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**
8, 9, 11 NOVEMBER 2004

DELIVERED ON: **18 NOVEMBER 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 described 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 levies 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.

<u>THE EVIDENCE:</u>

The first witness, on behalf of the plaintiff, was Mr. Leon du Plessis. He testified as to the structure of the Marketing Schemes and legislation relevant to the production of yellow maize. According to him the plaintiff became an exporter of maize and the delivery price to the export pool was set as R330,00 per ton for the 1995/1996 marketing season. In terms of the management agreement the price per ton was set at R394,80.

Professor Hammes was called as an expert agronomist to evaluate the relevant maize farming method on behalf of the plaintiff. He was critical of the composition of the budget which forms part of schedule 1 of the Management Agreement. He said it looked as if the budget had been put together to arrive at a figure of R875,00 per hectare. He further said it made no sense for several farmers in the Eastern Free State to have exactly the same provision for example for chemicals and although he disagreed with the farming methods supposedly to have been adhered to, he conceded virtually everything that was put to him in cross-examination.

Mr. S.G. Smith, a practising chartered accountant, testified that the defendant was paid the full contract sum of R131 250,00 during

December 1994 and he also levelled certain criticism with regard to the financial statements, which Mr. Kemp prepared for the Receiver of Revenue on behalf of the defendant.

The sum of R131 250,00 represented the rent, the management fee and the fixed costs. Mr. Hart could not remember why the full amount was paid in December 1994, and not later, as the schedule provided. It made practical sense for the full amount in respect of the fixed costs to be paid at an early stage and there is nothing sinister about the payment of the rent and management fee in December, rather than in April or June. As for the financial statements, they were prepared by Mr. Kemp, who is a bookkeeper in Harrismith. Mr. Smith, being a chartered accountant, was critical of the way in which the statements were prepared, but conceded that from the Receiver of Revenue's point of view there was no prejudice because "the loan in the 1995 statement was reflected as income in the 1996 statement". The fact that rent and management fee were reflected under farming income, was simply how Mr. Kemp reflected it, and from a tax point of view it made no difference, although it could amount to bad bookkeeping practice. It should be noted that in the 1996 statement under farming income, the fixed production costs, the maize production bonus, the management fee and the rental are all described as such. The evidence of Mr. Smith, in my view, does not take the case any further.

After the plaintiff's case was closed, the defendant, Temple Albert Hart, testified that after he attended a meeting at Harrismith, he signed the management and lease agreement on 26 October 1994. According to him Rainbow explained that they would lease the land from him and provide money for input costs. He would then produce maize for them. He testified that there was a severe drought in the Eastern Free State in the 1991/1992 years and after 1994, when the new government came into power, it was clear they would not assist the farmers. The defendant testified that the main attraction to him of the Rainbow scheme was that his risk was removed. Rainbow would pay all the input costs together with a rental and management fee, and would bear the risk in the crop. The defendant did not know what the hedging rate meant. He was interested in the sum of money allowed per hectare for the growing of the maize and the break-even yield. If he failed to produce the break-even yield he would suffer no loss and would still receive his rent and management fee. If he did better, he would receive a production bonus.

The defendant was adamant that nobody discussed with him the purchase of his maize, or a price of maize per ton. What concerned him was the amount paid per hectare and whether he could achieve the break-even yield. The defendant regarded the maize as belonging to Rainbow and he provided Rainbow with regular reports with regard to the crop.

The levy system was abolished in about 1997. In spite of this the defendant, and many other farmers, continued to farm on the same basis, that is they leased their lands to Verus Farms and managed the farming operations. Verus Farms pays for the input costs and bears the risk relating to the crop, and the farmer earns a production bonus if he produces more than the break-even yield.

Mr. Andrew Geard Waller, Rainbow's group auditor testified in conclusion. According to him Rainbow acquired maize in three ways namely firstly, it purchased maize at a ruling price, secondly, it had “maize contracts” (which he said was a reference to the management and lease contracts such as those between the defendant and Rainbow) and thirdly, it concluded forward buying contracts. The expenses incurred by Rainbow with regard to the input costs and the rent and management fees were reflected in Ranbow’s annual financial statements under the heading “crops”, which was reflected as part of the stock. Mr. Waller explained that the amounts reflected in respect of crops, represented the costs incurred by Rainbow. In order to satisfy the auditors that there was an asset which represented the expense incurred, the farms were inspected by the auditors and they satisfied themselves that there was a corresponding asset and that the expense could be reflected as the then value of the asset.

THE AGREEMENTS:

The Management and lease agreements were concluded on the same day. Rainbow leased 150 hectares from the defendant in order to grow maize, and appointed the defendant to manage the farming operations for it. In terms of the Management Agreement -

a) the duties of the manager were set out in clause 5 thereof;

b) the defendant would be paid a specified amount per hectare in respect of fixed costs;

c) the defendant would be paid a basic remuneration of R30,00 per hectare for managing the farming operations;

d) the defendant would be paid a bonus per hectare calculated in accordance with the formula in schedule 1 should he achieve the minimum yield reflected in schedule 1;

e) Rainbow would at its own expense supply seed, fertilizer, herbicide and insecticide;

f) In the event of a crop failure Rainbow would pay the defendant his fixed costs, extended to the date of such occurrence;

g) Rainbow would insure the crop against hail and the proceeds of the policy would be solely for Rainbow's benefit.

As far as the agreement of lease is concerned, Rainbow leased the land reflected in schedule 2, being 276 hectares, at a rate of R30,00 per hectare. Due to late rains the defendant only planted

150 hectares, and was only paid rent for 150 hectares. The rental was payable within 14 days of the effective date or the date of signature, which ever be the latter.

THE LAW:

If Rainbow produced its own maize and fed it to its chickens, no levies in terms of the scheme would have been payable. That would not have been an improper evasion of the levies or a destabilisation of the industry. The position would be the same if Rainbow produced the maize or leased land, farmed for it by a manager. The fact that Rainbow may have elected to do so in order to obtain maize more cheaply because no levies would be payable, is irrelevant. **MICHAU v MAIZE BOARD 2003 (6) SA 459 (SCA) at 463 I – 464 E.**

The onus to prove simulation is upon the plaintiff. **ZANDBERG v VAN ZYL 1910 AD 302 at 314.**

The law in this regard has been restated in the decision of the

Supreme Court of Appeal in **ERF 3183/1 LADYSMITH (PTY) LTD AND ANOTHER v COMMISSIONER FOR INLAND REVENUE 1996 (3) SA 942 AD,** subsequently affirmed in **MICHAU v MAIZE BOARD (***supra***) at 464.**

In the Ladysmith case, Hefer, J.A. paid considerable attention to the application of well known principles of our law, firstly, the principle which permits parties to arrange their affairs so as to remain outside the provisions of a particular statute, most notably revenue statutes; and secondly, the principle that a court of law will not be deceived by the form of a transaction and will look behind the wrapping and examine its true nature and substance.

The *locus classicus* on the subject of simulated transactions is the judgment of Innes J. in **ZANDBERG v VAN Zyl** *supra* where he stated the following at 309:

> "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."

In **COMMISSIONER OF CUSTOMS AND EXCISE v RANDLES, BROTHERS AND HUDSON LTD 1941 AD 369** the following is *inter alia* stated at 395 – 396:

> "A transaction is not necessarily a disguised one because it is devised for the purpose of evading the prohibition in the Act or avoiding liability for the tax imposed by it. ……

A disguised transaction in the sense in which the words are used above is something different. In essence it is a dishonest transaction: dishonest, in as much as the parties to it do not really intend it to have, *inter partes*, the legal effect which its terms convey to the outside world……
Of course, before the Court can find that a transaction is *in fraudem legis* in the above sense, it must be satisfied that there is some unexpressed agreement or tacit understanding between the parties."

Mr. Gordon, counsel for the plaintiff, submitted that Rainbow and the defendant neither intended nor performed the two agreements between themselves in accordance with their tenor. He argued that the true agreement between the parties was one of purchase and sale. He submitted that a lease of land to grow crops and a management agreement in terms of which the farmer of the land is to manage the crop ought to be simple to draft. Instead, in the instant case, the agreements are complex, unduly obtuse, and the endeavour to interpret them requires a "hopping" from one part to the other, and sometimes from one agreement to the other. He also submitted that both agreements are so lacking in clarity that this court would be justified in finding that they were never intended and could not be implemented.

It is important to note that on 8 April 2004 Hugo J. delivered a judgment in a Natal Provisional Division in a matter of **THE MAIZE BOARD v JACKSON (Case No. 1867/1996).** The management agreement and the lease agreement in that case were in identical terms to the agreements in the present matter, save that the formula for the production bonus, the farming budget and obviously the lands were different. Hugo J. dealt in the said judgment (p. 9 onwards) with "certain curiosities" in the agreement raised by Mr. Gordon in argument before him. I am in agreement with what was said in that judgment, namely that the parties are "not prisoners of their agreement" and that it does not take the plaintiff's case any further.

Even on the assumption that the agreements are unduly obtuse and complicated, what is important in the present case, are the advantages of the agreement, especially to the defendant, namely that he would not bear the risk of drought, or other disasters. Rainbow paid all the production costs, including the preparation of the land, seed, fertilizer, insecticide and pesticide. In addition, the defendant was paid a rental and management fee. If the crop failed, it was Rainbow's crop that failed. The defendant would still receive his rental in terms of the lease agreement and his remuneration in terms of the management agreement. There was an incentive for the defendant to produce as high a yield as possible. If the yield was lower than break-even, then the defendant would receive nothing in addition to his rental and remuneration. If he did better than break-even, he would receive a production bonus. These advantages appear to me to outweigh the fact that no levies would be payable because Rainbow would feed its own maize to its own chickens. It is also important to note that after the levy system was abolished, the defendant, and many other farmers continued to farm on the same basis – that is they leased their lands to Verus Farms and managed the farming operations, Verus Farms pays for the input costs and bears the risk relating to the crop, and the farmer earns a production bonus if he produces more than the break-even yield. It is clearly not a scheme designed to avoid levies, because there were no longer any levies.

Mr. Gordon criticised the defendant and submitted that he was not a satisfactory witness especially in view of his alleged "amnesia" of exactly what happened at the Harrismith meeting, and the fact that he knew nothing about levies where Mr. du Plessis testified to the fact that the levies had created the gap between the relevant prices. I do not agree with this submission. Mr. Hart made a favourable impression in the witness box and appeared to me to be an honest witness who gave his evidence to the best of his ability, having regard to the fact that the events to which he testified happened 10 years ago. His main interest was the sum of money allowed per hectare for the growing of the maize and the break-even yield. At that stage he was a young farmer who was concerned about the drought and the risks involved in farming operations. This scheme provided him with some financial security.

CONCLUSION:

In view of the a foregoing I am of the view that the plaintiff failed to establish, on a balance of probabilities, that the defendant's intention was anything different from what is contained in the management and lease agreements or that the management agreement and the lease agreement were simulated transactions.

Accordingly the plaintiff's claim is dismissed with costs, such costs to include the costs of two counsel.

S.P.B. HANCKE, J

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