

SOUTH AFRICA / JUDGMENT

Brisen Commodities (Edms) Bpk v Johannes (1806/09) [2010] ZANWHC 23 (1 September 2010)

[2010] ZANWHC 23

COURT

North West High Court, Mafikeng

BEFORE

Kgoele

CASE / FILE NUMBER

1806/09

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NORTH WEST

HIGH COURT, MAFIKENG

Case

1806/09

In

the matter between:

BRISEN

COMMODITIES (EDMS) BPK

.....Plaintiff

and

PRETORIUS

JACOBUS JOHANNES

.....Defendant

MMABATHO

KGOELE

J

DATE

OF HEARING : 1 September 2010

DATE

OF JUDGMENT :

COUNSEL

FOR THE : Adv. A.J. H. Bosman SC

COUNSEL

FOR THE : Adv. T. P Kruger

JUDGMENT

A.

INTRODUCTION

- [1] The plaintiff is Brisen Commodities (Pty) Ltd (Brisen) a registered company with its registered address at 120 Riviera Avenue Lyttelton, Pretoria.
- [2] The defendant is Jacobus Pretorius, an adult male farmer with his chosen domicilium citandi at the farm Bethlehem in the district of Lichtenburg.
- [3] Farmsecure (Pty) Ltd (Farmsecure) and the defendant concluded some written agreements (Annexure “A” and “B” to the pleadings) which they termed “production agreements”. Farm secure concluded a further agreement (Annexure “C” to pleadings) in terms of which the claims in relation to the agreement were ceded to the plaintiff, Brisen.
- [4] Plaintiff claims an amount of R1 758 282,74 from the defendant, being amount of maize that fell short of what the defendant should have delivered in terms of the conditions contained in the afore-said production agreements including arrear interest thereof.

B. BACKGROUND

- [5] The parties held a pre-trial conference on 16 February 2010
wherein they agreed that the question of quantum and merits be decided separately. They further agreed that certain points of common cause and points in issue be formulated in terms of a document, which document was handed by counsel on behalf of the plaintiff to the court prior to the start of the proceedings, on the 31st August 2010. In terms of this document, point 4 thereof, addresses the issue that it is common cause, that Farmsecure as well as the plaintiff have not been registered as credit providers in terms of the National Credit Act, Number 34 of 2005 (The NCA).
- [6] In terms of point 5 of the said document, the Plaintiff and Defendant have agreed to request the Court (in terms of the provisions of Rule 33(4) to adjudicate separately and prior to any other decision, the question whether the provisions of the said NCA is applicable to the production agreements concluded between the plaintiff and the defendant. The judgment will thus be confined to this issue only.
- [7] On behalf of the plaintiff, the following witnesses testified:-
a certain Mr Marais, being a senior official of Standard Chartered Bank Ltd (“the bank”),
an official in the Technical Department of the said bank, Mr Brits,
the Managing Director of the plaintiff,

and one Mr Bronkhorst, being an attorney from Gerrit Coetzee Attorneys of Potchefstroom.

[8] The defendant tendered no evidence, although the defendant, Mr Pretorius, was present in court for the whole of the first day.

C. EVIDENCE

Mr J.S. Marais

[9] Mr Marais was the first witness called on behalf of the Plaintiff. He confirmed that he is an official of Standard Chartered Bank (SCB) Limited for the past years.

[10] Mr Marais confirmed that Standard Chartered Bank is the fourth biggest bank, world wide and does a lot of business in Africa, as he put it, “the footprint in Africa” is fairly big.

[11] Mr Marais further confirmed that the bank did business with the plaintiff for the past few years and for the relevant period the financial inputs that the bank provided the plaintiff with, was an estimated amount of approximately R250 million, (which was an estimation on the side of Mr Marais). The bank’s attorneys were instructed to draft and formulate the production agreements. The attorneys of Brisen did give certain inputs in the formulation thereof.

[12] Mr Marais was referred to certain provisions of the contract, to enlighten the court as to the purpose of the contract and certain of its terms. He explained that the first part of the contract deals with a lease agreement in terms of which the farmer, being the defendant, leases certain fields to Farmsecure.

He further explained that Clause 9.1 and onwards deals with the right of the lessee (Farmsecure) to inspect the property and to enter upon the property to give effect to the purpose of the production agreements, namely, to plant and harvest the maize as contracted.

[13] Mr Marais was also referred to clause 13 to 18 and he confirmed that in terms of this part of the contract, the lessee, Farmsecure appoints the lessor, Mr Pretorius to manage and conduct the farming activities of Farmsecure in respect of the contracted fields on behalf of Farmsecure.

[14] Mr Marais also confirmed the content of certain of the annexures to the agreement, inter alia, Annexure “11” where the contracted fields are stipulated and explained, as well as Annexure “3” where the contracted hectares are also confirmed in writing, as well as the fact that white maize is to be harvested on these contracted fields.

[15] Mr Marais further confirmed, with reference to Annexure “3” that if one takes the amount of the surfaces contracted in terms of this first contract (332.50 hectares) and one multiplies it with column no. 5 (Multi Risk Insurance Guarantee) that is accepted by the insurance company, that would equal the “gelykbreek tonnemaat” (break even tonnage) that is reflected in column

6. This 638.40 ton also reflects the total Mult-Risk Insurance Guarantee as accepted by the insurance company and is also titled “gelykbreek tonnemaat” or the break even tonnage namely 638.40 tons.
- [16] This 638.40 tons is then to be multiplied with the SAFEX guaranteed minimum price (the SAFEX price contained in column 7 minus the transport differential, that is the gross minimum price as contained in column 9 (R1,394.82) which gives the figure of R890,453.09. . If 14% VAT is added to that the total value of the contract amounts to R1,015,116.52.
- [17] According to Mr Marais, it is highly important in these agreements concluded that the contracted fields (the hectares contained on pages 33, 85 and 137 of the pleading bundle) is harvested with the agreed aim to reach at least the break-even tonnage that is to be produced, to ensure that the farmer is at least able to reach the break even point (as set out in the 6th column of Annexure “3” of each contract). If the farmer does that, he would not be liable to deliver any more grain. He must, however, deliver all grain

harvested on the contracted fields.

The role of the bank in providing the financial credit for the agreement:

- [18] Mr Marais in his evidence clarified that the facility is granted to Brisen, the plaintiff. Brisen is not the credit provider but Brisen is only the conduit or means by which the input costs of the farming activities are effected to the service providers that provide the input costs like diesel, spare parts, fertilizer, and other costs. The bank loaned the input costs to Brisen, and this loan are used to pay the providers of the diesel, etc.
- [19] Mr Marais also confirmed that he personally or his assistant in the Technical Department either physically visits offices of Brisen Commodities or each file of each farmer is conveyed to the bank’s offices where Mr Marais would check the following;

Whether the contract is properly signed;

Whether the farmer who is the lessor in terms of the lease part of the agreement, has a right and title to the fields that are contracted. If the farmer is the lessee of such lands, a proper, signed and valid lease agreement must be in place. If there is a trust involved, a proper decision made by all the relevant trustees (resolution), must be available, etc;

Whether the contract contains the clause that the maize that is to be produced on the contracted fields will be the ownership of Farmsecure (or Brisen, depending who is contracting with the farmer);

Whether there is a proper application to insure the crops, to minimise the risk of non-delivery of the grain.

Whether there is proper hedging of the grain price on the SAFEX part of the Johannesburg Stock Exchange to make provision for the fluctuation in the prices of the maize or other type of grain. This is done to minimize the risk of loss due to fluctuations of grain prices in the market to the negative side of the agreed fixed price, in terms of the contract;

Whether every aspect is legal and binding as between the parties, because the only real guarantee and security for both the bank and Brisen is in the ownership of the maize.

- [20] Mr Marais testimony is to the effect that the plaintiff obtained all the rights in and to the maize contracted between Farmsecure and the defendant in terms of a session agreement and that all monies flow from Standard Chartered Bank to the service providers and providers of materials directly, and not to the farmer.
- [21] Mr Marais explained that when Brisen Commodities (the cessionary in terms of the session who steps in the shoes of Farmsecure in respect of all the rights in and to the contract) requests the bank to pay certain prior indicated service providers (e.g. Engen), the request is to make payments in specific amounts to specific accounts of these service providers. The bank transfers these monies, namely the exact amount so requested by Brisen into a special account that Brisen has. This account is properly and effectively controlled by the Bank itself and Brisen cannot deal with monies transferred into this special account.
- [22] Brisen then loads into the system payments to the various payees, namely the service providers that have to receive the monies in respect of the farming activities onto the system, with reference to the exact amount of each service provider and its banking details (account number, amount, etc), whereafter Brisen informs the bank's officials that the system has been loaded with the request that was made previously to the bank, in terms of this arrangement. The bank then checks the details and if the bank is satisfied, it does the releasing of these funds and thus effects payment to these particular service providers.
- [23] According to Mr Marais there is no credit extended or granted by Brisen, but the bank is the credit provider for Brisen and Brisen is the conduit of the payment to the service providers.
- [24] Brisen is obliged to pay back the loans that he obtains from Standard Chartered Bank, but his contract with the farmers stipulates the delivery of maize to Brisen. The silo certificates that are issued when the maize is delivered at the previous appointed silo, is to be credited (in terms of the silo certificates, being a negotiable instrument in this type of transaction) in favour of Brisen.
- [25] Mr Marais also confirmed that if there is a bonus or production on top of the break even tonnage that has to be delivered, this goes to the farmer as a "bonus" or "over production" as described in the contract according to clause 17.2 and 17.5.

Mr Britz

- [26] Mr Brits confirmed what Mr Marais said that the main purpose and aim of the contracts are namely to lease the land from the farmers and to entitle Brisen to conduct the farming activities to produce grain.
- [27] According to him, as Brisen is a dealer in grain, this is the best way for Brisen to obtain physical delivery of the grain so that Brisen can trade with that and make its profits in the open market in respect of all grains produced in terms of the contracts with the farmers.
- [28] He further confirmed that Standard Chartered Bank is the financial credit provider of Brisen Commodities, which puts Brisen in a position to be able to do the farming activities and the bank pays the service providers directly, as set out above.
- [29] He stressed the fact that ownership of the grain is of utmost importance, for the bank as well as for Brisen.
- [30] He further confirmed that Brisen does not contract with the farmer to obtain any payment of monies, but to obtain delivery of the grain. The whole harvest must be delivered at the appointed silos.
- [31] Mr Brits was adamant that, as Mr Marais also confirmed under oath, the agreements are not a simulated credit transaction and the true purpose of the agreements are set out in the wording of the agreements themselves as explained by Mr Brits. He confirmed that the payment of monies only comes into play when the farmer does not deliver the necessary break even tonnage of grain, like for example the 638.40 tons of maize reflected in column 6. His explanation is to the effect that, if the break even tonnage is not delivered, the only reason why the farmer has then to pay the value in monies is because of the breach of contract, namely to claim “damages” as Mr Brits put it. This obligation on a farmer, where he did not deliver the necessary maize which obliges him to make payment of a sum of money, to add up the short delivery, is nothing more than damages in respect of breach of contract.
- [32] According to Mr Brits, If the farmer complies with his obligations and duties, normally he will have a much larger harvest to deliver than the break even point. This will mean that the farmer will deliver the tonnage of grain to fulfil all his obligations, and thereafter Standard Chartered Bank or Brisen will pay him back the difference above the break even point, namely the bonus. There is no question of any monies that have to be paid or paid back to Brisen at all and this is purely an agreement to conduct farming activities, obliging the farmer to deliver all grain produced to the owner of the grain, namely to Brisen. It is only in the event of breach of contract that payment of damages becomes relevant.
- [33] Mr Brits further confirmed that damages come into play in four instances, namely:
- 33.1 Where short delivery is effected because the insurers do not pay out the full amount, for example where the farmer does not notify the insurer timeously;
- Where the farmer does not comply with all his obligations namely to deliver the grain at least up to the break even point;

Where a farmer would steal the crop and deliver it to different silos, other than the nominated silos that are stipulated in the agreement, to the credit of Brisen;

Where the farmer breaches the specific terms of the contract, namely to effect proper and sound farming policies and practices. This would amount to a breach of contract if short delivery is made which entitles the Plaintiff to claim damages, and has nothing to do with the fact that the contract has at aim the payment of monies. The payment of money only comes into play where there is a breach of contract which entitles the Plaintiff to claim damages from a farmer.

[34] Mr Brits also confirmed that the plaintiff or his agent or partner (Farmsecure) is monitoring the harvest, the emerging of the crops. He vehemently rejected any suggestion that the contracts were simulated credit transactions.

Mr H. Bronkherst

[35] Mr Bronkhorst confirmed that he is an attorney of the High Court and a professional assistant with the firm Gerrit Coetzee Incorporated.

[36] He further confirmed that he and Mr Wiehan Van Heerden attended the offices of Farmsecure in Lichtenburg on 17 September 2008, when he and Mr Van Heerden had a consultation with the defendant, Mr Pretorius.

[37] The defendant told him that he planted certain fields late, due to the fact that there was a drought.

[38] The defendant further confirmed that, shortly after the planting of the fields, he suffered serious depression and he stayed in bed for approximately 4 weeks, when he did not pay the necessary attention to his farming activities.

[39] According to him the defendant further told him that during or about April he experienced frost on the maize fields, but Mr Pretorius told them that he did not realise that the frost would cause damage to the maize fields that were planted later. Mr Pretorius confirmed to Mr Bronkhorst and Mr Van Heerden that he did not report such frost due to this view.

[40] The defendant, for the first time, when he harvested the maize crops, discovered that the frost caused material damages to the maize. Mr Bronkhorst confirmed that the date of 31 May 2008 in the second line of paragraph 1.5 was incorrectly reflected and the true date that all damage caused by frost had to be reported, was before the end of March 2008. The Defendant was therefore already too late to report the damage caused by the frost and the insurance company would not accept such a late claim.

[41] Mr Bronkhorst further confirmed that the defendant acknowledged that he owes Farmsecure an amount of approximately R1,700,000.00 and that he intends to pay that amount to Farmsecure.

[42] The said Mr Bronkhorst also confirmed and was referred to paragraphs 1, including 1.1, 1.2, 1.3, 1.5 and 1.6 of his letter (the letter that Mr Bronkhorst wrote) namely Exhibit "C".

- [43] Mr Bronkhorst confirmed that he drafted Exhibit “C” but did not sign the letter personally, as his secretary signed this letter on his behalf during his temporary absence.
- [44] Mr Bronkhorst further confirmed the content of paragraph 1.11, but indicated to the Court that the defendant, the debtor, conceded the fact that his liabilities exceeded his assets, and not the other way around.
- [45] Regarding the further reference (as is reflected in paragraph 1.11) to the fact that the defendant indicated that he has an insurance claim that is to be instituted, Mr Van Heerden, in the presence of Mr Bronkhorst, once again conveyed to the defendant that the insurance company repudiated the claim and that the chances are very low that the insurance company would accept such a claim, due to the fact that it was not timeously processed by the defendant. Under cross examination Mr Bronkhorst confirmed that Mr Van Heerden Introduced him to the defendant as the attorney of Farmsecure, at the start of the meeting.
- [46] Mr Bronkhorst was not sure whether Mr Van Heerden informed the defendant, prior to the meeting, that an attorney would be present.

Mr Bronkhorst, however, confirmed that it was standard procedure in all claims that he had to handle the claim initially, by arranging a meeting with any debtor to make an arrangement with such debtor with the aim to avoid unnecessary litigation.

- [47] Mr Bronkhorst also confirmed that, if the defendant wish not to participate in the meeting to discuss the aspects that were discussed during the meeting, he was free to do so.
- [48] Mr Bronkhorst also denied that he adopted any heavy handed approach towards the defendant.
- [49] Mr Bronkhorst further confirmed that the only “defence” that the Defendant raised during the meeting, was the insurance claim, as dealt with above.
- [50] Mr Bronkhorst also confirmed that the purpose of the meeting was to endeavour to recover the full balance of the outstanding amount due by the debtor.

D. EVALUATION OF THE EVIDENCE

- [51] The evidence of Mr Marais as well as Mr Britz corroborates each other on the fact that Brisen is a farmer who farms on the contracted lease lands and fields of the various farmers with the purpose to produce grain like,inter alia, maize, sunflower, etc. They were an idem that Brisen is not providing any credit whatsoever to any farmer.
- [52] What is of even more importance to accentuate this fact according to them, is the fact that Brisen Commodities deals in maize, and not in the payment of monies. Each farmer, like the defendant in our matter has to deliver maize and does not have to make any payment of monies whatsoever towards Brisen.

[53] Mr Britz made it abundantly clear that Brisen, for the past 14 years, is mainly a trader in grain. He further emphasized the point that because of the fact that delivery by a farmer to a co-operation, means that Brisen cannot get hold of such grain (like maize or sunflower) has made Brisen to decide to enter into contracts, directly with the farmers, to conduct and monitor the farming

activities so that Brisen can be in a position to physically obtain delivery of grain.

[54] Both Mr Brits and Mr Marais agree with each other and confirmed that the agreements are not “simulated credit transactions” and the true purpose of the contract are set out in the wording of the agreement, as explained by Mr Brits. What is of further utmost importance in their evidence is the fact which Mr Brits confirmed that the payment of monies only comes into play when the farmer does not deliver the necessary break even tonnage of grain. Mr Brits categorically confirmed that, if the break even tonnage is not delivered, the only reason why the farmer has then to pay the value in monies is because of the breach of contract, namely to claim “damages” as Mr Brits put it. This obligation on a farmer, where he did not deliver the necessary maize which obliges him to make payment of a sum of money, to add up the short delivery, is nothing more than damages in respect of breach of contract.

[55] If the farmer complies with his obligations and duties, as put by Mr Brits, normally he will have a much larger harvest to deliver than the break even point. This will mean that the farmer will deliver the tonnage of grain to fulfil all his obligations, and thereafter Standard Chartered Bank or Brisen will pay him back the difference above the break even point, namely the bonus. According to them there is no question of any monies that have to be paid or paid back to Brisen at all and this is purely an agreement to conduct farming activities, obliging the farmer to deliver all grain produced to the owner of the grain, namely to Brisen Commodities.

[56] From Mr Britz’s evidence it is quite apparent that the crop emerging report is the most important inspection report that has to be signed by the farmer.

[57] As correctly conceded by the defendant’s counsel in his heads of argument, the evidence of Mr Marais was credible and he was an honest witness. In addition, Mr Britz confirmed in material respect most of Mr Britz’s evidence. His evidence was not contested or even challenged during cross-examination. I find that he is also a credible and honest witness and his evidence is accepted by this court.

[58] Mr Bronkhorst evidence was not that significant in as far as the main issue that is before this court is concerned. His evidence focuses mainly on the meeting he had with the defendant wherein the production problems faced by the defendant were discussed which

evidence might become more relevant during the trial on the merits.

[59] The defendant closed his case without giving evidence or calling any witnesses.

D. APPLICABILITY OF THE NATIONAL CREDIT ACT

Simulated Credit Agreement

[60] The crux of the defendants arguments gathered from the questions during cross examination and statements made by him during the submissions after both parties had closed their case is to the effect that the contracts entered into between the plaintiff and the defendant are not what it purports to establish and mean, but was in fact “disguised credit transaction as envisaged by the NCA.” He maintains that there is little doubt that the contracts despite being styled production agreements, and purporting to be lease

contractor agreements, are nothing else but credit agreements as defined in the NCA.

[61] The point of contention is therefore whether the NCA is applicable to the contracts concluded between Farmsecure (Brisen) and the defendant. If it does, then it is the end of the plaintiff's claim against the defendant since neither the plaintiff nor Farmsecure was registered in terms of the NCA at the time of contracting between the parties or any time thereafter. If on the other hand the court were to find that the NCA has no application, the matter can proceed on the merits.

[62] In a civil trial, the onus of proof is discharged on a balance of probabilities. What a court does is draw inferences from the proven facts. The inference drawn is the most probable, though not necessarily the only inference to be drawn. See *Cooper and Another v Merchant Trade Finances* 2000 (3) SA 1009 (SCA) at page 1027 F to 1028 D. It is also trite law that the onus of proof rests on the party asserting a fact. In our matter, the onus is therefore on the defendant as he alleges that the agreements are simulated.

[63] 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 form it purports to be. In *Zandberg v Van Zyl* 1910 AD 302 the following is stated at page 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 indicates 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”.

- [64] The defendant's arguments are to the effect that although both Marais and Britz denied that the contracts entered into with the defendant were simulated contracts, on the true intention of the parties, the contracts were meant to be credit agreements in terms where Farmsecure advanced production loans to the defendant.
- [65] According to the defendant's counsel, the fact that the intention of the production agreements was to provide a production loan facility to the defendant is confirmed by a variety of factors. Firstly, according to him it was very openly admitted by Marais that the money made available by Farmsecure to the defendant came directly from SCB who used Farmsecure as its conduct to channel the money to the farmer. Secondly, SCB and Farmsecure at all material times held the purse strings and made payments to a supplier directly. Thirdly, if the crop yielded too little tonnage to cover the production facility provided by Farmsecure to the defendant, the defendant remained liable to make good any outstanding amount to Farmsecure on or before 14 September 2007. Lastly, the facility made available to the defendant was payable as and when required and not in one tranche to anyone party, in other words, he had credit available to the amount agreed in annexure 3 of the agreement. Once more money was required, the defendant had to stand in for the difference.
- [66] The defendant's counsel further submitted that it does not assist the plaintiff that both Marais and Brits testified that the purpose of the facility provided to the defendant not to provide him with any credit whatsoever but with the purpose to produce grain. Nor does the argument that the plaintiff deals in grain products and not in the payment of money, and therefore that the defendant had to deliver maize and did not have to make payment of monies to the plaintiff, assist the plaintiff. In order to produce his crops, the defendant obtained a credit facility from Farmsecure's further, if he failed to provide the maize, he has to make good the shortfall, in monetary terms.
- [67] It is further the defendant counsel's submission that contrary to the argument of the plaintiff, the contracts entered into between the parties are about "credit" as defined by the NCA. The agreement between the parties was about a promise to advance or pay money to either the defendant's supplier or the defendant himself at the direction of the plaintiff. The testimony of both witnesses Marais and Brits are along these lines. In addition, the contracts provide that payments will only be made for the purchase of seed, fertilizer, herbicide and other production costs.
- [68] He finally submitted that the only reasonable conclusion to come to was that Farmsecure made credit available to the defendant. This in turn means that the parties entered into a credit agreement, either in terms of a credit facility in terms of S 8(3) or s 8(4) of the NCA.
- [69] On the other hand, counsel for the plaintiff submitted that an agreement is a credit agreement in terms of s 8(4) (f) of the NCA if payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of:-

the agreement; or

the amount that has been deferred.

[70] Counsel for the plaintiff further quoted the following in support of his arguments:- The term “credit” as found in Section 1 of the NCA which provides:-

“When used as a noun means –

- (a) a deferral of payment of money owed to a person, or a promise to defer such payment; or
- (b) a promise to advance or pay money to or at the direction of another person “

[71] He further submitted that as it is born out by the evidence of Mr Marais and Mr Brits, the lease and production agreements are serious agreements (it is not disguised transactions) which have been drafted by the attorneys instructed on behalf of the bank.

[72] Counsel for the plaintiff’s basis for this submission can be summarised as follows:-

72.1 Mr Marais pointed it out, in broad terms, that before the bank approves of a farmer with which the plaintiff (or the business partner of the Plaintiff, Farmsecure) is about to conclude a contract, the bank ensures itself that such contract is signed, that provision is made for insurance and for the hedging of the price and more particularly to ensure that Farmsecure would have access to the farm and fields, by reason of a proper contract and a title to the fields. It is for these reasons that Mr Marais testified that the farmer has to have the right to possess, either through a lease contract or because of the fact that the farmer is the owner of the land. Only in that event would the farmer be entitled to enter into the lease agreement with Farmsecure, to enable Farmsecure and its successor in title (the Plaintiff) to enter it upon the land, to control the farming activities, to perform inspections of the emerging and the development of the harvest, etc.

72.2 The lease contract entitles the “principal” being Farmsecure to enter upon the property, inspect it and perform the farming activities on this land. (Clause 9.1, p 14).

The Clauses 9, 10 and 11 deals extensively with the rights and obligations of the lessee and lessor (p 14 – 16).

The ownership of the commodity that is to be produced vests in the principal (Clause 15)

72.3 Clause 17 and further deals with the important provisions that the commodity that is to be produced (the maize in this instance) is to reach at least the “gelykbreek tonnemaat” or the break tonnage that is to be produced as is reflected in Annexure “3” to the agreement, as discussed above (Page 16, 17, 33).

72.4 Mr Marais confirmed that the bank is part of these important transactions in the sense of making the loans available to Brisen, which was done during this period in the vast amounts of approximately R250 million.

- [73] According to plaintiff's counsel, it is totally inconceivable that a bank (or for that matter a company like Brisen) would enter into a disguised transaction to enable Brisen to lend monies or to provide credit to a farmer. That is why, according to the plaintiff's counsel, Mr Brits testified that the plaintiff is a dealer in grain, like maize, for the past 14 years and he gave thorough reasons why Brisen entered into these agreements, to perform farming activities on farmers' fields, to get hold of and be enable to obtain delivery of produced grain. He argues that it is nothing about any credit that is to be provided to the farmer. Credit is only provided to Brisen who makes use of this credit to perform the farming activities.
- [74] He argued in addition that, that is why there is NOTHING in the contract that provides that the farmer has to pay any money to the Plaintiff, he has only to deliver the maize. If the farmer does so to the break even point, as is reflected in Schedule 3, it is the end of the story and farmer has no further obligation towards the Plaintiff. If the break even point is exceeded, this constitutes a bonus for the farmer and therefore will the maize produced above such break even point will be for the benefit of the farmer.
- [75] According to him, it is only in the event that non-performance of the contract (breach of contract) and or a shortfall of delivery of maize equal to the break even point is taking place where Brisen will, as damages, seek payment from the farmer to be put in the position as if the contract has been properly performed. He quoted the following cases in support of his submission that it has been all along in our law the test that, where a breach of contract has been affected by a party, the other party, as his damages, must be put in the position as if the contract has been properly performed (*Victoria Falls & Transvaal Power Co. Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1; *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd* 1977 (3) SA 670 (A) 687; *Rens v Coltman* [1995] ZASCA 118; 1996 (1) SA 452 (A) 458 E.

FURTHER CLAUSES OF THE ACT

- [76] Plaintiff's counsel further made reference to other relevant clauses of the NCA which deals with the following:-

the definition of credit agreement, which means an agreement "that meets all the criteria set out in Section 8". (Section 1).

"Credit facility" means an agreement that meets all the criteria set out in Section 8(3).

Sub-section 8(3) reads as follows:-

"An agreement, irrespective of its form but not including an agreement contemplated in sub-section (2) or sub-section 4(6)(b), constitutes a credit facility if, in terms of that agreement –

- (a) a credit provider undertakes –

- (i) to supply goods or services or to pay an amount or amounts, as the determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and
- (ii) either to –
 - (aa) defer the consumer’s obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in sub-paragraph (i); or
 - (bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in sub-paragraph (i); and
- (b) Any charge, fee or interest is payable to the credit provider in respect of –
 - (i) any amount deferred as contemplated in paragraph (a)(ii)(aa); or
 - (ii) any amount billed as contemplated in paragraph (a)(ii)(bb) and not paid within the time provided for in the agreement.”

“Credit transaction” means an agreement that meets the criteria set out in Section 8(4).

Part C of the Act deals with “classification and categories of credit agreements”. It is therefore that Section 8 defines a credit agreement for the purposes of the Act is, that is:

“.....(a) a credit facility as described in sub-section (3)

- (b) a credit transaction, as described in sub-section (4);
- (c) a credit guarantee as described in sub -section (5);

or

- (d) any combination of the above.”

[77] He submitted that as it appears from sub-section 3 of Section 8, a credit facility has everything to do (as is born out by the definition of “credit’ referred to above) with the payment of a facility, the deference of the consumer’s obligation to pay, interest in respect of the amount that is deferred to be paid back or interest on any amount billed that is not paid within the time provided for in the agreement. According to him, It has therefore everything to do with the paying back of an amount in respect of the furnishing of credit as envisaged by the Act and has NOT to do with anything regarding the producing and the obtaining of the delivery of grain, as envisaged by the contract between the Plaintiff and the Defendant.

[78] In as far as the interpretation of the contract is concerned counsel for the applicant referred the court to an important judgment of His Lordship, Mr Acting Justice Tuchten (as he then was), in the matter of ABSA Technology Finance Solutions (Pty) Ltd v J S Viljoen t/a Wonderhoek Enterprises,

- [79] In as far as the intention of the parties are concerned, counsel for the plaintiff submitted that it is clear from the evidence of Mr Marais as well as Mr Brits that the bank as well as Brisen regarded these production agreements not to be disguised transactions, but were serious agreements that the bank and Brisen (and Farmsecure) intended to give proper effect to. Apart from the ownership of the maize that vests in Brisen, Brisen also concluded the lease agreement to further protect Brisen's rights. He referred this court in this regard to the principle of "huur gaat voor koop" which was dealt with in the case of *De Jager v Sisang* 1930 AD 71
- [80] His basis is premised on the fact that the production agreement and more particularly Clause 18 thereof, deals with the farming activities, the way the fields have to be planted, cultivated and how the harvest must be collected and more importantly Clauses 18.3.9 and 18.3.10 which provides that the harvest must be collected quickly and efficiently and the maize produced must be delivered to the nearest silo as provided for in Annexures "2" and "7". In this instance the maize had to be delivered at Hibernia Silo.
- [81] He further explained that section 8(4) which deals with the requisites of a credit transaction, refers to a pawn transaction, an incidental credit agreement which has also to do with the deliver of goods and services over a period of time and the payment of an amount of money – an instalment agreement, a mortgage agreement or secured loan, a lease or "any other agreement, other than a credit facility or credit guarantee, in terms of which the payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of –
- (i) the agreement; or
 - (ii) the amount that has been deferred."

Section 8(4)(f)

- [82] He argues that it is therefore clear that a credit transaction as defined in the Act has also to do with nothing else but the term "credit" as defined in Section 1 and the Act describes in more detail what agreements would be applicable and would be regarded as credit transactions. It has once again, everything to do with the payment of money and the deference of such payment whereupon interest is charged on such deferred payment.
- [83] According to him, in this matter the uncontested evidence of Mr Brits was clearly that any payment of monies (or interest, obviously on such payment) has to do with the fact where the farmer breaches the contract and where payment of any amount (as damages) becomes relevant. It has nothing to do with the providing of credit or a credit facility. Further that, as is the position in the production agreement between Farmsecure and the Defendant, there is no question of the deferral of any obligation to pay.

He quoted paragraph 20 of Tuchten AJ's judgment which provides as follows in support of this argument:-

“There could be no deferral unless there was a prior obligation to pay which for monetary consideration was postponed to a later date.”

[84] He maintains finally that this finding of Tuchten AJ is directly in accordance with the situation between Farmsecure and the Defendant, as there is no deferred payment agreed in the agreement, but as soon as the maize has been harvested by the Defendant, he must deliver this maize to the nearest agreed silo. In the production agreement there is therefore no agreement as to the payment of any amount regarding the obligations between the parties, but only the delivery of maize. It is only in the event, as it is in this case of the ABSA Technology-matter, when the Defendant defaults (effects a breach of contract) that the payment in respect of damages becomes relevant, due to the breach of contract and that the interest on such damages comes into play.

E.

ANALYSIS

[85] Likewise, as it is in the case between Farmsecure and the

Defendant, the construction of the terms of the agreement is clearly not one of a credit transaction, not one in terms of which money or credit is provided by Farmsecure to the Defendant and in terms of which the payment of monies had to be made back to Farmsecure (or the Plaintiff as cessionary), but an agreement in terms of which farming activities is to take place and the maize is to be delivered to the nearest silo to the credit of Brisen Commodities.

[86] It can hardly be put better than Tuchten AJ did in paragraph 33 and 34, namely:

“33. Amongst the purposes of the NCA as stated in its long title is the intention to promote access to consumer credit and generally to regulate consumer credit. ‘Credit’ as defined in the NCA means, when used as a noun, (a) the deferral of payment of money owed to a person or a promise to defer such payment, or (b) a promise to advance or pay money to or at the direction of another person. A common law lease such as the Agreement does not involve the provision of credit either as defined in the NCA or as the term is generally understood in commerce. A lessor who buys goods for the purpose of leasing them to a specific lessee does not extend credit to such a lessee, regardless of how the lessor calculates the rentals he wishes to receive, any more than does a landlord who buys a building not for his own use but for the purpose of accommodating tenants.

34. The agreement is therefore not one which is calculated to thwart the objects of the NCA. Even if one assumes that its terms were carefully drafted to keep it outside the reach of the NCA, this would make no difference.”

[87] The following order is thus made:-

The defendant, correctly, it is submitted, conceded that, as a general rule, parties to a contract intend it to be exactly what it purports to be.

(See: Kerr, The Principles of the Law of Contract, p 136, 137

[88] With reference to the decided case of Zandberg v Van Zyl 1910 AD 302 the Defendant correctly quoted the passage from judgment that “the Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention The enquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down....”

[89] In paragraph 4 of the Defendant’s heads of argument, the Defendant has conceded that the onus is upon the party who alleges that the transaction is simulated. As Kerr, supra on p 137 stated, with reference to the Skjelbreds-matter:

“A disguised transaction 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. The purpose of the disguise is to deceive by concealing what is the real agreement or transaction between the parties.... Such transaction is said to be in fraudem legis and is interpreted by the Courts in accordance with what is found to be the real agreement or transaction between the parties.”

See also: p 733 C – E of the matter of Skjelbreds Rederi A – S and Other V Hartless (Pty) Ltd 1982 (2) SA 710 (A)

[90] As Kerr put it on p 137:

“The enquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down.”

[91] As Landman J found in the Lichtenburg Graan Trustees v P J & ILM Boerdery- matter (the judgment annexed to the heads of argument of the Respondent) on page 17, para (33):

“Gevolglik het die Respondent versuim om getuienis voor die Hof te plaas oor hoe die Respondent die ooreenkomste verstaan het en wat aanleiding gegee het tot die Respondent se begrip van die ooreenkoms. Dit het tot die gevolg dat stellings wat namens die Respondent in kruisverhoor gemaak is, nie verhef kan word tot bewysmateriaal nie. Die versuim van die Respondent om die getuienis van Peet Nortje, Gert Els en Johan Els voor te lê, maak ‘n einde aan enige moontlike argument oor die toelaatbaarheid en gevolg van eksentrieke getuienis ten aansien van die Respondent se begrip van die ooreenkoms.”

[92] Likewise, statements and arguments put by the counsel for the Defendant during cross-examination, cannot be regarded as evidence or evidentiary material before the Court. On the contrary, the statement made by counsel on behalf of the Defendant that the argument will be that the lease and production agreements are simulated transactions, was disallowed by the Court.

[93] As it will appear more fully hereunder, Landman J correctly accepted the terms of the agreement that was the subject of the Applicant’s claim against the Respondent in the said Lichtenberg Graan Trustees-matter, to be interpreted according to the wording of the contract.

- [94] It is therefore clear from both the judgments of Landman J, as well as the ABSA Technology-matter decided by Tuchten AJ (as he then was) that the Learned Judges interpreted the written agreements in accordance with the normal rules of interpretation of written agreements, namely in accordance with the ordinary grammatical meaning of the words used in the proper context of the contract. No evidence was led on behalf of the Defendant, Mr J J Pretorius, although he was present in Court and the evidence tendered on behalf of the Plaintiff is therefore unchallenged and uncontested before the Court. (See evidence of Mr Marais and Mr Brits)
- [95] Mr Marais as well as Mr Brits in no uncertain terms confirmed that the intention and purpose of the contract entered into between Brisen Commodities and the Defendant, as well as the intention of Standard Chartered Bank, the banking institution that drafted the agreement, was that effect must be given to the contract in accordance with the wording and provisions of the contract. They both confirmed that there was no simulated intention that the Plaintiff would make a loan or would provide finance to the Defendant, at all.
- [96] The contention made on behalf of the Defendant's counsel that Farmsecure "could" visit the Defendant's farm and "take over the farming activities" is not correct. The evidence of Mr Brits was clearly that Farmsecure, as the business partner of the Plaintiff, physically inspects and supervises (monitoring) the harvest, and oversee to the compiling of various reports. (See for instance para 2.35, p 20 of Plaintiff's main heads of argument).
- [97] The contention made by the Learned Counsel for the Respondent in paragraph 18 namely: "... It was openly admitted by Marais that the money made available by Farmsecure to the Defendant came directly from SCB who used Farmsecure as its conduit to channel the money to the farmer" is incorrect. Firstly, the evidence was that Farmsecure was not financed by SCB but Brisen Commodities, the Plaintiff. Plaintiff then pays the service providers of the farming activities, from the special account controlled by SCB. There was never a purpose that these contracts were meant to be loan agreements to the farmer, at all. That is why Mr Marais in his evidence made it clear that the bank had to ensure itself that the farmer, who is the lessor of the land, has a right and title to the fields that are leased to Farmsecure. This was to ensure that Farmsecure could validly lease the fields from the farmer (Defendant in this instance).

See: para 2.13.2, page 10 of Plaintiff's main heads of argument

- [98] The second point made in the Defendant's heads of argument, in paragraph 18 thereof, namely that SCB and Farmsecure "held the purse strings and made payments to the supplier directly" is incorrect. It was Plaintiff's loan facility with SCB and not Farmsecure. The bank is clear that it only pays upon confirmation that the supplier is entitled to the monies in terms of the contract between Brisen Commodities (as cessionary) and the farmer (Defendant).

[99] The fourth point made in paragraph 18, is totally incorrect. There is no evidence that there was a facility made available to the Defendant. The Defendant had to conduct the farming activities and the Plaintiff as the principal was to pay the service providers, in respect of the farming activities, (only in relation to the fields that were contracted). Clause 17.11, read in conjunction with clause 17.5, puts it clearly that the farmer has to deliver the maize, and if there is a shortfall because of non-delivery, (breach of contract) damages come into play.

See for instance: The evidence of Mr Brits dealt with in para 2.33 and 2.34 from pages 18 to 20 of the Plaintiff's Main Heads of Argument

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[100] The reference in paragraph 22 of Defendant's heads of argument to the documents supplied by the Plaintiff in terms of Rule 35(14), is totally irrelevant, and without any substance.

[101] These documents have never been canvassed during the trial and no witness has been questioned about these documents. Neither did the Defendant take the stand in the witness box to give any explanation or testimony about these documents. The mere reference to: "finance surcharges" or "rate on negative balance" "lending rate" or "interest payable" must be seen in the light and against the background of the evidence of Mr Marais and Mr Brits. Mr Brits, in no uncertain terms, testified that the contract is all about the delivery of grain, strictly in accordance with the terms of the contract. It is not about the payment of monies. The payment of monies, and interest on such payment, only comes into play and becomes relevant when there is a short delivery of the agreed breakeven tonnage of maize. It is therefore only in the event of a breach of contract – that is damages, when payment of such damages becomes relevant.

[102] The mere presence of these documents in the bundle of documents does not alter these documents into evidentiary material or "bewysmateriaal" as found by His Lordship Mr Justice Landman in the Lichtenburg Graan-case. (See page 17 of the judgment).

[103] Neither does the presence of these documents, that have not been explained nor dealt with in evidence, in the bundle of documents raised the status of these documents to evidentiary material that was put before the Court to consider and to decide upon.

[104] Therefore, in the uncontested evidence of the Plaintiff, it was testified that the Defendant made short delivery of the contracted maize. That is why Mr Bronkhorst confronted him with the reasons why he did not deliver the necessary maize, and obtain an undertaking from the Defendant that the Defendant would pay the approximately R1.7 million, being the shortfall and outstanding balance that the Defendant owes Farmsecure (and therefore Plaintiff as its successor in rights).

[105] Tuchten AJ thoroughly dealt with the question of simulated agreements and correctly pointed to the requisites of a simulated transaction or agreement. As Landman J did, Tuchten AJ also examined the agreements in question, “by reference to the terms of the agreement under consideration”,

[106] As a result, I come to the conclusion that the defendant has not discharged the onus that rest upon him, in proving that the contracts entered into between Farmsecure and the defendant are disguised in that they are in reality credit agreement.

[107] In as far as the issue of the abuse of the process of court by the defendant which was raised by the plaintiff, I find that there is no sufficient basis made that justify a feeling to that effect.

F. ORDER

[108] The finding that I make is that the NCA is not applicable to the production and the lease agreements that are the subject of this matter.

[109] The defendant is ordered to pay costs of the adjudication of this point.

A.M. KGOELE

JUDGE OF THE HIGH COURT

DISCUSSION OF THE ABSA TECHNOLOGY-CASE:

On pages 5 and 6 of his judgment Tuchten AJ deals with the relevant clauses of the agreement in question (which was a master rental agreement) and more particularly the question of ownership and in paragraph 17,(p 6) Clause 9.1 of the master agreement which entitles the Plaintiff, in the event of the Defendant’s default, to take possession of the goods, retain all amounts paid and claim all arrear amounts as pre-estimated liquidated damages.

In paragraph 18, (p 7) Tuchten AJ deals with the rental clause which provides:

“If the Defendant defaults in his obligation to pay, he must pay interest at the rate of 6% above the publicly quoted prime interest rate of the Plaintiff’s bankers at the nominal and annual rate compounded annually...”

Like it is in the production agreement, interest is only charged in the event of breach of contract. See paragraphs 2.33 – 2.34 of these heads of argument.

Payment of an amount:

What is abundantly clear from the judgment of Tuchten AJ, is that the Act and more particularly Clause 8(4)(f) deals with payment of an amount which is –

owed by one person to another; and

is deferred.

As is the position in the production agreement between Farmsecure and the Defendant, there is no question of the deferral of any obligation to pay, as dealt with by Tuchten AJ in paragraph 20 (p 7) of his judgment. As Tuchten AJ puts it clearly:

In the important paragraph 21 Tuchten AJ also deals with the fact that there must be, in terms of the relevant agreement, regarding to interest, "... be a fee charge or interest payable to the Plaintiff in respect of the agreement or the amount that has been deferred. There is no such fee charge or interest payable under the agreement"

This finding of Tuchten AJ is directly in accordance with the situation between Farmsecure and the Defendant, as there is no deferred payment agreed in the agreement, but as soon as the maize has been harvested by the Defendant, he must deliver this maize to the nearest agreed silo. In the production agreement there is therefore no agreement as to the payment of any amount regarding the obligations between the parties, but only the delivery of maize. It is only in the event, as it is in this case of the ABSA Technology-matter, when the Defendant defaults (effects a breach of contract) that the payment in respect of damages becomes relevant, due to the breach of contract and that the interest on such damages comes into play.

In paragraphs 19 to 22 Tuchten AJ in his judgment deals with the requisites of Section 8(4)(f), and finds, it is submitted, correctly, that the construction of this agreement does not fall within the category of the definition of the Act, pertaining to credit transaction or credit agreement and therefore the Act is not applicable.

In the important paragraph 24 to 30 (p 9 to 12) Tuchten AJ deals with the argument whether the relationship between the parties and the true nature of the agreement was a credit transaction in terms of the NCA. Tuchten AJ correctly rejected this argument and referred to the terms of the agreement. As Tuchten AJ put it, in paragraph 29:

"As I pointed out, that the transaction be examined by reference to the terms of the agreement under consideration."

Likewise, as it is in the case between Farmsecure and the Defendant, the construction of the terms of the agreement is clearly not one of a credit transaction, not one in terms of which money or credit is provided by Farmsecure to the Defendant and in terms of which the payment of monies had to be made back to Farmsecure (or the Plaintiff as cessionary), but an agreement in terms of which farming activities is to take place and the maize is to be delivered to the nearest silo to the credit of Brisen Commodities.

It can hardly be put better than Tuchten AJ did in paragraph 33 and 34, namely:

"33. Amongst the purposes of the NCA as stated in its long title is the intention to promote access to consumer credit and generally to regulate consumer credit. 'Credit' as define

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