THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 58/2022

In the matter between:

PREVANCE BONDS (PTY) LTD **FIRST APPELLANT**

and

VOLTEX (PTY) LTD **FIRST RESPONDENT**

FIRST STRUT (RF) LIMITED (IN LIQUIDATION) **SECOND RESPONDENT**

MASTER OF THE HIGH COURT, PRETORIA **THIRD RESPONDENT**

Neutral citation: *Prevance Bonds (Pty) Ltd v Voltex (Pty) Ltd* (58/2022) [2023] ZASCA 40 (31 March 2023)

Coram: ZONDI, SCHIPPERS, MBATHA, CARELSE and MEYER JJA

Heard: 28 February 2023

Delivered: 31 March 2023

Summary: Rectification – document in which security cession is contained incorrectly describes the creditor – whether a claim for rectification was established.

Insolvency – subsequent insolvency of a debtor and establishment of *concursus creditorum* provide no impediment to rectification – a valid cession agreement was concluded between the parties prior to the granting of the liquidation order, but the agreement does not reflect the parties' common intention in the sense that the creditor was not correctly described – rights of third parties not affected by rectification.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Van der Schyff J, sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Zondi JA (Schippers, Mbatha, Carelse and Meyer JJA concurring):

Introduction

[1] This is an appeal against the judgment and order of the Gauteng Division of the High Court, Pretoria (Van der Schyff J) (the high court), in terms of which it granted an application by the first respondent, Voltex (Pty) Limited (Voltex 2), to rectify a recordal on an application for credit facilities, dated 26 January 1999, containing a security cession (a cession of book debts and other debts as security). The credit application form that was submitted to Voltex 2 by the second respondent, First Strut (RF) Limited (in liquidation) (First Strut), indicated Voltex 2's registration number as '88/06535/07' instead of '1964/006740/07'. The high court rectified the credit application form by deleting '88/06535/07' and substituted it with '1964/006740/07'. The appeal is before this Court with leave having been granted by the high court.

Background

[2] The appellant is Prevance Bonds (Pty) Limited (Prevance), Voltex 2's business competitor. First Strut was liquidated on 8 July 2013 and is represented in these proceedings by its duly appointed liquidators. Before its liquidation, First Strut had conducted business with both Prevance and Voltex 2 as well as Aberdare Cables SA (Pty) Limited (Voltex 1). On 26 January 1999, First Strut represented by its CEO, Mr Wiggill, and its director, Mr Bertulis, applied to Voltex 2 for credit facilities to enable First Strut to buy goods on credit from Voltex 2. The application for credit facilities form that was presented to them for signature contained the security cession clause. Mr Wiggill and Mr Bertulis signed the application for credit facilities on behalf of First Strut. It was only after the liquidation of First Strut that Voltex 2 realised that the company registration number on the credit application form was incorrect. The credit application form reflected Voltex 1's registration number and not the registration number of Voltex 2. The mistake occurred because the latter had used Voltex 1's pre-printed standard credit application form to record the security cession. At the time of the conclusion of the credit facility and the security cession agreement, Voltex 1 had long since changed its name from Voltex (Pty) Limited to Aberdare Cables SA (Pty) Limited.

[3] On 13 November 2013, Voltex 2 submitted proof of its claims to the liquidators of First Strut. At a meeting of creditors Voltex 2 proved its claims against First Strut in the sum of R26 854 196.38 for goods sold and delivered to First Strut, and relied on the security cession in issue for its claims. The liquidators accepted that Voltex 2's claims were secured by the security cession and reflected this in a first liquidation and distribution account.

[4] On 2 March 2017, Prevance objected to the liquidation and distribution account in terms of s 407 of the Companies Act 61 of 1973 recording Voltex 2 as a secured creditor. On 3 May 2017, the third respondent, the Master of the High Court, Pretoria, upheld the objection and directed the liquidators to amend the liquidation and distribution account to exclude Voltex 2 as a secured creditor.

[5] On 27 June 2017, Voltex 2 applied to the high court for the rectification of the recordal of its registration number on the credit facilities application form and the security cession. Prevance, to whom First Strut had also ceded its book debts to

secure payment of its claims, opposed the application. It denied that Voltex 2 was a secured creditor. It did so on two grounds. First, it contended that rectification of the security cession was incompetent after the establishment of *concursus creditorum* (coming together of creditors) brought about by the liquidation of First Strut on 8 July 2013. Second, it asserted that Prevance had, in any event, failed to make out a case for rectification. The high court rejected both contentions of Prevance and granted rectification of the recordal of Voltex 2's registration number on the security cession in the respect as set out in para 1 above.

[6] Prevance challenges the order granted by the high court on two grounds. First, that the founding papers do not disclose sufficient evidence of the common continuing intention of the parties to the security cession necessary for the rectification of the security cession. Second, it alleges that Voltex 2 is a concurrent creditor. Therefore, after the establishment of the *concursus creditorum* following the liquidation of First Strut, rectification could not be granted, since it would have an effect of elevating Voltex 2's status from a concurrent creditor to a secured creditor, which would prejudice the third party creditors.

Issues

[7] Two issues therefore arise for determination in this appeal. The first is whether Voltex 2 provided sufficient evidence to sustain a claim for rectification of the security cession in motion proceedings; and, secondly, whether it is competent to order rectification of a document after the institution of a *concursus creditorum*. I will address each of these issues in turn.

Rectification

[8] Rectification of a written agreement is a remedy available to parties in instances where an agreement reduced to writing, through a common mistake, does not reflect the true intention of the contracting parties. Didcott J in *Spiller and Others v Lawrence*,[1] emphasised that '[i]t is not the agreement between the parties which, on the other hand, is rectified. The Court has no power to alter it. To do so would be to amend their common intention and in effect to devise a fresh pact for them. That is

[1] *Spiller and Others v Lawrence* [1976] 1 All SA 553 (N); 1976 (1) SA 307 (N).

their exclusive prerogative. All that the Court ever touches is the document'.[2] The onus is on a party seeking rectification to show, on a balance of probabilities, that the written agreement does not correctly express what the parties had intended to set out in the agreement.[3]

[9] In *Lombaard v Droprop CC*,[4] this Court referred with approval to *Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd*,[5] where Streicher JA stated:

'A claim for rectification does not have as a correlative a debt within the ordinary meaning of the word. Rectification of an agreement does not alter the rights and obligations of the parties in terms of the agreement to be rectified: their rights and obligations are no different after rectification. Rectification therefore does not create a new contract; it merely serves to correct the written memorial of the agreement. It is a declaration of what the parties to the agreement to be rectified agreed.'

The facts

[10] Turning to the facts of this case, Voltex 2's claim for rectification of the security cession was supported by the evidence of Mr Stanley Green, the deponent to the founding affidavit, who at the relevant time was the Chief Executive Officer of Voltex 2 and also the legal director of Voltex 1, which later changed its name to Aberdare Cables SA (Pty) Limited. Voltex 1 carried on business as a wholesaler and distributor of electrical and other products (distribution division). It also carried out a manufacturing business.

[11] According to Mr Green, on or about 18 April 1995, First Strut completed a credit application form with Voltex 1 which embodied a suretyship and a cession of book debts. At the time, Ms Anne Bertha Gray was First Strut's director. Its auditor was Mr Furter Carstens Wonlitz, and the credit limit that was sought and granted was R60 000.

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[2] Ibid at 310A-F.
[3] *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* [2004] 2 All SA 366 (SCA); 2004 (6) SA 29 (SCA) para 21.
[4] *Lombaard v Droprop CC and Others* [2010] ZASCA 86; 2010 (5) SA 1 (SCA); [2010] 4 All SA 229 (SCA) para 20.
[5] *Boundary Financing Limited v Protea Property Holdings (Pty) Limited* [2008] ZASCA 139; 2009 (3) SA 447 (SCA); [2009] 2 All SA 7 (SCA) para 13.

[12] On or about 15 June 1998, Voltex 1 sold its distribution business to Voltex 2, which at the time was known as Voltex Distributors (Pty) Limited, a company with registration number 1964/006740/07. On or about 31 July 1998, Voltex 1 changed its name from Voltex (Pty) Limited to Aberdare Cables SA (Pty) Limited. At the same time, Voltex Distributors (Pty) Limited changed its name to Voltex (Pty) Limited. Voltex 1 retained its manufacturing division and continued trading in respect of its manufacturing division until it was deregistered on 12 November 2011.

[13] As mentioned above, on 26 January 1999, First Strut completed a new credit application form, identical in its standard form wording to the credit application completed on 18 April 1995. As before, the credit application was made to Voltex 2 with the registration number reflected thereon as that of Voltex 1. The credit application appears to have been on Voltex 1's standard form document that had been printed prior to its name change that had taken place some six months prior to the new credit application.

[14] Mr Green contended that at the time when the security cession was signed and at all times thereafter First Strut, represented by Mr Wiggill and Mr Bertulis, intended to give the security to Voltex 2. Voltex 2, represented by its credit controllers and Mr Green, intended to take the security from First Strut. He went on to say that in error Voltex 2 used Voltex 1's (then known as Aberdare Cables SA (Pty) Limited) standard credit application form to record the security cession, and as a result Voltex 2's name correctly appeared on the security cession but not its correct registration number. Voltex 2 presented the security cession to First Strut for signature and its representatives signed the security cession in the *bona fide*, but the mistaken belief that it correctly recorded the common continuing intention of the parties, which was that the security cession was given by First Strut in favour of Voltex 2.

[15] Prevance opposed the application and advanced a number of defences. It argued, firstly, that the relief sought is incompetent; secondly, that this is not a matter that should have been brought on motion proceedings; thirdly, that Voltex 2 has no *locus standi*; fourthly, that Credit Guarantee Insurance Corporation of Africa Limited (Credit Guarantee Insurance), Voltex 2's insurers, are endeavouring to obtain

security for Voltex 2's unsecured claims, so as to obtain payment for their claims; and, finally, that the liquidators of First Strut should have opposed the application and addressed the exclusion of Voltex 2's claims, having regard to the fact that same were premised on unsupported documents and false affidavits. Prevance submitted that a strategy had been designed to manufacture a secured claim, so as to create security for Voltex 2's proved unsecured claims when no security exists.

[16] In the replying affidavit, Mr Green reiterated his position that he had no difficulty in having his version subjected to cross-examination consequent upon a referral to oral evidence. For that reason, Voltex 2's attorneys called upon Prevance's attorneys to agree to a referral to oral evidence or trial of the application. However, Prevance rejected the invitation, contending that there were no serious factual disputes on the papers and that the application should be determined on the affidavits.

[17] Mr Green explained that the advance dividend of R26 799 896 Voltex 2 received from Credit Guarantee Insurance on 10 November 2014 was the payment Credit Guarantee Insurance had received from First Strut's liquidators. On 4 October 2019, Credit Guarantee Insurance repaid the whole amount together with interest to the liquidators of First Strut. He denied that Credit Guarantee Insurance had taken cession of Voltex 2's claims. He maintained that at all times the claims had been advanced by Voltex 2 in its own name, albeit that Credit Guarantee Insurance as Voltex 2's insurer had indemnified Voltex 2 and pursued the recovery of the claims by way of a right of subrogation.

[18] The high court rejected Prevance's defences on the basis that Prevance was not able to deal with Voltex 2's averments relating to the conclusion of the agreement and the parties' intention, as it was not a party to the agreement and had no personal knowledge of any of the relevant transactions that took place between Voltex 2 and First Strut prior to its liquidation. The high court found that the majority of the averments contained in Prevance's answering affidavit had no relevance to the rectification application. It accordingly concluded that Voltex 2 had made out a proper case for rectification and proceeded to rectify the security cession embodied in the application for credit facilities.

[19] Prevance challenged the findings of the high court. In argument before us counsel for Prevance submitted, with reference to *ER24 Holdings v Smith N O*,[6] that the party relying on rectification has to show that the contract as rectified reflects the common continuing intention of the parties thereto. Relying on *Hart v Pinetown Drive-In Cinema (Pty) Ltd*,[7] he argued that the founding papers do not disclose sufficient evidence of the common continuing intention of the parties to the security cession necessary for its rectification. Miller J in *Hart* at 469C-E remarked as follows:

'. . . [W]here proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that the case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound.'

[20] Counsel for Prevance argued that the high court should have rejected Mr Green's evidence, as he does not say that he was present when the security cession was concluded. He submitted that the deponent's assertion that information is within his or her personal knowledge is of little value without some indication, at least from the context, of how that knowledge was acquired. An indication, proceeded the argument, of how the alleged knowledge was acquired is necessary to determine the weight, if any, to be attached to the evidence set out in the founding affidavit, which he argued, was lacking in this case. For this proposition counsel relied on *President of the Republic of South Africa and Others v Mail and Guardian Media Limited*.[8]

[21] He accordingly submitted that the fact that Prevance did not have a witness who could produce first-hand testimony to rebut or challenge the testimony adduced by Mr Green on behalf of Voltex 2 is not determinative of the issue. Furthermore, counsel added, the fact that the liquidators on behalf of First Strut did not oppose the application and challenge the version of Mr Green was of no moment in

[6] *ER24 Holdings v Smith N O and Another* [2007] ZASCA 55; [2007] 4 All SA 679 (SCA); 2007 (6) SA 147 (SCA).
[7] *Hart v Pinetown Drive-In Cinema (Pty) Ltd* [1972] 1 All SA 586 (D); 1972 (1) SA 464 (D).
[8] *President of the Republic of South Africa and Others v Mail and Guardian Media Limited* [2011] ZACC 32; 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC) para 28.

circumstances where the averments in Voltex 2's founding affidavit did not meet the threshold in the *Hart* case. There was no case for Prevance to meet, and the fact that there was no evidence in opposition thereto does not transform allegations which are not evidence into acceptable evidence, even if First Strut did not oppose the application.

[22] Prevance's contention that the evidence adduced by Mr Green is insufficient to sustain a claim for rectification of the security cession, must be rejected. The high court's reasoning that it was not open to Prevance, who was not a party to the cession, to challenge the evidence of Mr Green, who was actively involved in the conclusion of the security cession, cannot be faulted. In *Letseng Diamonds Ltd v JCI Ltd and others*,[9] it was held that a third party cannot interfere in the terms and conditions contained in an agreement between two other parties. It is between them and them alone, and the terms of the agreement only operate between them and no one else. Mr Green's evidence regarding the conclusion of the security cession and how it came about that a wrong company registration number of Votex 2 was inserted in the document, is based on his personal knowledge. He represented Voltex 2 in its dealings with First Strut, including in relation to the credit application containing the security cession. The deponent to the answering affidavit and Prevance itself were not parties to, and had no knowledge of, the relevant transactions between the Voltex companies and First Strut.

[23] Mr Green's evidence regarding how the mistake occurred is based on his personal knowledge of the facts referred to in his affidavit. He personally represented Voltex 2 in negotiating with Messrs Wiggill and Bertulis for First Strut regarding the extension of credit by Voltex 2 to First Strut, including obtaining security, and which included approving the credit application containing the security cession.

[24] Mr Green's evidence was not seriously disputed by Prevance, other than to contend that it had not been confirmed either by Mr Wiggill or Mr Bertulis, who represented First Strut when the security cession was concluded; that the affidavits used to support Voltex 2's claims are false; that the agreement alleged to have been

[9] *Letseng Diamonds Ltd v JCI Ltd and Others* 2007 (5) SA 564 (W) para 19. See also Jafta JA's minority judgment on appeal in *Letseng Diamonds Limited v JCI Limited and Others* [2008] ZASCA 157; 2009 (4) SA 58 (SCA); [2009] 2 All SA 337 (SCA) paras 18-19 and 23.

concluded between Voltex 2, represented by Mr Green and First Strut, was based on a common intention as between Mr Green and the directors of First Strut, namely, Mr Wiggill and Mr Bertulis, both of whom had allegedly defrauded First Strut's creditors; and that Credit Guarantee Insurance, Voltex 2's insurer, was endeavouring to obtain security for Voltex 2's unsecured claims so as to obtain payment for their claims. Prevance accordingly asserted that the purpose of the application was to substitute an unsecured creditor for a secured creditor in circumstances when the unsecured creditor's claim should not have been admitted.

[25] It is clear that Prevance's defences were premised on the allegations that the purpose of the rectification application was to substitute a secured creditor in circumstances where the unsecured creditor's claim should not have been admitted. But, there was no factual foundation for Prevance's defences. Voltex 2 had made out a *prima facie* case for the relief sought through the evidence of Mr Green. It was not sufficient for Prevance to answer that case by simply contending that it was not required to do so, as Mr Green's evidence was based on inadmissible hearsay evidence.

[26] It is significant to note that Voltex 2's attorneys called upon Prevance's attorneys to agree to a referral of the application to oral evidence or trial. As stated, Prevance rejected that proposal. The referral to trial would have afforded Prevance an opportunity to cross-examine Mr Green.

Effect of rectification on *concursus creditorum*

[27] It remains to consider Prevance's second defence, which is formulated as follows. It is incompetent for the court to order rectification of a document after the institution of a *concursus creditorum* in instances where its effect would enable an otherwise unsecured creditor to establish a secured claim. This is because, so it was argued, rectification of the security cession would have an unlawful effect of disturbing the *concursus creditorum* established by liquidation of a debtor. I accept Prevance's proposition and it is supported by authority. Lord de Villiers CJ in *Walker v Syfret N O* stated:

'The effect of a winding-up order is to establish a *concursus creditorum*, and nothing can thereafter be allowed to be done by any of the creditors to alter the rights of the other creditors.'[10]

[28] Innes J in the same case expressed this principle as follows at 166:

'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.'

[29] It was held in *Incledon* (*Welkom) (Pty) Ltd v Qwaqwa Development Corp Ltd*[11] that '[a]s 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'.

[30] Another important principle to emphasise 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 creditorum*.[12]

[31] Nienaber JA in *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd*[13] held that rectification, once granted, operates *ex tunc*, as if the document at its inception read as it has now been reconstructed to read. Rectification does not alter the terms of the agreement; it perfects the written memorial so as to accord with what the parties actually had in mind. What is rectified is not the contract itself as the juristic act, but the document, to the extent that it fails to express the true intention of the parties.[14] Although rectification takes effect *ex tunc*, as if the document had from

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[10] *Walker v Syfret* 1911 AD 141 at 160.
[11] *Incledon (Welkom) (Pty) Ltd v Qwaqwa Development Corporation Limited* [1990] 2 All SA 561 (A); 1990 (4) SA 798 (A) at 803J.
[12] *Durmalingham v Bruce N O* 1964 (1) SA 807 (D) at 811G-H; *Thienhaus N O v Metje & Ziegler Ltd and Another* 1965 (3) SA 25 (A) at 30A-C; *Klerck N O v Van Zyl and Maritz N N O and Another and related cases* 1989 (4) SA 263 (SE) at 279F-G*; Nedbank Ltd v Chance and Others* 2008 (4) SA 209 (D) at 212, para 9; *The Standard Bank of South Africa Limited v Strydom N O and Others* [2019] ZAGPPHC 142 (GP) para 81.
[13] *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd* 2001 (4) SA 1315 (SCA) para 33.
[14] *Spiller and Others v Lawrence* 1976 (1) SA 307 (N) at 310E.

its inception expressed the true intention of the parties, it does not operate to the detriment of third parties who have relied on a written instrument in good faith.[15]

[32] In argument before this Court counsel for Prevance submitted that where a document constitutes both an instrument of delivery or transfer as well as the parties' common intention, the reason for retroactive operation of the rectification in relation to the parties' common intention has no application for the retroactive operation in relation to the transfer. The argument is unsound. In *Grobbelaar and Others v Shoprite Checkers Ltd*,[16] Brand JA explained that '[a] cession is an abstract legal act that is independent of the underlying, obligationary, agreement. The cession of personal rights is brought about by agreement and no formalities are required'. It is clear from this formulation that there is a distinction between the agreement to cede (the obligatory agreement whereby an obligation is created) also referred to as the *pactum de cedendo* and the cession itself (the real agreement whereby rights are bilaterally transferred) also known as the *puctum cessionis*.[17]

[33] In the present case, it cannot be disputed that the cession took place in January 1999 when Voltex 2 and First Strut agreed that First Strut's book debts and other debts were ceded as security to Voltex 2. Both the antecedent obligatory agreement as well as the act of cession took place then. It is clear that the parties to the transaction were completely *ad idem* as to all the essentials of the agreement. No further requirements were necessary to constitute an act of cession and the parties did not provide that further formalities were still to be performed before the cession could be constituted. There was therefore at all material times an enforceable claim in existence which the security cession intended to secure. However, the written document in the form of the credit application recorded the security cession incorrectly by inserting a wrong registration number of Voltex 2 as the creditor and cessionary. As the document in which the security cession was embodied was the recordal of the agreement and cession, rather than agreement and cession itself, it was capable of being rectified without offending the *concursus creditorum*.

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[15] *Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 291.
[16] *Grobbelaar and Others v Shoprite Checkers Ltd* [2011] ZASCA 11 (SCA) para 18.
[17] *Brayton Carlswald (Pty) Ltd and Another v Brews* [2017] ZASCA 68; 2017 (5) SA 498 (SCA) para 15.

[34] The high court was therefore correct to conclude that in circumstances where the facts prove that:

'(i) a valid cession agreement was concluded between the parties prior to a liquidation order being 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*. . . 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.'

[35] The rectification of the document would not result in any prejudice to the third party creditors and, in any event none has been established. As Wlliamson JA aptly put it in *Thienhaus N O v Metje & Ziegler Ltd and Another*:[18]

'If there is anything which might possibly indicate *dolus* as emerging in the present matter, it is the attitude of the creditors in seeking to gain an advantage for themselves out of the admitted mistake of the conveyancer – a mistake which could never have misled them in any material respect. The fact that they are not allowed to gain an advantage from the accidental misdescription, which in itself could not have caused prejudice, is not a prejudice suffered by them.'

[36] The decision of the court in *Nedbank Ltd v Chance and Others*[19] to refuse rectification of the contract document on the basis that '[r]ectification post *concursus* would almost inevitably prejudice the rights of other creditors' cannot be supported, as it is contrary to the established legal principles relating to the rectification of the document post *concursus creditorum*. It is trite that rectification does not change the actual agreement between the parties. That being so, the preference that Nedbank ultimately contended for had existed all along and that it was only by the slip of a pen that the written document failed to record that preference. *Nedbank* was followed in

[18] *Thienhaus N O v Metje & Ziegler Ltd and Another* [1965] 3 All SA 63 (A); 1965 (3) SA 25 (A) at 34E-H.

[19] *Nedbank Ltd v Chance and Others* [2008] 2 All SA 367 (D); 2008 (4) SA 209 (D).

an unreported decision in *The Standard Bank of South Africa Ltd v Strydom N O and Others*.[20] *Nedbank* has been criticised by academic writers (eg Du Plessis, A & Stander, A, 'The establishment of a *concursus creditorum* in insolvency and rectification of an agreement: Nedbank Ltd v Chance Brothers 2008 (4) SA 209 D', (2011) 74 THRHR 230; Steyn, L, 'Rectification and concursus creditorum: Nedbank Limitetd v Chance' (2008) Obiter 524-532).

[37] It is necessary to analyse the judgment in *Nedbank* in some detail in order to demonstrate why the high court was correct in not following it. The common cause facts on which the matter was decided were the following. On 17 April 1998, Chance Brothers was placed under provisional liquidation at the instance of Nedbank. During October 1998, the parties entered into an agreement (the reorganisation agreement) with the purpose of restructuring Chance Brothers' indebtedness to Nedbank and to ensure Chance Brothers' removal from provisional liquidation. It was recorded in the reorganisation agreement that Chance Brothers was indebted to Nedbank, as at the date of signature of the agreement, in an amount in excess of R10 million. It was also recorded that the defendants had personally guaranteed the obligations of Chance Brothers to Nedbank in terms of suretyship agreements executed during 1993.

[38] In terms of the reorganisation agreement a portion of the debt owed by Chance Brothers, R3.5 million, was to be repaid to Nedbank by the issue to the latter of 3.5 million cumulative redeemable preference shares. The parties agreed on the issue price of one rand per preference share, with a cost of one cent and a premium of 99 cents per share. The shares were issued subject to the terms and conditions set out in the annexure to the reorganisation agreement. Chance Brothers' remaining indebtedness to Nedbank was to be dealt with in terms of a loan agreement concluded by the parties during 1996. However, by mistake, the reorganisation agreement was not accurately reduced to writing and the signed document reflected the redemption value of the preference shares as R35 000 instead of the intended R3.5 million. It was a slip of a pen.

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[20] *The Standard Bank of South Africa Limited v Strydom N O and Others* [2019] ZAGPPHC 142 (GP) para 83.

[39] In 2002, Chance Brothers was wound-up, on account of its insolvency. Nedbank's claim against it for R10 752 119.85 (which included an amount of R3.5 million as the redemption value of preference shares) was accepted by the joint liquidators and was reflected in the second and final liquidation and distribution accounts. These were confirmed by the Master of the High Court in 2004 and 2007, respectively. Nedbank received dividends of R796 835.81 from the liquidators. Thereafter, Nedbank sued the sureties for the balance, which it contended was owed to it by Chance Brothers at the time when it was wound-up, less the dividend it received from the joint liquidators. In the same action, Nedbank sought rectification of the contract to reflect correctly the redemption value of the preference shares as R3.5 million.

[40] The defence raised by the sureties was that the reorganisation agreement could not, as a matter of law, be rectified after the winding-up of Chance Brothers. The court dismissed Nedbank's rectification claim. It held that:[21]

'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*." (emphasis added).

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. Liquidation post *concursus* would almost inevitably prejudice the rights of other creditors.'

[21] Paragraph 9.

[41] The court in *Nedbank* cited three cases, *Durmalingham v Bruce N O*,[22] *Thienhaus* and *Klerck N O v Van Zyl and Maritz N N O and Another*,[23] as supporting the notion that post-*concursus* rectification would offend the *concursus creditorum*. *Durmalingham* is clearly distinguishable from *Nedbank*, in that registration was not required for the creation of Nedbank's right to claim from Chance Brothers payment of R3.5 million as the redemption value of the preference shares issued to it. Their oral reorganisation agreement created that right. Nedbank did not enter into any transaction after the sequestration, nor did it require any step, such as registration, to take place. It simply sought rectification of the contract document.[24]

[42] *Thienhaus* does not support, but is against, the findings in *Nedbank* and *Durmalingham* that a post-*concursus* rectification is impermissible. In *Nedbank*, the court did not appear to appreciate the import of *Thienhaus*.

[43] This Court in *Thienhaus* specifically considered whether a rectification of a mortgage bond may take place after the *concursus creditorum* in the context of a dispute whether the mortgage bond conferred a valid preference in insolvency on the mortgagee. The majority of the court held that there was no objection to granting rectification after the *concursus creditorum*, and upheld the high court's rectification of the mortgage bond post-*concursus* and its declaration that the bond created a valid preference in insolvency.

[44] Both the majority decision and the dissenting judgment recognised the effect of the *concursus creditorum* and that a creditor could not by rectification acquire a right that it did not already have at the commencement of the *concursus creditorum.* The majority judgment continued that the post-*concursus* rectification of the mortgage bond that had been registered before the *concursus creditorum* to correctly reflect the debt that was secured by the mortgage bond did not detract from the creditor having had a real right of security from when the mortgage bond was registered.

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[22] *Durmalingham v Bruce N O* 1964 (1) SA 807 (D).
[23] *Klerck N O v Van Zyl and Maritz N N O and Another and related cases* 1989 (4) SA 263 (SE).
[24] L Steyn 'Rectification and Concursus Creditorum: Nedbank Limited v Chance' (2008) *Obiter* at 530.

[45] After referring to the locus classicus *Weinerlein*,[25] Williamson JA for the majority in *Thienhaus* held that at 33F:

'Applying that decision to the present case, both parties were bound, in terms of their true agreement, from the moment the bond was registered.'

[46] He went on to state at 34A-D:

'Suffice it to say that the mortgagor company was bound under the bond, without any rectification thereof, in terms of its true contract as surety for the specified debts of G. Merjenberg (Pty) Ltd, despite the error in the description of the person whose debts were guaranteed thereby. That bond, without rectification, also duly conveyed notice to the world, on its registration, of the existence of a security held by the first respondent over the specified property. . . In those circumstances 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 the payment of a debt indubitably and undisputedly due by the mortgagor. That real right was in existence at the moment of liquidation; it did not require to be brought into existence thereafter.' It is evident from this analysis that the decision in *Nedbank* was clearly wrong and its reasoning cannot be supported.

[47] To sum up, on the facts the high court was correct to conclude that Voltex 2 had made out a case for rectification of the document which embodies the security cession. Mr Green, for Voltex 2, explained how it came about that the company registration number of Voltex 1, instead of Voltex 2, was recorded on the application for credit facilities that was presented to First Strut by Voltex 2. He testified that it was the intention of both Voltex 2 and First Strut that the creditor referred to in the security cession was Voltex 2 and not Voltex 1. Prevance produced no credible evidence to challenge Mr Green's evidence. His evidence therefore remained uncontested. It was clear from his evidence that both parties to the security cession had the common continuing intention for the rectification of the security cession.

[48] I further find that the intervention of insolvency of First Strut was no impediment to the rectification of the document in which the security cession was recorded, as it is clear from the evidence that a valid cession of book debts was concluded between the parties, and from that moment Voltex 2 became a secured creditor and remained as such when First Strut was wound-up. Rectification did not

[25] *Weinerlein v Goch Buildings Ltd* 1925 AD 282 (A).

bring about a change in Voltex 2's status. Rectification did not therefore offend the *concursus creditorum* principle and did not prejudice the rights of the third party creditors.

The order

[49] In the result, I make the following order:

The appeal is dismissed with costs.

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D H ZONDI

JUDGE OF APPEAL

Appearances

For the appellant:	J Peter SC
Instructed by:	Fluxmans Incorporated, Johannesburg
	Lovius Block Attorneys, Bloemfontein
For the first respondent:	B M Gilbert
Instructed by:	Reitz Attorneys, Johannesburg
	Phatshoane Henney Attorneys, Bloemfontein