IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO. 8729/2001

REPORTABLE

In the matter between:

DOLE SOUTH AFRICA (PTY) LTD **PLAINTIFF**

and

PIETER BEUKES (PTY) LTD **DEFENDANT**

JUDGMENT DELIVERED ON 8 DECEMBER 2006

D, J

UCTION

n this matter the Plaintiff, Dole South Africa (Pty) Ltd. ("Dole") is n exporter of fruit from South Africa to foreign markets. The Defendant, Pieter Beukes (Pty) Ltd. ("the Defendant"), is a roducer of table grapes in the Hex River Valley. Dole was ppointed by the Defendant as its agent for the export and narketing of the grapes, and seeks to recover from the Defendant, monies paid to the Defendant as an "advance" or voorskot", prior to the marketing of the grapes, on the ground hat the eventual nett proceeds obtained from the sale of the rapes was less than the advance.

On 26 October 1999, a written contract was signed between the arties in terms of which Dole was appointed as the agent of the

Defendant for the export of table grapes to Europe, and which written agreement sets out in some detail the applicable terms and conditions. The Defendant seeks to avoid the written contract on various grounds, in particular the consequences of Clause 17.1 thereof, which states clearly and unambiguously that any advance is a loan to the Defendant (and not a fixed price or a minimum guaranteed price); that interest accrues thereon from the date of the advance, and that it is repayable to Dole (in whole or in part) in the event of the nett proceeds obtained from the sale of the grapes being less than the amount advanced.

Generally stated, the present hearing is tailored such that the Court must determine whether or not the Defendant was bound by the written agreement. By agreement between the parties, the issues relating to the contract were to be heard and determined separately from the quantum. Mr. Gess appeared for the Plaintiff whilst Mr. van der Riet (SC) appeared for the Defendant.

PLAINTIFF'S CLAIM

Dole claims that, on 26 October 1999, it concluded a written agreement with the Defendant, in terms of which Dole agreed to export table grapes from South Africa to foreign markets on behalf of the Defendant. The contract was valid for a period of one year (Clause 4.1). Clause 17.1 of this written agreement provided that:

> ***"Dole S.A sal die verskaffer op Vrydae volgende op die inname week ingevolge 11.2 en soos bepaal deur aanhangsel A, vir die vrugte goedgekeur deur***

PPECB tydens die inname week, in voorskot betaal. Die voorskot is 'n lening aan die verskaffer en is nie 'n vaste of minimum gewaarborgde prys nie. Indien die uiteindelike opbrengs uit die produk verkry, minder as die voorskot is, sal die verskil tussen die werklike bedrag wat aan die verskaffer betaalbaar is en die voorskot van die verskaffer verhaal kan word."

is common cause that the Annexure "A" referred to was not ttached to the contract when it was signed (the document only eing finalised later) and that it was subsequently made vailable to the Defendant. The document refers in its heading to *Advances*", and sets out the quantum of advances offered by ole, making separate and specific provision for each grape ariety and each production week. Higher advances were vailable for certain varieties, and within varieties varied ccording to the production week.

ole pleaded that, at the end of the 1999/2000 season, the dvances so made to the Defendant exceeded the nett roceeds obtained from the sale of the grapes by some R1 664 26.68, which amount Dole seeks to recover in the present ction. The written agreement contained various additional mportant clauses, including a sole memorial clause (clause 21); non-variation clause (clause 21.1) and a no representation lause.

ENDANT'S PLEA

Defendant admitted that the written agreement was signed on
October 1999 but pleaded that same was (for the reasons set out
aragraph 3 of its plea), *void ab initio*, alternatively, legally
nforceable. The Defendant alleged that an oral agreement had
n concluded between the parties, immediately prior to the
cution of the written agreement, which contained, *inter alia*:
express term at variance with the written agreement, being that
advances paid by Dole to the Defendant were not loans but
e minimum guaranteed prices, and that no part thereof was
overable should the quantum of the advances exceed the nett
ceeds; alternatively

a tacit term to the same effect as the alleged express term; alternatively

an implied term to the same effect.

s Plea, the Defendant pleaded in this regard that it had been
y agreed that:

Dole would from time to time, after delivery of the grapes, make payments to the Defendant, which payments were of the nature known in the deciduous fruit industry as "advances";

The advance payments would at no stage during the season be less than R20,00 per carton;

Should the nett price obtained in due course for the grapes be less than the advance payments, then Dole would not be entitled to recover the difference from the Defendant, and such a loss would be for Dole's own account.

he Defendant, having alleged and pleaded the existence of a rior oral agreement inconsistent with the subsequent written greement signed by it, was required to allege and prove facts which explained this conduct on the part of Mr. Beukes, and Defendant pleaded as follows:

) The written agreement was signed by Mr. Pieter Beukes, at the request of Mr. Anton van Zyl ("Mr. van Zyl"), an employee of Dole, without Mr. Beukes having read same;

i) That Mr. van Zyl knew that Mr. Beukes had not read the agreement before he signed it.

ii) The amount of the advances payable, and the fact that this would be a minimum amount which Defendant would receive for each carton of grapes was material/fundamental to the decision of the Defendant to conclude the agreement;

v) That prior to the agreement being signed Mr. van Zyl had given Mr. Beukes the assurance that the written agreement did not contain any clauses inconsistent with the prior oral agreement, and incorporated the terms of that prior oral agreement;

v) That this latter representation/assurance on the part of Mr. van Zyl induced Mr. Beukes to sign the written agreement, and that Mr. van Zyl had been aware of this.

vi) The Defendant then proceeded, for the purpose of seeking to establish that Mr. van Zyl did or ought to have realised the possibility that Mr. Beukes did not actually consent to the terms contained in the written agreement at the time that he signed same (and therefore that he should have enquired as to whether Mr. Beukes actually understood

and assented to the agreement and not "snatched at a bargain", to plead facts and circumstances which Defendant alleged that Mr. van Zyl was aware of at the relevant time.

he alleged facts and circumstances, of which Mr. van Zyl was lleged to have been aware, were alleged to be the following:

) The agreement was tripartite and included a third party, Dole Europe, which entity was unknown to Mr. Beukes;

i) Clause 17.1 of the agreement provided that the advances were loans, and were not fixed or minimum guaranteed prices, and were repayable by the Defendant should there be a shortfall;

ii) That there was a practice in the deciduous fruit industry, to the effect that advances were not considered as loans, but as minimum guaranteed prices and that any shortfall was not recoverable from the producer;

v) That Mr. van Zyl and Mr. Beukes had, during the previous season, concluded a bi-partite agreement, the provisions of which with regard to advances followed the alleged industry practice;

v) That during the previous season (1998/1999), at the time of concluding the agreement, Mr. van Zyl had provided Mr. Beukes with the Dole standard export contract, in which the alleged industry practice was followed, and that Mr. Beukes on behalf of the Defendant was aware of the terms contained in that standard contract;

vi) That Dole had deliberately changed its standard contract for the 1999/2000 season so as to depart from the alleged industry practice'

vii) That clause 17.1, insofar as it departed from the alleged industry practice, and departed from the prior oral agreement, was unusual and such a clause would not have been expected by Mr. Beukes to have been contained in the agreement that he signed;

viii) That Mr. Beukes on behalf of the Defendant was in fact not aware of the content of the written agreement, either prior to or at the time of the signature thereof, and would not have signed it if he had been aware, or had been made aware, of the provisions of Clause 17.1 insofar as it departed from the alleged prior oral agreement and the alleged industry practice.

he Defendant in conclusion alleged that:

) There was no actual consensus between the parties relating to the terms contained in the written agreement, thereby rendering it *void ab initio*;

i) There was a duty on Mr. van Zyl, in the circumstances, to draw Mr. Beukes' attention to Clause 17.1 and its meaning, and that Mr. Beukes' misapprehension regarding this clause was to be attributed to a misrepresentation on the part of Mr. van Zyl as the content and import of the written agreement which was provided for Mr. Beukes to sign.

In the nature of this case and by agreement reached between the parties in Rule 37 deliberations, the Defendant became the party with a duty to first adduce

evidence. I set out infra albeit in an extremely summarized form the evidence tendered by the parties.

CE IN DEFENDANT'S CASE

Mr. Beukes ("Mr. Beukes") testified that he is a farmer in the lexrivervalley and that he actually took over from his father who vas also a farmer. He was, however, involved in farming as early s 1995 during the time of his father. He would, for an example, e engaged together with his father in some negotiations about ertain contracts to be concluded regarding the export of rapes. As far as Mr. Beukes is concerned, there were two (2) robabilities of concluding the contracts with exporters. There vas fixed priced contract, meaning that the exporter would romise you that he would pay it in two (2) instalments. The first nstalment was normally the soonest and biggest to be paid. The econd category of contract, according to Mr. Beukes, was ubject to a minimum guarantee price. In the latter category the armer would get his first payment within a week or two after elivery of the product and the final payment would be orthcoming ten (10) weeks later. According to Mr. Beukes, armers did discuss among themselves the question of which gents can give the best deal offer and which not. It was enerally accepted among farmers that an agent who offered he biggest minimum guarantee price was the best one in the oreign market. According to Mr. Beukes, the minimum uarantee prices did differ from one year to the other depending n supply and demand. But Mr. Beukes told the Court that in 999 the minimum guarantee prices were very high compared to he prices for the 2000 season. When asked what normally would

appen if grapes were found to be rotten on arrival overseas, Mr. eukes answered thus: “Daar sou eers ‘n onafhanklike inspekteur evra word on na die omvang van die skade te gaan kyk en an moes hulle ten minste verkoelings, die agent moes ‘n erkoelingsverslag gee van wat het hy met die vrugte gedoen. k kan die vrugte net vat tot by die Hexco en daarvan af is dit ie agent se pad om die vrugte aan die ander kant te kry. So as y genoegsame bewyse het dat die probleem aan my kant ntstaan het, dan kan hy dit verhaal van my voorskot.” Mr. eukes testified that by the end of 1998 he concluded an greement with Dole and that Mr. Anton van Zyl acted on behalf f Dole. According to Mr. Beukes it was not mention to him either y Mr. van Zyl or any other official of Dole that the first payment y Dole was to be regarded as a loan and that in the event of osses; those losses would be for the account of Mr. Beukes. He naintained that if anybody told him that, he would not have oncluded the contract because there were enough other xporters who could export the fruits.

When Mr. Beukes was asked how the negotiations preceding the gning of the October 1999 contract which constitute the ubject matter of this litigation, were conducted, he explained as ollows: “Ons het maar weer die normale goed bespreek van minimum eerste prys en dan wanneer die finale betaal sou word. o ook wanneer die risiko sal oorneem, sou heel waarskynlik espreek word. As daar ‘n probleem is met kwaliteit, moet hulle arem vir ons ‘n kwaliteitseis binne 72 na aankoms lewer en ja, ie terme waarop hy gaan betaal. Die eerste betaling twee veke na pak en dan die res tien weke of wat ook al daarna.” He

old the Court that the discussions took place at his farm. He would not remember if Mr. van Zyl gave him an English Dole ontract but stated that he would have asked for an Afrikaans opy. He was given the Afrikaans copy. Asked what he said hen the contract was presented to him Mr. Beukes answered: Ons het gesels en die goed wat ons bespreek het is in die ontrak en ons het die kontrak geteken." He reiterated that he id not read the contract before appending his signature hereon. Asked if Mr. van Zyl would have been aware that he did ot read the agreement, he answered in the positive. Asked hat he thought was in the contract, Mr. Beukes answered: "Ek et gedink wat in die kontrak staan is dat ek 'n R20 minimum etaling, eerste betaling of voorskot sou kry en dan die res binne en weke en so ook wat die kwaliteitseise betref, dat as daar nige, van enige kwaliteitseise ter sprake is, dan sal dit binne 72 ur wees en die basiese goed, die kommissie wat hulle sal neem. ie basiese goed wat 'n mens maar bespreek." He added that Mr. van Zyl did not tell him that Dole amended its standard ontract which was in place the previous year. He was ccordingly never told that there was a provision in the contract o the effect that the advance paid was a loan repayable hould there be a shortage. If he was so told, he would definitely ot have used Mr. van Zyl for exporting his grapes. He referred to he contract he had with Fox and Brink founded on fixed inimum guarantee price but hastened to add that there were roblems – "hulle het kwaliteitsprobleme opgetel aan die ander ant en ek het my prokureur en 'n makelaar gestuur om te gaan yk wat daar aangaan en hulle het 'n verslag opgestel. Ek kan

ie presies onthou wat in die verslag aangaan nie en ons het toe y ooreenkoms gestop."

When he was referred to the Dole contract Mr. Beukes testified hat he was never aware that there was also a third party, amely Dole Europe involved in the contract. Mr. Beukes took the Court through many other contracts and contended all what vas there provided, was the minimum guarantee price. Mr. van iet (SC) referred Mr. Beukes to pages 29 and 30 of the bundle nd asked that he explain to the Court about the content of the ocuments and what discussions would have taken place in onnection with that documentation between himself and Dole. n this regard Mr. Beukes tendered the following explanation; "As k reg kan onthou, het ek eintlik nie aandag aan dit gegee nie, want ek het mos nou my prys gekry vir my vrugte en ek het eelwat betalings na hierdie ontvang in daardie spesifieke jaar, waar as hulle dan nou wou, dit kon aftrek, maar ek het later ewus geword dat hierdie twee betalings is afgetrek of daar is wee betalings van my state afgetrek in die 2000 seisoen, waarop k Mnr. Botes gevra het waarvoor is die geld afgetrek en teen aardie tyd het ek al lankal vergeet van hierdie twee frekeningsdatum en hy het vir my gesê dit kan stempels, hy het ereken dit was stempels en plakkers en omdat hulle vir my tempels en plakkers gebring het, het ek aangeneem okay, dit is ie aftrekking wat gemaak is op my eerste betaling in die 2000 eisoen." I will deal fully with Mr. Beukes' evidence, particularly his vidence consequent upon cross-examination when I evaluate he evidence holistically *infra*.

CE IN PLAINTIFF'S CASE

Mr. Anton Francois van Zyl ("Mr. van Zyl") testified that he is a trained horticulturist. He started to work in the fruit industry in 1989 with Unifruco as a table grape technical representative, and it carried on until deregulation of the industry in 1997. Mr. van Zyl then worked with a company called Sunpride for about six (6) months. That was until he was appointed by Dole South Africa. Unifruco was until deregulation in 1997 the sole agent of the Deciduous Fruit Board and on a statutory basis and in terms of a deciduous fruit scheme, saw to all the exports of fruit from South Africa abroad. Mr. van Zyl no longer works for Dole South Africa but he now farms on his own with deciduous fruit with export plums and local peaches, apricots, dried fruit. He prefixed his testimony with a brief history of Dole South Africa and how it started in this Country. Furtheron as basis of his testimony, Mr. van Zyl explained to the court what used to be the position when he worked for Unifruco as its sole export agent. At that stage, according to Mr. van Zyl, all the fruit was done on a consignment basis – meaning that the grower would produce fruit and he would present same for certification by the Perishable Products Export Control Board to assure that it complies with certain standards. Unifruco would then take ownership of the fruit, but not ownership as owner, the principal or the owner would still be the producer. He called this a consignment deal. Then about ten (10) days after intake Unifruco would pay the grower an advance, (voorskot) the aim being that it would help the grower with his cash flow requirements at that stage. Upon the export of the fruit and sale

thereof a final payment would be made to the grower. Even during those times of Unifruco it was possible to recoup a part of the advance from a grower, according to Mr. van Zyl. He testified then that he was then personally involved in negotiations with certain growers where purely on the quality side, recoupment was made. He hastened to add that it was his understanding that there was tremendous pressure on the pool to recoup due to exchange rate charges, or other factors that could have influenced a return in South African rand terms back to the grower. Mr. van Zyl testified that even when he left Unifruco to join Sunpride, he met Pieter Beukes. The deals, according to Mr. van Zyl's knowledge, concluded with Mr. Beukes Senior even at that stage were consignment deals. The only difference was then the fruit destined for the Middle East.

Mr. van Zyl testified that when he joined Sunpride and subsequently Dole at least up to the period when the 1999, 2000 season began there would basically be two (2) types of deals, namely, an outright buying of fruit from a grower, a category that does not have the involvement of an agent. The second brand would be where one could actually split it in two lines. The one would be an outright consignment deal wherein the farmer is the owner of the fruit carrying the risks up to the final point of sale in the market (European market). Mr. van Zyl explained further that in this category the farmer carries all the costs for shipping, distribution, documentation, administration etc. He added that in the case of Dole and most of the consignment agents, they would pay the bills, but then recoup it from the grower. The second category in that brand would be something

ike a consignment deal but with a certain benchmark or a certain value that is entrenched with the grower, for an example R40 for a particular box of fruit.

Mr. van Zyl testified that in South Africa Dole paid advances, but these were not minimum guarantees. These were explicitly described and discussed as not minimum guarantees by Dole South Africa. He emphasized that advances were not structured in a way that a grower could understand that they could be minimum guarantees. In other words, according to Mr. van Zyl's evidence, the advance paid to the grower would be recoupable if the returns from the overseas market would be less than the actual advance paid to the grower. Under the minimum guarantee the advance payment is not recoupable unless there was fruit quality problems ascribed to the producer's negligence. In Mr. van Zyl's evidence all exporters, not only Dole South Africa, handled fruit as a matter of norm at that period of time by way of consignment deal. He added, however, that there were instances where certain exporters needed a break into the market and they offered certain levels of entrenchment or guarantees on different ways, but the norm in the industry, the gross volume of fruit handled be it summer fruit or table grapes from south Africa to the European market, was done on a consignment basis.

Mr. van Zyl then testified about the contract between Dole and the Defendant company – adding that Dole did not grant any minimum guaranteed prices to any producer at all in the Hex River area in 1999/2000 season – nor was any such impression

created. Mr. van Zyl was personally involved in the drafting of the contract and therein he testified he included all points of the agreement with the growers although the final product thereof was finalized by a legal company on behalf of Dole so as to ensure that all the legal terms and points were covered. Importantly, Mr. van Zyl pointed out that the old Dole contract was concluded between Dole South Africa and the producer. The 1999/2000 contract contained clause 17.1 forming the subject of discussion in this litigation. Mr. van Zyl explained that the reason why clause 17.1 was put in the contract in the form it is, was to leave no uncertainty with the growers as to what the structure of the actual deal concluded with them was. Dole did not want the grower to be unsure or to interpret or to come to the conclusion in any way that Dole was doing an entrenched minimum guarantee deal with the grower. According to Mr. van Zyl when he met and discussed with Mr. Beukes they spoke about the advances paid or payable and the structure how it would be paid. But he added that at that stage the document or the appendix to the contract depicting the exact advances was not available yet.

This document was made available quite a while later. Mr. van Zyl categorically denied that he would have said to Mr. Beukes that R20 is cast in stone. He maintained that he was very clear on the structure of a consignment deal of an advance of a loan and the structure how it was put together. According to Mr. van Zyl the contract was given to the Beukes' (Heinie Beukes Senior and Pieter Beukes). The meeting took place in a room resembling a living room, a very nice informal social room and

most dealings Mr. van Zyl had with the Beukes family over the period that he dealt with them happened in that same room. He described the room. At that stage, testified Mr. van Zyl, further he handed to Mr. Beukes an English copy of the written agreement. Mr. Beukes' reaction is said to have been "okay dis mooi, maar het jy nie vir my 'n Afrikaanse een nie?" but Mr. van Zyl subsequently made an Afrikaans copy available to Mr. Beukes although not on the same day. Mr. van Zyl alerted the Court to the fact that he procured fruit all over the Country and that it would be difficult for him to have gone back to numerous farmers he serviced and ask what exactly happened. He, however, hastened to add that he was very firm on one thing, namely that he discussed and explained the terms and the conditions of the contract to all the growers that Dole dealt with, emphasizing that, that was a core part of his job. In his evidence he would take the contract and have same in front of himself and would give the grower a copy to hold in his hand. He would sit actually next to the grower, so that both he and the grower can have a look at the contract, they together would go through each paragraph in the contract. According to Mr. van Zyl he dealt rather extensively with the content of paragraph 17.1 of the contract because Dole had decided to make that aspect absolutely clear to growers. Mr. van Zyl added that he did not want a farmer in a consignment environment to be unsure where he stood. He emphasized that the above was but his modus operandi. He would go through each contract very clearly with the grower because he wanted the growers to fully understand what was being dealt with. In his discussion of the contract with the farmer, seeing that the impact on the whole

logistics of exporting fruit in a consignment environment leans very strongly on the crop prediction, they would also discuss every minute detail of it. He denied that he did not go through the contract with Mr. Beukes.

The next witness called by the Plaintiff was David Joachim Scholtz, the general manager of deciduous fruit at Dole. He also prefixed his testimony with what I would call the history in the deciduous fruit industry. He emphasized that the departure point of the deciduous fruit industry was always from the single channel days, to consignment business. Mr. Scholtz fully corroborated the testimony of Mr. van Zyl and emphasized that the advance is defined or determined by trying to evaluate what kind of cash flow the producer will need in that part of the season and to assist him with that. There are projected prices which are a lot more technical and are often difficult to determine. It was Mr. Scholtz evidence that out of the single channel days into the deregulated environment till today, the norm is still consignment business. He gave reason for the existence and use of the consignment business deal, namely that in the deciduous fruit business, the main markets are UK and the continent of Europe and that out of the sanction days it was the only markets available to Dole for many years. Expanding on this aspect, Mr. Scholtz mentioned that the business is built on those markets and those markets won't give orders at fixed prices to a South African exporter. In other words, in Mr. Scholtz' evidence, the whole business is developed as a consignment business. Mr. Scholtz then fully explained what is to be understood by consignment deal. In his explanation the

exporters act as agents for the producers, where all the risk of the final result is for the account or the benefit of the producer, the advances will not be minimum guarantees at all.

He emphasized that in any event procuring people, like Mr. van Zyl, did not have the mandate to negotiate minimum guarantee prices because it is obviously a different level of risk and a different set of rules. According to him there was not even the mentioning of minimum guarantees from Dole's side in those days. Dole never had any minimum guarantees even before the insertion of clause 17.1 in dole's contracts. In 1999/2000, according to the testimony of Mr. Scholtz, Dole had to recover outstanding balances from at least 80% of the farmers. Of all those farmers only three (3) did not pay. It was the Beukes (the Defendant) and Nervana, a family of Pieter Beukes and Moddersdrift, also a family of Beukes – cousins or uncles. All three (3) non-payers, according to Mr. Scholtz, claimed that they did not read the contract and do not want to pay back. I will deal with evidence that the Defendants' witnesses gave under cross-examination infra where I evaluate evidence and submissions.

AL PRINCIPLES APPLICABLE IN THIS MATTER

irst and foremost one needs to bear in mind the general rinciple set out by Innes CJ in ***Burger v Central South African ailways*** 1903 TS 571, namely that:

It is a sound principle of law that a man, when he signs a ontract, he is taken to be bound by the ordinary meaning and ffect of the words which appear over his signature."

is for the party seeking relief from an agreement that he has gned to convince the Court that he was misled as to the urport of the words to which he was thus signifying his assent. ee: ***George v Fairmead (Pty) Ltd.*** 1958 (2) SA 465(A).

With regards to the mistake which the Defendant alleged, the ollowing authoritative legal formulation enunciated from ***ABSA ank Ltd. v The Master NNO*** 1998 (4) SA 15(N) is of significance nd is, in my view, applicable in this matter as well:

A unilateral mistake, other than a mere error in the motive, also loes not allow the party labouring under the erroneous belief to epudiate his apparent assent to a contract except in very arrow circumstances, as explained in George v Fairmead (Pty) td. 1958(2) SA 465(A) at 471 and National & Overseas Distributors Corporation (Pty) Ltd. v Potato Board 1958(2) SA 473(A) at 479. he effect of these decisions is that, for a unilateral mistake to itiate the necessary assent to a contract, the error must be a ustus error. In this respect the courts in applying the test, have aken into account the fact that there is another party involved nd have considered his position. They have, in effect, said:

Has the first party – the one who is trying to resile – been to blame n the sense that by his conduct he has led the other party, as a easonable man, to believe that he was binding himself?"

A party to a contract who has concluded same whilst labouring nder a *bona fide* and reasonable mistake as to its contents will ot be bound by the provisions thereof. In particular, where the ontracting party has been led to believe by the other party that he contract contains certain provisions, which in fact it does not, he party relying upon the misrepresentations, will not be bound

y the agreement. In this regard it was stated in ***Tesoriero v HYJO Investments Shareblock (Pty) Ltd.*** 2000(1) SA 167(W) at 75:

The misrepresentation need not have been fraudulent or egligent. The duty to inform would or could arise where the locument departs from what was represented, said or agreed eforehand or whether other contracting party realizes or should ealize that the signatory is under a misapprehension or whether he existence of the provision or the contract is hidden or not pparent by reason of the way in which it is incorporated in a locument or whether provision, not clearly presented, is unusual r would not normally be found in the contract presented for ignature."

ee also: ***Spindrifter (Pty) Ltd. v Lester Donovan (Pty) Ltd.*** 1986(1) A 303(A).

n the absence of an actual misrepresentation on the part of the on-resiler (be it innocent, negligent or fraudulent), it has been eld that there is a duty on that party – if he realises, or ought easonably to realise, that there is a real possibility of mistake- to peak and enquire whether the intention indicated by the gnature of the agreement expresses the actual intention. The *snapping up of a bargain*", in the knowledge of the possibility hat the declared intention did not represent the actual intention, would not be *bona fide* and in such circumstances there is no inding agreement. See: ***Sonap Petroleum (SA) (Pty) Ltd v appadogianis*** 1992(3) SA 234(A). In ***Prins v ABSA Bank Ltd.*** 998(3) SA 904 (C), Davis AJ proposed a useful summary of the osition as follows:

There are three different sets of circumstances where a party as invoked the defence of justus error to resile from a contract.

*) Where the mistaken party is not to blame for the mistake in the sense that he behaved as a responsible person would have behaved in the circumstances, namely with due care. See **Spindrifter** case at 316.*

*i) Where the error has been induced by a misrepresentation of the other party who might have acted either fraudulently, negligently or even innocently. See **George v Fairmead** at 471 B-D.*

*ii) Where the non-resilers' reliance on the appearance of the consensus is unreasonable. See **Standard Credit Corporation Ltd. v Naicker** 1987(2) SA 49N at 53 I-J.'*

Davis AJ continues in 909 B-C that the following series of questions can be used to determine whether reliance on the contract was reasonable in terms of the conduct of the party allegedly creating the impression of consensus and the conduct of the other party in believing the impression:

a) Is there consensus?

b) If not, is there dissensus caused by a mistake?

c) Is the other party aware of the resiler's mistake?

d) Who induced the mistake and was it done by commission or omission, which was either fraudulent negligent or even innocent?"

Regard must be had to what transpired in ***Constantia Insurance Co. Ltd. v Compusource (Pty) Ltd*** 2005(4) SA 345(SCA) in which the Supreme Court of Appeal held that the term in question was an unusual one and which the Defendant's representatives may

vell not have wished to agree to, had they been aware of the ull implication thereof. It was accordingly held that the easonable person in the person of the Plaintiff would have nquired from the Defendant's representatives at the time whether he appreciated the meaning of the clause and would ave explained same to him. The legal consequences of the laintiff's failure to follow this approach in that matter led to the nding that the Defendant could not be held to the provisions of clause to which its representatives did not and could not easonably have been thought to agree (see paras 19-23 of the udgment at 254 G-356G).

ATION OF EVIDENCE AND APPLICATION OF LEGAL PRINCIPLES

n Mr. van Riet (SC)'s submissions, the Plaintiff's case is not based n the caveat subscriptor principle, but rather that there was true ral consensus as to the content and meaning of clause 17 of he agreement, which consensus is reflected in the written ontract. Concluding on this aspect, Mr. van Riet (SC) submitted hat the whole basis as to why the Defendant accepted the duty o begin, has fallen away and the overall onus remains on the laintiff to prove such consensus. In the alternative (only to the xtent that the Plaintiff may contend that the signer beware rinciple still apply), Mr. van Riet (SC) relying on the recent upreme Court of Appeal Judgment of ***Constantia Insurance*** *upra*, argued that no reasonable person in the position of the laintiff would have been misled by Mr. Beukes' signature to the ontract into believing that he was agreeing to the advance eing a refundable loan.

n Mr. van Riet (SC)'s submission as regard the alleged onsensus/dissensus Mr. Beukes' evidence that he believed that he advance was the minimum amount that farmers would eceive, cannot be rejected and that, to the extent that Dole learly intended the voorskot to be a loan, there was a nisunderstanding between the parties, much on the same basis s there were similar misunderstandings between so many armers and exporters in regard to the legalities of the advances t that time. To the extent that Mr. van Zyl's evidence may be rgued by Plaintiff to exclude such understanding, submitted Mr. an Riet (SC) that he clearly overstated the position and that, in ny event, Mr. Beukes' clear recollection and evidence cannot e rejected.

n conclusion Mr. van Riet (SC) submitted that the true defence in his case (as in ***Constantia*** *supra*) is not one of misrepresentation y omission, but one of dissensus in that the Defendant says Mr. eukes was unaware that the contract provided for a repayable oan and would not have contracted with the Plaintiff if he did. nder the circumsntaces, submitted Mr. van Riet (SC), the law is hat the Defendant would, despite Mr. Beukes' lack of actual onsensus be bound to the provisions of the contract, but only if Dole's representatives relied on an impression created by Mr. eukes in signing the contract that he was assenting to its terms nd was reasonable in doing so. If, however, submitted Mr. van iet (SC) further, a reasonable person in their position would have ealised that Mr. Beukes, despite his apparent expression of greement, did not actually consent to be bound by the clause, his clause could not be said to be part of their agreement. In the

atter regard I am referred to ***Constantia Insurance*** case page 53 G-I.

n contrast to the aforementioned submissions, Mr. Gess as a tarting point dealt somewhat exhaustively with what the Defendant in the instant case was required to have done. This, Mr. Gess succinctly set out as follows:

In seeking to avoid the consequences of the agreement which was signed, and which by that signature assent to the terms hereof is usually presumed, it is submitted that the Defendant would have to show inter alia that:

(a) That there was no consensus in respect of the terms contained in the written agreement. The Defendant sought to show this by alleging that there was a prior oral agreement between the parties which contained express, tacit or implied terms relating to the advances, and that the terms of the written agreement (without his being aware thereof – in that he had not allegedly read the agreement prior to signing same) contained material provisions at variance therewith; and

(b) If he could show that there was in fact such dissensus that this was occasioned by a misrepresentation on the part of Dole, whether innocent, negligent or fraudulent. The Defendant sought to show this by, inter alia, alleging that Van Zyl had represented to Defendant that the terms of the alleged oral agreement (as contended for by the Defendant)

had been included in the written agreement, but had not; alternatively

(c) If he could show that Van Zyl appreciated, or ought reasonably to have appreciated, that Beukes was labouring under a mistake as to the content of the written agreement, such as would have created a duty on his part to speak and enquire, and that he failed to speak and enquire but rather 'snatched at a bargain'."

egard being had to the rather detailed Defendant's Plea in this natter set out earlier on in this Judgment, Mr. Gess' forementioned submission, in my view, cannot be faultered. It is ot entirely correct that the Plaintiff in this case abandoned eliance on the caveat subscriptor principle. The starting point is s referred to by Harmse JA in ***Sonap Petroleum SA (Pty) Ltd v apadogianos*** 1992(3) SA 234 (A) quoting from the statement by lackman J in ***Smith v Hughes***, namely:

himself that a reasonable man would believe that he was ssenting to the terms proposed by the other party, and that ther party upon the belief enters into the contract with him, the nan thus conducting himself would be equally bound as if he ad intended to agree to the other party's terms".

As long ago as in 1903 it was our law and it remains our law that when a party signs a contract it is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. For the Defendant to succeed it needed to convince

he Court that it was misled as to the purport of the words to which he signified his assent by appending his signature.
ee: ***Burger v Central South African Railways*** 1903 TS 571; ***George Fairmead (Pty) Ltd*** 1958(2) SA 465 (A)

Maybe it is apposite to now refer to the evidential material used n this case. Importantly Mr. Beukes admitted that he could not ecall the exact words which were used when the contract was eing negotiated. On occasion he suggested that it had been tated that the advance would be a "minimum guarantee" or ven a "minimum price" (which would apply to sale and not gency) even though he had earlier conceded that these words ad not been used. On other occasions Mr. Beukes simply stated hat he was told that he would not receive less than twenty rand R20) or that no amount would be deducted therefrom and that he twenty rand (R20) was his. Mr. Beukes' evidence regarding romises of an advance of not less that R20,00 must not be onsidered in isolation, but in the context of the stage of the egotiations, and in particular the fact that Dole had not yet etermined the quantum of the advances it would offer for the eason. Annexure "A" to the agreement was not present at the me of the negotiations or the signature, and this was the ocument that was supposed to determine the advances which ole was prepared to pay, per cultivar, per week. As Mr. van Zyl estified, Dole had not yet determined the exact amount of the dvances – but was promising advances of not less that R20,00, s this represented the estimated production cost of the farmer. n the event, the schedule (Exhibit A, page 100) did provide for dvances, the quantum of none of which for first class fruit was

ess than R20,00 and in some cases was greater. In the absence f Annexure “A” it would be natural to want to know what the xpected advances would be. In my view, the mere fact that a erson, in these given circumstances, is assured that the dvances will not be of a quantum of less than R20,00 (which urned out to be a correct prediction of the quantum that ventually appeared on the Schedule, and also of the advances ctually paid over by Dole) – is a far cry from an assurance that he advance will be construed as a minimum guaranteed price – articularly against the background of the industry norm.

he evidence by Mr. Beukes that in deciduous fruit industry there as an established practice that a reference to both a voorskot” or “advance”, and to a “first advance” only had one eaning when used, that meaning being that of a “minimum uarantee price” in which no part of the amount so advanced ould be recovered from the producer, seems so wrong to the xtent that it would be fair to say that he was deliberately being ntruthful in this regard about his understanding. Having had sight f the content of the Exporter’s Handbook prepared by Fruit outh Africa pages ten (10) and forty (40) thereof, as well as the ncontested evidence of Mr. Scholtz and Mr. van Zyl, I am bound o reach an inescapable conclusion that Mr. Beukes was not ruthful to me on this aspect. Mr. Beukes is no newcomer in the eciduous industry. He was brought up by the family therein nvolved. He, himself is a seasoned businessman in deciduous ndustry. What is abundantly clear is that the practice was that in he case of agency business, an advance (payment in nticipation of the proceeds of fruit to be sold on behalf of the

roducer) was recoverable in the event of the nett proceeds eing less than the advance, and that this had prevailed even rior to deregulation in the days of Unifruco Ltd. and the Board. his practice was clearly the norm. Only in exceptional cases was specifically agreed (usually when the exporter had a special equirement for specific fruit) that all or a part of the advance would be a minimum guarantee, in which case the exporter eliberately took the risk that, if the nett proceeds were less than hat part of the advance which was subject to the minimum uarantee, same could not be recovered. Furthermore, an advance" and a "minimum guaranteed price" did not have the ame meaning.

leedless to mention that insofar as it was also alleged and leaded that the term may have been an implied term (my nderlining), it is essential to emphasise that Mr. Beukes accepted hat the relationship between Dole and the Defendant was one f principal and agent. The normal position with regard to such n agency relationship would clearly be that all expenses ncurred by the agent pursuant to his mandate were incurred on he principal's behalf; the principal would be entitled to the nett roceeds after expenses (and subject to a duty to account); and hat any amount advanced or loaned by the agent to his rincipal prior to the sale of the produce, and in expectation of he eventual receipt of the proceeds of the crop sold by the gent on the principle's behalf, would be repayable to the gent. As in all instances of agency, the risk of loss from the ransaction would be that of the principal alone, as would be the ght to the profits, unless expressly provided otherwise.

Mr. Beukes told the Court that the practice of Dole in 1998/1999 eason had been to grant advances which were minimum uaranteed prices. It is common cause that Mr. Beukes had also leaded that at the time of contracting in 1999/2000 season he ad been aware of the terms of the Dole contract for the revious year. It is of note though, that an oral contract was nfact concluded with Mr. Beukes' father and not with Mr. Beukes imself. Mr. Beukes was unable to testify that he was present hen the said oral contract was concluded. It is not without gnificance that although an unsigned written contract had een available that year (after conclusion of oral agreement) Mr. Beukes was obliged when cross-examined to concede that e had never read the document at all and was consequently naware of its terms. Strangely when Mr.Beukes testified he onceded that he had not only never read any previous Dole ontract, but that the contract with Modderdrift had never been n his possession at the relevant time. How on earth can he give is counsel wrong instruction in this regard, remains a mystery and thus totally beyond my comprehension. Therefore unavoidably, n my view, the enquiry in respect of the signing of the 1999/2000 eason agreement must be proceeded with on the basis that Mr. eukes had had no insight into the Dole standard contract for 998/1999 season, and had never read any part thereof.

Mr. Beukes testified that he signed the agreement in Afrikaans on 6 October 1999, in the presence of Mr. van Zyl, and without first eading same. He could not dispute that either on 5 October 999 or 14 October 1999 (but in any event in excess of a week

efore the signature of the Afrikaans version of the written greement on 26 October 1999), he may have been given an nglish copy of the agreement by Mr. van Zyl. The evidence of Mr. van Zyl, which was not contested, was that he had first anded over an English version, and had later brought an frikaans version on a separate occasion at least a week later. If his had taken place, he would have asked for an Afrikaans opy, (the purpose of this request would not have been to read he Afrikaans version, but rather to gain time to seek to negotiate urther with Dole's rivals for better prices). He was unable to state whether in those circumstances the English version was retained y him or returned to Mr. van Zyl. Mr. van Zyl testified that he would not have taken the English version away with him. Mr. eukes maintained that he never read any agreements, and ever had any intention or wish to read either the English or frikaans version of the Dole agreement. He accepted, if Mr. van yl had left the English version with him (either on 5 October 1999 r 14 October 1999) and had later brought him an Afrikaans ersion, Mr. van Zyl could reasonably have assumed that Mr. eukes would have read the agreement in the meantime. He ad the opportunity of reading the agreement before signing ame, but chose not to read it. He was not told by Mr. van Zyl not o read the agreement before he signed same.

y reason of his concessions regarding the English version, Mr. eukes was unable to state that Mr. van Zyl was actually aware, t the time that Mr. Beukes signed the agreement, that Mr. eukes had not read the agreement and acquainted himself ith the contents. When put to him, Mr. Beukes denied that Mr.

an Zyl had explained the content of the written agreement to im before he had signed same, and in particular that he had xplained the involvement of Dole Europe as a third party to the greement; the nature of the advances as set out in clause 17.1 nd the meaning of clause 17.2 relating to the exchange rate olicy and the charging of interest on the advance at the LIBOR ate.

Mr. van Zyl on the other hand, testified that he was certain that e would have adhered to his modus operandi and, as with all ther growers, explained the pertinent terms to Mr. Beukes. He elieved that he would have gone through the contract with Mr. eukes at the time that he first presented the contract- (which vas the English version). Although he conceded readily under ross-examination that he gave evidence about the explanation f the contract on the basis of the modus operandi which he had ollowed in all cases, he was not shaken on his assertion that he ad done so with every farmer. This explanation is furthermore robable. The criticism of his evidence under cross-examination is ot justified. He was being asked to speculate regarding the nodus operandi and the manner in which he might theoretically ad explained the matter to individual farmers. He had no ndividual recollection and relied in his modus operandi only. Had e recalled exactly what he said to a specific farmer, this might f itself not have been credible. To say that the recoverability vas not hammered on as a “mega point”, does not detract from he fact that the record shows that in both instances Mr. van Zyl onfirmed that he would have explained the nature and urpose of the advance to each producer.

Mr. Beukes further testified that he had signed the agreement without reading same because Mr. van Zyl assured/represented to him that the terms of the written agreement were consistent with the alleged prior oral agreement. Mr. van Zyl denied that he had misled Mr. Beukes as to the terms of the written agreement, and it was in any event his evidence that he would have followed his modus operandi with Mr. Beukes, as with all other producers who signed the written contracts. Mr. Beukes maintained in his testimony that he was unaware at the time of signing of the agreement that same was tri-partite in nature in that Dole Europe was a party thereto. On being cross-examined on this aspect he conceded that the face of the document referred clearly and in bold letters to both Dole South Africa and Dole Europe. Every page of the agreement alongside the position at which Mr. Beukes initialled, it is stated in black type-face that the agreement was a tri-partite one. How on earth can Mr.Beukes maintain he did not become aware that three (3) parties were party to this agreement is once more beyond my comprehension. Even if it can be accepted that he did not read the document, he, however, would have had sight of this as he initialled and fully signed at the tail of the agreement.

Taking a step backwards to what, according to Mr. Beukes explained he understood the practice to have been in the deciduous industry in general, I hasten to add that it would not be unreasonable to have expected the Defendant to have called at the very least an expert witness with regard to such industry practice or even another grape producer to confirm the

lleged practice. This the Defendant did not do despite its wareness that the Plaintiff would lead evidence to negate its nderstanding of the practice in the industry. It is also not without gnificance to note that when Mr. Beukes was asked for basis of is understanding of the industry practices prior to and during the 999/2000 season, he explained that he had never read any ontract at all relating to the export of fruit whether such ontract related to a fixed price deal or to the appointment of n agent. Mr. Beukes on his own version, had only been involved n the marketing of fruit for one or two years and until the year nder discussion he had been assistant to his father. In the season 998/1999 Mr. Beukes concluded contracts which were either on xed price deals or deals where minimum guarantee prices had een expressly given. Strangely even in those instances, he had ever read the contracts at all. Asked to comment on one of hese, namely, one he concluded with SAFE, he told the Court hat it provided for minimum guarantee prices whilst at the same me admitting that he never read it. When Mr. Beukes was asked o examine the document in the witness box, he did concede hat there was no express provision for minimum guarantee rices, but merely a reference to "advances" and a mechanism or determining same. He conceded that such advances could ot be a fixed minimum price. He concede further that the terms f the contract did not even provide for an advance in a redetermined amount, but that it was in fact an approximate mount determined by SAFE after taking various factors into ccount.

came as a complete surprise to me when Mr. Beukes ubsequently conceded that his knowledge was based solely pon the oral communications and dealings with those exporters ith whom he had dealt in the previous year and that he in fact ad no knowledge of practices in the wider industry at all. When sked to comment on the written agreement that he had oncluded with Capespan grapes in a subsequent year, he onceded that there was no express reference therein to the dvances not being recoverable. Furthermore, whilst conceding hat the agreement with Capespan provided that Defendant as obliged to pay interest on the advances made to it, he ersistently contended that, should the nett price achieved be ess than the advances made, the Defendant was not liable for he interest which it had undertaken to pay to Capespan, and hat Capespan would not be entitled to recover either the dvances or even the interest thereon which Defendant had ndertaken to pay. How can this testimony be accepted as a uthful explanation of what Mr. Beukes believed the practice nd his obligation were, I ask rhetorically.

is common cause that Dole standard contract for the previous ear (1998/1999) contained no express term at variance with lause 17.1. It merely referred to an advance being paid, but did ot address expressly the question of the recoverability of that dvance. It is contended on behalf of the Defendant that Dole ad changed the standard contract for 1999/2000 and that in oing so departed from the practice. This contention has as its asis that Mr. Beukes' evidence about industry practice egarding advances is correct. The contention cannot therefore

e sustained because Mr. Beukes is clearly incorrect on this spect. It must immediately be pointed out that the 1998/1999 tandard contract of Dole and of other exporters for that matter, hough not expressly dealing with recoverability of advances, vas also in no way inconsistent with the industry practice. It nerely did not spell it out. This did not mean that the exporter ould not recover portions of those advances when the overseas narket brought forth a loss instead of a profit. Clause 17.1 herefore, in my understanding, merely spelled out "in terms" the xisting established industry practice and was indeed, in my view, ntirely in accordance therewith. I was very much satisfied with he testimony of both Mr. van Zyl and Mr. Scholtz on this aspect. hey were both extensively cross-examined on this aspect and heir evidence did not change its "colour". It is clear from their vidence that the purpose in providing for clause 17.1 in the new greement was to remove any possibility of uncertainty. All that Dole clearly did in clause17.1 was to clarify what was always in ny event the position, namely that the advance was neither a xed price (similar to purchase and sale) nor provided a inimum guarantee price. In my judgment there was nothing ew and therefore unusual or unexpected in the contents of lause 17.1. In any event because Dole decided to spell out the osition in no uncertain terms, that does not in my view make the osition totally new. Mr. van Zyl and Mr. Scholtz' evidence on this spect remains convincing. They both totally disputed the ractice as alleged by Mr. Beukes. Their clear evidence was that he norm for conducting business as an agent in the deciduous uit industry was in accordance with the provisions contained in

lause 17.1. The provisions should in that context have been xpected or even anticipated as the norm.

Mr. Beukes' evidence that no farmer who was aware of clause 7.1 would agree to the term contained therein is hardly helpful n this regard. This is countered by Mr. Scholtz' evidence to the ffect that the clause was indeed in accordance with the ractice and that of the producers in the Hex River Valley who ad been required to repay part of the advances to Dole in 000, only the Beukes family had alleged that they had not read heir contracts and that they were not bound by clause 17.1. It is mportant to have regard to Mr. Scholtz' uncontested evidence o the effect that Dole, as South Africa's third largest exporter of able grapes from South Africa, at present exported between our (4) and five (5) million cartons of grapes per year from this ountry, almost exclusively as agent and in almost all cases ncorporating terms the same as clause 17.1, which provided that dvances were repayable.

Mr. Beukes presented himself as an unintelligent, inept and totally gnorant businessman, this despite his business experience and ducation. He persisted to exhibit what I regard as a wrong icture of himself. I can hardly accept that a man of his xperience and education would not read anything meant for im to read. In his testimony, it is not only business contracts, eriodicals and letters sent to him that he does not read; he also dmitted to not have read an ante-nuptial contract relating to is own marriage. I am called upon to accept and believe all what he told me in Court. A man must display honesty and

ncerity before he can venture to ask any court to accept and elief his version. Under cross-examination and whenever Mr. eukes perceived that he was being pushed into a corner, he would merely answer "ek kan nie onthou nie; ek weet nie ..."etc. Mr. Beukes's entire view of the industry, and the terms of usiness which applied to his relationships with exporters, was oloured and influenced (on his own version) by what was and is n entirely unhelpful and unreasonable attitude on his part that e did not read any documents which he received, be they dvertising material or contracts. It is my view that those dealings ith Mr. Beukes would have been reasonably entitled to expect hat, as a person involved in producing grapes and negotiating ith exporters for the marketing thereof, he would have taken he trouble to acquaint himself with the industry and would have ead materials and contracts put in his hands. At some point Mr. eukes suggested that he would have chosen the exporter with he highest minimum guaranteed price as such exporter no oubt had the best market. But he continued to concede that he advance offered by Dole was substantially lower than the inimum guaranteed price offered by competitors such as Del Monte, or fixed price deals he had with other exporters. Accordingly, the decision to contract with Dole at all cannot, in y view, (as alleged by Mr. Beukes) have been based upon the uantum of the advance but rather on a belief in the possible nal price that could be achieved by Dole in the foreign market lace. The advances paid by Dole were in accordance with the chedule of Advances (Exhibit A, page 100) and were in respect f certain varieties, higher than twenty rand (R20,00) per box. The ifficulty is that if Mr. Beukes' evidence is accepted, that would

ctually amount to accepting the proposition that an exporter vould agree on minimum guaranteed price of twenty rand R20,00), or not less than twenty rand (F20,00) per carton, and hereafter voluntarily and unilaterally (without being ontractually obliged to do so) increase that minimum uaranteed price and thereby increase its own exposure in the narket. Exporters are seasoned business entities. They would not hoot themselves in the foot.

One last aspect deserving attention is that Mr. Beukes could not ispute the suggestion that he had, on a prior occasion, been anded an English version of the agreement under discussion, nd that he had asked for an Afrikaans version, which was only elivered later. He also could not dispute that the same English ersion was most probably left with him until an Afrikaans version vas presented to him later. Although he said he could not recall uch incident, he was, however, prepared to accept that it had aken place. What struck me is that he was very clear of what his notivation would have been for asking for an Afrikaans "afskrif". Mr. Beukes did remember the incident of the English copy. He vas untruthful when he told the Court that he did not recall. If he ruthfully did not recall the occasion, it would not be expected hat he would be able to describe his motivation with such larity. I would have understood if his motivation was that he vanted to have a copy in his mother tongue so that he could ead same. Instead he stated that his intention was not to read he document but rather to buy time so as to try to do a better eal with a rival and in Mr. Beukes own words to "play with van yl."

he evidence of Mr. van Zyl which was not contested was that he ad first handed over an English version, and had later brought n Afrikaans version on a separate occasion at least a week ater. Mr. van Zyl's evidence, which is of cardinal importance is hat he was certain that he would have adhered to his modus perandi and, as with all other growers, explained the pertinent erms to Mr. Beukes. It is, however, not without significance that e readily conceded under cross-examination that he gave vidence about the explanation of the contract on the basis of he modus operandi which he had followed in all cases. I hasten o mention though that Mr. van Zyl was not shaken on his ssertion that he had done so with every farmer. I would have een very concerned and in fact suspicious of Mr. van Zyl's vidence if he testified that he specifically remembered dealing with Mr. Beukes and that he remembered specifically explaining o him the contract provisions, clause by clause. But he ategorically stated what his modus operandi was with regard to ll growers. This, in my view, is credible. Well, to say that the ecoverability was not hammered on as a "mega point", in my iew, does not detract from the fact that the record shows that in oth instances Mr. van Zyl confirmed that he would have xplained the nature and purpose of the advance to each roducer. Importantly Mr. van Zyl denied that he had misled Mr. eukes as to the terms of the written agreement. In his evidence e would have followed his modus operandi with Mr. Beukes, as with all other producers who signed the written contracts. Both Mr. van Zyl and Mr. Scholtz confirmed the purpose in providing for lause 17.1 in the new Dole agreement, namely that all what

Dole had done was to clarify what was always in any event the osition (being that the advance was neither a fixed price in the ontext of purchase and sale nor provided for a minimum uaranteed price).

I cannot find in the evidence that Mr. van Zyl is an untruthful witness. I cannot in the evidence make a finding that Mr. van Zyl oncluded an agreement contrary to the policy of his employer. I cannot on the evidence led in this matter make a finding that n agreement was concluded with the Defendant which greement was out of the ordinary for the business of Dole. It was or the Defendant to produce proof tending to convince the Court, on the balance of probabilities that Mr. van Zyl did not xplain the nature and tenor of the written agreement to Mr. eukes before the latter appended his signature thereon. On the ther hand, the probabilities favour the finding that Mr. van Zyl id explain the nature and tenor of the written agreement. The ollowing are but a few of such factors:

(i) Mr. Beukes did not only testify that the provisions of clause 17.1 had not been drawn to his attention, but went further and alleged that Mr. van Zyl had not drawn his attention to Dole Europe or to the LIBOR interest in clause 17.2.

(ii) Given the evidence of Mr. van Zyl that he explained these matters to each and every producer before the agreements were signed; that he invariably and without exception followed this practice, a suggestion to the contrary falls to be rejected.

(iii) No convincing or any reason at all was offered by the only Defendant's witness, Mr. Beukes as to why Mr. van Zyl would have departed from his established modus operandi.I am told there are twenty four (24) producers in the Hex River Valley with whom Mr. van Zyl dealt that year. The Defendant did not call even one of the twenty four (24) to come and tell the Court that the modus operandi testified to by Mr. van Zyl had not been followed with him as well.

(iv) If it is the truth that Dole amended the 1999/2000 standard contract (and particularly clause 17.1) for the specific purpose (as testified to by Mr. van Zyl and Mr. Scholtz) of avoiding disputes due to a failure to have spelled out the position regarding advances (a need which had been occasioned due to a perceived risk of disputes arising from an incident the previous year involving SAFE), there would have been, in my view, every reason to ensure that clause 17.1 was drawn to the attention of producers. It is extremely improbable that Mr. van Zyl would not have done so.

he probability that the terms were explained to Mr. Beukes by Mr. van Zyl is further strengthened by the fact that there was also need to explain to the producers that they were separately ppointing Dole Europe as an agent and that the concept of the IBOR interest, Which was a new feature introduced by Dole, would clearly be explained to the producers. It is most unlikely

nd improbable that none of these matters (as suggested by Mr. eukes) was raised. Moreover, the contents of the agreement nder discussion including clause 17.1 are clear and nambiguous. I accept the practice in the deciduous industry as ontended by Dole.

Accordingly the conduct and the statements of Mr. van Zyl, in my iew, fall to be judged in accordance with the practice in the ndustry as the background. It is no doubt reasonable to accept hat Mr. van Zyl would reasonably have believed that Mr. Beukes who was participating in the industry) had this same basic nderstanding and grounding as to the norms of the industry. In ny view, apart from Mr. van Zyl's evidence that he explained the alient terms of the agreement to Mr. Beukes, there would then e no reasonable grounds for Mr. van Zyl to have appreciated hat Mr. Beukes was under any misapprehension at all as to the erms contained in the written agreement. I find that Mr. van Zyl is man of vast knowledge and experience in the export of eciduous fruit industry. He presented to this Court the most ogical, thoughtful, narrative and informative version. That he was n honest and reliable witness in this matter cannot be doubted. ame cannot, however be said of Mr. Beukes. It is my view that armers with whom Mr. van Zyl did business must consider hemselves as having been very fortunate. They most certainly nust have taken full advantage of his knowledge and expertise n the export of deciduous fruit industry generally. Mr. Scholtz' vidence corroborated and merely complimented evidence endered by Mr. van Zyl.

Mr. van Riet (SC)'s contention of the term contained in clause 7.1 as being unusual must necessarily now be viewed in the ontext that I have shown above in this Judgment that there was othing new and thus unusual with recoverability of the dvances in the export of deciduous fruit industry generally. In ny event, Mr. van Zyl explained the provisions including clause 7.1 to Mr. Beukes just as he did with the other growers he dealt ith.

is important to note that this case is totally different from what is btained in ***Constantia Insurance*** case *supra*. The latter case is herefore distinguishable and in my view reliance on it in view of ndings set out *supra* is totally misplaced. Mr. van Riet (SC) ttaches too much importance on the following words from Mr. an Zyl uttered in the course of cross-examination, namely, "'n hens onderhandel net nie so nie. Waar jy gaan deur die inhoud n die bedoeling van wat 'n voorskot is, maar ek het nêrens vir om gesê jong, maar luister – wat ek wel sou sê, on second hought, wat ek wel sou sê as daar 'n gehalte probleem met jou rugte sou wees, dan sal ons na jou terugkom om geld te vra." In ny view, that hardly says Mr. van Zyl did not explain the content f clause 17.1. I have referred to how clear clause 17.1 is. In any vent, Mr. Beukes himself testified that in the event of a problem ith regards to the quality of the fruit, the agent invariably came ack to the producer. In my view, in these circumstances, the efendant must be held bound to what he signified with his gnature. See: ***Burger v Central South African Railways*** *supra*. It annot be contended in the instant matter that Mr. Beukes was n any way misled as to the purport of the words to which he

gnified his assent. See ***George v Fairmead (Pty)*** *supra*. Evidence as not shown that Mr. Beukes in any way laboured under a ona fide and reasonable mistake with regards to the content of he contract under discussion in this matter. See: ***Tesoriero v BHY O Investments Shareblock (Pty) Ltd supra***; ***Spindrifter (Pty) Ltd Pty) Ltd*** case *supra*.

is ordered and directed that the Defendant is bound by the erms of the written agreement annexed to the Particulars of Claim as Annexure "A" signed between the parties on 26 October 1999.

he Defendant shall pay the Plaintiff's costs occasioned by the resent hearing.

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D, J