Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No. 9922/2005

Before:

The Hon. Mr Justice Binns-Ward

In the matter between:

ANY NAME 451 (PTY) LTD Plaintiff

and

CAPESPAN (PTY) LTD Defendant

JUDGMENT DELIVERED ON 23 SEPTEMBER 2011

BINNS-WARD J:

[1] The plaintiff has sued the defendant in this action for orders (i) directing the defendant to render an account, duly supported by vouchers, in respect of the 'performance of the defendant's mandate for the marketing and sale of the citrus fruit of Chance Brothers and Club Champion during the 2002 season and

the allocation and/or appropriation by the defendant of all proceeds from such sale'; (ii) a debatement of that account and (iii) payment to the plaintiff of 'such amounts as the defendant has appropriated and / or failed to pay to the bank, Chance Brothers or Club Champion, in breach of its obligations under the Chance Brothers' new production loan agreement and the Club Champion new production loan agreement', together with interest thereon *a tempore morae*.

[2] Chance Brothers (Pty) Ltd and Club Champion Investments (Pty) Ltd (hereinafter referred to, when convenient, as 'the companies') were two entities which carried on business farming citrus, mainly grapefruit, in the Nkwalini Valley[1] in KwaZulu-Natal. The companies were sometimes collectively referred to as 'the Chance Group', after the family which, in one manner or the other, appears to have held the proprietary interest in them. As a consequence of intractable financial difficulties, the companies were finally wound up in December 2002. The plaintiff company, Any Name 451 (Pty) Ltd, has founded its claims in the current action on cessions of rights in its favour executed in August 2005 by the liquidators of Chance Brothers (Pty) Ltd (in liquidation) and Club Champion Investments (Pty) Ltd (in liquidation), respectively, and by Nedcor Bank Ltd ('Nedcor'). Nedcor was Chance Brothers' banker. It is 'the bank' referred to in the aforementioned relief sought by the plaintiff. Subsequently renamed Nedbank, Nedcor was often referred to by that name in the evidence and in some of the relevant documentation.

[1] Apparently, formerly known as the Nkwaleni Valley.

[3] The defendant, Capespan (Pty) Ltd (often referred to in the evidence as 'Outspan'[2]), is a company well known in South Africa as a marketer of fresh fruit produce. It is common cause that the defendant had marketed the citrus produced for the export market on the companies' farms during the 2002 season, as indeed it had in the preceding seasons.

[4] At the commencement of the trial a direction was given in terms of rule 33(4) that certain issues should be tried and determined separately from, and before the remaining issues in the action. The direction was formulated as follows:

> It is directed that the following issues be determined separately, and before the remaining issues in the action:
>
> 1 The question as to the existence, nature and content of the alleged contractual relationships between the companies, Nedbank and the defendant, respectively, insofar as they bear on the alleged duty by the defendant to provide an improved accounting[3] in respect of the marketing and sale of citrus

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[2] Capespan was the product of a merger between two pre-existing statutory marketing bodies known as Outspan and Unifruco, respectively.

[3] By the commencement of the trial it was admitted by the plaintiff that the defendant had in fact accounted to the companies regularly during the execution of the relevant contracts. What the plaintiff sought was an improved accounting, including in respect of the aspects set out in annexure E of the particulars of claim as finally amended. The claim was pleaded thus in the finally amended particulars of claim in respect of Chance Brothers at para 16A.3 and in respect of Club Champion at para 16B.3: '*Despite demand,* [the Defendant] *has failed and/or refused adequately to account to* [Chance Brothers/Club Champion] *in respect of the proceeds from the sale of its 2002 citrus crop, or the allocation by the Defendant of such proceeds, or the income and expenses incurred by the Defendant on behalf of* [Chance Brothers/Club Champion] *in respect thereof, in that it failed to provide any vouchers, other supporting documents or explanations in the respects listed in annexure "E" hereto, in support of the accounts rendered.*'
Annexure E in relevant part went as follows:
The supporting documentation required by the plaintiff as part of the further accounting sought from the defendant was set forth as follows in annexure E to the finally amended particulars of claim:

1. *The Defendant's agreement(s) with local (South African) terminal operators, including any agreements relating to rebates and/or discounts.*
2. *The Defendant's agreement(s) with shipping lines, including any agreements relating to rebates and/or discounts.*

fruit of Chance Brothers (Pty) Ltd and Club Champion Investments (Pty) Ltd during the 2002 season

2 To the extent, if at all, that it is not already comprehended by paragraph 1 of this ruling, the issue of the basis on which the defendant may have been obliged to allocate and/ or appropriate the proceeds of the aforementioned sales.

3 The competence or validity of the cessions upon which the plaintiff asserts its standing in this action.

4 To the extent that the issue may arise out of the allegations in para 20 of the plaintiff's particulars of claim, the question whether such claim as Nedbank may have enjoyed against the companies or against the defendant was ceded to the plaintiff.[4]

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3. *The Defendant's agreements with stevedores, including any agreements relating to rebates and/or discounts.*
4. *The Defendant's agreements with freight forwarders, including agreements relating to rebates and/or discounts.*
5. *Agreements between the Defendant and transport service providers.*
6. *Agreements between the Defendant and inspection service providers (PPECB)* [the Perishable Products Export Control Board, which is a statutory body].
7. *Agreements between the Defendant and Citrus SA and the Citrus Growers' Association relating to levies payable by Chance Brothers and Club Champion ("the companies") to those organisations.*
8. *All source documentation including invoices, statements and proof of payment, in relation to packing materials paid for by the Defendant in relation to fruit packed.*
9. *All agreements between the Defendant and purchasers and/or importers of fruit supplied by the companies.*
10. *All agreements for the provision of volume discounts, other discounts and rebates payable by importers, customers or other entities to the Defendant.*
11. *All exchange rate contracts between the Defendant and bankers.*
12. *All source documentation evidencing overseas costs and contracts relating to fruit supplied by the companies, including market duties, importers' commission, handling charges and freight and terminal charges.*
13. *Any agreement(s) between the Defendant and overseas (i.e. United Kingdom, EU and Japan) terminal operators, including agreements relating to rebates payable to the Defendant.*
14. *A full and proper description of and explanation for the expense line items shown on the Defendant's statements furnished to the companies, including individual supplies and/or expense types aggregated in each line item, and all source documents pertaining to such entities.*
15. *A full and proper explanation and supporting vouchers of and for the deductions reflected on the statements furnished to Club Champion in respect of the entries summarised in Table 4.3.1 of the export summary of Ms Sue Dean.*
16. *A full and proper explanation and supporting vouchers of and for the deductions reflected on the statements furnished to Club Champion in respect of the entries summarised in Table 4.3.2 of the export summary of Ms Sue Dean.*

[4] At the stage at which the ruling in terms of rule 33(4) was made, para 20 of the particulars of claim read as follows:

In the reasons which prefaced the making of the ruling in terms of rule 33(4), it was emphasised, however, that nothing in the expression of the court's identification of the issues for separate determination should be understood in any way to derogate from the manner in which those issues had been defined in the pleadings.

[5] It became evident during the testimony of Mr Christopher Chance - the erstwhile managing director of the companies, whose interests currently appear to be represented by the plaintiff - that he considered that Capespan had, in the context of its contractual relationship with the companies, withheld monies which it should have paid over to the companies and that it had failed to credit the companies with the benefit of certain rebates and discounts which it had secured in respect of the cost of exporting the fruit produced on the companies' farms in the 2002 season. The further accounting sought was required in order to confirm and quantify the claim that Mr Chance believed that the companies had had against the defendant in this connection. Exacting the payment of this claim was of course the ultimate object of the plaintiff's action. There is, however, no general principle of law that when one party does not know how much he is owed by another he can call upon the latter to

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> On or about 29 September 2005 the bank in writing abandoned and waived in favour of the Chance Brother's (sic) liquidators, all right title and interest which the bank may have had under and in terms of the Chance Brothers new production loan agreement ("*the bank's claim*").

The paragraph was later amended to read:

> On or about 29 September 2005 the bank, the Plaintiff and the liquidators of Chance Brothers concluded a written agreement, a copy of which is annexure "DP18" to the Defendant's plea, in terms of which, inter alia, the bank ceded, assigned and made over to the Plaintiff all its right, title and interest in and to the claim as defined in the said agreement ("the bank's claim").

render an account; see *Rectifier and Communication Systems (Pty) Ltd v Harrison and Others* 1981 (2) SA 283 (C) at 287 fin – 288B.

[6] In order to establish an entitlement to a statement of account, as claimed, the plaintiff had to prove either (i) that the defendant had been obliged in terms of a relevant fiduciary duty to account the companies in the manner sought, or (ii) that the defendant was contractually bound to the companies to render such an account, or (iii) that there was a statutory obligation on the defendant to render the account;[5] see *Absa Bank Bpk v Janse Van Rensburg* 2002 (3) SA 701 (SCA) at para 15; *Maitland Cattle Dealers (Pty) Ltd v Lyons* 1943 WLD 1 at p. 19 (per Millin J). No magic attaches to the expression 'fiduciary duty'. The existence of a fiduciary duty, and its nature and extent, are questions of fact to be adduced from a thorough consideration of the substance of the applicable relationship and any relevant circumstances which affect the operation of that relationship. Furthermore, the existence of a fiduciary relationship can be an incident of a contract - agency affords a typical example – and thus there is scope for an overlap between categories (i) and (ii) aforementioned. The terms of a contract may therefore create and define the nature and extent of a fiduciary relationship or duty,[6] including the extent of any attendant duty to account. In the current matter the plaintiff relied on the contractual relationship between the companies and the defendant – broadly

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[5] Although there was passing reference in the evidence to the Agricultural Produce Agents Act 12 of 1992, the plaintiff did not rely at any stage of the much amended pleaded case on a statutory basis for its claim.

[6] See *Phillips v Fieldstone Africa (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA) at para 27 (citing *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1130F; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 180 and *Hodgkinson v Simms* [1994] 3 SCR 377 (SCC); ((1995) 117 DLR (4th) 161) at p.38 of the pdf. copy of the judgment accessible at http://www.canlii.org/en/ca/scc/doc/1994/1994canlii70/1994canlii70.pdf).

characterised by it during the trial as one of agency, or of 'trust' – as the basis for the alleged duty on the defendant to provide an improved accounting. The focus was therefore on the identification of the applicable contract(s) and the pertinent terms thereof.

[7] The particulars of claim and the plea, as well as the trial particulars, have been the subject of multiple amendments on both sides. It is relevant to summarise the evolution of the plaintiff's claim in the pleadings from the time summons was issued in 2005 to the form in which it was finally couched after various amendments effected on 18 April 2011, some weeks after the commencement of the trial in early March 2011. That evolution demonstrates an initial reliance by the plaintiff on the marketing agreements concluded between the companies and the defendant in 1999 (to which I shall refer as 'the 1999 marketing agreements') to found the alleged duty on the defendant to account to the companies. The 1999 marketing agreements were also expressly referred to in the deeds of cession on which the plaintiff's claim to standing is founded, which were executed in 2005, at a time when any claims which the companies may have had against the defendant in respect of the 2002 citrus season were in danger of becoming extinguished by prescription. The evolving history of the pleadings further demonstrates a subsequent casting about for alternative bases for the alleged duty after a subsequently occurring external event - in the form of a full bench judgment of this court in other proceedings between the parties - exposed the initially pleaded foundation as legally untenable for the plaintiff's purposes.

[8] The terms of the two 1999 marketing agreements were identical in all respects material for present purposes, and comprised the content of a *pro forma* contract document used generally by the defendant in its dealings with fruit producers. Because of their centrality to the commercial relationship between the companies and the defendant, and notwithstanding the plaintiff's subsequent allegation, introduced some years after the institution of proceedings, that their terms did not govern the export of the citrus produced by the companies in 2002, it is convenient to describe at this stage how the 1999 marketing agreements worked. As will become apparent, the wording of the contracts might have been better considered in some respects. Nevertheless, their substantive import was clear enough.

[9] In terms of the 1999 marketing agreements the defendant was granted the right of first refusal for the marketing and distribution of the companies' fruit products throughout the world for the duration of the agreements. The fruit products subject to the agreements were oranges and grapefruit in the case of Chance Brothers; and oranges, grapefruit and lemons in the case of Club Champion. In context it was evident that the fruit products in question were those of the respective suppliers which met the quality requirements and standards laid down from time to time by the defendant and had been passed for export by the Perishable Products Export Control Board (a statutory body).

[10] The 1999 marketing agreements provided (in clause 4.1) that ownership of the fruit delivered by the companies to the defendant under the agreements for export passed to the defendant upon acceptance by the latter of physical

delivery of the fruit from the companies. Consequently, in contracting with the ultimate purchasers of the fruit, the defendant acted as principal and sold its own property. In consideration for the producer transferring ownership of the fruit to the defendant in terms of the 1999 marketing agreements, the producer obtained a participatory interest in the pertinent 'consignment accounts' to which the defendant allocated the proceeds of the sale of the fruit, and from which it funded the 'advance payments' to which producers were entitled under the marketing agreements.[7]

[11] The agreements provided (in clause 3) for the accounting for and payment of the proceeds (inclusive of advance payments) of the sale of the fruit as follows:

> 3. <u>ACCOUNTING AND PAYMENT OF PROCEEDS TO THE SUPPLIER</u>
>
> 3.1 [The defendant] will create and administer Consignment Accounts of the type specified in paragraph D of the front page hereof for the Products delivered to it, which accounts will be trust accounts administered on behalf of the Supplier or groups of suppliers who have agreed to deliver Products falling within the specification of Products for the different Consignment Accounts.
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> 3.2 The scope and definition of each Consignment Account and the specification of the Products falling within each such Consignment Account and the procedure to be followed in administration of such Consignment Accounts will be determined by [the defendant].
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> 3.3 After delivery of the Products and within fourteen (14) days of receipt of intake documentation by [the defendant], [the defendant] will advance the Supplier a minimum of sixty percent(60%) of the Supplier's pro-rata portion of

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[7] I agree with the submission by the plaintiff's counsel that the basis for the transfer of ownership did not lie in a sale by the companies of their fruit to the defendant. But that does not detract from the effectiveness of the transfer of ownership of the fruit in terms of the provisions of clause 4.1 of the 1999 marketing agreements. Nor did the fact that the provisions of the agreements limited the defendant's powers to deal with the fruit detract from the effectiveness of the transfer of ownership in terms of clause 4.1.

the projected Net Proceeds of any Consignment Account in which the Supplier participates in the form of an advance payment.

3.4 As soon as practicable after the total quantity of Products delivered to [the defendant] for sale through a particular Consignment Account has been sold, [the defendant] will determine the Net Proceeds of that Consignment Account and, after deducting advance and interim payments already made, pay the balance due to the Supplier participating in such Consignment Account pro rata in proportion to the quantities and quality of Products delivered by the Supplier to [the defendant] for sale through that Consignment Account. [The defendant] will endeavour to make such final payments within 60 days of closure of each Consignment Account.

3.5 [The defendant] will be entitled to increase or decrease any amount due to the Supplier with an amount calculated by [the defendant] in accordance with an evaluation programme established by [the defendant] for this purpose, or in accordance with the actual quality of the Products upon delivery to [the defendant] customers, where such quality leads to a reduction of value of the Products as a result of latent, inherent or progressive defects.

3.6 [The defendant] will adjust any amount due to the Supplier by any cost or expense incurred by [the defendant] or its agent which in the discretion of [the defendant] should not be shared by all Suppliers participating in a specific Consignment Account on an equal basis.

3.7 The Supplier will abide by the outcome of the audited and approved Consignment Accounts.

[12] '*Consignment Account*' was specially defined to mean '*Differential trust accounts each administered on behalf of the Suppliers, as the case may be, who agree, by their selection in paragraph D of the front page hereof, to deliver Products in accordance with the specifications of such accounts.*' (Paragraph D of the front page of the *pro forma* contract document provided for the supplier to select a type of 'consignment account', namely either (i) an own

consignment account, (ii) a syndicated account or (iii) a group account. Both companies selected an '*own consignment account*'.

[13] '*Net proceeds*' was defined in the 1999 marketing agreements to denote '*Gross proceeds less the costs incurred by* [the defendant] *in the marketing of the Products and* [the defendant's] *commission*' as stated on the front page of the contract document (in each case 7%). '*Gross proceeds*' was defined to mean '*The proceeds received by* [the defendant] *in respect of the sale of the Products, wherever marketed and without any deduction whatsoever.*'

[14] The defendant's commercial objective in concluding the 1999 marketing agreements was the generation of income. It would retain a commission of 7 per cent of '*the total FOB Proceeds of the Supplier for all products marketed in terms of the*' agreements. '*FOB Proceeds*' was defined to mean '*The Gross Proceeds less Overseas Costs and CIF Costs*'.

[15] It is not possible to properly understand clause 3 of the 1999 marketing agreement without an insight into the manner in which the fruit producers and the defendant practically did business in terms of the standard form contract. Seen in that context it is apparent that the expression 'consignment account' bore two connotations. One related to a 'consignment account' determined by the defendant and the other related to a 'consignment account' stipulated by the producer by selection of one of three options provided in Part D of the front page of the contract document. Confusingly to the uninformed reader, the expression is used in both senses in clause 3.1 of the contract.

[16] To explain: The first of the two aforementioned connotations of ‘consignment account’ related to the composition of a consignment of fruit for export. The defendant was responsible, in terms of clause 3.2 of the contract, for determining the character of each such consignment. This was done with reference to defined characteristics such as the type and size of the individual items of fruit, its date of ripening and so forth. The scope and definition of the consignments thus determined and the specifications - including issues such as the nature of packaging to be used - of the fruit that were to comprise them were fixed by the defendant with regard to market demands and requirements, which varied according to the geographic location of the markets in which the fruit was to be disposed of and, in some cases, the specification of individual end-customers. The variables were such that during the 2002 season some approximately 15000 such consignments would have been individually determined by the defendant in the ordinary course of its business.

[17] A contracted producer having fruit available that was compliant with the characteristics determined for a particular consignment account would deliver such fruit to the defendant. (The 1999 marketing agreements provided for the drawing up of business plans by the defendant in co-operation with the producer. The business plans were intended, to the contracting parties’ mutual advantage, to coordinate production by the suppliers with the defendant’s anticipated requirement for fruit.) The fruit thus delivered would be pooled with fruit supplied by other producers meeting the same scope, definition and specification, and treated as a batch (or consignment) by the defendant for export purposes. Each such consignment would be separately accounted for

in the defendant's books, hence the 'consignment account'. All expenses incurred in connection with the disposal of the fruit in the consignment would be debited to the consignment account. The advance payments made to producers as provided for in terms of clause 3.3 of the contract would also be debited against each contributing supplier's individual account in the consignment account.

[18] The producers whose fruit was included in the consignment would each have an interest in the consignment account proportional to their respective individual contribution.[8] After the fruit subject of the particular consignment account had been sold, the proceeds would be credited to the consignment account and the credit balance, assuming the account was in credit after the receipt of the proceeds, would be paid to the producers who had participated in the consignment *pro rata* their participation, less the commission and the advance payment debt due by them to the defendant, and subject to any individual adjustments effected by the defendant in terms of clauses 3.5 and/or 3.6.

[19] Payments to producers would be made by the defendant to the consignment account stipulated by the producer in Part D on the front page of the pro forma contract document, which is the second of the aforementioned connotations of the expression 'consignment account'. Producers could choose to be accounted to individually, in a syndicated account, or in a group account. (Chance Brothers and Club Champion had chosen to be accounted

[8] A producer's participation in a particular consignment account was determined with reference to the number of cartons supplied by it in the consignment as a proportion of the total number of cartons comprising the consignment.

to individually.) The consignment account referred to in Part D of the front page of the contract document thus was an account of the individual producer, a group account of related producers, or an account operated by a syndicate of producers, as selected in each case, in terms of clause 3.1, by the contracting supplier

[20] The consignment accounts administered by the defendant were, as mentioned, treated separately in the defendant's books. The defendant segregated the consignment accounts, referred to by the defendant's chief financial officer as the defendant's 'trading accounts', from the accounts maintained in respect of what he described as 'the corporate side' of its business. Two sets of ledgers were kept; one for the consignment (or trading) accounts, and the other for the corporate business. The funding for advance payments to producers (in terms of clause 3.3) would be provided from the defendant's corporate funds and debited as loans in the relevant consignment accounts. The funding by the defendant of the expenses incurred to export and sell the fruit would be treated in the defendant's accounts in an equivalent manner to the advance payments. The flow of funds to the defendant's corporate account in respect of the export of consignments of fruit would comprise only the repayment of the aforementioned loans (including, I assume, the interest payable to the defendant in terms of clause 6.4) and expenses and the commissions stipulated in the applicable marketing agreements between the defendant and the fruit producers.

[21] In the words of the group financial director of the Capespan Group, Mr Andrew De Haast, 'both of [the aforementioned ledgers] are part of [the defendant's] balance sheets, so if one looks at the…balance sheet the collective of the two ledgers comes into form. It will be reflected in [the defendant's] balance sheet; they are definitely both Capespan ledgers'. This makes it clear that amounts standing to the credit of producers in the respective consignment accounts did not constitute funds belonging to the producers, but merely amounts in which the defendant was, subject to clause 3 of the (1999) pro forma marketing agreement, liable to pay to the producers. Fruit in any number of different consignment batches might be exported together in a single shipment. The defendant, by reason of the volumes of fruit which it exported, was frequently able to obtain bulk rebates (or discounts) from carriers in respect of freight charges. The defendant had its own professionally designed systems in place for determining how such rebates should be accounted for between the various consignments included in the affected shipments. The defendant's accounts were maintained in a manner which made its trading transactions amenable to verification by audit process.

[22] If the fruit concerned failed to realise as much as had been estimated for the purpose of the calculation of the advance payments referred to in clause 3.3 of the marketing agreement, the relevant consignment account could well reflect a claim by the defendant against the supplier, instead of an amount due by it to the supplier. This makes it clear, I think, that the use of the term 'trust accounts' in clause 3.1 of the marketing agreement is incorrect, certainly in the strict sense of the legal concept of a trust, as indeed is evident when one

construes the provision in the context of clause 3 read as a whole. Any credit balance in the so-called trust accounts constitutes the disposable proceeds of the realisation of the defendant's property. The defendant holds those funds for itself and administers them in a manner so as to facilitate the discharge of its obligation to pay to the suppliers what is due to them. Despite some language which might on a superficial and insufficiently contextual consideration suggest otherwise, the contractual scheme creates a means of determining and effecting payment of the defendant's indebtedness to the suppliers in terms of the contract, or, in cases in which the disposal of the fruit does not go propitiously, of determining the supplier's indebtedness to the defendant; it does not establish an entrustment of property to be administered by the defendant for the benefit of the producers. Indeed, KPMG, the defendant's external auditors, confirmed as much in a letter written on 14 November 2002, in respect of the defendant company's compliance with the rule of the Fresh Produce Exporters' Forum ('FPEF') that funds in respect of which exporters were liable to producers should be held in an appropriately segregated manner.[9]

[23] Reverting then to the evolution of the pleaded claim: After the institution of the current proceedings in 2005, matters were left somewhat in suspense

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[9] The KPMG letter, addressed to the CEO of the FPEF, read:

> *Dear Mr Symington*
> *FPEF requirements*
> *This serves to confirm that Capespan (Pty) Ltd has conformed with the requirements of the FPEF in that:*
> *1) The bank accounts are in the name of Capespan (Pty) Ltd but are separate from the normal company accounts. These are however not trust accounts.*
> *2) There is a clear audit trail available on these accounts due to sufficient accounting systems being in place.*
> *Yours sincerely*
> *KPMG Inc.*

while the parties to the action concentrated their attention on separate, but in a sense related, litigation connected with an arbitration claim that had been instituted by the companies against the defendant in 2001. The arbitration claim was one for compensation for damages alleged to have been caused to the companies by a breach, during the 2001 citrus season, by the defendant of its obligations under the 1999 marketing agreements.

[24] The arbitration was variously referred to by the protagonists as 'the fruit fly claim' or the 'out of protocol claim'. It arose out of the rejection, due to fruit fly infestation, of a considerable quantity of grapefruit delivered by the companies to the defendant in mid 2001 for export in terms of the 1999 marketing agreements. In their statement of claim in the arbitration the companies referred to the written notice of termination of the 1999 marketing agreements, dated 22 September 2000, which they had purported to give in circumstances that I shall describe later, without making it clear whether they contended it had been effective or not. They alleged, in para 13 of the statement of claim, '*Notwithstanding the Claimants' Notice of Termination dated the 22nd September 2000…., the respective Claimants and the Defendant conducted themselves at all material times thereafter on the basis that a marketing agreement was in force between them in respect of the 2001 seasons on the terms and conditions which included those pleaded in paragraphs 6, 7, 8, 9, 10 and 11 above, and that they continued to do business on the terms and conditions contained in the said agreement.*' The clauses of the 1999 marketing agreements pleaded in paragraphs 6, 7, 8, 9, 10 and 11 of the statement of claim were clauses 1.1, 4.1, 4.3, 6.1, 6.2, 8.2.2, and 15. (The

reference to arbitration had presumably occurred in terms of clause 13 of the agreements.) It was also apparent that the companies must have been accounted to in respect of the proceeds of the fruit delivered by them to the defendant in terms of clause 3 of the marketing agreements. It is therefore apparent from the manner in which the arbitration claim was formulated that the companies contended that their relationship was governed either by the 1999 marketing agreements; alternatively, an agreement tacitly relocating those agreements.

[25] The arbitration proceedings had been interrupted by the intervening liquidation of the companies. The plaintiff company took cession of the arbitration claim from the liquidators and sought to have itself substituted as the claimant in the arbitration. The defendant resisted the substitution relying on a clause in the 1999 marketing agreements which prohibited a cession of rights under the agreements. The relevant provision in the 1999 marketing agreements was referred to variously by counsel and the witnesses during the trial as 'the non cedability clause' or the '*pactum de non petendo*'. It appeared as clause 16 of the 1999 marketing agreements and provided: '*Save as herein expressly otherwise provided, neither this Agreement nor any part, share or interest therein nor any rights or obligations hereunder may be ceded, assigned, or otherwise transferred without the prior written consent of the other party, provided that* [the defendant] shall *have the right to cede, assign or transfer this Agreement, either in whole or in part, to an associate or subsidiary company of* [the defendant] *without the consent of the Supplier.*' In his replying affidavit in the application for the substitution of the plaintiff for the companies

as the claimant in the arbitration proceedings, Mr Christopher Chance did not dispute the incidence of the non-cedability clause to the contractual relationship between the companies and the defendant in 2001. He argued, however, that the liquidation of the companies had 'the effect that vis à vis the liquidators, clause 16 of the marketing agreements is to be regarded as *pro non scripto*'. That argument was rejected by a full bench of this court (per Thring J; Allie and Waglay JJ concurring) in *Capespan (Pty) Ltd v Any Name 451 (Pty) Ltd* 2008 (4) SA 510 (C). An application by the plaintiff for special leave to appeal against the adverse decision of the full bench was refused by the Supreme Court of Appeal.

[26] The defendant had also relied on the non-cedability clause in its plea in the action. The plaintiff, consistently with its position in the arbitration matter, alleged in its replication that the non-cedability clause was not binding on the liquidators of the companies.[10] Mr *Muller* SC, who appeared for the plaintiff together with Mr *Melunsky*, conceded, however, as he had to, that the full bench judgment is binding on this court, and dispositive of the action, if the business transacted between the companies and the defendant in the 2002 season had been governed by the terms of the 1999 marketing agreements.

[27] Thus the effect of the judgment of the full bench was that the plaintiff's claim in the current action, also founded, as it was at that stage, on a cession of the companies' alleged rights under the 1999 marketing agreements, could not be prosecuted on that basis. The plaintiff thereafter looked elsewhere – that is outside the 1999 marketing agreements - to found the alleged right of

[10] See para 12.3 of the plaintiff's replication which was delivered on 13 June 2006.

the companies to the type of accounting sought from the defendant in the action. In terms of a succession of amendments to its particulars of claim – several of them effected after the commencement of the trial - the plaintiff alleged that the defendant's mandate for the marketing and sale of the companies' citrus fruit in the 2002 season and the associated duty to account was in the December 2001 production loan agreements, alternatively in the so-called November 2000 agreements, further alternatively, in tacitly concluded marketing agreements which were not subject to any prohibition on the cession of rights. I shall elaborate later on these allegations to the extent necessary.

[28] Indeed, the plaintiff, having initially relied on the 1999 marketing agreements, then alleged that those agreements had been terminated before the commencement of the 2002 citrus season. It alleged that the 1999 marketing agreements were cancelled by agreement at the end of September 2000; alternatively, with effect from the end of September 2001, pursuant to written notice of termination given by the companies on or about 29 September 2000; further alternatively, on 8 November 2000, upon the conclusion of what were labelled in evidence as 'the November 2000 agreements' or the acceptance of 'the grapefruit offer'. The defendant denied that the 1999 marketing agreements had been cancelled, but alleged that in any event, even were it to be held that they had been, the companies' produce continued to be marketed during the 2002 season in accordance with the terms and conditions of the marketing agreements, as amended or affected by the November 2000 agreements and by the new production loan agreements concluded between the respective companies and the defendant in December 2001. The

defendant’s alternative contention therefore rested, in substance, on an alleged tacit relocation of the 1999 marketing agreements.

[29] Owing to its potentially dispositive nature, it is sensible to consider the question of the alleged termination of the 1999 marketing agreements first. The 1999 marketing agreements provided (in clause 2) for an annual duration with effect from their respective commencement dates (30 September 1998 and 1 October 1998), subject to notice of termination being given by either party at least one month prior to the anniversary date. In the event of notice of termination not being given, as aforesaid, the agreements were to continue from year to year until one of the parties gave the other written notice of termination in accordance with clause 2 thereof.[11] The clause bears quotation in full; it provided: ‘*This Agreement shall commence on the date indicated in paragraph A of the front page hereof and terminate on the first anniversary of such commencement provided that one of the Parties has given notice of such termination to the other at least one (1) month prior to such anniversary date. In the absence of such notice this Agreement will continue from year to year until one of the Parties gives the other written notice of termination, provided that the notice period will commence on 1 September, immediately following such notice, and will terminate on 30 September of that year unless otherwise agreed.*’

[11] The Club Champion 1999 marketing agreement carried a hand-written endorsement, initialled by the parties’ representatives, providing ‘*Minimum Length of Contract 3 years*’, but nothing was made of this by either party at the trial. The 2002 season fell outside the ‘minimum length’ period.

[30] The evidence established that at a meeting of the defendant's directors on 22 September 2000, Mr Christopher Chance read out a statement informing the defendant's board of the intention of the members of the Nkwaleni Alliance to cancel their marketing agreements with the defendant and to enter into negotiations with the defendant for the conclusion of new marketing agreements. The Nkwaleni Alliance was an association of citrus growers in the Nkwalini Valley in KwaZulu-Natal, to which the companies belonged, and in which Mr Chance played a leadership role. It was evident from the content of Mr Chance's statement that the growers' complaint was that then extant agreements were too one-sided in favour of the defendant. In particular, the growers wished to introduce a regime in terms of which the defendant, as the marketer of the citrus produced by them, would be committed to payment to the growers of no less than the lowest price in the range of prices that it had forecast that fruit packed and delivered in a particular week would realise, even if the fruit were sold below such price. The growers were dissatisfied with the situation which prevailed, by which they were induced to pack and deliver fruit on the basis of price forecasts given to them by the defendant, only to discover, after the fruit had been sold, that the range of prices actually realised was considerably lower. In the 2000 season the disparity between forecast prices and realised prices resulted in many suppliers having from their own funds to repay part of the moneys paid to them by the defendant as advance payments in terms of clause 3.3 of the standard form contracts used for the 1999 marketing agreements.[12]

[12] Clause 3.3 has been quoted in para [10], above.

[31] The statement by Mr Chance to the board meeting was not intended in itself to constitute notice of termination within the meaning of the contracts. Formal written notice of termination was given by Mr Chance on behalf of each of the companies by telefax on 29 September 2000. The notice letter, which was dated 22 September 2000, read as follows:

> Chance Brothers (Pty) Ltd and Club Champion Investments (Pty) Ltd hereby give Capespan notice on (sic) the termination of our existing marketing agreement (sic) with Capespan and wish to proceed, immediately, via the Nkwalini (sic) Alliance of Capespan Growers, to re-negotiate a new agreement.

[32] On its face, the terms of the cancellation letter were amenable to construction either as notice of a purported immediate cancellation, which would have constituted a repudiation of the 1999 marketing agreements – it will recalled that they stipulated that at least one month's notice of termination to be given before 1 September in any year and to become effective on the following 30th day of September – or as notice of the termination of the agreements with effect from 30 September 2001. In my judgment it is evident from the context, however, that the termination letter sent by Mr Chance on the companies' behalf to the defendant was intended to be of immediate effect and that it was so understood by the recipient. It was intended to place the defendant in the position in which it would be put to the choice between concluding replacement agreements on terms more favourable to the members of the Nkwaleni Alliance, or losing their business. Mr Chance's intention in writing the termination letter was confirmed in a letter by him to his fellow directors of Chance Brothers, dated 29 September 2000. Reporting on recent

events and in the lead up to a scheduled meeting with representatives of the defendant on Monday, 2 October 2000, he stated:

> In the interim, all Capespan growers in Nkwalini, including ourselves, have cancelled their contracts, so as to be in a position to re-negotiate new contracts for next season [i.e. April – October 2001].

Indeed, Mr Chance confirmed in his evidence at the trial that it had been the companies' intention to notify the defendant of their cancellation of the 1999 marketing agreements with immediate effect.

[33] That the director of citrus division of the defendant, Mr Chandler, understood the letter in the manner in which Mr Chance had intended is evident from his urgent and pressing attention to resolving the situation, including, amongst other things, cancelling a planned overseas marketing-related trip. This much is evident from a letter written by Chandler to Chance, in the latter's capacity of chairman of the Nkwaleni Alliance, dated 13 October 2000. In the letter, Mr Chandler stated '*I…wish to advise that I am currently investigating the contents of your statement tabled at the Outspan Board on 20th September and associated correspondence, so as to be able to deal with these issues in an appropriate way*'. The documentary evidence shows that Mr Chandler was conscious that Mr Chance was influential with growers in Nkwalini Valley area. In the circumstances it was understandable why the defendant should have reacted by endeavouring to save the situation by resolving underlying issues of dissatisfaction amongst the growers, rather than by pointing out to Mr Chance that his purported termination of the companies' marketing agreements with immediate effect constituted a repudiation

[34] It is evident from the defendant's acknowledgement of the notice of termination given by the companies that it was agreeable to entering into negotiations for the conclusion of replacement marketing agreements. The defendant proposed, however, that negotiations for a new marketing agreement should stand over until after a meeting already scheduled to take place with the members of the Nkwaleni Alliance at Shakaland, Nkwalini, in early October 2000, had occurred. On the evidence, and notwithstanding Mr Chance's evident belief to the contrary at the time, it would appear that the companies were the only members of the Alliance to have purported to give notice of the termination of the marketing agreements with the defendant before the meeting at Shakaland. The defendant's written response to the companies' termination letter went as follows:

> **Re-negotiation of Marketing Agreement with Capespan**
>
> Notice to re-negotiate your Marketing Agreement with Capespan is accepted.
>
> I suggest that we postpone negotiations until after the meeting to be held with Grapefruit growers on Monday, 2 October 2000 at Shakaland, Nkwaleni.
>
> I trust that you will find this in order.
>
> Yours sincerely
>
> Craig Erichsen
>
> **Area Manager: KwaZulu-Natal**

The defendant's letter was notably silent on the issue of the purported immediate cancellation by the companies of the 1999 marketing agreements. It certainly did not evidence any agreement on the part of the defendant which could support the plaintiff's allegation that a consensual cancellation of the agreements occurred.

[35] The upshot of the meeting between representatives of the defendant and the members of the Nkwaleni Alliance in October 2000 was the addressing by the defendant to the individual members of the alliance of an offer ('the grapefruit offer'), which, upon acceptance by the companies and most other members of the Alliance, gave rise to the so-called 'November 2000 agreements'. The effect of the November agreements committed the companies to making their grapefruit produce exclusively available for marketing by the defendant for the 2001, 2002 and 2003 seasons. That commitment was given in consideration for monetary settlements in favour of each of the growers who accepted the offer to compensate them, on an agreed basis, for the shortfall between the realised prices for grapefruit and the advance payments that had been made during the 2000 season.

[36] The standardised letter setting out the offer made by the defendant to the members of the Nkwaleni Alliance in November 2000 was dated 8 November 2000. It read (not entirely sensibly in para 1 thereof) as follows:

> Dear Grower,
>
> The following sets out Capespan's final offer to the Nkwaleni Alliance and it should be signed and returned to me by all Growers who wish to avail themselves of Capespan's offer. In order to bring this issue to finality, the offer should be accepted by no later than 13.00 on Friday 10th November 2000. This will enable our accounting department to process the settlements and make payment as soon as possible.
>
> A copy of this offer will be forwarded to Craig Erichsen of our Durban office, who will communicate directly with your individual members. Acceptance can take place by members signing below and faxing a copy to Craig.
>
> The agreement is in respect of grapefruit supplied to Europe during the current season, and is as follows:
>
> 1. The difference between the first advances (as set out below) and the final payment to the Grower will not be recovered from the Grower.

Marsh		Star Ruby	
Count[13]	Final Payment	Count	Final Payment
32	R11.00	32	R14.00
35	R13.20	35	R15.00
40	R13.20	40	R17.00
45	R9.00	45	R16.50
50	R8.00	50	R14.50
55	R6.00	55	R10.00
48	R5.00	48	R4.71
56	R4.00	56	R3.10
64	R4.00	64	R3.10

2. The Grower will commit 100% of his grapefruit volume to Capespan over a three-year period, i.e. 2001, 2002 and 2003. This is not a right of first refusal, but due to the exclusivity of this offer, Capespan will endeavour to place the product in the best paying market, taking cognizance of market conditions from time to time.
3. Any dispute arising from the performance of Capespan in the 2000 season is considered fully and finally settled.

Our offer to consider additional assistance to individual Growers in the form of pre-season loans remains available to Growers who satisfy Capespan's credit criteria.

I trust that you find this acceptable and look forward to entering into negotiations regarding a new marketing agreement so that we may focus on the 2001 season.

Yours sincerely,

L.M. Chandler
Executive Director Citrus

[37] In my judgment the express terms of the November agreements are irreconcilable with their pleaded characterisation as substitutes for the 1999 marketing agreements. What the November agreements did indeed contain were recordals of the defendant's willingness to negotiate and agree upon the terms of replacement marketing agreements with those producers who accepted the grapefruit offer. However, save to the extent set out in numbered

[13] The term 'count' denotes the size of the grapefruit concerned.

para 2 thereof, they had no effect on the subsisting agreements between the defendant and the growers, including the 1999 marketing agreement between the defendant and the companies.

[38] There is nothing in the evidence to suggest that the envisaged negotiations ever occurred, or that the postulated new marketing agreements were concluded, either with the companies, or with any other members of the Nkwaleni Alliance. Instead, save for the implementation of the November offer, business proceeded as usual in accordance with the marketing agreements in place between the defendant and the members of the Nkwaleni Alliance. In the case of the companies, this may have been at least in part because of the emergency caused by the fruit fly infestation which resulted in the rejection for export of a large part of the companies' 2001 grapefruit crop in July 2001. It is plain from the content of correspondence exchanged between Mr Chance and various members of the management of defendant in July 2001 and the ensuing months that the financial effect of the fruit fly infestation jeopardised the continuing existence of the companies. It is clear that it resulted in a situation in which, because of the resultant increase in the degree of already entrenched financial dependence of the companies on the defendant, there could be no question but that the companies' fruit would, as a matter of business necessity or survival, be marketed by the defendant if the companies were to remain operational into 2002. The incentive to the defendant to assist to keep the companies afloat was the hope that in the ensuing season they might trade themselves out of difficulty and be able redeem their significant debt to the defendant company.

[39] Having regard to its position on the pleadings with regard to the 1999 marketing agreements, it is somewhat ironical that during 2001 the defendant sought to justify an increase in commission charges debited to the companies account from the 7 per cent provided in the 1999 agreements, to its 'default' commission rate of 9 per cent on the basis of an allegation made in correspondence[14] that the 1999 marketing agreements had been cancelled at the end of September 2000. Equally ironic, from a current perspective, in view of the allegation by the plaintiff (which currently represents Mr Chance's interests) that the 1999 marketing agreements had been cancelled in September 2000 or November 2000, was Mr Chance's refuting of that contention evidenced by his insistence that the 7 per cent commission rate was still in place.[15] The true nature of the contracting parties' business relationship as supplier and marketing agent, respectively, in the period between the giving of notice on 29 September 2000 and the end of September 2001, falls to be determined with regard to the terms of their agreements, however, and not by their conflicting expressions of opinion. In this respect the non-variation and

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[14] By Mr Chris Knoetze (Key Account Manager) in a letter dated 25 September 2001.

[15] In trial particulars furnished by the defendant it was admitted that commission based on a rate of 9 per cent had been recovered from the companies during the 2001 season. The fact that this constituted an over-recovery is irrelevant in the context of the relief sought in the action, being an accounting for the performance by defendant of its function as the companies' marketing agent during the 2002 season. The recovery based on a 9 percent commission rate was reversed later in 2001 and the commission rate actually applied in that year was 7 percent, in line with that stipulated in the 1999 marketing agreements. Mr Knoetze's apparent apprehension that the marketing agreements had been cancelled appears to have been based on his understanding of the effect of Mr Chance's letter of cancellation, which he may have construed without the advantage of insight into the context. There is no evidence that Mr Knoetze was involved in the events of 2000. Indeed, no-one who gave evidence at the trial appeared to have known him.

non-waiver provisions in clause 17.1 of the 1999 marketing agreements[16] are significant.

[40] The conclusion of the December 2001 production loan agreements (referred to by the companies and the defendant as 'the fruitfly loan') likewise affords no support for the contention that the 1999 marketing agreements had been cancelled. The evidence indicated that it was the defendant's policy, when appropriate, to financially assist farmers who supplied it with fruit to produce the crop. The loans were advanced on the basis that they would be recoverable against the moneys due to the producers after the fruit had been exported. The terms of the December 2001 production loan agreements concluded between the companies and the defendant confirmed that the companies had obtained funding from the defendant on this basis in preceding seasons, including the 2001 season, and that as at the end of the 2001 season the amounts owed by the companies to the defendant in respect of these loans had not been fully repaid.

[41] In the context of a consideration of whether or not they evidenced that the 1999 marketing agreements had been cancelled, the only provisions of the 2001 production loan agreements that are of interest are the provision in each agreement that '[the company] *will supply all of its fruit exclusively to Capespan until such time as the new production loan has been repaid in full. The manner in which the fruit will be supplied and marketed by Capespan will be dealt with*

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[16] Clause 17.1 provided:

> *No waiver or variation of any of the terms and conditions of this Agreement shall be binding or effectual for any purpose unless expressed in writing and signed by both Parties hereto. Any waiver shall be effective only in the specific instance and for the purpose given.*

in a Marketing Agreement to be negotiated and agreed between [the company] *and Capespan'* and the related provision that *'The Marketing Agreement will entitle Capespan to a commission equal to 9% of the selling price of all fruit marketed and sold by Capespan for and on behalf of* [the company]'.[17] Those provisions were clearly indicative of an intention by the parties to put in place between them a contractual regime which would constitute a substitute for that which had previously subsisted between them. The evidence shows, however, that no such replacement agreements were in fact concluded. Instead, all the indications are that the marketing of the companies' fruit in 2002 continued, as it had done in 2001, consistently with the terms of the 1999 marketing agreements. The only difference was that in the 2002 season the defendant exacted a commission calculated at nine percent of the FOB proceeds within the meaning of that expression as defined in the 1999 marketing agreements; in other words at the increased rate to which the parties had agreed in terms of the December 201 loan agreements.

[42] The defendant's management officials who gave evidence testified that the defendant would not under any circumstances have advanced production loans to producers which were not bound to it in terms of marketing agreements. That evidence was wholly consistent with sound business sense and the inherent probabilities. Moreover, the scheme of loan redemption provided for in the production loan agreements could not find any basis for operation if the defendant were not to be in a position to market the companies'

[17] In the case of the production loan agreement concluded between Chance Brothers and the defendant, it was provided that a copy of the marketing agreement to be concluded would be supplied to Nedcor, which also subscribed as a party to the agreement.

fruit, and substantially on the basis on which it had hitherto been undertaken. The repayment provisions in terms of the December 2001 agreements, predicated as they were on an entitlement by the defendant to deduct R4 per carton from advance payments and R5 per carton from final payments due by it to the companies, were plainly modelled to operate within the context of the transactional scheme reflected in clauses 3.3 and 3.4 of the 1999 marketing agreements.[18] It is significant in that context that the defendant proceeded to advance substantial amounts to the companies under the December 2001 production loan agreements even before the commencement of the 2002 citrus season. Indeed, it became apparent as early as the beginning of January 2002, that the companies would require yet further funding if they were to be able to survive into commencement of the 2002 marketing period.

[43] Mr Chance testified that the new production loans made available to the farming companies in terms of the agreements concluded with the defendant in December 2001 proved insufficient to satisfy the requirements of Chance Brothers and Club Champion. Consequently, on 11 January 2002, a further agreement was concluded between the companies and the defendant, in terms of which additional loan finance was made available to the companies by the defendant. The agreement in respect of the additional loans was incorporated in a letter from the defendant to Mr Christopher Chance, as representative of the so-called Chance Group, dated 11 January 2002. Mr Chance counter-signed the letter in acknowledgement and acceptance of the terms and conditions set out in the letter. The letter provided as follows:

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[18] Quoted in para [11], above.

Dear Chris [Mr Chance],

I am pleased to advise that your production loan facilities have been approved for 2002 on the following basis:

Farm	**Existing Balances[19]**	**Fruit Fly loan**	**Additional**	**Total**
Chance Brothers	1 374 532	1 100 000	1 174 661	3 649 193
Club Champion	1 293 835	800 000	1 597 507	3 491 342

The following conditions be applied to these loans:

1. The additional loan will bear interest at prime overdraft rate.
2. It is accepted that the existing balances as reflected above are the opening position and that you are fully indebted for these amounts and that your maximum indebtedness during the year will not exceed the amounts reflected above.
3. We will require guarantees from each farm for the indebtedness of the other to Capespan.
4. Funds are advanced to pay defined existing creditors, i.e. we do not simply make a cash advance but settle specific creditors as verified by Capespan after consultations and discussions with yourself.
5. A 1% raising fee is levied to cover additional monitoring costs on the additional loan amounting to R27 722. Capespan will consider refunding any unspent portion of this amount to you at the end of the years, at our discretion.
6. I [Mr Lance Chandler] participate in all Board meetings and play an active role in the financial management of the business. In this regard I intend to attend four meetings scheduled for Saturdays throughout this year. The raising fee referred to above will cover the costs. We will only recover direct expenses and will not charge for any of my personal time.
7. The advance of the loans is to be staggered over the next five months until first advances start to flow (which should enable us to advance less than the above in total as we manage the cash flow) in accordance with terms negotiated with creditors and entirely at the discretion of Capespan (Pty) Ltd.
8. The conditions of the fruit fly loan and undertaking by you, will, as far as possible apply to the additional loan.
9. You will institute financial and management controls as recommended by Capespan and we will be entitled to receive regular information from you so as to assess your financial position and minimize our risk as and when required.

[19] The ‘existing balances’ were the amounts owed by each of the companies after the end of the 2001 season in respect of previously advanced production loans.

10. The standard terms of our normal production loan (attached) will apply.[20]
11. Should we lose the fruit fly claim, the full amount of the claim is immediately repayable to Capespan (Pty) Ltd, in terms of the fruit fly loan agreement.
12. Recovery rates regardless of the outcome of the claim will be set out adjusted throughout the year to ensure that the total loans are repaid over a maximum of two years, with at least 50% being repaid in this year.
13. The commission rate of 9% for the current year is confirmed.
14. Existing securities in the form of cessions and personal guarantees already in place will cover the full indebtedness and if we deem it necessary these may be updated or changed in order to update the administration thereof.
15. You will personally be involved in the affairs of the farm to ensure GAP and sound financial practices, including no further Capital Expenses or expansion takes place throughout this year.
16. Further financial restructuring will take place prior to the financial year end so as to improve the long-term funding and strengthen the financial position of the group, details of which will be resolved between the parties in the long-term interests of your Group.
17. All parties will actively explore the sale of Capespan's investments in the pack houses.
18. Capespan reserves the right to call for repayment on demand should any of these conditions be in breach or should there be any act in bad faith between the parties which is detrimental to either yourselves or to Capespan.

I trust that this is acceptable to you and look forward to a successful 2002 in the interests of all parties.

Kindly sign and return this fax to me as a matter of urgency so that we can instruct payment.

Yours sincerely,
L.M. Chandler
CEO Capespan Citrus

[44] The terms of the January 2002 agreement make no reference to the conclusion of a new marketing agreement. They were clearly formulated on the basis of a common acceptance of a subsisting contracted marketing relationship, it being confirmed, however, that the commission rate had been

[20] Mr Chance testified that there was no attachment to the letter, but gave no indication that he had requested insight into the 'standard terms' before counter-signing the letter in acceptance.

increased to nine percent. The only source for that relationship was the 1999 marketing agreements and I have little doubt that Mr Chance appreciated as much at all material times. It is that appreciation that explains the initial reliance by the plaintiff on the agreements in this action and its persistence in that reliance even after the defendant raised the potentially vitiating issue of the non-cedability clause.

[45] As an aside, because it is relevant only to the separate question of the appropriation of the proceeds of the fruit, it is also apparent from clause 12 of the January 2002 agreement that a fixed rate of recovery of the money advanced would not apply and that the defendant could effect recoveries to ensure that at least 50% of the total amount outstanding by the companies to the defendant would have been repaid by the end of 2002. The agreement, in addition, provides that the defendant will be involved in managing the companies' cash flow as part of its management of the incremental (or 'staggered') advances to be made under the agreement. All of this contradicts the assertion by Mr Chance on behalf of the plaintiff that the defendant was restricted to recoveries of R4 and R5 per carton as provided in terms of the December 2001 production loan agreements.

[46] In the circumstances it seems clear that the purported termination of the 1999 marketing agreements by the companies was not accepted by the defendant and was therefore ineffectual.[21] Furthermore, no alternative, or

[21] In the arbitration claim the defendant pleaded in its statement of defence that 'In terms of clause 2 of the marketing agreement, "the notice period will commence on 1 September, immediately following such notice, and will terminate on 30 September of that year unless otherwise agreed". In the circumstances the notice furnished on 22 September 2000 only

replacement for the 1999 marketing agreements was ever concluded. The contracted parties continued, after September 2000, to do business with each other on the basis they had done previously, save to the extent amended in terms of the November 2000 agreements. In the circumstances the plaintiff has not established its allegation that the 1999 marketing agreements were terminated. The action therefore falls to be dismissed for failing at the first hurdle by reason of the non-cedability clause in the 1999 marketing agreements.

[47] If I am wrong, however, and the 1999 marketing agreements were indeed effectively terminated, as later alleged by the plaintiff when confronted with the effect of the full bench judgment, it would beg the question as to the character and basis of the relationship between the companies and the defendant in respect of the export of the 2002 season citrus. In my view the undisputed facts impel the conclusion that business went on as before, save for the increase in the defendant's commission stipulated in the December 2001 new production loan agreements and save for the effect of the further agreements concluded between the parties during the 2002 year, commencing with the additional loan agreements concluded in January 2002. While the 2001 new production loan agreements expressly contemplated the conclusion of new marketing agreements, that was not achieved. Indeed, apart from some desultory correspondence written by Mr Chance apparently with the

commenced on 1 September 2001 and accordingly the marketing agreement was extant at all material times.' It will be apparent that apart from the conclusion that the marketing agreements remained extant, the allegations are otherwise factually and legally incorrect. The notice of termination would have had the effect alleged in the statement of defence only if it had been given in terms of terms of clause 2. (The same observations hold true in respect of the allegations in para 5A of the finally amended particulars of claim in the action.)

object of initiating discussions between the parties on the content of the contemplated new marketing agreements and the odd telephone call and a unilateral consultation with the companies' attorneys to which Mr Chance alluded in his evidence, there was nothing even approximating negotiation between the parties on the terms of any contracts to replace the 1999 marketing agreements. In the circumstances the inference impelled by the conduct of the parties is that, save in the respects otherwise expressly agreed between them, the terms of the 1999 marketing agreements were tacitly relocated.

[48] That conclusion in turn begs the question whether the provision prohibiting the cession of rights lived on as part of the tacit contract. As observed in *Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC and Others* [2002] 2 All SA 551 (SCA), at para 5, with reference to the judgment in *Doll House Refreshments v O'Shea and Others* 1957 (1) SA 345 (T), a term of the previously subsisting contract which is collateral, rather than 'incident', to the essential subject matter of the agreement in question does not survive the lapsing of the previously subsisting contract when such contract is tacitly relocated. The enquiry falls to be determined with regard to whether the term or provision in question is intrinsic to the contract that has been tacitly renewed. In *Doll House Refreshments*, for example, a provision of a contract conferring an option to purchase was held to be collateral to an agreement of lease for which the original expressly concluded contract had principally provided and thus it did not survive the termination of the contract and was not incorporated in the subsequent agreement tacitly relocating the lease. In *Tor*

Industries (Pty) Ltd v Gee-Six Superweld CC and others 2001 (2) SA 146 (W), however, Wunsh J found that a covenant in restraint of trade was incident to a contract of employment and that it thus also formed part of the tacitly relocated contract of employment when the expressly concluded contract lapsed.

[49] In the current matter I have concluded that the prohibition against any cession of rights was incident to, rather than collateral to, the agreement in terms of which the defendant did business with the companies in respect of the export of the citrus crop in terms of the 1999 marketing agreements. Although the 1999 marketing agreements did not create a relationship of agency between the companies, as principals, and the defendant, as agent, it resulted in a situation in which it would be invidious were the defendant to be open to having to account to a party different to the one from which it had obtained the fruit for the net proceeds. The marketing agreements had only one object or purpose; the regulation of the relationship between the companies and the defendant in respect of the export of the citrus fruit produced on the companies' farms. The inclusion in the agreements of a prohibition against a cession of rights was an integral part of the central subject matter of the contracts. A number of aspects of the contracts afforded good reason for the inclusion of a non-cedability clause. These included the contemplated scope for the operation of set-off in respect of the producers' liability to the defendant in respect of first, and interim advances *vis à vis* the defendant's liability to the producers in respect of the final payments; the right of Capespan to make adjustments; and the arbitration clause. The whole nature of the contractual relationship established in terms of the 1999 marketing agreements was one

that contemplated the respective parties being tied together on an inextricable basis throughout each season. On the facts, the existence of production loans given against discretionary recovery rates is conduct by the parties post Sept 2001 consistent with the tacit relocation of the provision. The defendant was hardly likely to have agreed to make such advances if it could not be assured of the right to recover from the amounts in which it would foreseeably itself later become due to pay to the companies. The factors to be taken into account in this respect materially overlap with the considerations urged by the defendant in respect of the *delectus personae* relationship between the parties. This is understandable because a finding that the prohibition against cession was incident to the essence of the contractual relationship established under the 1999 marketing agreements, rather than just a collateral term, comes down, in substance, to a finding that the contracts were subject to a mutual relationship of *delectus personae*.

[50] The conclusion that if the 1999 marketing agreements had been cancelled, they were substantially tacitly relocated, makes it unnecessary to discuss the plaintiff's further alternative allegation that if the agreements had in fact not been cancelled, the defendant was estopped from relying on them. I should perhaps record, however, that I did not find any merit in the point. There was no evidence that the defendant represented to the companies that the marketing agreements had been cancelled. Even if the evidence of the letter by Mr Knoetze in September 2001 is accepted as constituting such a representation, there is no evidence that the companies reasonably acted on it to their prejudice. The evidence by Mr Chance that the companies would not

have entered into the December 2001 production loan agreements if they had not believed that the 1999 marketing agreements had been cancelled is unconvincing. On the contrary, it is clear that the companies concluded the December 2001 production loan agreements, and shortly thereafter the January 2002 agreement, in order to endeavour to survive the desperately adverse financial situation in which they found themselves at that stage. The companies required not only the indulgence of the defendant in respect of their failure to have redeemed the outstanding balance owed on production loans advanced in 2000 and 2001, but, in the case of Chance Brothers, also that of its banker, Nedcor. The terms of the December 2001 production loan agreements afforded that indulgence.

[51] The plaintiff's counsel submitted that in the context of the parties' indications of a desire or willingness to negotiate new marketing agreements it could not follow that if the 1999 marketing agreements had been terminated, the contracts were thereafter tacitly relocated. They contended that the marketing agreements were instead replaced by tacit agreements *simpliciter* – as distinct from tacit relocations of the previously subsisting agreements - without any provision therein of a prohibition against a cession of rights. This argument appeared to have been founded on the following passage in the judgment of Harms JA in *Golden Fried Chicken (Pty) Ltd*, supra, at para 4: '*After the termination of the initial agreement and prior to this letter the parties (in the light of the facts recited) conducted themselves in a manner that gave rise to the inescapable inference that <u>both desired the revival of their former contractual relationship on the same terms as existed before</u>. Taken together,*

those facts establish a tacit relocation of a franchise agreement (comparable to a tacit relocation of a lease)…' (the underlining replicates the emphasis, indicated in the same way, in the plaintiff's heads of argument). The argument, as I understood it, appeared to go that because it was evident that the companies wished to replace the 1999 marketing agreements with something different (presumably with agreements with provision for some degree of minimum price guarantee) and the defendant had indicated its willingness to enter into negotiations in that regard, it could not be said that both sides desired the revival of the former contractual relationship on the same terms as had existed before.

[52] The argument is unsound in my view, and, if I have understood it correctly, based on a contextual misreading of the quoted passage from *Golden Fried Chicken*. It overlooks that the inference as to the conclusion of a tacit agreement is made with regard to the external manifestations of the parties' conduct and not the subjective workings of their minds. In the current matter the contracting parties continued behaving as before, even while all along expressing a willingness, after successful negotiations, to enter into a different agreement. We know that the contemplated negotiations were never held and the postulated differently formulated marketing agreements never concluded. The current case is thus concerned with the nature of the parties' subsisting contractual relationships while the contemplated negotiations to introduce a different regime remained in the offing. The evidence shows that in that period, including the 2002 citrus season, business continued to be transacted between the companies and the defendant as it had been under the

1999 marketing agreements, subject only to the amending effect of the November 2000 agreement and the commission rate increase agreed upon in the December 2001 production loan agreements and confirmed in the January 2002 agreement.

[53] Although not strictly necessary in view of the conclusions to which I have come as to the non-cedability of the companies' rights against the defendant, there are two remaining issues which might usefully be addressed for completeness, in case this matter goes further. Those issues are (i) the validity or efficacy of the cessions on which the plaintiff relies and (ii) whether the companies enjoyed a right to claim a statement of account of the nature demanded by the plaintiff in this action.[22]

[54] Treating with the first issue: The subject matter of the relevant cessions, that is the cessions in favour of the plaintiff by the liquidators of the companies and by Nedbank, was identified in essentially similar terms in each of the relevant instruments. In the deed of cession executed by the liquidators of Chance Brothers and Nedbank Ltd the 'claim' was defined as follows:

> all claims of any nature whatsoever or howsoever arising which the former directors [of] the cedent [defined as Chance Brothers Pty Ltd (in liquidation)] contend that they have against [the defendant], which claims shall include but not be limited to those claims arising as a consequence of the alleged breach by [the defendant] of the Marketing Agreement entered into between it and the cedent on or about April 29, 1999 and the alleged breach by [the defendant] of the Tripartite Agreement entered into between it, the cedent and [Nedcor Ltd] on or about December 21, 2001.[23]

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[22] As to the detail of which see note 3, above.

[23] The 'Tripartite Agreement' was the deed of agreement recording the contract in respect of the December 2001 production loan by the defendant to Chance Brothers; Nedcor was the third subscriber to the tripartite agreement. The deed executed by the liquidators of Club

[55] The defendant contends that, assuming the alleged cessions were competent (which, of course, it denies), the cession agreements upon which the plaintiff relies are void for vagueness. In my judgment the defendant's point is well-taken. It is evident that the determination of what has been ceded is dependent on the contentions and allegations of the former directors of the companies in liquidation, or of the liquidators of Club Champion. There is no evidence of what those contentions were, or as to when they were formulated, or as to whether their precise import was known to the liquidators when they purported to execute the cessions. I do not think that terse references in minutes of meetings between the liquidators and representatives of the defendant held long before the purported cessions were effected provide the required evidence of the directors' contentions in respect of alleged claims founded in the 2002 season, as I understood the plaintiff's counsel to argue. The same observation holds true for the vaguely recorded content of the report of the managing director of Chance Brothers to the liquidators relied upon by the plaintiff's counsel in this connection.[24] The widely embracing connotation of the word '*all*' also emphasised by counsel for the plaintiff in this connection is not a panacea for the lack of evidence. In context, the word refers to all the claims which the former directors *contend* the companies had against the defendant, without identifying which those are. As mentioned, the formulation of the basis of the claim against the defendant in this action has been through

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Champion did not contain a reference to the contentions of the company's erstwhile directors, but defined the claim with reference to what 'the cedent' (that is the company itself) contended it had against the defendant. There was no evidence to identify what the company's relevant contentions may have been. The Club Champion cession also included a reference to claims arising out of the alleged breach by the defendant of the December 2001 production loan agreement with that company. (Nedbank was not a creditor of Club Champion.)

[24] See Exh A974 at A978 sv *Section 402(c) – Causes of the Failure of the Company*.

a number of iterations in the course of numerous amendments to the particulars of claim. When the action commenced it was founded in the 1999 marketing agreements. When the judgment of the full bench rendered reliance on those agreements fruitless, the foundation of the alleged claims was transferred to the 2001 production loan agreements and then to the November 2000 agreements and finally to tacitly concluded marketing agreements which allegedly had taken the place of the cancelled 1999 marketing agreements. Thus the claims were ultimately asserted on a basis entirely at odds with that on which the action was commenced. No evidence was adduced of the directors' contentions, but it is difficult to conceive that they could have been formulated in September 2005 in a manner consistent with the claims as finally pleaded during the trial in 2011. The cession of claims could only be premised on the erstwhile directors' contentions and allegations at the time the cessions were purportedly effected; they could not relate to contentions as yet unformulated in September 2005. Moreover, the liquidators would have needed to know what the relevant contentions and allegations were if they were to be able to form the requisite intention to transfer the pertinent rights to the plaintiff.

[56] The plaintiff's counsel submitted that the different iterations of the claim in the pleadings did not affect the essence of what had been ceded (i.e. the claim for the allegedly unaccounted for proceeds of the disposal of fruit produced on the companies' farms in the 2002 citrus season) and thus did not detract from the validity of the cession. They relied in this regard on the principles set out in *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15-16,

amongst other cases, in relation to the prescription of a claim in the context of the amendment of pleadings. According to those principles a defectively pleaded, but nevertheless sufficiently clearly identified, claim timeously pursued by the institution of proceedings before it has become prescribed is not extinguished by prescription if the pleading is amended to properly plead it only after the applicable prescriptive period has elapsed. I am not persuaded, however, that those principles are applicable in the context currently under consideration. In the current case what the alleged debt by the defendant is and the basis for its existence depends on the contract which is alleged to have given rise to it, as does the nature of any related accounting to which the plaintiff alleges an entitlement.

[57] But quite apart from the aforegoing considerations, which in my view are fatal to the efficacy of the cessions, the subject matter of the cessions was in any event just too vaguely described for the agreements to be valid. In this regard, as stated by Van der Merwe *et al* in *Contract General Principles* (3rd edition) at p.460, the subject matter of a cession '*must be described in such a manner as to be certain or ascertainable*'. In Hutchison (ed) *The Law of Contract in South Africa* (2009) the point is made in the following terms '*... the personal right or rights in question must be described in such a way as to make the subject matter of the cession certain or at least determinable*'.[25] Certainty is necessary not only on the grounds of basic contractual principle, but also because a cession of rights affects the position of the third party which is obligated to perform in terms of the ceded rights. The third party should not be

[25] At p. 360, para 14.4.4.

at risk of prejudice because of actual or potential uncertainty between the cedent and the cessionary as to whether or not the right in issue is encompassed by the cession in question.

[58] Furthermore, and in any event, no basis for a claim by Nedbank for a statement of account by the defendant was established. The only contractual link between the defendant and the bank was to be found in the December 2001 production loan agreement between Chance Brothers and the defendant, to which the bank was also a signatory (the so-called 'tripartite agreement'). Nothing in that agreement constituted the defendant as a debtor of Nedcor; the agreement merely provided for certain payments to be made by the defendant to the bank either from the funds to be lent by it to Chance Brothers under the agreement, or from funds to which Chance Brothers would otherwise have been entitled as final payments in terms of its marketing agreement with the defendant. In other words, the December 2001 production loan agreement constituted the defendant as Chance Brothers' payment agent in respect of the redemption of identified debts owed by the latter to Nedcor. (As to the apparent cession by the Chaunce Brothers to Nedbank of the proceeds of its crop *in securitatem debiti*, that would, of course, have fallen away upon the liquidation, with Nedbank thereupon becoming a secured creditor against the company in liquidation; all that Nedbank could cede to the plaintiff in 2005 was its secured claim against Chance Brothers in liquidation.)

[59] Turning to the second issue mentioned in para [53]: There was frequent reference to the defendant as the companies' agent and, indeed, during the

currency of their relationship, the defendant was loosely described, even by itself, as the companies' export agent. It was in the general principle that an agent has a duty to account to its principal that the plaintiff also sought to found the defendant's alleged duty to account to the companies. On a proper consideration of their mutual positions in terms of the 1999 marketing agreements it is clear, however, for the reason explained earlier in this judgment,[26] that the label of 'agent' to characterise the defendant's legal relationship *vis à vis* the companies was a misnomer.

[60] The defendant's counsel emphasised the distinction between the loose sense in which the word 'agent' is often employed and its connotation in law. They supported their submissions in this respect with the following quotations from De Villiers & Mackintosh *The Law of Agency in South Africa* 3rd ed., which are apposite:

> '[An agent is] a person who has authority to act for and on behalf of another (called the principal) in contracting legal relations with third parties; the agent represents the principal and creates, alters, or discharges legal obligations of a contractual nature between the latter and third parties.'[27]

and

> 'The specific characteristic of agency in the legal sense is the authority conferred on the agent to make binding contracts on behalf of his principal. An agent is sometimes defined as one who has authority to act for another, but while such a definition may describe persons who do not possess the distinguishing characteristic referred to and are nevertheless popularly termed 'agents' (such as, for example, the 'estate' or 'house agent'), it is for legal purposes inexact. A person who has authority to act for another cannot be regarded in law as an agent unless that authority covers the

[26] At para 11.
[27] De Villiers & Mackintosh *The Law of Agency in South Africa* 3rd ed p. 38.

> creation of contractual obligations between his principal and the third party. To the extent to which an 'agent' is required to perform non-juristic acts (i.e. acts which do not have the effect of bringing his principal into legal relations with third parties), he ceases to be an agent and becomes a servant or independent contractor… From this point of view an agent may be defined as a servant or independent contractor who brings his principal into binding legal relations with third parties. His capacity as agent exists in law only for the time during which he is representing his principal in the formation of contractual obligations with third parties.'[28]

[61] As already noted, in terms of the 1999 marketing agreements, the defendant was constituted the owner of the fruit to be exported upon delivery thereof to it by the companies. In exporting the fruit and selling it abroad the defendant was therefore contracting with third parties on its own behalf *qua* principal, and not as the companies' agent. The fact that the vitality and competitiveness of defendant's business enterprise depended on its dealing with the fruit to the maximal financial advantage of its suppliers and the fact that it had contracted to pay to the companies the net proceeds of the disposal of the fruit did not detract from the feature that it was transacting with third parties in respect of its own fruit, and not that of the companies. In consideration for passing ownership of the fruit to the defendant, the companies obtained a claim against the defendant, the sum of which fell by their agreement to be calculated with reference to the amounts credited to the pertinent consignment accounts consequent upon the realisation of the fruit. The labelling of these consignment accounts as 'trust accounts' was also a misnomer. That much is evident from the description given elsewhere in this judgment[29] of the character and operation of the consignment accounts. The

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[28] Ibid pp. 39-41.
[29] At para [11] -[22].

resulting relationship between the companies and the defendant was therefore one of creditor and debtor; cf. *Absa Bank Bpk v Janse Van Rensburg* 2002 (3) SA 701 (SCA) at para 14 -16. The character of the agreement between the parties which gave rise to it was an innominate contract.

[62] I accept that the fruit producers contracted with the defendant on the basis described, understanding that the defendant was thereby duty-bound to dispose of the fruit to best advantage for the producer, and that the defendant accepted that it was so duty-bound. To that extent I can understand the repeated references by the plaintiff's counsel to the notion that the companies had placed their trust in the defendant. In view of the conclusion to which I have come in respect of the relevant terms of the contract, it is unnecessary to determine whether the duty on the defendant to account to the producer that was undoubtedly an incident of the contractual relationship established in terms of the 1999 marketing agreements was fiduciary or not. There was in any event no dispute that the contractual relationship which they created included a duty on the defendant to account to the companies and the evidence demonstrated how it regularly did so in the ordinary course. In the nature of the contractual relationship it was inherently foreseeable that the companies might query or dispute the calculation of the amount due to them. Their contracts with the defendant provided for such an eventuality. The companies bound themselves in such a situation to accept the outcome of an audit and approval of the relevant consignment account (see clause 3.7 of the marketing agreements, quoted in para [10], above). Clause 3.7 of the marketing agreements appears to me to be entirely irreconcilable with the

notion of any duty to render a statement of account of the nature claimed by the plaintiff.[30]

[63] Some accounting would be necessary in terms of the parties' contractual relationship. The contract would require, for example, that the companies be informed of the gross proceeds of the realisation of the fruit in any consignment in which fruit supplied by them was included and in broad terms of the costs incurred by the defendant in respect of such consignment after it had taken delivery of the fruit.[31] There was no suggestion in the evidence that an accounting at this high level was not either routinely given, or available on request. Indeed all the indications are to the contrary. Although the accounts given to suppliers by the defendant in the ordinary course disclosed costs only 'below FOB level', there is nothing in the pro forma marketing agreement that prevented the supplier from obtaining information from the defendant as to the gross proceeds and in general terms as to the costs incurred in respect of the export and sale of a consignment after the fruit had been delivered to the defendant. The defendant indeed admitted that it had a certain duty to account.[32] It alleged that it had discharged this duty in the course of the execution of the contract and in doing so had dealt

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[30] This conclusion would also apply even if the plaintiff's argument that the transfer of ownership provision were merely 'a device' which should not be permitted to distract from the true nature of the relationship between the companies and the defendant as one as between principal and agent. If one were to accept this to be so, which I do not, clause 3.7 would still regulate the extent of the agent's duty to account in the context of any query by the companies as to the extent of their entitlement against the consignment account.
[31] Clause 8.1 provided '*The Supplier will be entitled to price projections, market reports and feedback on the marketing of the Products.*'
[32] In answer to a question in the plaintiff's request for trial particulars the defendant admitted that in '*terms of the Chance Brothers Marketing Agreement, Chance Brothers was entitled to the details in relation to the specific market to which its fruit was sent and the price at which it was sold*'.

reasonably, and apparently to the companies' satisfaction at the time, with any queries that the companies had raised. (Certainly it was apparent that a number of questions about the probity of the defendant's accounting to the companies raised by the plaintiff through the opinion evidence of an accounting expert, Ms Susan Dean, apparently to lend some cogency to the plaintiff's allegation that the accounting received by the companies had been incomplete and insufficient, were allayed during cross-examination of the witness with reference to the accounts which had been rendered by the defendant during the 2002 season.)

[64] There were, however, many logistical and business-related reasons for the defendant to not wish to be bound to give a detailed accounting supported by vouchers to each and every one of its many suppliers, which is the quite different nature of accounting sought by the plaintiff in the action made evident in the testimony of Mr Chance and the content of annexure E to the particulars of claim.[33] Mr Strauss and Mr De Haast, senior and longstanding management officials of the defendant, both testified as to the intensely competitive nature of the fruit exporting business in the post-deregulation era.[34] Both witnesses gave evidence about certain producers having taken over some of the functions in the export chain previously undertaken by the defendant, with some large producers handling the export of their fruit entirely by themselves. It would not suit the defendant's business interests to allow its customers

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[33] Annexure E and the relevant paragraphs in the amended particulars of claim are quoted in note 3, above.

[34] Deregulation of the fruit export industry occurred in about 1997. Prior to deregulation, fruit exports had been regulated by statute and transacted exclusively through the medium of statutory bodies.

insight into too much of the detail of the transactions entailed in effecting the exports. To do so would be tantamount to permitting a potential competitor insight into confidential business information.

[65] Mr De Haast also explained that providing producers with vouchers of the sort set out in annexure E to the plaintiff's amended particulars of claim would in any event in many cases be meaningless. In this respect the witness reiterated that there were almost invariably multiple participants in each consignment and that any number of different consignments might be shipped together. Moreover, the manner in which the defendant might choose to ship consignments, or parts of consignments, might require the defendant to apply a form of cost averaging when it calculated the costs falling to be charged to each consignment account for the purpose of determining the final payments to which the growers participating in the accounts should be entitled.

[66] An example given by Mr de Haast in this regard was the need to 'average' the costs in a case in which during a certain period some product is shipped using conventional shipping methods in which stevedoring is entailed, which is comparatively expensive, and other product is shipped in containers, in respect of which different costs are incurred. An average cost rate would be calculated by the defendant to avoid arbitrary advantage or disadvantage to participating producers dependant on whether their cartons fell into those shipped by the defendant using more costly or cheaper means, as the case might be. Giving a detailed accounting with reference to a multitude of vouching invoices to each and every grower in respect of such determinations

just would not be practicable contended Mr de Haast, persuasively in my view. In such a situation the safeguards that producers would be entitled to would be met by the assurance that objectively acceptable systems were in place to ensure that costings were fairly allocated to achieve a determination of payments to consignment accounts that would be amenable to objective scrutiny and confirmation by independent audit.

[67] In my view the 1999 marketing agreements were expressly structured to provide growers with that very form of assurance. Clause 3.7 of the marketing agreements seems to me to have been especially included as a practical and effective means to address the needs and concerns of both the fruit supplier and the defendant company in a situation in which the supplier wanted to verify the correctness of the calculation of any payment due to it. In my judgment the sub-clause both provided and delimited the supplier's contractual remedy in a situation in which it might seek to suggest or assert that a consignment account had not been properly or correctly administered by the defendant in the course of the execution of the contract. The letter from the auditing firm KPMG to the FPEF, referred to earlier,[35] appears to confirm that the defendant had the required systems in place in order for clause 3.7 of the 1999 marketing agreements to fulfil its intended purpose. The plaintiff's counsel made something of the evidence of Mr de Haast to the effect that the defendant would not allow an auditor appointed by a grower to do the audit contemplated by clause 3.7. Whether Mr de Haast's opinion as to the parties' rights and obligations arising out of the terse provisions of clause 3.7 was sound or not is,

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[35] At para [22].

however, not an issue that arises for decision in the context of the accounting sought by the plaintiff. The plaintiff is not seeking an audit report on the relevant consignment accounts. (Similarly, the opinions expressed by Messrs Latham and Zaayman as to what they might have been entitled to if they had found themselves in dispute with the defendant, on which the plaintiff's counsel sought to rely in argument does not advance matters. Latham and Zaayman were two citrus growers in the Nkwalini Valley, who were called as witnesses by the defendant. Their opinions do not affect the import of the written marketing agreement.)

[68] Irrespective of whether or not the 1999 marketing agreements subsisted in the 2002 season, or whether their provisions had been tacitly relocated, or whether the contractual relationship between the defendant and the companies was regulated at the time under some other tacit contract, it is clear that the parties conducted themselves in respect of matters of accounting and payment in accordance with clause 3 of the 1999 marketing agreements. The incidence of clause 3.7 of the 1999 marketing agreements rendered the attempt by the plaintiff to impute certain provisions of the FPEF code of conduct to determine the extent of the defendant's accounting obligations to the companies misguided in my view. The code of conduct in any event stressed that the mutual rights and duties of producer and exporter fell in the ultimate analysis to be determined by the terms of those parties' applicable contracts.

[69] The companies did not seek an audit report in respect of any of the consignment accounts; nor did either the liquidators or the plaintiff.

[70] Before concluding I should perhaps record that the subsequent amendments to the plaintiff's particulars of claim made it unnecessary to treat with the fourth issue formulated in the ruling made in terms of rule 33(4) quoted at the outset of this judgment, other than to the extent that I already have.[36]

[71] In the result then, the action is dismissed with costs, such costs to include the costs of two counsel.

A.G BINNS-WARD
Judge of the High Court

[36] At para [4].