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# Finance & Banking ALERT

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## Rectification of security cession agreements: How far does it go?

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In January 1999, First Strut (RF) Limited (First Strut) applied for a credit facility from Voltex Proprietary Limited (Voltex 2) for purposes of buying goods from Voltex 2. The form used for the credit facilities application (application form) contained a security cession clause (security cession) and also happened to be a form which was previously used by Aberdare Cables SA (Pty) Limited (Voltex 1) for a similar credit facilities application by First Strut in a previous transaction.

In 2013, First Strut was liquidated, and this prompted Voltex 2 to submit its proof of claims as a secured creditor to the liquidators. The liquidators accepted that the claim was secured by the security cession. Three years later, Prevance Bonds Proprietary Limited (Prevance), another of First Strut’s secured creditors, objected to the liquidation and distribution account under section 407 of the Companies Act 61 of 1973. It then emerged

that the security cession incorrectly reflected the registration number of Voltex 1 instead of the registration number of Voltex 2. Anxious to avoid losing its status as a secured creditor, Voltex 2 applied to the High Court for rectification of the recordal of its registration number on the application form. The High Court granted the application, but Prevance appealed the decision.

The SCA was asked to decide whether Voltex 2 had provided sufficient evidence to sustain a claim for rectification of the security cession in motion proceedings, and whether it was competent to order rectification of a document after the coming together of creditors (*concursum creditorum*).

The SCA explained that rectification of a written agreement is an available remedy to parties where a written agreement does not reflect the true intention of the contracting parties through a common mistake.



Cliffe Dekker Hofmeyr

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## Rectification of security cession agreements: How far does it go?

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With reference to *Spiller and Others v Lawrence* [1976] (1) SA 307 (N), it held that rectification does not amend the agreement between the parties, as that would amend their common intention and in effect devise a fresh pact for them. The aim is instead to bring the written document in line with the actual original consensus of the parties. The SCA further held that a third party may not interfere in the terms and conditions contained in an agreement between two parties as the agreement is between the parties involved alone and its terms operate between them and no one else. As a result, it dismissed Prevance's application on that point.

On the second issue, the SCA accepted that a *concursum creditorum* effectively freezes the rights of creditors as at the time a winding-up order is issued. But it rejected Prevance's argument that rectification would enable an otherwise unsecured creditor to establish a secured claim and thus unlawfully disturb the *concursum creditorum* established by liquidation. This was because from January 1999, there existed an enforceable claim which the security cession intended to secure, and about which the parties had agreed. The only trouble was that the written document, in the form of the application form, had misrecorded Voltex 2's registration number as creditor and cessionary. Since the

issue was the recordal of the security cession and not the contents of the security cession itself, the document could be rectified without offending the *concursum creditorum*.

The case presents a cautionary tale to all parties intending to incorporate security cessions in financing transactions. It invites greater care to every detail in the drafting process if parties are to avoid unnecessary litigation upon liquidation or escalation. Nevertheless, the SCA has reminded us that the courts will not take an overly formalistic view to the rectification of finance documents if the parties can show that they had a common intention which was not properly reduced to writing due to a common mistake.

Koketso Maake and Liso Zenani



## OUR TEAM

For more information about our Finance & Banking practice and services in South Africa and Kenya, please contact:



**Mashudu Mphafudi**

Practice Head & Director:  
Finance & Banking  
T +27 (0)11 562 1093  
E mashudu.mphafudi@cdhlegal.com



**Sammy Ndolo**

Managing Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E sammy.ndolo@cdhlegal.com



**Sabelo Goma**

Director:  
Finance & Banking  
T +27 (0)11 562 1602  
E sabelo.goma@cdhlegal.com



**Adnaan Kariem**

Director:  
Finance & Banking  
T +27 (0)21 405 6102  
E adnaan.kariem@cdhlegal.com



**Mbali Khumalo**

Director:  
Finance & Banking  
T +27 (0)11 562 1765  
E mbali.khumalo@cdhlegal.com



**Jacqueline King**

Director:  
Finance & Banking  
T +27 (0)11 562 1554  
E jacqueline.king@cdhlegal.com



**Pitso Kortjaas**

Director:  
Finance & Banking  
T +27 (0)11 562 1589  
E pitso.kortjaas@cdhlegal.com



**Phetole Modika**

Director:  
Finance & Banking  
T +27 (0)11 562 1625  
E phetole.modika@cdhlegal.com



**Deon Wilken**

Director:  
Finance & Banking  
T +27 (0)11 562 1096  
E deon.wilken@cdhlegal.com

**Kuda Chimedza**

Senior Associate:  
Finance & Banking  
T +27 (0)11 562 1737  
E kuda.chimedza@cdhlegal.com

**Koketso Maake**

Senior Associate:  
Finance & Banking  
T +27 (0)11 562 1618  
E koketso.maake@cdhlegal.com

**Ernest Maboko**

Senior Associate:  
Finance & Banking  
T +27 (0)11 562 1771  
E ernest.maboko@cdhlegal.com

**Brian Muchiri**

Senior Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E brian.muchiri@cdhlegal.com

**Stephanie Goncalves**

Professional Support Lawyer:  
Finance & Banking  
T +27 (0)11 562 1448  
E stephanie.goncalves@cdhlegal.com

**Michael Bailey**

Associate:  
Finance & Banking  
T +27 (0)11 562 1378  
E michael.bailey@cdhlegal.com

**Damaris Muia**

Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E damaris.muia@cdhlegal.com

**Thato Sentle**

Associate:  
Finance & Banking  
T +27 (0)11 562 1844  
E thato.sentle@cdhlegal.com

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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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**JOHANNESBURG**

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E [jhb@cdhlegal.com](mailto:jhb@cdhlegal.com)

**CAPE TOWN**

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E [ctn@cdhlegal.com](mailto:ctn@cdhlegal.com)

**NAIROBI**

Merchant Square, 3<sup>rd</sup> floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E [cdhkenya@cdhlegal.com](mailto:cdhkenya@cdhlegal.com)

**STELLENBOSCH**

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E [cdh Stellenbosch@cdhlegal.com](mailto:cdh Stellenbosch@cdhlegal.com)

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