



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED:

Date: Signature: _____

CASE NO: 2022/26393

DATE: 24 January 2024

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

and

**THE MASTER OF THE HIGH COURT OF SOUTH AFRICA:
JOHANNESBURG**

First Respondent

MARI HAYWOOD N.O.

Second Respondent

KGASHANE CHRISTOPHER MONYELA N.O.

Third Respondent

(In their capacity as the joint liquidators of Truvelo
Manufacturers (Pty) Limited, Registration No. 1974/000024/07)
(In liquidation)

Coram: Ternent AJ

Heard on: 23 May 2023

Delivered: 24 January 2024

Summary:

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email

and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 12h00 on 24 January 2024.

JUDGMENT

TERNENT, AJ:

INTRODUCTION

- [1] It is common cause that the applicant (*“the Bank”*) is an aggrieved party and entitled in terms of the provisions of section 407(4)(a) of the Companies Act 71 of 2008 to launch this application for the review and setting aside of the Master’s decision (the first respondent) (*“the Master”*), on 25 August 2022, in terms whereof the Master dismissed the Bank’s objection to the third liquidation and distribution account. In this regard it is accepted that the Court has a broad general power to reconsider the Master’s decision and is not constrained to find either that the Master erred or committed a gross irregularity. The objection related to only a portion of the Bank’s claim which the Master has determined is concurrent. Having awarded a sum of R916 587,12 to the Bank, it pursues the alleged shortfall in the sum of R1 053 511,06, the total claim being R1 970 098,79.
- [2] The Bank, as a secured creditor, contends that it is entitled to payment to the full extent of its claim.
- [3] The Bank relies on a Cession and Pledge agreement concluded *in securitatem debiti*, on 15 May 2019, with Truvelo Manufacturers (Pty) Limited (in liquidation) and says that the *“ceded interests”* provide it with

the maximum security and must be interpreted to include a right to the proceeds of all goods sold by the second and third respondents (*“the liquidators”*) whether financed or not financed by the Bank.

- [4] The liquidators drew the third liquidation and distribution account on the basis that the Cession and Pledge agreement provides the Bank with limited security over only those movable assets financed by the Bank rendering the balance of its claim concurrent.
- [5] The Master in coming to her decision concluded that the definition of *“goods”* forming the subject-matter of the Cession should be strictly applied to include only those goods defined in clause 1.2.8 of the Cession, namely *“sniper rifles and accessories and all other goods, stock and merchandise financed by the bank”*¹.
- [6] The applicant therefore seeks an order reviewing and setting aside the Master’s direction to confirm the third liquidation and distribution account in the insolvent estate.
- [7] The liquidators agree with the Master and contend that the Cession cannot be interpreted in the manner in which the Bank seeks and the argument that Truvelo Manufacturers agreed to cede all of its movable assets to the Bank is legally untenable.
- [8] It is the liquidators’ contention that in the event that the Court accepts the interpretation favoured by the liquidators and the Master the application should be dismissed with costs.
- [9] The Cession agreement commences with a definition section, titled *“INTERPRETATION”*. The definition clause explains that, *“The following*

¹ CaseLines 002-136 Annexure **“C”** to Annexure **“KC3”**, clause 1.2.8.

*terms shall have the meanings assigned to them*² and the terms are listed below. As I understand the purpose of definitions they ensure that terms are not misunderstood, or interpreted in different ways in an agreement. The definition provisions seeks to narrow the meaning or broaden an obligation to include meanings which would not ordinarily be included, but importantly the term/words when used in an agreement will always have the same meaning throughout the agreement, unless expressly stated to the contrary.

- [10] The issue before me involves the proper interpretation of the definition “*ceded interests*”³ in the light of the definition of “*goods*” in the Cession and, more particularly, the extent of the rights ceded to the Bank in relation to the proceeds derived from the sale of the movable assets by the liquidators.

BACKGROUND

- [11] Truvelo Manufacturers and Truvelo Africa Mechanical Division (Pty) Limited design, manufacture and sell firearms. In 2019, both companies were awarded a substantial contract by Armscor. The Armscor contract required the companies to manufacture and supply sniper rifles and accessories (“*the firearms*”).

- [12] Armscor agreed to make an advance payment of 30% of the purchase price of the firearms against an advance payment guarantee and provide a letter of undertaking for the balance of the purchase price to be paid within thirty days from the invoice.

- [13] Because the components for the manufacture of the firearms, such as the telescopes and the ammunition *inter alia*, had to be imported the

² CaseLines 002-135 Annexure “C” to Annexure “KC3”, clause 1.2.

³ CaseLines 002-135 Annexure “C” to Annexure “KC3”, clause 12.2 and sub paras.

companies required loan finance to cover the costs due to suppliers and the importation costs pending the payment by Armscor.

- [14] Trade facilities were granted to Truvelo Manufacturers and Truvelo Africa Mechanical Division (Pty) Limited by the Bank on 25 April 2019. This is provided for in a Structured Trade Facility Letter (“the Facility Letter”), dated 23 April 2019, in terms of which a total sum of R21.2 million was made available to the Truvelo companies,⁴ conditional on the provision of security.
- [15] The extent of the facilities⁵ to the Truvelo companies and the *modus operandi* of the facilities extended and security required⁶ is set out in the Facility Letter.
- [16] The “*goods*” which formed the subject matter of the transaction with Armscor are defined in the Trade Facility Letter as “*sniper rifles and accessories and all other goods or merchandise FNB may from time to time decide to finance*”.⁷
- [17] Furthermore the definitions in the Facility Letter are also preceded with the words “*In this Facility letter the following words shall bear the meanings ascribed to them in the table below.*”
- [18] Include is defined in the Facility Letter as:

“include – The words ‘include’ and ‘including’ mean ‘include without limitation’ and ‘including without limitation’. The use of the words ‘include’ and ‘including’ followed by a specific

⁴ CaseLines, 002-152 to 002-179, Annexure “D” to Annexure “KC3”

⁵ CaseLines, 002-154, Annexure “D” to Annexure “KC3”, para 2

⁶ CaseLines, 002-152, clause 1, titled “Parties and Definitions”

⁷ CaseLines, 002-152, clause 1, titled “Parties and Definitions”

example or examples shall not be construed as limiting the meaning of the general wording preceding it.”

[19] The existing security for the facilities is also set out in the Facility Letter.⁸ This included a:

“Cession/ Pledge of rights, title and interest in and to:

- *Accounts and credit balances*
- *Book debits*
- *Purchase contracts*
- *Forward Exchange Contracts*
- *Goods / merchandise*
- *Goods in transit cover*
- *Loan accounts*
- *Marine Cargo Open Policy*
- *Purchase orders*
- *Supplier Orders”*

and was provided by Truvelo Africa Mechanical Division on 15 March 2019.

[20] Clause 9⁹ sets out the new security and documents required from Truvelo Manufacturers namely a

“Cession/ Pledge of rights, title and interest in and to:

- *Book Debts of Borrower (referring to both companies)*
- *Purchase contract*

⁸ CaseLines, 002-16, clause 8

⁹ CaseLines, 012-161, Annexure “D” to Annexure “KC3”

- *Forward Exchange Contracts*
- *Goods / merchandise*
- *Goods in transit cover*
- *Marine Cargo Policy*
- *Loan accounts*
- *Purchase orders*
- *Supplier orders*
- *Short-term insurance over business assets”*

and certain personal unlimited suretyships and group cross-suretyships for the amount of the facility together with various documents which would evidence the Armscor contract and importation of the components.

[21] As anticipated, the Truelo companies gave the necessary undertakings to the Bank that they would not encumber any of their assets by way of mortgage bonds or pledge or cession or dispose of their assets in whole or in part without the consent of the Bank.¹⁰

[22] On 9 September 2019, Truelo Manufacturers was placed under final winding-up as it was unable to pay its debts. The liquidators were appointed to wind-up the company.

[23] Upon the appointment of the liquidators they elected, in the interests of

¹⁰ CaseLines, 002-164, para 12.1 read with clauses 12.1.1 and 12.1.2

the body of creditors, to continue the Truvelo business as a going concern in order to obtain a better resale value. The liquidators also, as authorised, sold Truvelo's assets both movable and immovable by public auction, tender and privately. In so doing all the assets were valued on a forced sale basis. They successfully sold the business to the Africa Defence Group (Pty) Limited. A sum of R20 million was raised, amounting to 72% of the purchase price of the forced sale value of the assets. The forced sale value of the assets included:

[23.1] the immovable assets at R13 million; and

[23.2] the movable assets at R9 730 532,00.

[24] The movables were sold for R7 million despite a forced sale value of R9 730 532,00. Therefore the firearms which had a forced sale value of R1 942 602,00 were reduced to R1 397 469,00

[25] This excluded the components financed by the Bank and firearms that were manufactured for Armscor in terms of the contract. These items were delivered to Armscor and the Bank received the proceeds.

[26] The Bank, as set out above, sought to recover its full claim from the proceeds received from ADG and relied on the mortgage bonds registered over the immovable properties of Truvelo Manufacturing and also the Cession agreement.

[27] From the outset the liquidators held the view that the cession or security did not cover the full amount of the Bank's claim. This was because the liquidators and the Master determined that the Bank's right to the proceeds from the goods sold with reference to the definition clause of "goods" in the Cession agreement required that the goods be financed by the Bank. Legal opinions were taken by both parties and the opinions taken favoured each party's respective views.

- [28] As a consequence, the Cession agreement, referred to in clause 9 of the Facility Letter, forms the subject-matter of this dispute and more particularly its correct interpretation in regard to the cession of the rights to the proceeds of the goods sold by the liquidators.
- [29] It is important to consider and mention the provisions of the Cession and Pledge agreement and the substance of the security that was ceded to the Bank:

“2. **Cession and Continuing Covering Security**

2.1 **Security** – *As security for the proper and timeous performance and discharge by the Cedent of all the Cedent’s obligations, indebtedness and liabilities of any nature whatsoever and from whatsoever cause and howsoever arising whether such indebtedness be a direct, indirect or contingent liability and whether any debt or liability has matured or not and whether such indebtedness be incurred by the Cedent, or jointly with others or which the Cedent has to FRB, now at any time (hereinafter “Obligations”), the Cedent hereby cedes and pledges in favour of FRB as a first-ranking security cession and pledge all the Ceded Interests, which cession and pledge FRB hereby accepts.*

2.2 **Continuing Cover** – *This Cession shall operate as a continuing covering security in favour of FRB for all the Obligations until FRB notifies the Cedent in writing that the Cession is cancelled. This Cession document shall remain the property of FRB, even after cancellation and shall not be given to the Cedent.”*

[30] The “*ceded interests*” are defined in the Cession agreement as follows :

“1.2.2 **“Ceded interests”** – *all the Cedent’s present and future rights, title and interest in and to the Book Debts, Foreign Currency Transactions, Goods, Goods in Transit Policy, Loan Accounts, Marine Insurance Open Cargo Policy, Purchase Orders, Sale Orders, including:*

1.2.2.1 *any security securing such rights/goods; and*

1.2.2.2 *all rights of action and recovery (.....), and the proceeds on the disposal or realisation of any rights/goods ...”*

[31] Goods are defined in the Cession agreement as :

“1.2.8 **Goods** – *Sniper Rifles and Accessories and all other goods, stock and merchandise financed by FRB now and in future (including whether in transit or storage or under collateral management).”*

[32] In fact each ceded right, in clause 1.2.2, is specifically defined in the Cession agreement, i.e. Book Debts, Foreign Currency Transactions, Goods (as mentioned), Goods in Transit Policy, Loan Accounts, Marine Insurance Open Cargo Policy, Purchase orders and Sales orders.¹¹

[33] Include is defined in the Cession agreement as:

“include – The words ‘include’ and ‘including’ mean ‘include without limitation’ and ‘ including without limitation’. The use of the words ‘include’ and ‘including’ followed by a specific example or examples shall not be construed as limiting the

¹¹ CaseLines, 002-135 to 002-136, Annexure “C”, clauses 1.2.1, 1.2.8 to 1.2.13

meaning of the general wording preceding it.”

THE LAW

[34] The law on the interpretation of contracts commences with ***Natal Joint Municipal Pension Fund v Endumeni Municipality***¹² where Wallis JA said the following in regard to the construction of a document:

“The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.”

And further:

“Unlike the trial judge I have deliberately avoided using the conventional description of this process as one of ascertaining the intention of the legislature or the draftsman, nor would I use its counterpart in a contractual setting, ‘the intention of the contracting parties’, because these expressions are misnomers, insofar as they convey or are understood to convey that interpretation involves an enquiry into the mind of the legislature and the contracting parties. The reason is that the enquiry is restricted to ascertaining the meaning of the

¹² 2012 (4) SA 593 (SCA)

*language of the provision itself.*¹³

[35] In ***Shakawa Hunting & Game Lodge (Pty) Ltd v Askari Adventures CC***.¹⁴

“What was said in Endumeni Municipality regarding the expression ‘the intention of the parties’ is in line with what was expressed by Greenberg JA more than six decades ago in Worman v Hughes & others 1948 (3) SA 495 (A) at 505, namely:

‘It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties’ intention was, but what the language used in the contract means ...’

It follows that the testimony of the parties to a written agreement as to what either of them may have had in mind at the time of the conclusion of the agreement is irrelevant for purposes of ascertaining the meaning of the words used in a particular clause.”

[36] Accordingly, in ***Betterbridge (Pty) Ltd v Masilo and Others NNO***¹⁵ Unterhalter AJ summarised the enquiry into interpretation as “a unitary endeavour requiring the consideration of text, context and purpose”. Furthermore, in ***Capitec Bank Holdings and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others***¹⁶ it was said that:

¹³ Paras 18 and 20

¹⁴ 2015 JDR 0728 (SCA) at para 12

¹⁵ 2015 (2) SA 396 GNP at para 8

¹⁶ 2022 (1) SA 100 (SCA) at para 25

"It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As Endumeni emphasised, citing well-known cases, the inevitable point of departure is the language of the provision itself."

[37] As submitted to me by counsel for the liquidators, I need to consider the interrelation between the provision in issue and the rest of the document and have regard to the apparent purpose and scope of the provision, the nature and purpose of the contract and, relevant circumstances attendant upon conclusion of the contract.¹⁷

[38] A succinct synopsis of the approach to interpretation is also to be found in **Arnold v Britton**¹⁸, endorsed by Lord Neuberger,

"[15] When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", ... And it does so by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the

¹⁷ LAWSA, Vol 9, 3rd Edition, para 351

¹⁸ [2005] UKSC 36 [2015] AC 1619

contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

[39] It is also trite that it is irrelevant whether the language used is vague or ambiguous. It was not submitted to me by either counsel that the definitions were in any event ambiguous.

[40] The Court has a wider discretion to admit and consider evidence of surrounding circumstances to understand the context and this allows the Court to consider what meaning the parties attributed to special words or phrases and what passed between the parties during their negotiations and correspondence as well as evidence of the sense in which they understood and acted on the documents but not direct evidence of their intentions before or at the time of the formulation of the contract.¹⁹

[41] The Bank is not entitled to rectification of the cession, and did not seek rectification, as set out in ***Nedbank v Chance***²⁰

"[9] On liquidation and by operation of the common law a concursus creditorum (concourse of creditors) comes into existence. The effect of a liquidation order is that it 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. The insolvent estate is 'frozen', and nothing can thereafter be done by any one creditor that would have the effect of altering or

¹⁹ ***Tshwane City v Blair Atholl Home Owners Association*** 2019 (3) SA 398 (SCA) at para 66, 76 and 77

²⁰ 2008(4) SA 209 D at 212

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.”

[42] As also submitted to me, it is clear that should the parties have entered into an unwise contract or a one-sided bargain they will have to live with that and they are not able to call upon the Court to re-interpret the contract or to insert a new term, retrospectively, in order for the parties to have better contracted. It is not within the Court’s domain to make a better contract for the parties than that which they negotiated.

[43] Further, if having considered all the admissible evidence there was ambiguity, there are rules of construction to assist the Court in determining the intention of the parties. These include:

[43.1] the *ejusdem generis* rule (“of the same type”) which provides that if specific words are followed by one or more general words/ clauses the general words are limited (*ejusdem generis with*) or restricted to matters of the same kind as those specifically listed so if a contract refers to cars, trucks, vans, motorcycles the *ejusdem generis* rule restricts the interpretation of the other vehicles to land based vehicles because the initial list did not include air or water based vehicles and

[43.2] the *contra proferentem* rule which provides that ambiguous words or phrases can be interpreted against the party in whose favour or request they were inserted. This is only done as a matter of last resort.

THE SUBMISSIONS

[44] The Bank submits that the Master failed to consider the nature and extent of the ceded interests, as defined above, and simply focussed on the definition of goods which is defined as the goods financed by the Bank.

[45] As I understand the submission the Bank says:

[45.1] The definition of "*ceded interests*" provides for a general cession of "*all right title and interests*" in and to various items and goods in clause 1.2.2.

[45.2] Clause 1.2.2 is then qualified by the word "*including*", and includes without limitation, as defined, "*.....the proceeds of any rights/goods*", in clause 1.2.2.2.

[45.3] Under the qualification in clause 1.2.2.2 the ceded rights include "*any rights/goods*" and the use of the word "*any*" excludes any limitation of the word, goods, as imposed by the definition of "*goods*".

[45.4] Therefore, the definition of "*ceded interests*" includes a cession of rights to all goods and not only the goods financed by the Bank under the agreement. As such the definition of "*ceded interests*" is all encompassing, broadly worded and unlimited.

- [45.5] I was referred to the decision of **S V Wood** in support of the submission that the word “any” is a word of wide import and unlimited as follows:²¹
- “The word ‘any’ is, according to the Oxford Dictionary, the indeterminate derivative of one, and or a, and means ‘whichever, of whatever kind, of whatever quantity.’ Quantitatively it means a quantity or number however large or small. In the Afrikaanse Woordeboek the meaning of ‘enige’ is given as ‘een of ander; watterook al.’ Judicially the word ‘any’ has been defined as a word of very wide import, ‘and prima facie the use of it excludes limitation.’”*
- [45.6] Therefore the Bank is entitled to the proceeds of all goods sold, as a preferent creditor, and its rights are not limited to the goods that it financed.
- [45.7] Furthermore, because clause 22.2 provides that the security is continuing cover security for all obligations to FRB until cancelled by FRB this meant that as a secured creditor, the Bank’s security was unlimited, and entitled it, to all proceeds raised from the sale of the movable goods.
- [45.8] As such to limit the ceded rights to the proceeds of the goods financed by the Bank would not make commercial sense.
- [46] It was also submitted that goods in the Facility Letter include merchandise²² which is referenced in the case law as merchandise, supplies and raw materials. Accordingly, this provides for a wider scale of security and makes commercial sense as the Bank in concluding the Cession would always take maximum security.

²¹ 1976(1)SA 703(A0 @ 706

²² CaseLines 002-161; clause 9

- [47] The submission that the Bank took maximum security, it is submitted, is supported by the decision of ***Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd***.²³

[12] *To interpret the cession in the manner contended for by the respondent would be destructive of the very purpose for which the cession in securitatem debiti was entered into, which was to provide security for the loan that the bank was to advance to the respondent. That purpose is specified in the first part of clause 8 which provides that the cession was to operate ‘as additional security for the due repayment by the Mortgagor of all amounts owing to or claimable by the Bank at any time in terms of this bond.’ The evidence shows that the bank required the respondent to furnish the maximum conceivable security for the loan. Were the respondent’s interpretation correct, the bank would enjoy no security from the cession in the event of the respondent’s insolvency. The bank’s representatives conceded that it could never have been the intention of the parties that the bank would not be a secured creditor in respect of the respondent’s rental revenues in the event of its insolvency.”*

- [48] In addition, it was submitted that the Bank was always mindful as to the need for maximum security over all the Truvelo companies’ movables including those that were not financed by it.

- [49] Also, the Court must distinguish between “goods” and “Goods” as set out in clauses 1.2.2.2 and 1.2.8 and that to the extent that goods were referred to in the lower case in 1.2.2.2 this evidenced a change in

²³ 2009 (1) SA 493 SA at 498

intention by the drafters of the Cession which was fortified, in any event, by the use of the word “any” preceding rights/goods.

[50] Again, these definitions evidenced that the Bank had a preferent right to all the proceeds from all and any movables financed or not and which were ceded to the Bank or the security would have no practical effect.

[51] It is, furthermore, apposite for the court in interpreting the definition clauses in the Cession and more particularly the rights that were ceded to the Bank to having regard to the Trade Facility Letter which constitutes extratextual evidence of the security requirements.

TEXT, CONTEXT AND PURPOSE

[52] The liquidator’s counsel submitted that only on a *prima facie* reading of clause 1.2.2 does it appear that the Cession relates to all goods and the other rights including the rights in clauses 1.2.2.1 to 1.2.2.4.

[53] As also submitted to me, the word “Goods”, in this clause, is capitalised but specifically defined and so too are each of the remaining rights, also capitalised and specifically defined. As such the rights are not referred to in a general way.

[54] Further, the Bank proffered no explanation for the definition given to “goods” and the limitation implicit therein created by the reference to the Bank, namely FRB/FNB, which limited the ceded right to the financed goods. The question arises as to the reason for this limitation if the parties intention was different.

[55] The definition for goods expressly refers to the goods which FRB/FNB financed. The Bank did not contend that the definition could mean anything other than that expressly provided.

- [56] Furthermore, and to the extent that it was submitted to me by the Bank that the word "*including*" extended and included the nature of the rights, this cannot be faulted. Yet I do not agree that "*including*" permitted a change to the meaning of "*goods*", as defined to include all goods. Rather the qualifying clause, in my view, emphasises the very right stipulated for - the right to the proceeds on the disposal of the goods, as financed. I am of the view that in so doing the ceded right remained the same, and its ambit did not change, contrary to what the Bank contends. As such "*goods*" cannot be given a different meaning inconsistent with its definition.
- [57] As a result goods in clause 1.2.2 is affirmed by clause 1.2.2.2.
- [58] The liquidators' counsel also countered the submission made that in interpreting the qualification, preceded as it is by the word "*any*," this broadened the interpretation to include all rights and goods generally and not as defined. The court was cautioned to be cautious not to read the word "*any*" out context. Rather, I should consider the interpretation of the word within the context of the sentence and the definition clause.
- [59] I agree. On a plain reading of the qualification the Bank was entitled to any rights/ goods that were disposed of or sold. The words preceding "*any*", namely "*the proceeds on the disposal or realisation of any rights/ goods*" give context and meaning to the word "*any*" in the sentence. This is because not all of the rights ceded to the Bank are capable of being sold and the use of the word "*any*" recognised this and referred to any of those rights which could be sold or disposed of.
- [60] Also, it is contradictory to have specifically defined goods as goods that were financed by the Bank and then include, as a ceded interest, any rights to the proceeds of any goods. It would render the definition of "*goods*" unhelpful and require that I ignore the definition when reading all of the clauses referencing goods. Furthermore, all of the remaining

rights were also specifically defined. On the Bank's reasoning these definitions should and could be ignored too when encountering these terms in the Cession.

[61] As also submitted to me by the liquidators' counsel, the ceded interests, as defined and listed in clause 1.2.2 of the Cession, corresponds with the new security that is required in clause 9 of the Facility Letter and reads like "*a wish list*" of security which was then ceded to the Bank and the adjacent rights or related rights in clause 1.2.2.2. As such the security provided in the Cession agreement is directly linked to and gives effect to the Facility Letter.

[62] The Cession agreement naturally provides more detail about the nature of the security required, as it was a requirement of the Facility Letter.

[63] In the Facility Letter "*goods*"²⁴ are defined as :

Goods – *Sniper Rifles and Accessories and all other goods, or merchandise FNB may from time to time decide to finance.*

[64] It is clear from reading the Facility Letter and the Cession agreement that the definition ascribed to "*goods*" is almost identical in scope and substance and referred to the firearms which would be financed by the Bank from time to time. The new security namely "*Goods/merchandise*", called for in the Facility Letter is limited to financed goods just as each other ceded right is defined, such as Book Debts etc., and the intention is clear.

[65] Although merchandise is not defined, it is incorporated in the definition for goods. Merchandise, in the context of the agreements, is in my view a synonym for goods, and cannot be given the broad dictionary meaning

²⁴ CaseLines, 002-152, clause1, PARTIES AND DEFINITIONS

contended for by the Bank's counsel and treated differently. It therefore does not expand upon the definition attributed to "*goods*". The security to be furnished and covered by the Cession must be interpreted accordingly, to my mind.²⁵

[66] As mentioned, it was further contended that the Court must have regard to whether or not the word "*goods*" is capitalised or not. Because the definition capitalised the word "*goods*" and clause 1.2.2.2 referenced "*goods*," using the lower case, this designated a different definition. This is not plausible in my view. It simply reflects the drafter's writing style. "*Goods*" or "*goods*" are understood as defined and used as such in the Cession. As submitted to me, by the liquidators' counsel, the submission is just "*not good enough*".

[67] All the ceded interests are actually rights and so the reference to rights/goods does seem to have been, as submitted to me, a matter of convenience.

[68] It was also submitted to me that the term "*goods*" is used interchangeably in the Facility Letter. There is no indication that the word "*goods*" is sometimes referring to goods generally and sometimes to the firearms that were financed in terms of the facility granted. As such, I do not believe that there is any merit to this submission.

[69] Rather goods are defined and the use of the word "*any*" does not extend that definition. Having defined goods it makes no sense to me that the word would be used interchangeably. If the word was to be used to convey all goods and, not as defined, that is when a qualification would be required to demonstrate this different meaning. There is no qualification of "*goods*" in the Cession or Facility Letter.

[70] The further argument is that the companies also undertook not to

²⁵ CaseLines, 002-161, clause 9

encumber the assets to the detriment of the Bank and this demonstrated the wide ambit of the Cession. As submitted to me, this is a common term in agreements to ensure that there is not a material change in the circumstances of the company at the time the Cession agreement was concluded. The undertaking is given to reassure the Bank that the company is not on the verge of insolvency because then the Bank would have to take immediate action. I therefore do not agree with the Bank's contention.

SURROUNDING CIRCUMSTANCES

[71] To the extent that it was submitted to me by the Bank's counsel that the Bank intended to take the maximum security, there is no evidence to this effect. Not only can I not take account of any direct evidence as to intention but also the deponent to the affidavit is a Recovery Manager and, at best, had access to the documents, as stated by her in her affidavit. She is not a person who was involved in or has knowledge of this transaction. She was not a signatory to the Facility letter or the Cession agreement. There is no evidence from the persons who drafted the Facility letter and Cession agreement about the extent of the security required and whether having defined goods and taken other substantial security the Bank was of the view that it had sufficient security for its claims.

[72] I was referred to clauses²⁶ in the Facility Letter which allegedly demonstrated the Bank's intention to take maximum security. This was resoundingly countered by the liquidators' counsel. The Bank was silent in its affidavit about these provisions or that it ever exercised its rights to take delivery of pledged goods. The bank did not address this direct invitation to do so in the answering affidavit. In addition, it was contemplated that the Bank would surely have registered a notarial bond over Truvelo's assets, another indication that the security required by the

²⁶ CaseLines 002-139 clause 3.4.7 and CaseLines 002-140 clauses 3.4.10 and 3.14.16 and 3.4.16.1 as examples in the Facility Letter

Bank was far – reaching²⁷. Yet there was also no evidence that it did so.

[73] I also do not agree that the *Picardi Hotels* decision assists the Bank. This is a matter that went to trial, and evidence was given at the trial by the relevant Bank employees, as mentioned in the appeal judgment. I do not agree that the SCA determined that a Court can take judicial notice of the fact that the Bank always takes maximum security in every instance. If that were so then the process of interpretation would be rendered wholly unnecessary. Rather it is authority for construing provisions in accordance with sound commercial principles and good business sense. In *Picardi Hotels*, the interpretation that the cedent sought to place on the cession provision in the mortgage bond was entirely destructive of the Cession and the evidence established that this interpretation did not make commercial sense. This is not the case here. I am of the view that the matter is not on all fours with this application.

[74] As submitted to me, in limiting the goods to those that were financed by the Bank, the Bank still received proceeds from the sale of the goods in an amount of approximately R3.6 million. Furthermore, it is not unusual that the security taken is compatible to the nature of the asset in the transaction. As also submitted to me, when the Bank finances the acquisition of an asset the security taken by the Bank is relative to its exposure and not the wealth of the borrower. Here the Bank would reasonably have anticipated that having financed the acquisition of components and the manufacture of firearms, the proceeds from the sale thereof would exceed the costs of manufacture and so the security would suffice.

[75] When I posed the question to the Bank's counsel as to what the purpose of the definition was, he conceded that the definition was limiting and related to the goods which were the subject matter of the Armscor transaction only. That said he also persisted with his submission that it

²⁷ CaseLines 006-21 to 006-22, paras 26.3 and 26.5 AA and CaseLines 008-16, paras 20.7 and 20.9 RA

was not the intention of the Bank to limit security in the Cession or Facility Letter for that matter.

[76] The nature of this transaction, as already mentioned, related to firearms that were being manufactured for Armscor. The *modus operandi* in the Facility Letter sets out the manner in which this transaction would be financed step by step and how the debt would be liquidated as Armscor paid for the firearms. The security required and “*goods/merchandise*” were specifically and similarly defined in the Facility Letter and the Cession agreement.

[77] As set out by the liquidators²⁸, at the time that the agreements were drafted the undisputed facts known to the parties included that the facility was for a limited period and specific purpose, the facility related to the import of components for firearms and the manufacture of the firearms for Armscor, Armscor would make payment and the facility would be repaid, and the Truvelo companies also manufactured firearms for sale to the general public and electronic speed measurement equipment. As such it is reasonable that the agreements defined goods relative to the transaction at hand. All of these facts affirm, in my view, the interpretation that must be given to goods, just one of the “*ceded interests*”, and the intention of the parties as gleaned from the agreements.

[78] As such, the interpretations sought to be given to “*goods*” by the Bank would be contrary to the basic principles of interpretation. The Bank must live with the contract that it has made and the security that it obtained. The Bank has suffered a loss albeit not a substantial one. I cannot speculate on the reasons therefore. The upshot of the cession is that the Bank did take a substantial amount of security but just not enough.

²⁸ CaseLines 006 -22 to 006-23; para 27 AA

[79] Because the *ejusdem* principle is usually invoked where there is ambiguity, it has no merit in this interpretative exercise. Because of my view that the definition of “*goods*” is clear and applies, wherever used in the Cession, and in interpreting the “*ceded rights*” acquired by the Bank, that is the end of the matter.

SUBMISSIONS ON THE CESSION OF GOODS

[80] Additionally the liquidators counsel submitted that the Bank’s attempt to rely on clause 1.2.2 as a definition of general interpretation independently of the qualifying clause 1.2.2.2, which specifically refers to the bank’s right to the proceeds of the sale of any rights/goods, is simply wrong for two reasons namely:

[80.1] Goods cannot be ceded. To the extent that the Cession purports to cede goods, goods can only be pledged, a principle which is trite;²⁹ As a consequence the firearms which formed the subject-matter of the agreement cannot be ceded. In truth it is only the proceeds of the sale of the firearms that are capable of cession, and

[80.2] Because the ceded interests in referencing goods went on to stipulate that “*the proceeds on the disposal or realisation of any rights/ goods*” formed part of the ceded interests in the qualifying provision at clause 1.2.2.2 this qualification, to that extent, saved the cession from being void insofar as it relates to movables. As also submitted to me the subject-matter of the Cession is the “*transfer of rights in and to the goods*”.

[81] Also, if regard is had to the founding affidavit³⁰ it is apparent that the

²⁹ *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) at para 17

³⁰ CaseLines, 002-28, para 9.10; 002-34, para 10.5; 002-36, para 11.8 and 002-240, para 11.14 FA

cause of action was framed in a way so as to misconstrue the nature of the cession in the sense that it was contended that the Bank had taken cession of all the movable assets without distinguishing between the assets themselves and the rights attaching thereto.

[82] The Bank's counsel conceded that to the extent that the word "assets" had been referred to in the founding affidavit it is clear that only personal rights could be ceded and that it was these rights to the proceeds of the sale of the goods which was the subject-matter of the claim. In any event, he explained on any terminology, the result would be the same which is the value of the movable assets.

[83] It is correct that the subject matter of a cession is in fact rights not goods and this is evident from the nature of the ceded interests which all pertain to rights.

[84] As also submitted to me, the Bank's counsel submission, at the outset, that the liquidators had conceded that the Bank was entitled to all of the assets and that they had been paid is incorrect and disputed. The liquidators set out in detail what had been paid to the Bank and how it was computed.³¹ The liquidators distinguished between the proceeds from the sales of the firearms which is secured under the Cession and the proceeds from other assets, what are termed non - current assets, and which belong to the company in liquidation. The company has a real right to these assets. The realisation of these assets does not convert the real right into a personal right, as affirmed in **Nedbank v Chance**, quoted above.

[85] Also, at all times the advance payment of R1 970 098.75 was made to the Bank to curtail the accrual of interest and was conditional on the Bank repaying any amounts if the account was not confirmed or

³¹ CaseLines 006 -18, para 23 AA

amended³².

[86] As such, I am of the view that the qualifying provision is essential to convey the nature of the Bank's rights to the goods and without it the general provision pertaining to "goods" would have been meaningless.

CONCLUSION

[87] I am of the view that the Master was correct in her interpretation of the definition of "goods" and referenced in the definition of "ceded interests" and cannot be faulted. The objection to the 3rd liquidation and distribution account cannot be upheld.

[88] In all of the circumstances, I am of the view that the application must be dismissed with costs. There is no reason why the costs should not follow the result.

[89] Accordingly, I make an order in the following terms:

[89.1] The application is dismissed.

[89.2] The applicant is to pay the costs of the application to the second and third respondents.

P V TERNENT
*Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

³² CaseLines 002-225 to 002-226 Annexure "KC4" at 002-226

HEARD ON: 23 May 2023

DATE OF JUDGMENT: 24 January 2024

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