THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Not reportable

CASE NO: 248/05

In the matter between :

THE MAIZE BOARD Appellant

and

TEMPLE ALBERT HART Respondent

Before:	**STREICHER, BRAND & JAFTA JJA**
Heard:	**16 FEBRUARY 2006**
Delivered:	**7 MARCH 2006**
Summary:	**Contracts – simulation – effect to be given to true agreement between parties**
Neutral citation:	**This judgment may be referred to as The Maize Board v Temple Albert Hart [2006] SCA 4 (RSA)**

J U D G M E N T

STREICHER JA

STREICHER JA:

[1] The issue to be decided in this appeal is whether two agreements respectively styled 'Agreement of Lease' and 'Management Agreement' entered into between Rainbow Chicken Farms (Pty) Ltd ('Rainbow') and the respondent were what they purported to be or whether the true transaction was one of purchase and sale. It is common cause between the parties that, if the latter was the case, certain levies were payable by the respondent to the appellant in respect of maize produced on the land which was 'leased' to Rainbow. In an action instituted by the appellant against the respondent for the payment of such levies the High Court in Bloemfontein held that the transactions were not simulated and dismissed the action but granted leave to the appellant to appeal to this court.

[2] The respondent is a farmer who farms on the farms Gryskop, Molen River and Quarriekop in the district of Warden. Rainbow is a breeder and producer of broiler chickens. The appellant is the control board in terms of the Maize Marketing Scheme ('the Scheme') published by Proclamation R45 of 16 March 1979 in Government Gazette 6349 in terms of the now repealed Marketing Act 59 of 1968 ('the Act').

[3] In terms of ss 23 and 24 of the Scheme a levy and special levy and in terms of s 46A of the Act a general levy payable to the appellant was imposed upon certain producers of maize who sold the maize otherwise than to the appellant or who utilized the maize otherwise than for household consumption or to feed their own animals. At the relevant time a single channel system was used in respect of the marketing of maize. A producer could sell and deliver his maize to a co-operative acting as agent of the appellant and receive the nett producer price. The appellant would then sell the maize into the domestic market at the consumer price. Both the producer price and the consumer price were set by the appellant with the approval of the Minister of Agriculture before the commencement of a

marketing season, the marketing season being the period 1 May of a year until 30 April of the next year. For various reasons the gap between the producer price and the consumer price widened considerably by the late 1980's. This caused dissatisfaction manifested by threats by different individuals and corporations that if the issue of the widening gap was not addressed, they would find ways and means to bypass the Scheme.

[4] Rainbow itself devised schemes intended to avoid the obligation on the part of the farmer to pay the maize levy. The object of the schemes was to achieve a higher income to the farmer and a lower expenditure on the part of Rainbow. In terms of one of these schemes Rainbow entered into two agreements with farmers namely an agreement of lease, purchase and sale and a management agreement. In terms of the former agreement the farmer concerned hired a broiler site from Rainbow who undertook to sell to the farmer day-old chickens and to repurchase them at the end of the growing cycle. In terms of the latter agreement Rainbow undertook to manage the broiler operation on behalf of the farmer and to procure the milling and processing of the maize which was to be provided by the farmer for the feeding of the chickens. This scheme was the subject of the litigation in the case of *Michau v Maize Board* 2003 (6) SA 459 (SCA). It was contended that Michau, the farmer who had contracted with Rainbow, utilised the maize produced by him to feed his own animals and that no levies were consequently payable by him. This court held, on the particular facts of that case, that the true nature of the transaction was one of purchase and sale of Michau's maize and that levies were payable by Michau to the appellant.

[5] In terms of another scheme the farmer leased his land on which he cultivated maize to Rainbow and at the same time concluded a management agreement with Rainbow in terms of which it was agreed that the farmer would manage the farming activities on the leased land on behalf of

Rainbow. This scheme was the subject of the litigation in *Maize Board v Jackson* 2005 (6) SA 592 (SCA). In this case it was contended that Rainbow was the producer of the maize and that it was utilising the maize so produced to feed its own animals. Again this court held that, on the particular facts of the case, the true nature of the transaction was one of purchase and sale and that levies were payable by Jackson to the appellant.

[6] In the present case the respondent and Rainbow entered into an 'agreement of lease' and a 'management agreement' similar to the agreements between Jackson and Rainbow. As in the case of *Jackson* the respondent contended that the maize delivered by him to Rainbow was produced by Rainbow on lands leased by it and that Rainbow was utilising the maize so produced to feed its own animals. It does not follow that the transactions, having been found to be simulated in *Jackson*, were also simulated in the case of the respondent. In each case one has to determine what the true agreement between the parties was. In the words of Hefer JA in *ERf 3183/1 Ladysmith (Pty) Ltd v Commissioner for Inland Revenue* 1996 (3) SA 942 (A) at 953C-D: '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.' That is so because 'the law regards the substance rather than the form of things'.[1]

[7] If the true agreement between Rainbow and the respondent was one of lease and management i.e. if they actually intended that each agreement would have effect according to its tenor, the fact that their object was to avoid the payment of the maize levies cannot serve to make their agreements anything different from what they intended them to be. There was no legal impediment against the conclusion of such a lease and

[1] See *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 547.

management agreement and the parties were free to arrange their affairs so as to remain outside the provisions of the Scheme.[2]

[8] The true intention of the parties to the agreements must be ascertained from all the relevant circumstances, including the manner in which the agreements were implemented.[3] I shall, therefore, proceed to examine the agreements and the manner in which they were implemented.

[9] The respondent signed the agreements on 26 October 1994 and Rainbow did so on 28 December 1994. (For ease of reference I shall refer to the agreements as the agreement of lease and the management agreement although the very issue to be decided is whether or not they actually constituted agreements of lease and management.) The agreements were interdependent. Cancellation of the one resulted in the cancellation of the other.

[10] In terms of the agreement of lease the respondent leased to Rainbow the land defined as 'the property more fully described and depicted in Schedule II' to the agreement. However, the only document annexed to the agreement of lease is a document which is not identified as Schedule II and which contains sketches made and signed by the respondent.

[11] In terms of the management agreement Rainbow appointed the respondent as manager to manage the farming operations on the land on Rainbow's behalf. As in the case of the agreement of lease the land is defined as the property described and depicted in Schedule II. However, the management agreement only has a Schedule I annexed to it.

[12] The respondent thought and the matter was presented and argued on the basis that the sketches referred to constituted the Schedule II referred to in both the agreement of lease and the management agreement and that Schedule I, annexed to the management agreement, also constituted Schedule I referred to in the agreement of lease. According to the

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[2] See *Erf 3183/1 Ladysmith (Pty) Ltd* at 951A-C).

[3] See *Michau* at 464D-E.

inscriptions on the sketches they depict the ‘Lands Planted for Rainbow’ on the farms Gryskop, Molen River and Quarriekop in the district of Warden. The lands depicted comprise 143,10 ha , 76,9 ha and 56 ha in the case of Gryskop, Molen River and Quarriekop respectively i.e. 276 ha in total. However, according to the respondent the inscription ‘Lands Planted for Rainbow’ was wrong and should have read ‘Lands intended for Rainbow’ as the planting only started in November i.e. after the agreements had been signed by the respondent and after the sketches had come into being.

[13] The rent payable by Rainbow was to be the amount reflected in Schedule I per ha of the land upon which feed crops were grown. But in terms of Schedule I the rent was payable in respect of 150 ha situated on Gryskop while there were only 143,10 ha available on Gryskop.

[14] The agreement of lease provided that the rent was payable to the respondent within 14 days of the effective date or the date of signature of the agreement whichever was the later. The effective date is defined as the date referred to in Schedule I. However, no effective date is to be found in Schedule I and according to the schedule the rent is payable after planting but not later than 20 December 1994. In the event the rent was included in payments made by Rainbow to the respondent on 13 and 14 December 1994 i.e. the rent was paid even before the agreements had been signed by Rainbow.

[15] In the preamble to the agreement of lease it is stated that the respondent is the owner of the land being leased. The statement is not correct as the respondent’s father was the owner of the land.

[16] Both the agreement of lease and the management agreement were to commence and terminate on the dates reflected in Schedule I. (In the case of the agreement of lease the commencement date was to be the effective date which, by definition, was the date ‘referred to in Schedule I’.)

However, no commencement date or termination date is to be found in Schedule I.

[17] In terms of the management agreement Rainbow undertook to, at its own expense, supply such seed, fertilizer, herbicide and insecticide as were necessary for the farming operations in the quantities and the values reflected in Schedule I and the respondent was obliged to apply herbicide and insecticide upon Rainbow's directions. However, Rainbow never gave any instructions regarding the application of herbicide and insecticide to the respondent and never supplied any of the items referred to, to the respondent. Instead of doing so Rainbow paid an amount that it had budgeted for these items to the respondent and the respondent acquired and used the fertiliser and other items that were in his view required.

[18] The management agreement also provided that the respondent would strictly adhere to and conduct the farming operations according to the instructions given by Rainbow from time to time and that the respondent would under no circumstances deviate from such instructions without Rainbow's consent first had and obtained. However, Rainbow never gave any instructions to the respondent as to how to conduct the farming operations.

[19] In terms of the management agreement the respondent was entitled to and was in fact paid an initial amount of R131 250 and a subsequent amount equal to 0.94 of the market price of maize in respect of the maize produced by the respondent in excess of 333 (150 x 2.22) ton. It follows that the respondent in effect received R131 250 in respect of 333 tons of maize which equates to R394.14 per ton. It so happens that according to documents admitted by the court a quo as evidence on the basis that they were found in the possession of Verus Farming and Investments (Pty) Ltd ('Verus') the 'world price' of maize as at 13 November 1994 was R394,8 per ton. (Verus had been contracted by Rainbow to administer its maize

contracts and the litigation is being funded and conducted on behalf of the respondent by Rainbow.) It is thus clear that the parties in effect agreed that the respondent would be paid for the first 333 tons of maize, an amount equivalent to the 'world price' of maize at the time the agreement was entered into and for the maize produced in excess of 333 tons 0.94 of the market price of maize.

[20] According to Schedule I the amount of R131 250 is made up as follows:

		Per Hectare
Basic remuneration		R 30,00
Rent		R 30,00
Fixed costs		R290,00
Preparatory costs	R 87,00	
Cultivation costs	R 58,00	
Harvesting costs	R145,00	
Direct costs		R525,00
Seed	R 90,00	
Fertiliser	R174,00	
Insecticide	R 26,10	
Pesticide	R 26,10	
Herbicide	R 78,30	
Insurance	R 65,25	
Unspecified	R 65,25	_____
		R875,00

R875/ha x 150 ha = R131 250

[21] Rainbow paid the amount of R131 250 to the respondent in two instalments on 13 and 14 December 1994 i.e before the agreements were signed by it while, apart from the rent, only the fixed costs and the basic remuneration were payable and then only in three tranches, as follows:

A down payment of R150 per ha 14 days after signing of the agreements, 60% of the balance in mid-April and the balance in mid-June. The direct costs purported to be no more than a budgeted figure.

[22] Rainbow undertook, in the event of a total crop failure, to pay the respondent's fixed costs expended to the date of the crop failure, determined by Rainbow in accordance with the estimated operating costs as reflected in Schedule I. However, according to Schedule I such costs formed part of the amount of R131 250 that was paid in December and according to the respondent the amount so paid was not refundable to Rainbow in the case of a crop failure. Rainbow also undertook to insure the crop of feed on the land against the risk of hail damage and the parties agreed that in the event of the feed being damaged or destroyed by hail the proceeds of such insurance would be for the benefit of Rainbow. However, in the event the respondent effected the insurance and ceded the policy to Rainbow. According to Schedule I an amount that had been budgeted in respect of insurance formed part of the sum of R131 250 that was paid to the respondent in December.

[23] The respondent together with other farmers met with a representative of Verus on a regular basis and monthly progress reports on the crop were furnished to him. The representative of Verus also visited the farm and inspected the crop 'to make sure that the money was spent where it was meant to have been spent and to see the progress of the crop'. After the abolition of levies in 1997 the respondent as well as other farmers continued to conclude the same agreements of lease and management with Verus.

[24] The court a quo held that it made practical sense for the full amount in respect of the fixed costs to be paid at an early stage and that there was nothing sinister about the payment of the rent and management fee in December rather than April or June. In this regard it expressed agreement

with the statement by Hugo J in the court of first instance in the *Jackson* matter that the parties were 'not prisoners of their agreement'. The court a quo also referred to the advantages of the agreements to the respondent, namely that he would not bear the risk of drought or other disasters as Rainbow had to pay 'all the production costs, including the preparation of the land, seed, fertilizer, insecticide and pesticide'. In addition, said the court a quo: '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.' These advantages, in the opinion of the court a quo, outweighed the fact that no levies were payable if Rainbow were to feed its own maize to its chickens. In the light of these considerations coupled with the fact that, after the abolition of levies, the respondent and many other farmers continued to farm on the same contractual basis, the court a quo concluded that 'the (appellant) failed to establish, on a balance of probabilities, that the (respondent'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'.

[25] For the reasons that follow I am of the view that the transactions were simulated and that the court a quo erred in finding that they were not.

[26] According to Schedule I payment of the management fee and the rent had to be made on the basis of 150 ha having been planted with maize. However, in terms of Schedule II 276 ha were planted for Rainbow or if the respondent is to be believed, 276 ha were intended to be planted for Rainbow. Furthermore, once again if the respondent is to be believed, planting had not yet started on 26 October when the agreements were signed by the respondent because the rains were late. According to him planting only started in the first or second week of November. The number

of hectares planted with maize could, therefore, not have been known when the agreement was signed by the respondent, consequently the 150 ha, on the basis of which the rent and management fee was allegedly calculated, could have been nothing other than a fictitious figure.

[27] The respondent leased 276 ha to Rainbow and undertook to manage that 276 ha on behalf of Rainbow but rent was according to Schedule 1 only payable on 150 ha which still had to be planted, yet, no arrangement was made in respect of the remaining 126 ha. If only 150 ha were to be planted or had been planted as is suggested by the fact that the rent and management fee were to be calculated on the basis of 150 ha having been planted with maize there was no point in letting 276 ha to the respondent. It is, therefore, unlikely that the parties seriously intended a lease and management contract in respect of 276 ha as the parties purported to do in the agreement of lease.

[28] If the parties to the agreements seriously intended a lease –

a) one would have expected them to take care as to the formulation of the duration of the lease. However, as stated above, neither a commencement date nor a termination date can be found in the agreement;

b) one would have expected Rainbow to make sure that the lessor was the owner of the land.

[29] Likewise, if the parties seriously intended to perform the agreements according to their tenor, the date upon which the rent was payable in terms of the agreements should have been of some importance to them. However, in terms of the agreement of lease the rent was payable to the respondent within 14 days of the effective date or the date of signature whichever was the later, yet, they omitted to state what the effective date was. In addition, the management agreement stipulated a different time for the payment of rent.

[30] The agreements were not implemented according to their tenor. Payments were not made in accordance with the provisions of the agreements, obligations were not performed in terms of the agreements and instructions and directions were never given as envisaged in the agreements. It is true that the parties to the agreements were not prisoners of the agreements but on the other hand in the light of the fact that they acted as if the agreements did not exist, without any explanation as to how it came about and why the agreements were not implemented, the inference has to be drawn that the agreements were not intended to be performed according to their tenor but were nothing more than an attempt to mislead. More so is that the case where there was a considerable amount to be gained by doing so.

[31] Not having intended an agreement of lease and a management contract Rainbow and the respondent must have intended a sale. Rainbow paid the amount of R131 250, an amount equivalent to the 'world price' of maize, to the respondent in respect of 333 tons of maize which still had to be produced and stood to lose that amount in the event of a crop failure. Such a transaction is known as an emptio spei.[4] In respect of maize produced in excess of 333 tons Rainbow undertook to pay 0.94 of the market price of maize. Such a transaction is known as an emptio rei speratae.[5] As the assumption of the risk of a crop failure is consistent with a sale the court a quo erred in relying on such assumption in support of its finding that the lease and management contracts were what they purported to be.

[32] I have not lost sight of the fact that the respondent and Verus are, notwithstanding the abolition of levies, still contracting on the same basis. According to the respondent nothing has changed. If nothing has changed the agreements are still being implemented as agreements of sale. As such

[4] See LAWSA, First Reissue Vol 24 para 15.
[5] Op cit para 14.

they may still be considered to be to the advantage of the respondent and Verus and that is probably the reason why the parties are still contracting on the same basis.

[33] The respondent submitted that the fact that monthly progress reports were furnished to Verus and that a representative of Verus visited the farm and inspected the crop indicated that the agreement of lease and the management agreement were intended to be what they purported to be. However, these actions are in my view equally consistent with an agreement of purchase and sale. Rainbow clearly had an interest in the crop, more so in the light of the fact that it bore the risk of a crop failure.

[34] During argument before us the appellant applied for an amendment to its particulars of claim so as to allege that on a proper interpretation of the lease and the management agreements read with the Scheme and the Act the respondent was the producer of the maize delivered to Rainbow. Having found that the transactions were simulated and that the respondent and not Rainbow was the producer of the maize it is not necessary to deal with the application.

[35] The parties are agreed as to the terms of the order that should in the circumstances be made.

[36] In the result the following order is made:

1 The appeal is upheld with costs, which costs shall include the costs of two counsel.

2 The order of the court a quo is set aside and the following order is substituted therefor:

‘1 Judgment is granted in favour of the plaintiff for the payment of R25 877,70 together with interest thereon at 15,5% per annum from the dates when the levies ought to have been paid to date of payment.

2 The defendant is ordered to pay the costs of the action including the costs of two counsel and Professor Hammes and Mr Smith are declared to have been necessary witnesses.

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STREICHER JA

BRAND JA)

JAFTA JA) CONCUR