REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 43914/17

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO

Date: 5 October 2021 E van der Schyff

In the matter between:

VOLTEX (PTY) LIMITED	APPLICANT
and	
FIRST STRUT (RF) LIMITED (IN LIQUIDATION)	1ST RESPONDENT
THE MASTER OF THE HIGH COURT, PRETORIA	2ND RESPONDENT
PREVANCE BONDS (PTY) LIMITED	3RD RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] This is an application for the rectification of 'an application for credit incorporating a cession of book debts' (the written agreement). The applicant avers that the written agreement was concluded between itself and the first respondent prior to the latter being wound up. Although the written agreement reflects the applicant's name (Voltex (Pty) Ltd –previously known as Voltex Distributors (Pty) Ltd - herein referred to as 'Voltex 2'), it does not reflect the applicant's company registration number. Coincidentally it reflects the company registration number of a pre-existing company with an identical name (Voltex (Pty) Ltd – 'Voltex 1'), which company effected a name change to Aberdale Cables SA (Pty) Ltd during 1998. The applicant concluded a general cession of book debts in favour of Voltex 1 during 1995 and allegedly a second credit agreement with cession of book debts with Voltex 2 during 1999. This second agreement constitutes the written agreement that is the subject-matter of this application because it reflects Voltex 1's company registration number, and not Voltex 2's company registration number. The first respondent is presently in liquidation. The applicant seeks to advance a secured claim against the insolvent estate of the first respondent relying on the cession. The rectification application was launched almost four years after the winding-up commenced.

[2] When the application was heard, the applicant did not press for the relief sought in the notice of motion but sought a referral to oral evidence concerning the alleged common intention between itself and the first respondent. The applicant averred that a referral to oral evidence would enable the third respondent, who has no personal knowledge of any of the relevant facts but raised a legal challenge to the application, to cross-examine the applicant's witnesses for purposes of establishing the veracity of the applicant's version supporting the rectification. The applicant argued that referring the matter to oral evidence from the onset will prevent a piecemeal approach to the issues to be determined. Counsel for the applicant emphasised that the request for referral to oral evidence was made because recent development

dictates that such a request needs to be made at the onset of a hearing if it is to be considered.

[3] The third respondent, a rival creditor in the insolvent estate of the first respondent, opposes the application. The third respondent contests that the applicant is a secured creditor as opposed to a concurrent creditor. Counsel for the third respondent contends that the two critical questions for determination are (i) whether an application for the rectification of the written agreement which would subsequent to its rectification confer security on a debtor, can be brought against an insolvent debtor after the institution of a *concursus creditorum* (the legal challenge), and (ii) whether the applicant provided sufficient evidence to sustain a claim for rectification on motion (the factual question). The third respondent opposed the referral of the application to oral evidence and contended that even if the applicant could establish the facts necessary for a rectification claim, the relief is not legally competent as this would disturb the *concursus creditorum.*

[4] Since the legal challenge regarding the competency of the relief claimed constitutes a question of law which, if upheld, will be dispositive of the application, it can conveniently be decided separately from the factual question. Having said that, it is of significance to consider that the applicant invited three respondents to the present proceedings. The first respondent is the company in liquidation. The application was served on the appointed liquidators. It is trite that when liquidators are appointed, they step in the shoes of an insolvent company.[1] A liquidator is statutorily conferred with the power to institute and defend legal proceedings against the company in liquidation. Of the three respondents, the liquidator who represents the insolvent company, is the only party who can contest the applicant's averments that the applicant and the first respondent intended for the agreement to be concluded between them and that the wrong company registration number reflected in the written agreement stands to be rectified. In the absence of any opposition on behalf of the company in liquidation, in circumstances where the application was served on

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[1] *Syfrets Bank Ltd and Others v Sheriff of the Supreme Court, Durban Central, and Another; Shoerie NO v Syfrets Bank Ltd and Others* 1997 (1) SA 764 (D) at 782H.

the liquidator in accordance with the rules of court, these averments stand uncontested. It is not necessary to refer the application to oral evidence to provide the third respondent with the opportunity to test the veracity of the applicant's version in circumstances where it is not contested by the first defendant. The factual question can be considered on the papers as it stands. The legal challenge will be addressed first.

Legal challenge

[5] Both parties base the relief they seek on the premise that the effect of a liquidation order is to crystallise the insolvent's position and that no transaction can be entered into thereafter with regard to the estate, as it was explained by the then Appellate Division in *Walker v Syfret NO.*[2]

[6] Relying on the judgment in *Incledon (Welkom) (Pty) Ltd v QwaQwa Development Corporation Ltd,*[3] the third respondent contends that as between the insolvent estate and the creditors, the relationship of the creditors *inter se*, became fixed and their rights and obligations became vested and complete on the company being liquidated. Counsel submitted that one of the consequences hereof, as confirmed in a number of judgments,[4] is that a creditor who was only a concurrent creditor at the date of winding-up, cannot by rectification of an agreement between the parties alter its position post liquidation to become a preferent creditor, as this would disturb the *concursus creditorum.* The third respondent therefore raised the legal challenge.

[7] The applicant, on the other hand, asserts that the rectification of the agreement will not elevate the applicant from being a concurrent creditor to being a secured creditor. Counsel for the applicant submitted with reference to, *inter alia*, *Guman v*

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[2] 1911 AD 141 at 166.

[3] 1990 (4) SA 798 (A) at 803G-J.

[4] Counsel for the third respondent referred the court to the judgments in *Durmalingam v Bruce* 1964 (1) SA 807 D at 811G-H; *Thienhaus NO v Metje & Ziegler Ltd and Another* 1965 (3) SA 25 (A) at 30A-C; *Klerc NO v Van Zyl and Maritz NNO and Another and Related Cases* 1989 (4) SA 263 (SE) at 279F-E; *Nedbank v Chance and Others* 2008 (4) SA 209 (D) at 212 para [9]; *The Standard Bank of South Africa Ltd v Strydom NO and Others* (64891/2015) [2019] ZAGPPHC 142 (9 May 2019).

Latib,[5] that the security was created when the security session, in terms of which the first respondent ceded its book debts and other debts to the applicant as continuing covering security, was concluded on 26 January 1999. The cession did not require any formality such as registration in a Deeds Office to be satisfied before the real right of security came into existence. The fact that the security session reflects the incorrect registration number for the applicant does not change the fact that the applicant was a secured creditor from 26 January 1999. The rectification will merely ensure that the written agreement accords with the actual agreement as concluded between the applicant and the first respondent. Counsel maintained with reference to, *inter alia, Weinerlein v Goch Buildings Ltd,*[6] that it is a trite principle that it is not the actual agreement between the parties that is rectified by a claim for rectification but the document recording the agreement. This principle, counsel submitted, has been overlooked by the court in *Nedbank Ltd v Chance,*[7] and *Standard Bank of South Africa Ltd v Strydom* respectively,[8] and resulted in erroneous findings that are wrong in legal principle and contrary to binding appeal court authority. As a result, counsel argued that this court should not follow the said judgments. Once the trite principle that 'rectification corrects the document, not the juristic act expressed by the document, and does not amount to a variation of the contract' is applied, the objection to a post-*concursus* rectification as affecting the insolvent company's position that crystallises upon liquidation dissipates. Counsel emphasised that the Supreme Court of Appeal confirmed in *Thienhaus NO v Metje & Ziegler Ltd and Another* that a *post-concursus* rectification of a security agreement is competent provided that the creditor already enjoyed real security before the *concursus.* Counsel emphasised that although the majority in *Thienhaus* acknowledged that to

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[5] 1964 (4) SA 715 (A) at 722D-E. Reference was also made to *Botha v Fick* 1995 (2) SA 750 (A) at 779F-G; and *De Hart NO v Virginia Land and Estate Co Ltd* 1957 (4) SA 501 (O).

[6] 1925 AD 282 – '... in reforming the agreement, ... all the Court does is to allow to be put in writing what both parties intended to be put in writing and erroneously thought they had.' The court was also referred to *Spiller and Others v Lawrence* 1976 (1) SA 307 (N) at 310F; *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd* 2001 (4) SA 1315 (SCA); *National Credit Regulator v Lewis Stores* 2020 (2) (SCA).

[7] 2008 (4) SA 209 (D).

[8] See note 4, *supra.*

permit *post-concursus* rectification could open the door to possible fraud they held that '[t]he mere possibility of fraud should not affect the legal position in any case.'

Discussion

[8] The question that lies at the heart of the dispute between the parties, is whether in circumstances where one party to an agreement is in liquidation, a written agreement concluded *inter* se can be rectified after the *concursus creditorum* was established.

[9] The security cession in issue in the present application is a cession of book debts.

[10] It is trite that the rectification of an agreement corrects the document wherein the agreement is captured to reflect the true agreement between the parties. It does not alter, or add to the terms of the agreement. In *Lazarus v Gorfinkel*[9] it was held that the doctrine of rectification also applies where a document wrongly records the identity of a party, so as to give effect to the intention of the true parties in terms of a prior oral agreement or understanding between them. Rectification, once granted, operates *ex tunc.*[10] Williamson JA held in *Thienhaus N.O. v Metje & Ziegler Ltd and Another*[11] that

> 'Rectification may be a necessary step when some essential or desired act or result can only eventuate if the contract is actually correct in all its details.'

[11] Another consideration also comes into play when rectification is considered. In *Industrial Finance and Trust Co (Pty) Ltd v Heitner and Another*[12] Marais J explained:

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[9] 1988 (4) SA 123 (C).

[10] *Weinerlein v Goch Buildings Ltd* 1925 AD 282; *Spiller and Others v Lawrence* 1976 (1) SA 307 (N).

[11] 1965 (3) SA 25 (A) at 33.

[12] 1961 (1) SA 516 (W) at 522E-523.

> "[A] right to have the note rectified by coupling a notification of agency to the defendants' signatures on the face of the instrument - is one recognised by law (*Hill v Wilson*, 8 Ch. A.C. 888 at p. 899). A negotiable instrument is a written contract, with some special features. No logical or practical reason suggests itself why it should not be as capable of reformation as any other written contract, provided the negotiability and transferability of the instrument is not affected thereby. To fulfil this condition, the rectification would have to be strictly limited, in its effect, to the parties concerned in the error sought to be rectified. That is, in fact, a requirement of the rules as to rectification of contracts other than negotiable instruments. Williston on *Contracts*, vol. 5, para. 1547; *Restatement of the Law of Contract*, para. 504; *Weinerlein v Goch Buildings Ltd.*, 1925 AD 262 at p. 291; *Meyer v Merchants' Trust Ltd.*, 1942 AD 254. In this respect there is no difference between rectification and the admission of extrinsic evidence under LORD WATSON'S rule: innocent third parties may not be allowed to suffer prejudice in consequence of the application of a rule which is essentally (*sic.*) founded on equitable considerations.' (My emphasis).

[12] The law of contract and insolvency law comes to a cross road, or rather a T-junction, where the issue of rectification after liquidation arises. Once a company is liquidated a *concursus creditorum* is established. It is trite that the main objective of a sequestration or liquidation order is to secure the orderly and equitable distribution of the insolvent's assets in accordance with a pre-determined ranking of claims.[13] In order to attain this objective -

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[13] Sharrock *et al Hockly's Insolvency Law* 8 ed (2006) 4.

> 'The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.'[14]

[13] In considering the application for rectification the first question that needs to be determined is whether the rectification of the written agreement will alter or change the nature of the applicant's claim to constitute something more than what it was at the time when the liquidation order was granted. To phrase the question differently - Will the effect or result of the rectification be to make the applicant a preferent or secured creditor? The second question that needs to be considered is whether innocent third parties may suffer prejudice as a consequence of the rectification.

[14] The issue of rectification after liquidation arose in *Durmalingam v Bruce, N.O.*[15] The facts of the case, as set out in the headnote of that judgment, are that:

> 'M, prior to his insolvency, had passed in favour of the excipient (the defendant) a notarial bond in terms of which he had hypothecated an H bus and all the licences and motor carrier certificates' presently and from time to time attaching'. In 1961 M had replaced the bus with an I bus and had surrendered the motor carrier certificate held in respect of the H bus for a certificate relating to the I bus. When M's estate was sequestrated his trustee, the plaintiff, claimed that it was the common intention of M and the excipient that the bond should hypothecate any certificate obtained in substitution for the certificate in regard to the H bus and claimed rectification of the bond to express such intention. Alternatively, he averred that it was an implied term of the bond that it should hypothecate any certificate obtained in substitution for the certificate

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[14] *Walker v Syfret, NO.*, 1911 AD 141 at 160.

[15] 1964 (1) SA 807 (D).

for the H bus. The excipient took exception to the declaration as disclosing no cause of action in that to grant any of the relief claimed would have the effect (a) of adding to the assets hypothecated by the bond, which would inevitably prejudice third parties, and (b) of altering the rights of the creditors *inter se* after a *concursus creditorum* had occurred by conferring on the plaintiff a preference which did not exist when the insolvent's estate was sequestrated.'

[15] In deciding the matter, the court commenced by referring to *Walker v Syfret, N.O.* where it was held that an insolvent's position is crystallised when the liquidation order is granted. The court then referred to *Ward v Barrett, N.O.*[16] where it was held that a personal right to the registration of a bond that existed before a *concursus* supervened, could not thereafter be converted into a *jus in rem* under a registered bond. In *Ward,* Steyn CJ held:

> 'Even if irrevocable, the mere grant and existence of the power to effect registration could not and did not change the personal right into a real one'.

The learned judge held in *Durmalingam* that the same reasoning applied to the facts before him. He explained:

> 'Whatever rights the respondent may have had against the insolvent prior to insolvency, the position was altered by the insolvency. ... The claim of each creditor has to be dealt with by the trustee as it existed at the date of the sequestration of the insolvent estate. At that date, the respondent was merely a concurrent creditor in so far as the proceeds of realisation of the certificates relating to the International bus are concerned. Assuming the correctness of the facts alleged in the declaration, the respondent was, at that date, entitled to claim rectification of

[16] 1963 (2) SA 546 (AD)

the notarial bond as to give him a preference in respect of such proceeds.'

[16] It is significant to note that Act 18 of 1932 applied to the notarial bond in question in *Durmalingam*. Section 1(1) of the Act provided that the Act shall apply only to movables situated within the Province of Natal and shall apply only to a notarial bond in so far as such bond hypothecates movables specifically described and enumerated therein. Section 2 of the Act provided that movables specially hypothecated by a notarial bond shall subject to any landlord's hypothec be deemed to have been pledged to the holder of the bond as security for the debt secured in the same manner as if they had been delivered to him as a pledge. Section 4 of the Act provided that movables specially hypothecated by a notarial bond would not form part of the free residue of the mortgagor's insolvent estate. It was argued on behalf of the excipient that the respondent would only receive a preference if a rectification is granted because, only on rectification, the certificate obtained in substitution for the certificate in regard to the H bus would be described and enumerated in the bond. The court held (i) that a mistake could be rectified only so long as third parties were not injured thereby, (ii) that rectification must be strictly limited, in its effect, to the parties concerned in the error to be rectified, and (iii) that the interests of other creditors would inevitably be prejudiced by granting the rectification claimed. The court allowed the exception.

[17] In my view, the misdescription of a party is to be distinguished from the facts in *Durmalingam*. Reliance on *Durmalingam* in the present matter is misplaced. In *Durmalingam* the notarial bond that was passed did not contain the description of an asset sought to be hypothecated in circumstances where the applicable legislation required the movable property covered by the bond to be described in writing. Despite the parties' intention that the I bus would replace the H bus as security, their intention or oral agreement was not enough to create the security they intended to create, in light of the statutory requirement that the movable asset under consideration had to be described in a written agreement. When the *concursus* came into existence, no security right existed.

[18] The issue of rectification after liquidation again arose in *Thienhaus, N.O. v Metje & Ziegler Ltd and Another.*[17] The relevant fact of this case can be summarised as follows:[18]

> 'The debt in a suretyship mortgage bond passed by B Company in favour of the first respondent was wrongly described in that a conveyancer's error had resulted in an individuals' name being substituted for that of a company as principal debtor. The mortgagor company was place in liquidation and the liquidator applied for an order declaring that the mortgage bond did not create a valid security in favour of the mortgagee, arguing that the registration of the bond had not created a real right because of the misdescription of the principal debt. The existence of the debt *intended* to be secured by the bond was acknowledged in the liquidator's prayer for a declaration that the mortgagee's claim was concurrent only. Since a *concursus creditorum* has taken place, the crisp question for decision was whether the bond, in the absence of rectification prior to the liquidation of the mortgagor, gave rise to a real right.'

[19] The question was answered in the affirmative by the court of first instance and the judgment was upheld by the, then, Appellate Division by a majority of three to two. In coming to their decision, the majority, acknowledged that Mr. G Merjenberg and G. Merjenberg (Pty) Ltd were two separate legal *personae*. The facts indicated that the mortgagor and the mortgagee were fully *ad idem* in regard to (i) the nature and amount of the debt for which the mortgagor was standing security and which had to be secured by the bond; (ii) the property to be mortgaged as security for the mortgagor's said security obligation; (iii) the nature of the debts due by the principal debtor for which the mortgagee required a suretyship, re-inforced by a bond passed by the surety; and (iv) the identity of the debtor whose liabilities to the mortgagee

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[17] 1965 (3) SA 25 (A).

[18] Mathews, A.S. *Annual Survey of South African Law,* 1965, 222-246 at 236.

were thus guaranteed. The bond was registered in respect of the suretyship obligation of the mortgagor, against the title of the correct property of the surety company, and it set out the correct type of debt due by the person whose liabilities to the mortgagee were being guaranteed – the identity of this latter person was however, incorrectly stated.

[20] Williamson JA, writing for the majority, stated with reference to *Walker v Syfret N.*O, that if it is found that the first respondent did not possess a real right in the mortgaged property at the time when the liquidation order was granted, it would not during liquidation acquire a real right as a result of the rectification of the mortgage bond. The learned judge of Appeal further held that it is essential to determine exactly what rights the first respondent had in regard to the bond at the moment of liquidation and the first step into such enquiry is to ascertain the requirements for the validity of the bond.[19] Williamson JA quoted from *Weinerlein v Goch Buildings Ltd:*[20]

> 'from the above it is clear that the Romans did not allow the true agreement between the parties to be prejudiced by a slip of the pen or other inaccurate expression'

[21] In applying the judgment in *Weinerlein* to the facts before him, Williamson JA held:[21]

> '... both parties were bound, in terms of their true agreement, from the moment the bond was registered. If the parties had earlier noticed the error in the bond in relation to the description of the agreed debts giving rise to the suretyship obligation undertaken by the mortgagor – the obligation actually secured by the bond – they could, if it was considered necessary or desirable, have applied to the Registrar ... for a correction 'in the name or description of a person ... mentioned therein'.; in the circumstances he would no

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[19] At 30.

[20] 1925 AD 282

[21] At 33

> doubt have granted a rectification. But it could hardly be contended that the bond then acquired its necessary accessory obligation so as to give it validity only as from that date'.

[22] The majority held that is was not essential to the operation of the bond as a binding transaction as between the mortgagor and mortgagee that any rectification be obtained. In the circumstances the majority held that it was not necessary for any steps to be taken by way of rectification for the bond to bring into being a valid *jus in re aliena* as security for a debt 'indubitably and undisputedly due to the mortgagor. That real right was in existence at the moment of liquidation; it did not require to be brought into existence thereafter.' As for the creditors suffering any prejudice the court held that the fact that the creditors are not allowed to gain an advantage from the actual misdescription, is not a prejudice suffered by them. The majority regarded the misdescription 'an irrelevant error in the bond' and allowed the rectification.

[23] Wessels JA, writing for the minority, highlighted that when De Villiers JA in *Weinerlein* held that a court would not refuse to recognise the existence of an agreement between the parties to an agreement 'because the memorandum thereof contains some mistake through 'a slip of the pen', the court was dealing with the position as between the parties to the agreement –

> 'The judgment does not furnish authority for a somewhat wider proposition, namely, that in so far as a third party is concerned, and in so far as his knowledge of the transaction might be relevant, the Court will determine the matter upon a consideration of the real agreement between the parties and not upon the version contained in the memorandum thereof, even where it appears that the third party's knowledge is restricted to that contained in the memorandum.
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> Having regard to the accessory nature of the real right which is constituted by the registration of a mortgage bond, it is notionally impossible for the antecedent agreement to be valid and

> enforceable without reference therein to the principal debt which it is intended to secure by hypothecation.'

[24] The issue of rectification after liquidation was again considered in *PG Bison Ltd and Others v The Master of the High Court, Grahamstown and Another.*[22] The court had to interpret a clause in a cession contract to determine whether a condition contained in a hand-written clause had to be complied with before the cession became valid. The court held that where one party to an agreement became insolvent, no rectification of the agreement is possible after insolvency intervened where the rights of other creditors will be 'injured' or prejudiced thereby.

> 'This is so because the insolvency order once granted establishes a *concursus creditorum* and the claim of each creditor must be dealt with as it existed at the issue of the order. The rights of concurrent creditors will be injured if the effect of the rectification will be to elevate a concurrent claim to a preferent or secured claim.' (References omitted.)

The court concluded that a mutual mistake in an agreement will only be rectified by the court as long as third parties are not prejudiced thereby.

[25] In *Nedbank Limited v Chance and Others,*[23] the court again had to decide an issue concerning the rectification of an agreement after liquidation. The material facts were common cause. In 1998, the plaintiff, Nedbank Ltd (Nedbank), obtained a provisional winding-up order against Chance Brothers (Pty) Ltd (Chance). Nedbank and Chance subsequently concluded a 'reorganisation agreement' with the purpose of restructuring Chance's indebtedness to Nedbank and to remove Chance from provisional liquidation. The restructuring agreement recorded the fact that Chance owed Nedbank an amount in excess of R10 million and that its sureties personally guaranteed Chance's obligations to Nedbank in terms of suretyship agreements

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[22] [1998] JOL 1225 (E).

[23] 2008 (4) SA 209 (D).

executed during 2013. In terms of the restructuring agreement, a portion of the debt, an amount of R3.5 million, was to be repaid to Nedbank by issuing in Nedbank's favour, 3.5 million cumulative redeemable preference shares. The balance was to be dealt with in terms of a loan agreement concluded between the parties in 1996. By mistake, the reorganisation agreement inaccurately reflected the parties' agreement. It reflected the redemption value of the preference shares as R35 000 instead of the agreed upon and intended R3.5 million. Chance was wound up in 2002. Nedbank's claim was accepted by the joint liquidators for R10 752 119.85, and as such reflected in the second and final liquidation and distribution accounts. These accounts were confirmed by the Master in 2004 and 2007 respectively. Nedbank received dividends of R7 936 835.81. Nedbank subsequently sued the sureties for the balance which it contended was owed to it by Chance at the time of Chance's winding-up. In the same action Nedbank sought rectification of the reorganisation agreement to correctly reflect the redemption value of the preference shares as R3.5 million. The sureties' defence was that, as a matter of law, the reorganisation agreement could not be rectified after Chance's winding-up. It was common cause that if Nedbank failed in its claim for rectification, there would be no outstanding balance for which the sureties would be liable to Nedbank. The application was argued before Theron J on the basis of an agreed set of facts.

[26] Theron J dismissed Nedbank's claim for rectification. She relied on the above quoted passage from *Walker v Syfret N.O.* and emphasised the last sentence of the passage that – '[t]he claim of each creditor must be dealt with as it existed as the issue of the order.' She explained:

> 'The insolvent estate is 'frozen' and nothing can thereafter be done by any one creditor that would have the effect of altering or prejudicing the rights of other creditors. As between the estate and the creditors and as between the creditors *inter se*, their relationship becomes fixed and their rights and obligations become vested and complete. One consequence of this is that a creditor who at the date of winding-up was only a concurrent

> creditor cannot by rectification of an agreement alter its position to become a preferent or secured creditor as this would disturb the *concursus*. The same must hold for a creditor who seeks rectification to improve its position from that of a preferent creditor in a certain amount, to a preferent creditor in a greater amount. This approach is in line with the general principle that the claim of each creditor must be dealt with as it existed at the date of liquidation. Rectification post *concursus* would almost inevitably prejudice the rights of other creditors.' (Footnotes omitted).

[27] The applicant in the present application urged the court not to follow the judgment in *Nedbank Ltd v Chance*. In *Standard Bank of South Africa Ltd v Strydom N.O. and Others*[24] Janse Van Nieuwenhuizen J from this Division, however, stated that the judgment in *Nedbank Ltd v Chance* was based on 'the long line of authorities on the subject of altering a creditor's rights post *concursus.'* In the absence of convincing argument and reference to authorities that hold different views, she was not prepared to interfere with the clear reasoning and findings of the court in *Nedbank Ltd v Chance*. She, however, did not find it necessary to deal with the issue as the facts of the matter did not substantiate the claim for rectification. Although *Nedbank Ltd v Chance* does not emanate from this Division, *stare decisis* dictates that cognisance must be taken of the judgment, not as authority but for the reasoning contained therein.

[28] Counsel for the applicant argued that it does not appear from the –

> 'somewhat terse judgment in *Nedbank v Chance* that the court's attention was drawn to the guiding trite principle that rectification does not change the actual agreement between the parties, and that accordingly the preference that the creditor contended for in

[24] (64891/2015) [2019] ZAGPPHC 142 (9 May 2019) at

that matter had existed all along and it was only by the slip of a pen that the written document did not record that preference.'

[29] Counsel submitted although Theron J referred to the majority judgment in *Thienhaus*, she only referred to the passage where *Walker v Syfret N.O.* is quoted. *Thienhaus* went further, however, and found that a post *concursus* rectification would not offend the *concursus* if the actual agreement between the parties had already conferred the preference on the creditor by the time of the *concursus*. Counsel submitted that in failing to appreciate and apply the principle as stated in *Thienhaus*, the court in *Nedbank Ltd v Chance* erred. If read in its totality, counsel contends, *Thienhaus* does not support the findings in *Nedbank Ltd v Chance.* As for the remainder of the cases relied on in *Nedbank Ltd v Chance,* counsel contended that some of the precedents cited are not on point, and that the position where no real right of security existed when the *concursus* came into existence, should be differentiated from those cases where a real right of security already existed by way of the 'true agreement' between the parties before *concursus* supervened.

[30] Due to the reliance placed on passages from *Walker v Syfret*, not only in *Nedbank Ltd v* Chance but in all the cases dealing with the issue of rectification after liquidation, it is necessary to revisit this old authority to determine the context within which to consider the *dictum* relied upon in matters where rectification was refused. The issue in *Walker v Syfret* was that the holder of debentures in a company had transferred them to his brother, after liquidation, in an attempt to avoid set-off. The brother lodged a claim against the insolvent company. The debentures were regarded as negotiable instruments. The court held that the set-off also operated in relation to the brother's claim because he had no greater rights in respect of the debentures that the transferor himself would have had if he had proved his claim on them instead of selling them to his brother. The issue of rectification never arose in *Walker v Syfret.* The principle laid down that creditor's rights are 'crystallised' when a concursus is established, is unassailable. However, I find nothing in the case to substantiate a view that because of the fact that a creditor's claim is crystallised, the crystallisation of the claim prevents the rectification of the written document wherein the claim is captured, where the document erroneously reflects the description of a

party in order to reflect the correct description of the parties to the agreement. The correct approach as stated in *Thienhaus* is to determine whether the agreement under consideration was valid at the moment of liquidation.

[31] Although not dealing with rectification, the judgment in *Van Zyl and Others NNO v The Master, Western Cape High Court and Another,*[25] is relevant for the present discussion because the core issue in the matter required:

> 'resolving the tension between the principle that, once there has been a *concursus creditorum*, no creditor in a liquidated estate can take steps to improve its position to the prejudice of other estate creditors, on the one hand, and, on the other, the principle that temporary non-compliance with the provisions of reg 10(1)*(c)* of the Exchange Control Regulations, which requires treasury approval of any transaction involving the export of capital, does not present a bar to the validity or enforceability of a claim based on such a transaction.'

[32] In *Van Zyl,* Bozalek J held with reference to *Oilwell (Pty) Ltd v Protec International Ltd and Others*:[26]

> 'By parity of reasoning I consider that a claim by a creditor against an insolvent estate cannot be rejected for the sole reason that it is based upon a transaction requiring treasury approval in terms of reg 10(1)9C) but which approval has at the relevant time neither been obtained nor refused. To hold otherwise would lead to 'greater inconvenience and impropriety', the phrase used by Voet as referred to in *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 274, and deliver a windfall advantage to competing creditors in the estate. It ignores the fact that the underlying transaction, the

[25] 2013 (5) SA 71 (WCC).

[26] 2011 (4) SA 394 (SCA).

loan agreement, was not void and that treasury approval therefor could still be sought.'

He continued:

[33] To hold that a claim by a creditor based on a transaction in respect of which treasury approval has not been obtained is irrevocably unenforceable because a *concursus creditorum* intervened before such approval was sought would, I consider, produce an arbitrary and inequitable result not intended by the regulations. The argument that until treasury consent is obtained the transaction is not enforceable, and that allowing the claim will impermissibly disturb the *concursus creditorum* is based, in my view, upon a narrow reading of para 25 of the judgment in *Oilwell* where Harms DP stated that this does not mean that in the absence of treasury consent the transaction is enforceable 'without more'. Significantly, in the same passage, citing *Barclays National Bank Ltd v Thompson,* he goes on to state that this does not mean that the transaction, absent consent, is void at the behest or election of one of the parties thereto. At best an affected party may file a dilatory plea pending the determination by the treasury of the application for the necessary consent.

[34] The argument for the applicants relied heavily on the principle that the rights of other creditors should not be prejudiced by anything done post-*concursus* since the positions of the parties are frozen as at that date and their rights and obligations are determined on that basis. I consider, however, that it is a misconception to view ex post facto treasury approval as an interference with the position obtaining at the *concursus creditorum* and therefore of no effect. This view appears to be based on the assumption that without treasury consent AIK's claim is invalid and on the premise that the underlying transaction was

> void. As the leading decisions on the effect of the Regulations have made clear, there is nothing preventing SARB from affording the relevant transaction the necessary consent ex post facto. At best for the competing creditors as *concursus creditorum* they had no more than a *spes* that the transaction underlying AIK's claim would ultimately not receive treasury consent, in which event the claim might be unenforceable. Applying the principles in *Oilwell* and *Barclays National Bank Ltd* in an insolvency context must, in my view, of necessity lead to the recognition of a claim whose only defect is that treasury consent has yet to be obtained in terms of reg 10(1)*(c)* of the Exchange Control Regulations, notwithstanding that a *concursus creditorum* has intervened. Should such consent be thereafter refused a different situation arises and argument may then arise as to the validity of the claim. That question, however, does not require to be addressed in the present matter since treasury consent was ultimately obtained prior to the master taking her decision not to expunge the claim.'

[33] The present situation is to be distinguished from a situation where a case is made out that a commitment to provide security has not been implemented prior to liquidation.[27] It should also be distinguished from the position where registration is required before a real right or security right can come into existence, or where the assets that are hypothecated should either clearly be described in a written document or be in the possession of a creditor before a real security right vests.[28] The principle is firmly established that no greater rights can be acquired post liquidation than what was enjoyed at the date of liquidation.[29]

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[27] *FirstRand Bank Ltd v Land and Agricultural Development Bank of South Africa* 2015 (1) SA 38 (SCA)

[28] *Durmalingen*; *Oertel NNO v Brink* 1972 (2) PH A43 (WLD, *FirstRand Bank Ltd.*

[29] *FirstRand Bank Ltd* at para [31].

[34] Boraine *et al*,[30] with reliance on *Thienhaus,* advocate that the effect of the existing authorities dealing with the issue of rectification after liquidation is not to preclude the right to claim rectification, but only to preclude the rectification where such would result in a creditor acquiring a right or a claim not already held at the institution of the *concursus*. They contend:

> 'Thus were such a right or claim in fact already exists as at such date, rectification is permissible where it is necessary in order to reflect the correct position according to the true intention of the parties as at such a date. In such a case the creditor is not afforded a real right greater than which he enjoyed as at the commencement of the concursus since the effect of the rectification would be to reflect the true position *prior* such commencement.'

[35] Du Plessis and Stander[31] propose that the core question to be answered where the issue of rectification after liquidation arises is whether the rectification will result in the creation of new rights or whether it would simply amount to an acknowledgement of exiting rights. Steyn,[32] is of the view that the rectification of an agreement to reflect the common intention of the parties as it existed when the contract was concluded, does not amount to a 'transaction' that is being concluded. She explained that:

> 'Rectification does not alter a concurrent creditor's position for it to *become* a preferent or secured creditor, nor, as Theron J viewed it, does it improve, or elevate a creditor's position from that of a preferent creditor in a certain amount to a preferent creditor in a greater amount. Rectification would simply have allowed the document to reflect the agreement which existed, and hence

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[30] Boraine, A *et* al (eds), Meskin's *Insolvency Law*, LexisNexis August 2021 – SI 56.

[31] Du Plessis, A and Stander, L. 'Die totstandkoming van 'n *concursus creditorum* en die rektifikasie van 'n ooreenkoms: Nedbank Ltd v Chance Brothers 2008 4 SA 209 (D), *THRHR,* 2011 (74), 230-246.

[32] Steyn, L. 'Rectification and concursus creditorum – Nedbank Limited v Chance 2008 4 209 (D)', *OBITER*, 2008, 524-532.

provide documentary evidence of the rights which had been created before liquidation'

[36] After considering the case law and sources referred to above, I am of the view that in circumstances where the facts prove that (i) a valid cession agreement was concluded between the parties prior to a liquidation order been granted, but (ii) the agreement does not reflect the parties' common intention in the sense that the creditor is not correctly described, and the evidence indicates that the insolvent and the creditor are in actual fact the parties to the agreement, rectification will neither create nor detract from any rights as it existed when the *concursus creditorum* came into existence. It is a misconception to view *ex post facto* rectification of the description of a party to an agreement as an interference with the position obtained at the *concursus creditorum.* If, in the present case, it is found on the facts that a valid cession of book debts was transacted between the parties, the applicant is a secured creditor and has been such from the moment of liquidation. Where a misdescription of a party is the only issue taken with the contentious agreement there can be no prejudice to third parties if the document wherein the agreement is captured is rectified to reflect the correct description of the parties. The *status quo* is not affected by such rectification. It is an opportunistic creditor who claims that it will be prejudiced by the rectification of a patent error concerning the description of a party to a valid contract concluded before liquidation.

[37] In determining whether a valid cession agreement was concluded cognisance must be had to the Supreme Court of Appeal's reiteration in *Brayton Carlswald (Pty) Ltd and Another v Brews*[33] that cession is a bilateral juristic act in terms whereof a right is transferred by agreement between the transferor (cedent) and the transferee (cessionary). Generally, no formalities are required for the antecedent obligatory agreement or the act of cession to constitute a valid session. Unless the parties agree otherwise and unless a statute sets particular requirements there are no formal or publicity requirements for cession. Cession can be effected even

[33] 2017 (5) SA 498 (SCA) at para [9].

verbally.[34] The existence of a written deed of cession can, however, provide evidence of an intention to cede.

[38] The questions as to (i) whether a valid session was concluded between the applicant and the first respondent that existed when the *concursus creditorum* came into existence, and (ii) whether the applicant made out a proper case for the rectification, need to be determined on the facts of the case as set out in the affidavits.

The factual question

[39] In order to determine the factual question as to whether the applicant made out a case for the rectification of the agreement on paper, it is necessary to consider the parties' respective affidavits.

[40] The applicant explains in the founding affidavit the relevant background that contextualises its claim that it is erroneously described in the document containing the cession of book debts that it seeks to rectify. The applicant, was previously called Voltex Distributors (Pty) Ltd – registration number 1964/006740/07. Another company existed using the name Voltex (Pty) Ltd – registration number 88/006535/07 (Voltex 1). Voltex 1 conducted business with at least two divisions, a manufacturing division and a distribution division. The deponent to the founding affidavit was the Chief Executive Officer (CEO) of both companies. On 31 July 1998 Voltex 1 changed its name to Aberdale Cables SA (Pty) Ltd – registration number 88/006535/07. On the same day, Voltex Distributors (Pty) Ltd changed its name to Voltex (Pty) Ltd - registration number 1964/006740/07 (Voltex 2). Voltex 1 sold its distribution division to Voltex 2. Voltex 1 ceased to carry on its distribution business which was taken over by Voltex 2 and was finally deregistered with effect from 12 November 2011.

[41] Voltex 1 and the first respondent concluded numerous business transactions since 1992 until the first respondent's liquidation. Voltex 2 also entered into business with

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[34] Muller, G. *et* al (eds), Silberberg *and Schoeman's The Law of Property, 6th ed,* 469.

the first respondent and on the first respondent's liquidation, Voltex 2 was the first respondent's largest creditor. Voltex 1 and Voltex 2 was continually represented by the same CEO. The first respondent's CEO and its director were fully aware of the sale of Voltex 1's distribution division to Voltex 2. The first respondent was fully aware that it dealt with Voltex 2 from 31 July 1998. Voltex 2 sold goods to and purchased goods from the respondent. On 26 January 1999 the first respondent, through both its CEO and its director approached Voltex 2 and formally applied for credit facilities. The credit application form contains the security cession relied upon by Voltex 2 to secure its claim in the first respondent's insolvent estate. At the time the security session was signed the first respondent intended to provide security to Voltex 2 and Voltex 2 intended to take the security from the first respondent.

[42] Voltex 2, however, in error, used Voltex 1's pre-printed standard credit application form to record the security cession. Although Voltex 2's name appears on the document, it is Voltex 1's (now Aberdale Cables SA (Pty) Ltd)'s registration number that accompanies the company name. Voltex 2 presented the security cession to the first respondent. The security session was signed in the mistaken but *bona fide* belief that it correctly recorded the common continuing intention of the parties which was (and remains) that the security cession was given by the first respondent in favour of Voltex 2, the applicant. Voltex 2 brought this application to rectify the security session concluded between itself and the first respondent on 26 January 1999 by deleting "REG. NO. 88/06535/07" as it appears on page 2 of the document and replace it with "REG. NO. 1964/006740/07".

[43] It needs to be mentioned that the affidavits filed by the CEO in support of all 13 of Voltex 2's claims in the liquidation contains errors. The CEO explains that he mistakenly attached a previous security cession given by the first respondent in favour of Voltex 1 during 1995, in addition to the security session granted by the first respondent in favour of the applicant in 1999, in support of the claims.

[44] The first respondent did not file any notice of intention to oppose this application, despite the application being served on its liquidators.

[45] The third respondent opposes the application. The third respondent claims in its answering affidavit that:

(i) The relief sought is incompetent;
(ii) This is not a matter that should have been brought on motion proceedings and that the bringing of the proceedings by way of application is ill-conceived and an abuse of process;
(iii) The applicant has no *locus standi*;
(iv) The applicant's insurers (Credit Guarantee Insurance Corporation of Africa Limited) are endeavouring to obtain security for the applicant's unsecured claims so as to obtain payment for their claims;
(v) The first respondent should have on receipt of the application opposed the relief sought and addressed the exclusion of the applicant's claims having regard to the fact same were premised on unsupported documents and false affidavits.

[46] The third respondent, is not able to deal with the applicant's averments relating to the conclusion of the agreement and the parties' intention as it was not a party to the agreement and has no personal knowledge of any of the relevant transactions that took place between the applicant and the first respondent prior to its liquidation. The majority of the averments contained in the answering affidavit has no relevance to the rectification application other than that it attempts to create doubt regarding the applicant and the first respondent's representatives' *bona fides*. Of relevance is the third respondent's contention that pursuant to the Master's ruling every secured creditor who had proved a claim ought to have been notified by the liquidators of the rectification application. The third respondent contends that the crux of the applicant's application, namely that there was a meeting of minds and that the first respondent's CEO and its director intended to grant the security cession to the applicant is either based on inadmissible hearsay evidence as these averments are not confirmed by the first respondent in a confirmatory affidavit, or unsubstantiated because the applicant was not able to provide any invoices issued by Voltex 2 to the first respondent or for the goods the first respondent sold to Voltex 2, as referred to in paragraph 19 of the founding affidavit.

[47] In its replying affidavit, the applicant avers that much of the answering affidavit is conjecture and argumentative. The applicant states that the third respondent has no personal knowledge of the transactions referred to in the founding affidavit, while the deponent to the founding and replying affidavit represented the applicant in the transactions described in the founding affidavit and has personal knowledge thereof. The applicant proposes that the application be referred to oral evidence to be presented regarding the issue whether there was a common continuing intention between the applicant and the first respondent that the security cessions was in favour of the applicant and not Voltex 1 and should accordingly be rectified. The applicant denied that it had been paid and claimed that it is in any event entitled to interest on its secured claim. The applicant avers that the claims have been advanced by the applicant in its name albeit that its credit insured CGIC has indemnified it and pursues the recovery of the claims by way of subrogation. The applicant refutes the contention that there is anything sinister to the fact that it is not able to provide invoices of the transactions between itself and the first respondent and attributes it to the effluxion of time. The applicant states that no challenge has been raised to the quantification of its claims but that the Master's ruling relates only to whether the proven claims are to be reflected as secured claims. The applicant again explained that the error occurred because a pre-printed credit application bearing Voltex 1's details was erroneously used.

[48] As far as the factual challenge is concerned, the third respondent contends that the applicant has failed to adduce sufficient evidence regarding the parties common continuing intention as contended for in the application. The applicant states that it presented the evidence, under oath of its duly authorised representative who negotiated with the first respondent's representatives in relation to all the relevant transactions, including the conclusion of the security cession.

[49] A party seeking the rectification of an agreement needs to allege and prove:[35]

(i) An agreement between the parties which was reduced to writing;

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[35] Harms, LTC. 'Amler's Precedents of Pleadings', LexisNexis, 8th ed, 318.

(ii) That the written document does not reflect the common intention of the parties correctly;

(iii) An intention by both parties to reduce the agreement to writing;

(iv) A mistake in drafting the document;

(v) The wording of the agreement as rectified.

[50] Absent any opposition from the first respondent, the affidavits do not reveal any dispute of fact. The applicant, as a party to the contested agreement, has the necessary *locus* standi in these proceedings. The applicant contends that it is not the quantification of its claim but its position as a secured creditor that was affected by the Master's ruling, and prompted it to approach the court for the relief sought. The question as to whether the applicant proved its claims against the first respondent's insolvent estate is not a question that this court is required to answer. The applicant's evidence, under oath, that the parties intended for the credit agreement and security cession to be concluded between the applicant and the first respondent is not opposed by the only other party with the required personal knowledge to oppose it. The absence of any confirmatory affidavit by the first respondent in circumstances where the first respondent was invited to the proceedings, cannot be regarded to render the applicant's version inadmissible hearsay.

[51] The applicant made out a proper case for the relief sought. Since I am of the view that a security right came into existence when the agreement was concluded between the parties, that the applicant's position as a secured creditor existed at the moment of liquidation, and that the rectification of the written agreement will only record the correct description of the parties to the agreement, no other creditor can be prejudiced by any order for rectification. The rectification does not change, but confirms the *status quo* as it existed at the moment of liquidation. Other remedies were available to the third respondent if it wanted to contest the validity of the applicant's claims. Rectifying the credit agreement with its concomitant security cession does not impact on the quantification, or proving of any claims.

ORDER

In the result, the following order is made:

1. The 'Application for Credit Facilities Incorporating Deed/s of Suretyship' containing the security session, dated 26 January 1999, a copy of which is annexed to the Notice of Motion, is hereby rectified by the deletion of "REG. NO. 88/0635/07" as it appears on page 2 thereof and substituted with "REG. NO. 1964/006740/07";

2. The third respondent is to pay the costs of the application.

E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 5 October 2021.

Counsel for the applicant:	Adv. B. M. Gilbert
Instructed by:	Reitz Attorneys
Counsel for the third respondent:	Adv. J. Peter SC
Instructed by:	Fluxmans Inc.
Date of the hearing:	24 August 2021
Date of judgment:	5 October 2021