REPORTABLE
Case No 280/2002

In the matter between:

PETRUS WILLEM MICHAU Appellant

and

THE MAIZE BOARD Respondent

CORAM : HARMS, SCOTT *et* HEHER JJA
HEARD : 15 AUGUST 2003
DELIVERED : 12 SEPTEMBER 2003
Simulated contract – effect given to its true nature

J U D G M E N T

SCOTT JA/…

SCOTT JA:

[1] The appellant farms maize in the district of Harrismith, Free State. On 27 July 1994 he entered into two written agreements with Rainbow Chicken Farms (Pty) Ltd ('Rainbow') which carries on business as a breeder and producer of broiler chickens. The one was styled 'Agreement of Lease Purchase and Sale' and the other, 'Management Agreement'. In terms of the former, broadly stated, the appellant was to hire a broiler site for the 1994 to 1995 season from Rainbow which in turn undertook to sell to the appellant at the beginning of each growing cycle its entire stock of day-old chickens at the broiler site and to repurchase same at a higher price from the appellant at the end of each growing cycle. In terms of the Management Agreement, Rainbow was appointed by the appellant as the latter's manager to manage the broiler operation, to take proper care of the chickens during their growing cycle and to procure the milling and processing of the maize which was to be provided by the appellant for the feeding of the chickens. It was not in dispute that the object of Rainbow and the appellant in entering into the agreements was to avoid the payment of certain levies which would have been payable to the respondent had the appellant simply sold maize to Rainbow.

[2] During July and August 1994, and in circumstances more fully set out below, the appellant delivered in accordance with Rainbow's directions a crop of yellow maize of 2352,161 tons and was paid a total of

R917 342,79, being the equivalent of R390 per ton. The respondent subsequently instituted action against the appellant in the Free State Provincial Division for payment of the levies, alleging that the agreements referred to above were simulated and couched in terms aimed disguising the true nature of the transaction between the appellant and Rainbow which was the sale of maize. The respondent's claim was upheld in the Court *a quo* and the appellant now appeals with the leave of that Court.

[3] It is necessary at the outset to say something about the levies and the circumstances in which they became payable. At all times material to the action there existed a Summer Grain Scheme ('the Scheme') which was established in 1979 in terms of s 14(1)(a) of the Marketing Act 59 of 1968 ('the Act'). The Scheme was administered by the respondent which is a control board contemplated in s 25 of the Act and established in terms of s 6 of the Scheme. Although the Act has since been repealed the respondent continues to exist by virtue of the provisions of s 27(2) of the Marketing of Agricultural Products Act 47 of 1996. The appellant planted, grew and harvested yellow maize on his farms in the Harrismith district and was accordingly a 'producer' of summer grain (maize) as defined in s 1 of both the Act and the Scheme. As previously mentioned, he produced and delivered a total of 2352,161 tons of yellow maize during the months of July and August 1994. For that season the

respondent, acting in terms of s 23 and 24 of the Scheme, imposed levies totalling R156,31 per ton of yellow maize produced and the Minister of Agriculture, acting in terms of s 46A of the Act, imposed a general levy of R0,08 per ton of yellow maize produced. The levies were payable to the respondent on maize sold by the producer or 'utilised by the producer thereof for a purpose other than his own household consumption or farming operations'. If, however, the producer wished to sell his maize he was required by the scheme, subject to certain exceptions, to sell it to the respondent at a price determined by the latter which also determined the consumer price, ie the price at which it, in turn, would sell the maize to consumers. For the purpose of these transactions cooperative societies acted as agents for the respondent and purchased and sold maize for and on behalf of the latter. In 1994 the purchase price of yellow maize was fixed at R330 per ton and the consumer price at R495 per ton. The difference accounted for the levies plus certain additional expenses. If, however, a producer sold maize to someone other than the respondent or other than a person dealing in the course of trade with maize, the levies would be payable by the producer to the respondent in the ordinary way. Rainbow was not a person dealing in the course of trade with maize and it follows that if the Court *a quo* is held to have correctly found that the yellow maize produced by the appellant during the season in question was sold by the latter to Rainbow, the levies imposed would be payable

by the appellant to the respondent in the sum of R367 854,46 and the appeal must fail. If, on the other hand, it is held that the Court *a quo* ought to have found that the maize produced by the appellant was utilised by him for his own farming operations, the levies would not be payable and the appeal must succeed.

[4] The agreements referred to in para 1 above were so structured that the appellant, who farmed in the Free State, played no role in the raising of the chickens which was done at Rainbow's broiler site in Kwazulu-Natal. Every aspect of the operation was handled by Rainbow. Indeed, the appellant conceded in evidence that all he had to do was produce the maize. But this, coupled with an obvious intention to avoid the levies, would not be sufficient in the absence of anything else to justify the respondent's claim that the agreements were simulated and that the true nature of the contractual relationship between the appellant and Rainbow was one of sale. It has long since been established in cases such as *Zandberg v Van Zyl* 1910 AD 302, *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530, *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd* 1941 AD 369 and more recently affirmed in *Erf 3183/1 Ladysmith (Pty) Ltd and Another v Commissioner of Inland Revenue* 1996 (3) SA 942 (A) that parties are free to arrange their affairs so as to remain outside the provisions of a particular statute. Merely because those provisions would not have been avoided had the

parties structured their transaction in a different and perhaps more convenient way does not render the transaction objectionable. What they may not do is conceal the true nature of their transaction or in the words of Innes JA in *Zandberg*'s case, *supra*, at 309, 'call it by a name, or give it a shape, intended not to express but to disguise its true nature.' In such event a court will strip off its ostensible form and give effect to what the transaction really is. But, while the principle is easy enough to state in the abstract, its application in practice may sometimes give rise to considerable difficulty. Each case will depend upon its own facts. A Court will seek to ascertain the true intention of the parties from all the relevant circumstances, including the manner in which the contract is implemented. The onus is upon the party who alleges that the transaction is simulated.

[5] It becomes necessary, therefore, to examine in greater detail the agreements referred to in para 1 above and the manner in which they were implemented. By agreement between the parties a number of documents were tendered in evidence 'as if they [had] been produced in Court pursuant to a notice given by the plaintiff in terms of Rule 35 (10).' These included a set of accounts in similar form in respect of each of seven 49-day broiler cycles which had been drawn up by Rainbow. Each set purported to give the number of one day-old chickens purchased by the appellant from Rainbow, their purchase price, the maize used to feed

them, the price at which they were repurchased by Rainbow at the end of the 49-day period and the appellant's profit. The maize stated to have been used in the course of the cycles totalled the figure of 2352,161 tons previously mentioned. The first of the 49-day cycles was said to have commenced on 10 September 1994 and the seventh to have commenced on 16 January 1995. The Agreement of Lease Purchase and Sale made no provision for Rainbow to pay for the maize to be used in the feed for the chickens. But it did require the appellant to pay the purchase price of the day-old chickens within fourteen days of the end of each cycle. Rainbow was similarly required to pay the purchase price of the chickens at the end of each cycle within the same 14-day period. In the event, this did not occur. The maize produced by the appellant during July and August 1994 was delivered to the Sentraal-Oos (Koöperatief) Bpk (SOK) of which he was a member. In terms of an arrangement between Rainbow and SOK the latter periodically sent to Rainbow a schedule setting forth the quantity of maize delivered to SOK by each of the farmers with whom Rainbow had entered into similar agreements. The schedule also indicated whether the cheque in payment of the maize was to be sent to the farmer or to SOK. If the farmer was not indebted to SOK the cheque was sent directly to him. If, on the other hand, the farmer was indebted to SOK, whether by reason of a production loan or otherwise, the cheque was sent to SOK which first deducted what it was

owed before handing over the balance to the farmer. It appears that the appellant was indebted in an amount of some R2,2 million to SOK which enjoyed a lien over his maize. Three cheques were sent to SOK in payment of the appellant's crop of 2352,161 tons of maize. They were dated respectively 28 July 1994, 15 August 1994 and 2 September 1994. Their total value was R846 777,96 which worked out at precisely R360 per ton. The cheques were drawn on an account in the name of the appellant at the Durban branch of a national bank. It appears, however, both from the documents emanating from Rainbow and the evidence of the appellant himself that this account was opened and financed by Rainbow. The maize was delivered on the instructions of Rainbow to various concerns for milling. Subsequently and by cheque dated 24 October 1994, the appellant was paid a further sum of R70 564,83. The cheque was drawn on the same account as before but was payable to the appellant and not to SOK. This amount represents precisely R30 per ton in relation to the appellant's crop of 2352,161 tons. The appellant received no further payment as income or profit from having concluded the agreements with Rainbow.

[6] What is immediately apparent from the aforegoing is that the sum paid to the appellant, whether directly or indirectly amounted to precisely R390 per ton for his maize. This was R60 per ton more than he would have received had he sold the maize to the respondent. It was R105 per

ton less than Rainbow would have had to pay had it purchased the maize from the respondent. But more significantly, the payment of R70 564,83 made directly to the appellant, and which resulted in the appellant in effect receiving precisely R390 per ton for his maize, was made before 1 November 1994 which, according to Rainbow's accounts, would have been the day on which the first of the seven 49-day cycles was completed. Had the true intention been to give effect to the contracts according to their tenor the amount to which the appellant would ultimately have become entitled would not have been known at that stage. The reason is that the income or profit accruing to the appellant from each cycle was dependent on several factors which would only have become known once the cycle had been completed. It is true that the payments to SOK and the appellant were reflected as 'drawings' in the accounts, but that these should have constituted the precise amount to which the appellant would ultimately become entitled under the agreements could hardly have been coincidental.

[7] The Agreement of Lease Purchase and Sale did not specify the exact price at which the day-old chickens would be purchased by the appellant or at which the broiler chickens at the end of each cycle would be purchased by Rainbow. Instead, it recorded that in both instances the price was to be agreed between Rainbow and the appellant but in the case of the day-old chickens it was to be 'no less than 95c (plus VAT at 14%)

and … no more than 100c (plus VAT at 14%)' and in the case of the broiler chickens 'no less than R4,95 (plus VAT at 14%) and … no more than R5,30 (plus VAT at 14%)'. An examination of the accounts in respect of each broiler cycle reveals that in each case the purchase price of the day-old chickens is given as 93c. This, of course, is lower than the minimum specified in the contract. But of far greater significance is the fact that in respect of each cycle the price of the broiler chickens is given in rands to the seventh decimal place or, in other words, cents to the fifth decimal place. The price, moreover, varies from cycle to cycle, albeit in some cases only by a few decimal points of a cent. The inference that these figures were arrived at by working backwards so as to arrive at a predetermined result is overwhelming, particularly when it is borne in mind that amount to which the appellant was ultimately entitled was paid in October 1994 and before the completion of the first cycle. If this were not enough, the accounts relating to three of the cycles contain minor arithmetic errors which if corrected would result in the amount paid to the appellant (being the equivalent of R390 per ton of maize supplied) having to be altered.

[8] What emerges, thus far, is first that the provisions of the Agreement of Lease Purchase and Sale with regard to payment were wholly disregarded. The payments by Rainbow to the appellants were related to the delivery of maize, not to the purchase price of chickens.

Second, the payments by Rainbow were made via a bank account opened by Rainbow in the name of the appellant. Why the payments should have been laundered in this way was never explained. Counsel for the respondent submitted that the object was to create the impression that the appellant was paying for the release of his own maize. No other inference was suggested in argument. Third, the accounts prepared by Rainbow for each cycle were clearly drawn up so as to arrive at a predetermined total amount, ie R917 342,79. That amount was paid to the appellant before the figure would have been known had it been based on the sale of chickens. In the result, the inference is inescapable that the accounts for each cycle were prepared to create the impression that the appellant derived his income from the sale of chickens whereas in truth he derived his income from the sale of his maize to Rainbow.

[9] On behalf of the appellant it was pointed out that the accounts made provision for the payment of VAT which would not have been payable had Rainbow purchased maize from the appellant to feed its chickens as the transaction would have been zero-rated for VAT purposes. However, this is hardly decisive as the payment of VAT would not be inconsistent with an intention to disguise the true nature of the agreement.

[10] The appellant, not surprisingly, denied in evidence that the contract was simulated and that a price for his maize had been determined in

advance. He conceded, however, that he had no idea of the price of day-old chickens or poultry and that, although in terms of his agreement with Rainbow the price at which the chickens were sold would be decisive as to whether there was a profit or not, the price of chickens was of no importance to him at the time. He said he simply placed his faith in Rainbow to give him an added value on his maize. What is clear is that the appellant's evidence was wholly inconsistent with that of a person who had genuinely entered into an agreement to farm chickens. His sole concern was what return he would receive on his maize. As previously indicated, Rainbow's accounts were drawn up so as to arrive at an obviously predetermined return of R390 per ton. This strongly suggests that R390 was an agreed amount. But if not, the inference is overwhelming that in such event the appellant would simply have left it to Rainbow to determine the figure which he subsequently accepted, the only limitation being that it would be more than the R330 per ton determined by the respondent.

[11] In the result I am satisfied that the respondent discharged the burden of establishing that the true nature of the transaction between the appellant and Rainbow was the purchase by the latter of the former's maize.

[12] The appeal is dismissed with costs, such costs to include the costs of two counsel.

D G SCOTT
JUDGE OF APPEAL

CONCUR:

HARMS JA
HEHER JA