REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case Number : 396 / 04

In the matter between

MAIZE BOARD **APPELLANT**

and

JOHN JACKSON **RESPONDENT**

Coram : HOWIE P, STREICHER, VAN HEERDEN, PONNAN JJA et NKABINDE AJA

Date of hearing : 5 SEPTEMBER 2005

Date of delivery : 19 SEPTEMBER 2005

SUMMARY

Contracts – simulation – lease and management agreements - evidence establishing true nature of the transaction one for the sale of maize – agreements simulated to conceal that intention to avoid the payment of Maize Board levies.

J U D G M E N T

PONNAN JA

[1] The dispute in this case turns upon the true nature of two simultaneously concluded, separate, but interrelated written agreements. As a general rule parties to a contract intend it to be exactly what it purports to be. Not infrequently however, they may endeavour to conceal its true character. In such a case, when called upon, a court must give effect to what the transaction really is and not what in form it purports to be.[1]

[2] The appellant, the Maize Board ('Maize Board'), is a control board contemplated in s 25 of the Marketing Act 59 of 1958 ('the Act'), charged with the responsibility of administering the Summer Grain Scheme ('the Scheme').[2] From 1944 onwards the marketing of maize was governed in South Africa by what has been described in the evidence as a 'single channel fixed price system'. Simply put, the effect of that system was that there was a single buyer and seller of all maize in the country – the Maize Board. A pre-season announcement by the Minister of Agriculture ('the Minister') fixed both the producer and consumer prices of maize. The advantage of that system, so it was suggested, was that there was price stability in the market place.

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[1] *Zandberg v Van Zyl* 1910 AD 302 at 309.

[2] Although the Act has since been repealed, the Maize Board continues to exist by virtue of s 27(2) of the Marketing of Agricultural Products Act 47 of 1996. The Summer Grain Scheme was established in 1979 in terms of s 14(1)(a) of the Act (see *Michau v Maize Board* 2003 (6) SA 459 (SCA) para 3).

[3] In terms of the Act and the Scheme, a levy, special levy and general levy were imposed on maize. Those levies, which were fixed by the Minister, were payable by a producer of maize to the Maize Board in respect of maize sold or utilised for any purpose otherwise than for his own household consumption or to feed his own animals.[3] During each marketing season the consumer price was determined by adding the levies to the producer price.[4] The imposition of the levies caused unhappiness amongst the consumers and producers of maize, who sought to regulate their affairs in such a way as to attempt to circumvent their levy obligations.[5] The single channel system came to be replaced during the 1995/6 marketing season with what was described in the evidence as a free market system. The free market system, as the name suggests, permitted a maize producer to sell maize to a willing purchaser at a mutually agreed price.

[4] Rainbow Chicken Farms (Pty) Ltd ('Rainbow'), which carries on business as a breeder and producer of broiler chickens, is, according to the evidence, the largest consumer of yellow maize in this country. For

[3] Although the earlier proclamations referred to 'farming operations' instead of 'feed his own animals', nothing, it would appear, turns on that.

[4] A production (or growing) season spanned the period 1st October to 30th September and the corresponding marketing season the period 1st May to 30th September of the succeeding year. Thus maize produced during the 1992/3 production season (1st October 1992 – 30th September 1993) would be marketed in the 1993/4 marketing season (1st May 1993 – 30th April 1994).

[5] On 21 May 1987 Rainbow Chicken Farms (Pty) Ltd wrote to the Maize Board: '*We now find that various schemes to bypass the summer grain scheme are in operation and every week we are approached by producers to do the same. We cannot continue to support the maize industry and allow our competitors to steal a march on us.'.*

each of the production seasons 1992/3, 1993/4 and 1994/5, Rainbow entered into two written agreements with the respondent, a farmer in the Bergville area of Kwa Zulu Natal.[6] In terms of the first, an agreement of lease, the respondent let to Rainbow certain portions of his farm. In terms of the second, styled a management agreement, Rainbow employed the respondent as the manager of its maize farming operations on the leased land. Pursuant to those agreements, the respondent produced and delivered to Rainbow, during the 1993/4, 1994/5 and 1995/6 marketing seasons, 1322.067, 2250 and 1453.936 tons of maize, respectively.

[5] The Maize Board instituted action against the respondent in the Pietermaritzburg High Court for payment of levies in the sum of R576 439.63, alleging in paragraph 7 of its particulars of claim that:

'… the lease and management agreements were simulated and were concluded in their terms with the intention:

7.1 of disguising that the Defendant in fact sold and Rainbow in fact purchased the yellow maize produced on the land; and

7.2 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;

[6] The only agreements produced in the court below related to the 1994/5 production season. Of that the court below stated: 'The parties have however only been able to trace the contracts for the 1994/1995 production season. The Court has been asked to infer that the contracts for the previous two production seasons were in similar terms with only the figures, areas and amounts changing from year to year. For the purposes of this judgment I am prepared to make that assumption.'

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.'

In dismissing the claim of the Maize Board, Hugo J concluded in the court below that: ‘the Plaintiff has not succeeded in proving that the agreements entered into between the Defendant and Rainbow were not what they purported to be but that in fact that they were a simulated agreement of purchase and sale’. The present appeal is with the leave of this court.

[6] The argument advanced on behalf of the respondent both before this court as well as the court below is that Rainbow was feeding its own chickens with maize produced on land leased by it. It was accordingly, so the argument went, utilising the maize 'to feed its own animals' and was therefore exempt from liability for payment of levies.

[7] This court recently held (per Scott JA) in *Michau v Maize Board* 2003 (6) SA 459 para 4:

'[I]t 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 3183/1Ladysmith (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.'

[8] A manifest intention to avoid the payment of levies would not, in the absence of anything else, be sufficient to justify the claim by the Maize Board that the agreements were simulated and that the true or real nature of the contractual relationship between Rainbow and the respondent was one of purchase and sale. The true enquiry in a matter such as this is to establish whether the real nature and the implementation of these particular contracts is consistent with their ostensible form. In pursuit of that enquiry one must strive to ascertain, from all of the relevant circumstances, the actual meaning of the contracting parties. It therefore becomes necessary to examine in

greater detail the agreements in question and the manner in which they were implemented.

[9] The agreements were signed simultaneously and were plainly interdependent to the extent that the one would not have been concluded in the absence of the other. The parties restricted their own power of subsequent variation by including a non-variation clause in each agreement, as well as recording that it constituted the whole agreement between them.

[10] Clause 6.2 of the Management Agreement provides:

'Should all the feed grown on the land during the growing season and delivered by the manager average the minimum yield per hectare reflected in **Schedule** I or more Rainbow shall pay to the manager over and above the basic remuneration a bonus per hectare calculated in accordance with the formula reflected in **Schedule** I.'

[11] The formula for the calculation of the production bonus in Schedule 1 of the agreement was described by the learned judge a quo as one that ‘contains some twenty six different items resulting in a somewhat complex reckoning of such a production bonus’. Included in the formula is an item ‘O’ which is described as ‘Factor’. Neither ‘O’ nor 'Factor' are defined elsewhere in the agreement. Nor is any value attributed to either of them. Moreover, each of the subsequent elements ‘Q’, ‘R’ and ‘S’ in the formula are dependent for their determination on

the value of the undefined ‘Factor O’. Absent a value for ‘O’, the complex formula is rendered meaningless and can have offered no assistance to Rainbow for the determination of the production bonus due to the respondent.

[12] It is common cause that during the 1994/5 production season the respondent failed by some 256 tons to achieve the minimum yield specified in Clause 6.2 read with Schedule 1 and that he therefore did not qualify for payment of the stipulated bonus. He was nevertheless paid a production bonus by Rainbow in the sum of approximately R156 220. That in the face of the clear wording of Clause 6.2 that a bonus to be determined in accordance ‘with the formula reflected in Schedule 1’ was payable only in the event of the specified minimum yield being achieved or exceeded. As the minimum yield had not been reached, not only did the respondent not qualify for payment of the production bonus but the formula for the determination of the production bonus, did not find application.

[13] On 21 September 1994 the respondent applied for a loan to the Land and Agriculture Bank of South Africa. In a statement under oath in support of that application, not only did the respondent not disclose the existence of the lease and management agreements, which had been in existence since at least the 1992/3 production season, but he asserted

that he farmed on his own properties. A portion of one of those properties was already at that stage the subject of the lease agreement. He likewise failed to divulge in the application under the heading ‘Any Other Income (Salary etc)’ any of the remuneration, rental or bonus due to him in terms of the agreements. That he failed in a statement under oath to make full disclosure of items that would in all probability have enhanced his application is, in the absence of any explanation, inexplicable.

[14] It was put by counsel for the respondent to the Maize Board’s witnesses, with reference to an alleged overpayment of so-called 'fixed costs' by Rainbow to the respondent - ‘I want to tell you the defendant paid back … I’m telling you that as a fact. That will be his evidence.’ That clearly presaged the respondent being called as a witness. And yet, although in a position to do so, he deliberately refrained from testifying about matters peculiarly within his knowledge or elucidating the facts. Should an adverse inference be drawn from his failure to testify as was urged upon us? Given the particular circumstances of the litigation, this being the yardstick to be used, that, it would seem is the most natural inference. For this is not the kind of case where a dearth of information would preclude a decisive inference. Indeed on an analysis of the evidence adduced by the Maize Board, a reasonable expectation

existed that the respondent would testify about the elusive ‘Factor O’, the payments he received, his non-disclosure to the Land Bank, as well as various other aspects that were alluded to by his counsel during the cross-examination of the Maize Board’s witnesses. The inescapable conclusion must therefore be that because of the facts known to himself, he could not benefit - and indeed might well have damaged his case - by testifying. It follows on the facts here present that the respondent’s silence must count against him. It would thus be fair to infer that he failed to disclose the agreements to the Land Bank because, in truth, they were illusory and not real.

[15] The provisions of the Management Agreement with regard to payment were clearly disregarded by Rainbow and the respondent. Properly construed, the computation and subsequent payment of the production bonus by Rainbow to the respondent could hardly have occurred in accordance with the tenor of the Management Agreement. If the production bonus was not due in terms of the agreement, why - it must be asked - was it paid by Rainbow? Two hypothetical possibilities come to mind. They appear to be exhaustive. First, it was a donation; or, secondly, it was payment in terms of some other undisclosed agreement. Given the nature of the relationship between Rainbow and the respondent, it could hardly have been the first - commercial reality

excludes that possibility. It is to the second that one must look, as it, inherently, sounds the more likely and must in my view be the true explanation. Support for the existence of an undisclosed agreement is to be found in what was put by the respondent's counsel to one of the Maize Board's witnesses. Of 'Factor O' he stated '[it] … is an agreed factor … It is not in the contracts, but it's an agreed factor.'

[16] The payment, coupled with the established fact of delivery of maize by the respondent to Rainbow, leads inexorably to the conclusion that the undisclosed agreement was indeed one of purchase and sale of maize. I accordingly conclude that the underlying and disguised transaction was one for the purchase and sale of maize and that the agreements were simulated to conceal that intention.

[17] Ultimately what the parties achieved is that Rainbow paid less and the respondent received more than would have been the case had the sale been conducted under the auspices of the Maize Board. I am satisfied on all of the aforegoing that the Maize Board discharged the onus of establishing that the true nature of the transaction between Rainbow and the respondent was the purchase by the former of the latter's maize. The respondent is thus liable to the Maize Board for payment of levies. It follows that the appeal must succeed.

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

1 The appeal succeeds with costs, such costs to include the costs of two counsel.

2 The order of the court below is set aside and replaced with the following:

'1 Judgment is granted in favour of the Plaintiff for the payment of R576 439.63 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.'

V M PONNAN
JUDGE OF APPEAL

CONCURRING:

HOWIE P
STREICHER JA
VAN HEERDEN JA
NKABINDE AJA