERS' GENERAL INSURANCE CO. LTD</u> 1992 (1) SA 494 (W) at 498 I – 499 G:**

> "It seems to me that the purpose of the amendment was to permit hearsay evidence in certain circumstances where the application of rigid and somewhat archaic principles might frustrate the interests of justice. The exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained might be a far greater injustice than any uncertainty which may result from its admission. ….. There is no principle to be extracted from the Act that it is to be applied only sparingly. On the contrary, the court is bound to apply it when so required by the interests of justice."

In the present case the issues between the parties relate to the question as to whether or not the management agreement and the lease agreements are simulated transactions. It is therefore necessary to consider, *inter* *alia*, the interpretation of the clauses contained in the agreements, how the agreements were in fact formed as well as the intention of the parties when concluding the agreements. In **ERF 3183/1 LADYSMITH (PTY) LIMITED AND ANOTHER v COMMISSIONER FOR INLAND REVENUE 1996 (3) SA 942 (A)**, Hefer, JA stated the following on **953C-D**:

> "That the parties did indeed deliberately cast their arrangement in the form mentioned, must of course be accepted; that, after all, is what they had been advised to do. The real question is, however, whether they actually intended that each agreement would *inter partes* have effect according to its tenor. If not, effect must be given to what the transaction really is."

In **ZANDBERG v VAN ZYL 1910 AD 302** the following is stated at 309:

> "Not frequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is; not what in form it purports to be …. But the words of the rule indicate its limitations. The Court must be satisfied that there is *a real intention,* definitely ascertainable, which differs from the simulated intention. For if

> the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances, that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be. The enquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down."

See also **P.W. MICHAU v THE MAIZE BOARD** (unreported case No. 280/2002 (SCA) delivered on 12 September 2003).

The contention of the plaintiff in the present case is that the intention of the parties was to conclude a contract of purchase and sale but clothed it in the wrappings of a lease and management agreement.

Mr Gordon submitted that in view of the fact that all contracts require consensus *ad idem,* it does not help the defendant in the present case were the Court to find that it was the intention of Rainbow to buy his maize, but his intention was to manage his own farm and permit the transfer of ownership to Rainbow in that crops upon separation of the plants. If the Court were so to conclude, there could have been no consensus *ad idem* and accordingly no commonly agreed management and lease agreements. Accordingly, the Court's investigation of the intention of Rainbow is a crucial consideration in achieving a just decision.

It also appears that all of the hearsay documents sought to be admitted as evidence relate to the intention of Rainbow and/or its agents. It appears that Rainbow, which is the party behind the defendant in this case, requires the proof of its own documents extending even to the agency agreement which its own deponent to an affidavit in these proceedings, Mr Heath specifically referred to. The conduct of Mr Heath and Rainbow in this regard should be considered as highly relevant to the determination of the application.

The relevant section of the Act reads as follows:

"**3. Hearsay evidence –**

(1) subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the Court, having regard to –

(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party to which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the Court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice."

The Act requires the Court in terms of section 3(1)(c) of it to have regard to seven considerations or "factors", as they are referred to, which should be regarded as inter-relating and overlapping and judged cumulatively and as a whole. **MAKHATHINI'S**-case *op.cit*. p.**522C**.

It is therefore necessary to consider the factors as set out in section 3(1)(c) in the light of the facts of the present case.

(i) THE NATURE OF THE PROCEEDINGS (Section 3(1)(c)(i))

In view of the decision in **MAKHATHINI v ROAD ACCIDENT FUND** (*supra*) at **522F**, this section requires a consideration in the

widest sense of the nature of the proceedings, i.e. a civil trial during which judicial consideration of a contract is required. The nature of the proceedings is for the recovery of money payable to a statutory body in terms of lawfully imposed levies. According to the evidence at this stage of the proceedings, the other party to the contract, namely Rainbow, appears to be the *de facto* party to the proceedings. As was pointed out in **MAKHATHINI'S**-case (*supra*) at p.**522H,** both the defendant and Rainbow "can counter" the effect of the admission of the hearsay evidence by other means.

It is simple, if it is intended to aver that the documents are taken out of context, that what appears to have been annexures were not in fact annexures and if there are innocent or exculpatory explanations for what was written, then a witness from Rainbow or Verus Farms can be called by the defendant to ensure a complete consideration of the documents and inferences to be drawn therefrom.

Accordingly, on the first factor to be considered, the proper administration of justice within the nature of these proceedings is achievable and well within the ability of the means of the farmer.

(ii) THE NATURE OF THE EVIDENCE (Section 3(1)(c)(ii))

What is required by the sub-section is a characterisation of the evidence sought to be introduced. **MAKHATHINI'S**-case *op.cit.* p.**523A**. The evidence is documentary evidence recording and generally describing the policy, purpose and thinking behind the conclusion of the contracts.

(iii) THE PURPOSE OF THE EVIDENCE (Section 3(1)(c)((iii))

As has been stated above the documents fall within three categories. The first document sought to be admitted is the Agency Agreement. As has been pointed out, this agreement has been relied upon in proceedings before this Court by Mr Heath and was concluded by Rainbow and Verus Farms represented by Vermaak on 6 September 1994, almost two months before the agreements in the present matter were signed. I can see no reason why this document should not be admitted.

The value of the document is its terms where Verus was appointed the “manager of Rainbow’s maize growing” operations and received remuneration therefore. The Verus documents are relevant as reflective of the true intention of both the manager (Verus) and its employer (Rainbow) to have entered into and to continue to enter into agreements of purchase and sale. The relevance of the Rainbow documents is to prove that Rainbow at board level considered the contracts to be or at the very least have elements of a contract of purchase and sale.

The purpose for which the evidence is tendered is to establish the relationship between Rainbow and Verus Farms, the real intention of Rainbow in entering into the contracts as well as the inferences which can be drawn therefrom.

(iv) THE PROBATIVE VALUE OF THE EVIDENCE (Section 3(1)(c)(iv))

This section requires that the probative value of the evidence be considered. **<u>MAKHATHINI'S</u>**-case *op.cit.* p.**523I**. This gives rise to questions of relevance and reliability. In so far as reliability is concerned there is no reason to doubt the reliability of the evidence of a contract concluded by Rainbow and relied upon by Mr Heath in the aforesaid proceedings. There is also no reason to doubt the reliability of the documentary evidence which, *ex facie*, is created by Rainbow or its agent and which was obtained by Mr Rudman and adv. Lingenfelder at inspections at the relevant premises.

In totality these documents reflect intentions, understanding and descriptions which are relevant to the state of mind of one of the contracting parties. They are also relevant because they apparently form a part of a very broad scheme or arrangement which operated in all the major maize growing areas of the Republic and which had the effect, as Mr Du Plessis the one witness in his unchallenged evidence testified, to destabilize the maize industry.

(v) WHY EVIDENCE IS NOT GIVEN BY THE AUTHORS OR CREATORS OF THE DOCUMENTS (Section 3(1)(c)(v))

The most common way or method of proof of the documents and their contents would require the plaintiff to call witnesses manifestly unhelpful to the plaintiff's case to testify and create the opportunity where even the identification of a document could result in a sympathetic cross-examination occurring within the ambit of the plaintiff's presentation of his case. The proper administration of justice within the context of our adversarial system could be diminished by a Court giving in to stratagems such as that adopted in the present case and likely to be adopted in the monolith of cases in waiting.

(vi) PREJUDICE TO THE DEFENDANT (Section 3(1)(c)(vi))

One of the perils of hearsay evidence which must be faced whenever hearsay evidence is sought to be introduced is the inability on the part of a party to test by cross-examination the accuracy of the hearsay evidence. **S v RAMAVHALE 1996 (1)**

SACR 639A on 649J; **<u>MAKHATHINI'S</u>**-case (*supra*) at **524D-F**.

As already mentioned earlier in this judgment, the defence in this case is managed and directed and paid for by Rainbow. In the light of Rainbow's active participation in similar cases, the suggestion that there is an independence and/or separation between the defendant and Rainbow within the context of the present litigation appears to be absurd when in reality there is identity of interest and support.

(vii) OTHER FACTORS (Section 3(1)(c)(vii))

In this regard

> "…. the Court is required to take into account any other factor, which must reflect to any relevant factor not yet covered by any of the preceding categories."

(**<u>MAKHATHINI'S</u>**-case (*supra*) at **524G**).

Mr Gordon has not referred to any such factors.

Mr Ploos van Amstel, on behalf of the defendant, argued that these documents have not been authenticated and that they are therefore inadmissible. In this regard he, *inter alia*, referred to Rudman's evidence that he obtained some of the documents from the plaintiff.

The documents found in possession of Rainbow and/or Verus Farm Holdings (Pty) Ltd., as well as the affidavit of Mr Heath, with annexures thereto, filed under Case No. 2726/96 appear to be *prima facie* authentic documents. There is doubt regarding the authenticity of documents obtained by Mr Rudman from the plaintiff, because the source of these documents is unclear. As long as this is the situation, these documents are inadmissible as evidence.

Having regard to all the factors set out in section 3(1)((c)(i) to (vii), and the circumstances dealt with above, I regard it in the interest of justice that the first mentioned documents be admitted as evidence. It also follows that upon the application of common law principles the statements of Rainbow and Verus, and found in their possession, are admissible against the defendant, subject to what is stated above. **H & D WITKOPPEN AGENCIES AND FOURWAYS ESTATES (PTY) LTD v DE SOUSA** (*supra*) at **940E-G**, and authorities referred to above. As to the weight to be attached to this evidence, a final decision can only be made at the conclusion of the trial.

I accordingly rule that the documents mentioned above and contained in Bundle "X" are admitted as evidence in the present trial.

S.P.B. HANCKE, J

<u>On behalf of Plaintiff:</u>	Adv. D.A. Gordon SC assisted by: Advv. S. Joubert & E.J.B. Lingenfelder instructed by: Bezuidenhout, Milton Earle Inc.
<u>On behalf of Defendant:</u>	Adv. J.A. Ploos van Amstel SC assisted by: Adv. A. Stokes instructed by: Webbers

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