

Dispute Resolution ALERT

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CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

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To amend or not to amend: The effect of rectification on *concursum creditorum*

"A written agreement which fails to express accurately the true intention of the parties may be rectified so as to make it accord with the parties' common intention. If the party seeking rectification can prove an actual agreement anterior to or contemporaneous with the writing with which the written agreement, owing to a mutual mistake, fails to conform, the court will rectify the erroneous instrument." – Melamet J in Leyland (SA) (Pty) Ltd v Rex Evans Motors (Pty) Ltd [1980] n(4) SA 271 (WLD).



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To amend or not to amend: The effect of rectification on *concursum creditorum*

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– *Melamet J in Leyland (SA) (Pty) Ltd v Rex Evans Motors (Pty) Ltd [1980] n(4) SA 271 (WLD).*

The Supreme Court of Appeal (SCA) recently deliberated on the question of whether it is competent to order rectification of a document after the commencement of a *concursum creditorum*. The appeal in *Prevance Bonds (Proprietary) Limited v Voltex (Proprietary) Limited* (58/2022) [2023] ZASCA 40 (31 March 2023) pondered the judgment of the Gauteng Division of the High Court in which it granted an application by the first respondent, Voltex (Proprietary) Limited (Voltex 2), to rectify an incorrect company registration number recorded on a security cession, dated 26 January 1999. The credit application that was submitted to Voltex 2 by the second respondent, First Strut b(RF) Limited (in liquidation) (First Strut), recorded Voltex 2’s company registration number incorrectly.

Background

First Strut was liquidated on 8 July 2013. Prior to its liquidation, First Strut had conducted business with the appellant, Prevance Bonds (Proprietary) Limited (Prevance) and Voltex 2 as well as Aberdare

Cables SA (Proprietary) Limited, which changed its name from Voltex (Voltex 1). On 26 January 1999, First Strut applied to Voltex 2 for credit facilities to allow it to buy goods on credit from Voltex 2. First Strut ceded its debtors to Voltex 2, by way of a written agreement, as security for the credit facilities. It was only after the liquidation of First Strut that Voltex 2 realised that the company registration number on the credit application form and the cession of book debts was incorrect. The credit application form reflected Voltex 1’s registration number and not the registration number of Voltex 2. The mistake occurred because Voltex 2 used Voltex 1’s pre-printed standard credit application form, which also contained the security cession. On 13 November 2013, Voltex 2 submitted proof of its claims to the liquidators of 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 support of its claims. The liquidators accepted that Voltex 2’s claims were secured by the security cession and reflected this in the first liquidation and distribution account.



Cliffe Dekker Hofmeyr

2023 RESULTS

Chambers Global 2022 - 2023 ranked our Dispute Resolution practice in Band 2: Dispute Resolution.

Chambers Global 2018–2023 ranked us in Band 2 for Restructuring/Insolvency.

Tim Fletcher ranked by **Chambers Global 2022 - 2023** in Band 2: Dispute Resolution.

Clive Rumsey ranked by **Chambers Global 2019 - 2023** in Band 4: Dispute Resolution.

Tobie Jordaan ranked by **Chambers Global 2022 - 2023** in Band 4: Restructuring/Insolvency.

Lucinde Rhoodie ranked by **Chambers Global 2023** in Band 4: Dispute Resolution

Jackwell Feris ranked by **Chambers Global 2023** as an upcoming dispute resolution lawyer.

Kylene Weyers ranked by **Chambers Global 2023** as an upcoming restructuring/insolvency lawyer.

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On 2 March 2017, Prevance, to whom First Strut had also ceded its book debts as security for debts owed to Prevance, objected to the liquidation and distribution account in terms of section 407 of the Companies Act 61 of 1973 and contended that Voltex 2 should not be listed as a secured creditor. Prevance based its objection on the discrepancy in the company registration number recorded on the security cession relied upon by Voltex 2.

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.

On 27 June 2017, Voltex 2 applied to the High Court to seek rectification of the recordal of its registration number on the credit facilities application form and the security cession. Prevance opposed the application and denied that Voltex 2 was a secured creditor on two grounds. First, that the rectification of the security cession

ex post facto was incompetent because a *concursum creditorum* (coming together of creditors) was established by virtue of the liquidation of First Strut. Second, it contended that First Strut had, in any event failed to make out a case for rectification.

The court *a quo* rejected both assertions of Prevance and granted rectification of the recordal of Voltex 2's registration number on the security cession. Prevance appealed the order granted by the High Court and argued that Voltex 2's founding papers did not disclose sufficient evidence of the common continuing intention of the parties to the security cession necessary for its rectification. Prevance also alleged that Voltex 2 was a concurrent creditor. According to Prevance, after the establishment of *concursum creditorum* following the liquidation of First Strut, rectification could not be granted, since it would have the effect of substituting a secured creditor for a concurrent creditor, which would prejudice third-party creditors.

Types of creditors

In terms of insolvency law, once an order of sequestration or liquidation is granted, a *concursum creditorum* is established with the purpose of securing the equitable distribution of a debtor's assets where they are insufficient to meet the claim of all its creditors. This entails placing the joint interests of creditors above the interests of individual creditors by dividing the debtor's assets proportionally amongst the creditors in the prescribed order of preference.

While secured creditors are paid from the net proceeds of the assets, preferred creditors rely on the free residue (that portion of the debtor's assets which is not subject to any right or preference by reason of any legal hypothec, pledge, right of retention or special mortgage) to settle their claims. Conversely, concurrent creditors have no entitlement to settlement of their claims in preference over other creditors and they hold no security for their claims either. They are essentially at the back

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of the queue as payment for their claims is based on what remains of the free residue after the claims of secured and preferred creditors have been discharged.

Counsel for Prevence argued that:

*"... it is incompetent for the court to order rectification of a document after the institution of a *concursum creditorum* in instances where its effect would enable an otherwise unsecured creditor to establish a secured claim. This is because rectification of the security cession would have an unlawful effect of disturbing the *concursum creditorum* established by liquidation of a debtor."*

The SCA had an opposing view and declared that in circumstances where:

*"(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 [sic] existed when the *concursum creditorum* came into existence."*

Accordingly, the SCA determined that the rectification of the security cession would not result in any prejudice to third-party creditors.

Effect of rectification on *concursum creditorum*

Rectification of a written agreement can be described as a remedy available to parties in circumstances where an agreement, reduced to writing, through a common mistake, does not reflect the true intention of the contracting parties. In *Brits v Van Heerden* [2001] (3) SA 257 (C), it was held that:

"... the mistake does not have to relate to the writing itself, but might relate to the consequences thereof. The mistake may be that of only one party; the mistake may be induced by misrepresentation or fraud. But there must be a mistake. [The] crux of the matter is that the mistake, be it a misunderstanding of fact or law or be it an incorrect drafting of the document, must have the effect of the written memorial not correctly reflecting the parties' true agreement."

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In *Spiller and others v Lawrence* [1976] (1) SA 307 (N), the court emphasised that *"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"*. Importantly, an order for rectification does not create a new agreement nor does it alter the rights and obligations of the parties in terms of the agreement. It simply acts as a corrective measure to reflect the parties' true intentions in terms of the agreement retrospectively. Put differently, the rectification must maintain the continuing intention of the parties.

Voltex 2 asserted that when the security cession was signed, it intended to take security from First Strut and the latter intended

to give it security. Voltex 2 further averred that it mistakenly used Voltex 1's standard credit application form to record the security cession, consequently, Voltex 2's name correctly appeared on the security cession, however, the incorrect company registration number was reflected on the credit application and security cession. Voltex 2 claimed that it:

"...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."

In opposition, Prevence testified that *"a strategy had been designed [by Voltex 2] to manufacture a secured claim, so as to create security for Voltex 2's proved unsecured claims when no security exists"*. In making a ruling, the High Court rejected Prevence's defences and held that Prevence was not in a position to contest Voltex 2's claims relating to the conclusion of the agreement and the parties' intention, as it was not a party to the agreement and therefore had no personal knowledge of the transaction between Voltex 2 and First Strut prior to its liquidation. Accordingly, the High Court found that Voltex 2 had made out a proper case for rectification and proceeded to rectify the security cession.

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Judgment

The SCA maintained that while it is true that it would be incompetent for the court to order rectification of a document after the institution of a *concursum creditorum* in instances where its effect would enable an otherwise unsecured creditor to establish a secured claim, in the present case, it could not be disputed that it was the intention of Voltex 2 and First Strut for the security cession to take place. The SCA further held because “*the document in which the security cession was embodied was the recordal of the agreement and cession, rather than the agreement and cession itself, it was capable of being rectified without offending the concursum creditorum*”. The SCA adopted the legal position of the High Court and upheld the rectification. It is evident that in granting an order for rectification, the court will consider the parties common continuing intention for

the rectification. It is not part of the court’s mandate to alter the status of the parties or their rights and obligations in terms of any agreement. All the court seeks to do is to ensure that rectification does not stray from the principles of *concursum creditorum*. In so doing, the rights of third-party creditors remain intact and they accordingly suffer no prejudice. The rectification of a document must be considered carefully on its merits and its principles must be applied strictly. In coming to a decision, the court considers substance over form and will be inclined to amend the form of a document if a *prima facie* case of its substance has been established. Mistakes are not uncommon and they will continue to happen, however, when they are committed *bona fide*, parties must be given the opportunity to cure their mistakes to reflect their mutual covenant, provided the continuing intention of the parties remains extant.

Thabile Fuhrmann and Buhle Duma

The
**LEGAL
500**

EMEA

**2022
RESULTS**

The Legal 500 EMEA 2022 recommended our **Dispute Resolution practice** in **Tier 1** for dispute resolution.

The Legal 500 EMEA 2022 recommended **Tim Fletcher** as a leading individual for dispute resolution.

The Legal 500 EMEA 2022 recommended **Kgosi Nkaiseng** and **Tim Smit** as next generation lawyers for dispute resolution.

The Legal 500 EMEA 2022 recommended **Rishaban Moodley, Jonathan Witts-Hewinson, Lucinde Rhodie, Clive Rumsey, Desmond Odhiambo, Mongezi Mpahlwa, Corné Lewis, Jackwell Feris** and **Kylene Weyers** for dispute resolution.

OUR TEAM

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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