



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 845/2019 and 898/2019

In the matter between:

SILOSTRAT (PTY) LIMITED

FIRST APPELLANT

THE STANDARD BANK OF

SOUTH AFRICA LIMITED

SECOND APPELLANT

SUIDWES LANDBOU (PTY) LIMITED

THIRD APPELLANT

and

PIETER HENDRIK STRYDOM NO

DEON MARIUS BOTHA NO

CAROLINE MMAKGOKOLO LEDWABA NO

(in their capacities as joint trustees of the Insolvent

Estate of Frederick Barend Christoffel Kirsten)

FIRST RESPONDENT

THE LAND & AGRICULTURAL

DEVELOPMENT BANK OF SOUTH AFRICA **SECOND RESPONDENT**

TECHNICHEM OESBESKERMING

(PTY) LIMITED

THIRD RESPONDENT

Neutral citation: *Silostrat (Pty) Ltd & Others v Pieter Hendrik Strydom N.O & Others* (case no 845/2019 and 898/2019) [2021] ZASCA 93 (25 June 2021)

Coram: PONNAN, DAMBUZA and NICHOLLS JJA, GORVEN and MABINDLA-BOQWANA AJJA

Heard: 15 February 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 25 June 2021.

Summary: Law of Contract – cession – interpretation of three competing cessions – principles of interpretation of legal documents applicable – importation of words not used in the cession not permitted.

Rectification of cession – insufficient evidence to prove mistake common to both parties to the cession for purposes of a claim for rectification thereof.

Insolvency - Institution of proceedings against the trustees of the insolvent estate where a debt had been proved and admitted by the trustees improper.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Janse van Nieuwenhuizen J, sitting as court of first instance):

The appeal in each instance by:

- (i) the first appellant, Silostrat (Pty) Ltd, against paragraphs 2 and 3;
- (ii) the second appellant, Standard Bank, against paragraph 1; and
- (iii) the third appellant, Suidwes Landbou (Pty) Ltd, against paragraph 6;

of the order of the court below is dismissed with costs, including those of two counsel where so employed.

JUDGMENT

Dambuza JA (Ponnan, Nicholls JJA and Gorven and Mabindla-Boqwana AJJA concurring)

Introduction

[1] Central to this appeal is the validity and ranking of three cessions executed by Mr Frederick Christoffel Kirsten (Kirsten), whose estate was sequestrated in August 2016. The three cessionaries were: the second appellant, Standard Bank of South Africa Limited (Standard Bank or the bank), the third appellant, Suidwes Landbou (Pty) Ltd, a dealer in agricultural commodities (Suidwes), which had ceded a portion of its book debt to the second respondent, the Land and Agricultural Development Bank of South Africa (Land Bank), and the fifth respondent, Technichem Oesbeskerming (Pty) Ltd (Technichem), a supplier of agricultural chemicals. In the high court each of the three cessionaries, relying on

their respective cessions, asserted an entitlement to the proceeds of Kirsten's 2015 maize crop. The first appellant, Silostrat, a grain trader, also laid claim to those funds, based on contracts of sale for the 2015 maize produce, which it had concluded with Kirsten at the start of the 2015/16 maize production season.

[2] The high court:

1. Dismissed Standard Bank's claim against each of the trustees of Kirsten's insolvent estate, Suidwes and the Landbank, with costs including those of two counsel.
2. Dismissed Silostrat's conditional counterclaim against Standard Bank with costs including those of two counsel.
3. Dismissed Silostrat's conditional counterclaim against Suidwes with costs including those of two counsel.
4. Declared Technichem's cession dated 5 October 2014 valid and enforceable.
5. Held that Technichem's cession predates the cessions relied upon by Suidwes and the Landbank in respect of Kirsten's 2015 crop income.
6. Ordered Suidwes to pay Technichem's costs.

Standard Bank appeals against paragraph (1) of the order of the high court, Silostrat against paragraphs (2) and (3) and Suidwes against paragraph (6). In each instance the appeal is with the leave of the high court.

Background

[3] Until his estate was sequestrated in 2016, Kirsten was a widely respected maize, sunflower and cattle farmer in the North West Province, having taken over the farming enterprise from his father, and extended it by renting some of the neighbouring farms. In the course of his farming operations, Kirsten held several bank accounts and enjoyed credit facilities with Standard Bank. He also enjoyed credit facilities with Suidwes and Technichem. As security for these credit facilities, Kirsten executed deeds of cession in favour of his creditors, Standard

Bank, Suidwes and Technichem. He also registered a mortgage bond in favour of Standard Bank and a General Notarial Covering Bond in favour of Suidwes.

[4] From October 2014, Kirsten defaulted on his loan repayments. He also failed to deliver the 2015 maize crop, which Silostrat had bought from him. On 13 August 2015, Standard Bank instituted proceedings against Kirsten and the other parties herein, asserting its entitlement to payment of the balance outstanding in Kirsten's loan account from the proceeds of his 2015 maize crop. On 29 April 2016, his estate was provisionally sequestrated. This triggered a contest amongst the cessionaries. On 31 August 2016, a final order of sequestration was granted against Kirsten. After his sequestration, Kirsten was substituted by his three joint trustees (the Trustees) in the proceedings before the court below. They are collectively cited as the first respondent in the present appeal.

The Standard Bank claim

[5] As a client of the bank, Kirsten held an overdraft and several loan accounts. From 2009, his credit profile was reviewed by the bank during September of each year. In 2011, Mr Lood Mathee (Mathee), a relationship manager with the bank, conducted the review of Kirsten's bank accounts. At that time, Kirsten's indebtedness to Standard Bank was R6.5 million. Kirsten had applied for an increase in his overdraft facility to R 8 million. His financial position was assessed as 'extremely strong' and his farming operation as 'outstanding'. At that stage, the bank held no security for the line of credit afforded to Kirsten. The increase sought was duly approved on condition that he execute a deed of cession in favour of the bank in respect of his crop income and provide proof of the maize that he then held in the silos. It was recorded in his bank file that he owed R16 432 428 to Suidwes and R5 836 988 to another agricultural co-operative,

Senwes Limited. Mathee had to investigate and confirm that Kirsten had paid these moneys to the respective institutions.

[6] On 6 October 2011, Mathee visited the Suidwes premises where he discussed Kirsten's account with the Suidwes relationship manager, Mr Louis Botha. Botha advised that Kirsten still owed R11,5 million to Suidwes on a revolving credit loan with a credit limit of R15 million. Mathee recorded this information in Kirsten's file, together with the following:

'With above in mind he will definitely again make use of Suidwes' assistance for the next season on the Revolving credit loan. We therefore will not get that confirmation that he will not make use of any credit facilities at the Co-op. He does not owe Senwes any funds, but they also make a production facility of R4 million available'.

[7] On 22 November 2011, Kirsten executed a Deed of Cession in favour of Standard Bank. In the relevant clauses the cession provided:

1 Giving of cession

I, Frederik Barend Christoffel Kirsten (700407 5240 080) ("Cedent") cede and transfer in favour of The Standard Bank of South Africa Limited ("the Bank"), or anyone who takes transfer of the Bank's rights under this cession, all the Cedent's rights in and to all income and/or moneys due and to become due to the Cedent by agricultural producers ("Producers") in respect of Maize supplied by the Cedent and/or agricultural produce ("produce") purchased from Producers and sold to buyers of the produce from time to time, upon the terms and conditions set out in this agreement.

2 Amount secured under this cession

The maximum amount secured under this cession is unlimited.

3 Continuing covering security

This cession will be a continuing covering security for all amounts (including interest, collection cost, default administration charges and other cost and fees permissible in terms of the underlying debt and value added tax) which the Cedent now or in the future may owe to

the Bank for whatever reason whether directly, contingently as surety or otherwise (“debts”) even if the debts are temporarily settled at any time . . .’

[8] Prior to the execution of this cession, on 16 November 2011, Mathee wrote to Botha of Suidwes, advising that Kirsten had pledged and ceded to Standard Bank all crops and all right, title and interest and claims arising from the proceeds thereof. On 24 November 2011 Mr Olivier of Suidwes responded that Suidwes had approved Kirsten’s application for a revolving credit against cession of his crop and that Standard Bank could obtain a cession for surplus production.

[9] Over time Kirsten’s indebtedness to the bank continued to increase steadily. By October 2012, the balance outstanding on his overdraft facility was R19 million. But the bank kept approving further loan applications. During the latter part of 2013, a second production loan was advanced to Kirsten. This loan was to be repaid in full by 31 August 2014. It was approved on condition that Kirsten would provide a ‘cession over [his] crop and crop proceeds’. However, no cession, other than the 2011 cession, was executed by Kirsten in favour of the bank. A further ‘long term loan’ of R20 million, payable over a 10 year period was approved in favour of Kirsten, on condition that he would register first mortgage bonds in favour of the bank over two of his farms.

[10] During the period 17 September 2013 to 22 December 2014, Standard Bank concluded six instalment sale agreements with Kirsten in relation to the purchase of farming implements and vehicles. The value of these loan agreements was R79 367 633.04. The bank’s records revealed that the relevant bank officials were of the impression that the bank was in possession of an ‘unrestricted cession of [Kirsten’s] crops and crop income’ executed by him in favour of the bank as security for his credit facilities.

[11] During November 2014, the bank approved a production loan application of R21 million in Kirsten's favour. This loan was intended for use in financing production costs in respect of the 2014 to 2015 maize production season. Part of this loan amount was a roll-over of the unpaid portion of the loan from the previous season (2013).¹ The loan agreement between Kirsten and the bank provided that Kirsten would provide collateral security in the form of an 'unrestricted cession of crops and crop income' together with an unrestricted cession of a comprehensive crop insurance, and an 'input cost insurance contract'. On 27 November 2014 Standard Bank extended to Kirsten, an overdraft facility with a maximum limit of R5 000 000.00.² In the overdraft agreement it was recorded that under the November 2011 cession the bank was in possession of collateral security in the form of 'monies due and to become due [to Kirsten]'.

The Silostrat claim

[12] To ensure payment of the 2014/2015 production loan, Kirsten sold 35 000 tons of his 2015 maize produce to Silostrat. This arrangement was implemented through a business relationship between Standard Bank and Quattro-Vest (Pty) Ltd, an entity which conducted the business of 'arranging' finance for farmers, among other things.

[13] Under this arrangement, Kirsten sold his anticipated 2015 maize produce to Silostrat in three forward contracts, concluded during November 2014, January 2015 and February 2015 respectively. In terms of the first of these agreements the maize was sold at a variable purchase price, pegged to the SAFEX maize price

¹ Three loan agreements were concluded between Kirsten and the Bank on 7 November 2014, 10 November 2014 and 11 November 2014 for R68 400 000.00, R4 985 500.00, and R9 244 900.00 respectively.

² In this regard it was recorded that Standard Bank held as collateral, a cession of moneys 'due and to become due'.

as at 31 July 2015. In the other two contracts the purchase price was fixed. Kirsten undertook to deliver the maize before July 2015.

[14] Silostrat immediately sold the maize bought from Kirsten by way of ‘back-to-back’ agreements on the SAFEX commodities exchange, and, consistent with the contracts concluded with Kirsten, Silostrat was to deliver the maize on 31 July 2015; except that Kirsten never delivered the maize to it.

[15] During May 2015, as Kirsten struggled to meet his obligations under the various business transactions it became apparent that his creditors were intent on laying claim to the proceeds of his 2015 maize produce. It turned out that during the same period over which Kirsten had obtained loans and other credit facilities from the Standard Bank and Suidwes, he had secured similar credit facilities with Technichem for amounts running into millions of Rand.

[16] When Silostrat could not perform its obligations under the back-to-back contracts because of Kirsten’s non-performance, it resorted to ‘buying in’ maize in order to fulfil its obligations under those contracts. It secured replacement maize at a higher price than that contracted for with Kirsten, and incurred purchase costs of R35 288 000.00.

The Suidwes (and the Land Bank) claims

[17] Kirsten’s relationship with Suidwes also went as far back as October 2009, when he executed the first of what was to be annual cessions in favour of Suidwes. The first two clauses thereof provided:

‘Die kliënt seeder hiermee aan Suidwes, wat die sessie aanvaar, al die kliënt se reg, titel en belang in die totale opbrengs van alle oeste wat gedurende die 2010 produksieseisoen geproduseer word, van watter aard total ook al en waar ook al verbou, wat –

1.1 reeds deur die kliënt ingesamel, maar nog nie te gelde gemaak is nie;

- 1.2 reeds aangeplant is, maar wat nog nie op die land is; en
- 1.3 alle oeste wat die kliënt in die toekoms mag aanplant.
- 2 Die sessie dien as sekuriteit vir die behoorlike betaling deur die kliënt aan Suidwes van alle gelde wat tans aan Suidwes verskuldig is of in die toekoms verskuldig mag word ontstaande uit watter skuldoorsaak ook al’.

[18] In terms of the second cession executed by Kirsten in favour Suidwes on 15 October 2010, he ceded to Suidwes ‘all future crops which [he] might in the future plant’. Clause 3 of that cession provided that it would:

‘. . . bly van krag totdat alle bedrae wat aan Suidwes verskuldig is deur die kliënt betaal aan is en Suidwes, na betaling . . . die sessie skriftelik gekanselleer het.’

Further cessions were executed in November 2011 and in 2013.

[19] In August 2014, Suidwes concluded a service level agreement with the Land Bank in terms of which it sold and ceded part of its book debts and related security to the Land Bank. A portion of Kirsten’s debt with Suidwes was sold to the Land Bank, while another portion remained with Suidwes. Hence the Land Bank’s involvement in these proceedings. On 28 October 2014, Kirsten executed the last of the annual cessions in favour of Suidwes, ceding his right, title and interest to the crop produced during the 2015 production season.

[20] During May 2015, Suidwes demanded from Kirsten delivery of the 2015 maize crop produce. Subsequently, Kirsten sold 22 619.52 tons of his 2015 maize crop to Africum, a wholly owned subsidiary of Suidwes. The maize was delivered to Suidwes’ silos during the period between 14 July 2015 and 21 September 2015. Africum sold the maize to third parties. The proceeds thereof were paid to Suidwes, who used some of it to credit Kirsten’s debt due to Suidwes, and the balance to settle Kirsten’s debt with the Land Bank.

The Technichem claim

[21] During the same period as the conclusion of the transactions set out above (2014), Kirsten bought agricultural chemicals from Technichem under a credit agreement. As security for this indebtedness Kirsten executed a Deed of Cession dated 5 October 2014, in terms of which he ceded all of his rights to the income from his 2015 crop produce to Technichem. In the relevant clause the Technichem Deed of Cession provided:

‘As sekuriteit vir betaling van enige of alle bedrae geld wat die aansoeker aan TECHNICHEM verskuldiging is of mag raak, ongeag wat die skuldoorsaak daarvan is, sedeer en dra en maak die aansoeker hierby oor aan en ten gunste van TECHNICHEM al die aansoeker se reg, titel, belang en aanspraak in en op alle oesopbrengste van die aansoeker verbou het of in die toekoms mag verbou. Verder geskied sodanige sessie op die volgende voorwaardes:

Die AANSOEKER verklaar en bevestig dat hy gesamentlik en/of afsonderlik die volgende gewasse aangeplant en verbou het en/of van voorneme is om dit te bou, gesamentlik en/of afsonderlik die eienaar daarvan is en dat dit nie aan enige ander party of instansie verpand is, hetsy by ooreenkoms of statuter nie. . . .’

[22] It was not in dispute that the Technichem cession, having been executed 19 days prior to the 2014 Suidwes cession, ranked before the latter cession. It is in this context that Suidwes relied on its earlier cessions which, it maintained, were evergreen. I deal with this contention later in this judgment. By July 2015, an amount of R8 062 498,94 was owing by Kirsten on his credit account with Technichem.

The sequestration proceedings

[23] At the time of sequestration Kirsten’s liabilities exceeded his assets by approximately R44 751 458,20. Standard Bank, the Land Bank and Technichem proved their claims against his insolvent estate.³ Silostrat’s claim against the

³ The relevant proven claims against the estate were: Standard Bank in the amount of R 73 072 098,93, Suidwes – R 87 350,89, Land Bank – R67 17 234, 02, Silostrat R35 288 000,00, and Technichem – R7 665 946,44.

insolvent estate was conceded by the trustees during the course of the trial in the high court and judgment was entered by agreement in respect thereof. Nevertheless, Silostrat persisted with its counter claims against Standard Bank and Suidwes.

Proceedings before the court a quo

[24] On 13 August 2015, Standard Bank instituted proceedings against Kirsten, Suidwes, and Silostrat for payment of the proceeds of Kirsten's 2015 crop produce. For this claim Standard Bank relied on the cession executed by Kirsten in its favour on 22 November 2011. The Trustees were subsequently substituted in his place. Later, the Land Bank and Technichem were joined in the proceedings.

[25] As against Kirsten, Standard Bank claimed payment of the moneys advanced pursuant to the conclusion of the third production loan agreement concluded on 10 November 2014, for which the bank held, as security, the deed of cession executed by Kirsten in its favour on 22 November 2011. The bank contended that, properly interpreted, that cession meant that Kirsten had ceded and transferred to it all of his rights in and to his entire maize crop, and to all income due and to become due to him in respect of maize sold and supplied by him. It asserted that the amount secured under the cession was unlimited and that the cession was a continuing covering security for all amounts owed by Kirsten to the bank at the time of its execution and in the future.

[26] As an alternative, the bank contended that the failure to record in the Deed of Cession the common intention held by itself and Kirsten as set out above, was occasioned by a common and bona fide error in the drafting of the cession and that the cession therefore fell to be rectified to accord with the following intended meaning:

‘1 Giving of cession

I Frederik Barend Christoffel Kirsten (700407 5240 080) (“Cedent”) cede and transfer in favour of the Standard Bank of South Africa Limited (“the Bank”), or anyone who takes transfer of the Bank’s rights under this cession, *all the Cedent’s rights in and to the Cedent’s entire Maize crop and all income and/or moneys due and to become due to the Cedent in respect of Maize supplied and sold by the Cedent and/or agricultural produce (“produce”) purchased from agricultural producers and sold to buyers of the produce from time to time, upon the terms and conditions set out in this agreement.*’ (Emphasis added.)

[27] The bank maintained that the cession should be interpreted to mean that it was entitled to all the proceeds of Kirsten’s 2015 and 2016 maize crop harvest. It sought a declarator that its cession (as rectified, if necessary) was valid and enforceable, and that it pre-dated the cessions executed by Kirsten in favour of Suidwes and Technichem. It contended that its cession trumped the others and therefore all proceeds realised from Kirsten’s 2015 maize produce should be paid to it. However, the bank later accepted that the 2016 produce fell to be dealt with in the insolvent estate and abandoned its claim in that regard.

[28] In their plea, the Trustees contended that the interpretation of the cession advanced by Standard Bank was legally incompetent and that the Standard Bank cession was void for vagueness, a view shared by all the other parties. A further contention by the Trustees was that it was not possible to determine from the cession which maize crop or income was being ceded. Alternatively, the ceded rights were limited to Kirsten’s rights against agricultural producers in respect of maize supplied to them, ie, the rights ceded in the cession had nothing to do with the proceeds of maize sold to grain dealers such as Silostrat and Suidwes.

[29] Suidwes and the Land Bank filed similar pleas. In respect of the Standard Bank claim they asserted that from 2009 until 2014 Kirsten provided Suidwes

with annual evergreen cessions which trumped those he executed in favour of Standard Bank and Technichem.

[30] Suidwes and the Land Bank also asserted their rights flowing from the General Notarial Bond registered by Kirsten in favour of Suidwes over Kirsten's movable property, and ceded to the Land Bank on the same day of its registration. The Notarial Bond had been perfected by agreement between Kirsten and Suidwes. It was contended that the General Notarial Bond included Kirsten's 2015 maize produce. This argument was, however, not pursued on appeal.

[31] Suidwes and the Land Bank further pleaded that although the maize was delivered by Kirsten to the Suidwes silos and held by Suidwes in pledge on behalf of both entities, it was then sold by Kirsten to Africum and the latter sold it to third parties. The proceeds were paid to Suidwes in settlement of Kirsten's debts to Suidwes and the Land Bank. Incidentally, the payment made by Africum to Suidwes became the subject of a separate action instituted by the Trustees of Kirsten's insolvent estate against Africum.⁴

[32] Silostrat responded to the Standard Bank claim with its own claim against Kirsten's insolvent estate, for payment of the R35 288 000.00, which it had suffered as a result of Kirsten's breach of contract in failing to deliver the 2015 maize produce contracted for in the three forward agreements. It also asserted a conditional delictual counter-claim against Standard Bank based on alleged negligence by the bank in failing to ensure that the cession provided by Kirsten would protect it (Silostrat) in the event of Kirsten's failure to deliver the 35 000 tons of maize.

⁴ Standard Bank was also party to that action.

[33] As an alternative to that conditional counterclaim, Silostrat claimed delictual damages against Suidwes for ‘appropriation’ and disposal of the 22 619.52 tons of maize delivered by Kirsten to its silos. Silostrat alleged that there was a legal duty⁵ on Suidwes not to interfere with its contractual rights under the three forward purchase agreements. It contended that by accepting delivery of Kirsten’s maize and disposing of it with full knowledge of Silostrat’s contractual rights, Suidwes usurped the maize and appropriated it to itself.⁶

[34] In its plea to the Standard Bank claim, Technichem asserted its entitlement to the proceeds of Kirsten’s 2015 maize produce on the basis of the unpaid balance of Kirsten’s indebtedness to it amounting to R7 665 946.44, and its cession. Technichem disputed Standard Bank’s claim as pleaded under the 2011 cession and maintained that its cession trumped both the Standard Bank and the Suidwes cessions, as well as the General Notarial Bond relied on by Suidwes. However, it also conceded the right of the Trustees to the proceeds of Kirsten’s 2016 harvest.

Judgment of the high court

[35] In dismissing Standard Bank’s claim, the high court found that the interpretation contended for by the bank on the wording of its cession was untenable. The learned judge further found that, having proved its claim against the insolvent estate in the sequestration proceedings, Standard Bank had no cause of action in relation to the 2015 maize crop. Further, no proper basis had been laid for rectification of the cession as the bank had failed to establish that Kirsten and the bank were labouring under a common mistake when the cession was

⁵ Silostrat employed the expression ‘duty of care’, which conduces to confusion and in our legal setting is inherently misleading (see by way of example: *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality* [2017] ZASCA 77; [2017] 3 All SA 382 (SCA); 2018 (1) SA 391 (SCA) para 25).

⁶ These claims were conditional upon any dividend that would be paid to Silostrat by the Trustees.

executed. The learned judge held that, in any event, rectification of the cession subsequent to the establishment of the *concursum creditorum* would place Standard Bank in a stronger position than it occupied at *concursum creditorum*, to the prejudice of the other creditors.

[36] The high court rejected the interpretation of Suidwes' cessions as evergreen. It found that each cession related to the crop produced in a specific season. As to the Suidwes 2014 cession, the court held that it ranked after the Technichem cession because it was executed later. With regard to the perfected General Notarial Bond, it found that, due to the sale by Suidwes of part of its book debt to the Land Bank, neither entity held any security from Kirsten.

[37] Silostrat's forward agreements were upheld by the high court (in line with the concession made by the Trustees). This meant that Silostrat's claim would be administered in the insolvent estate. However, as already stated, Silostrat persisted with its conditional counter claims, even on appeal.

[38] With regard to its delictual claim against Suidwes, the court found that, contrary to the allegation by Silostrat, Suidwes had not appropriated Kirsten's maize. Instead, Kirsten had sold the maize to Africum 'on his own folio number in his own name'.

[39] The high court upheld Technichem's claim, having found that its cession, executed by Kirsten on 5 October 2014, predated the Suidwes cession. It is noteworthy that none of the parties have sought to assail this conclusion on appeal. The court then awarded the costs incurred by Technichem in the application against Suidwes.

The Standard Bank appeal

[40] I first consider the submission made on behalf of the Trustees and Suidwes/Land Bank that Standard Bank had no cause of action against them. The argument was that, given that the bank had proved its claim against the insolvent estate, its claim in the summons for the same debt against the insolvent estate, Suidwes and Land Bank was unsustainable.

[41] The bank did not deny that its cession was *in securitatem debiti*. It had held the cession pending the repayment of the moneys advanced to Kirsten. Once it had proved its claim against the insolvent estate, it fell upon the Trustees to deal therewith in the course of the administration of the insolvent estate. The claim had clearly not been disputed by the Trustees. The institution of proceedings against the insolvent estate and the other parties was contrary to established principles in the Law of Insolvency. The proceedings instituted by the Trustees against Africum for payment of the same proceeds clearly illustrate this point.

[42] Regarding the validity and ranking of its cession, Standard Bank contended that the high court's interpretation of its cession was unbusinesslike, that it overemphasised the grammatical and objective meaning of the term 'agricultural producers' rather than considering the purpose of the cession and the context in which it was executed, and that the court's interpretation resulted in an absurdity. It was submitted on behalf of Standard Bank that there was no evidence that any income was due to Kirsten from agricultural producers to whom he had sold the maize. The only contemplated sales were to grain dealers, it was argued. Consequently, the interpretation that took into account the reference to agricultural producers in the Standard Bank cession was illogical.

[43] The interpretation advanced by the bank runs contrary to the established approach to interpretation of legal documents that has been repeatedly

emphasised by our courts. Central to the interpretation of legal documents is the principle that meaning must be attributed to the words used by the parties in the document. Although evidence of context is admissible as an interpretative aid such evidence may not be led to alter the meaning of the clear and unambiguous words used in an agreement.⁷ The interpretation advanced on behalf of the bank meant that the words used in the cession would have to be disregarded and other words substituted in their place.

[44] The bulk of the evidence led on behalf of Standard Bank pertained to the conditions that were stipulated by the bank for the approval of Kirsten's applications for increased credit facilities. It was not disputed that in some instances the conditions for approval of the credit facilities included that Kirsten would provide, as security for the loans and overdraft facilities, his 'crop and crop proceeds'. The evidence of Mathee and Ms Winnie Pienaar (Pienaar), the bank's credit manager who approved Kirsten's overdraft facility in November 2011, regarding those conditions, was not in dispute.

[45] However, that was never included in the cession that was executed by Kirsten in favour of the bank. The Deed of Cession only provided for the cession of Kirsten's rights:

'in and to all income and/or moneys due and to become due to the Cedent by agricultural producers ("Producers") in respect of Maize supplied by the Cedent and/or agricultural produce ("produce") purchased from Producers and sold to buyers of produce from time to time, upon the terms and conditions set out in this agreement'. (Emphasis added.)

[46] There was nothing insensible or unbusinesslike about the limitation of the expected income to that which would be due to Kirsten 'by agricultural

⁷ *KPMG Chartered Accountants (SA) v Securefin Ltd* [2009] ZASCA 7; [2009] 2 All SA 523, 2009 (4) SA 399 (SCA) para 39; *Natal Joint Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 602-610; *City of Tshwane Municipality v Blair Atholl Homeowners Association* fn 7 above.

producers'. The definition of the word 'produce' is: 'make, manufacture or create';⁸ and its derivative, 'producer' is defined as: 'one who produces: especially agricultural products or manufactures crude materials into articles of use'.⁹ The fact that Kirsten was an agricultural producer in his own right did not render unbusinesslike or absurd the reference to him purchasing maize or agricultural produce from other agricultural producers for the purpose of onselling it. The submission on behalf of Standard Bank that the words used in the cession had to be interpreted to include 'expressly, impliedly or tacitly, that Kirsten ceded to the bank his entire maize crop and all rights thereto, including the right to the income due or to become due' was untenable. The high court was correct in its interpretation of the Standard Bank cession.

Rectification

[47] To meet the onus of proving the alleged mistake common to both parties to the cession, Standard Bank relied on the evidence of Mathee and Pienaar. However, neither of them tendered admissible evidence in support of a case of rectification. Neither of them had the authority to decide on the wording of the cession nor any contract on behalf of the bank. Mathee viewed himself as merely a conduit, who only served to facilitate Kirsten's signature on the cession. Kirsten did not testify. It is thus difficult to see how, absent his evidence, the bank could establish a mistake common to the parties. According to Mathee, the Deed of Cession was drafted by officials of the Standard Bank legal department in Johannesburg. Neither Kirsten nor Mathee read it before it was signed. Mathee's insistence that, in as far as it was not recorded in the Deed of Cession that Kirsten had ceded his 'crop and crop proceeds', the intention of the contracting parties had not been correctly recorded, was plainly conjecture.

⁸ Concise Oxford English Dictionary, 2002.

⁹ Merriam Webster Dictionary.

[48] Consequently there was no factual basis to justify rectification. The high court's dismissal of the application for rectification was correct. And its finding that Standard Bank had no valid cession in respect of Kirsten's crop income is unassailable. That being so it is unnecessary to consider the issue of rectification post *concursum creditorum*.

[49] In any event, when Standard Bank approved Kirsten's 2011 production loan and accepted his cession, it was aware of the earlier cession executed by Kirsten in favour of Suidwes, and was also aware that Suidwes had misgivings about the later cession. Hence, Standard Bank had accepted that its cession could only obtain in relation to the Kirsten's surplus production.

Silostrat's appeal

Delictual claim against Standard Bank

[50] In Silostrat's conditional counterclaim, it alleged that the Bank breached a legal duty owed to it. The legal duty, so it was contended, centred on the Bank's failure to ensure that Kirsten's 2015 maize crop was unencumbered by the Suidwes cession, thereby preventing Silostrat suffering damages. Silostrat's conditional counterclaim, which was dependent upon two conditions, was framed as follows:

'In the event of the Court finding that:

- (i) [the] rights acquired by [Suidwes] in terms of a Deed of Cession . . . trumped and/or supersede [Standard Bank's] rights in respect of the Deed of cession [executed by Kirsten in favour of Standard Bank], and
- (ii) the sale of 35,000 tons of maize by Kirsten to [Silostrat] is unenforceable and/or void ab initio . . .'

[51] The high court found that whilst the first condition was met, the second was not – hence Silostrat's appeal. Important in this regard, the sale agreements were concluded between Silostrat and Kirsten. Neither Silostrat, nor the Trustees

or Kirsten contend that these sale agreements are void and/or unenforceable. Quite the contrary, at the commencement of the trial, and by agreement, the Trustees admitted Silostrat's claim. Judgment was accordingly granted in favour of Silostrat against the insolvent estate, in the same amount as that claimed against the Bank in the conditional counterclaim. This occurred on the basis that: (i) the three sale agreements were validly concluded; (ii) Kirsten breached the three sale agreements by failing to deliver the 35 000 tons of maize to Silostrat; and (iii) Silostrat suffered damages because of Kirsten's breach of the three sale agreements.

[52] Moreover, aside from the agreement reached between the trustees and Silostrat, the evidence of the witnesses for Silostrat established that: (i) the sale agreements were valid and enforceable and Silostrat would not have been entitled to terminate them at any point prior to 31 July 2015, being the last day for delivery by Kirsten; (ii) any assertion that Silostrat could have closed out its position early would have been premature because Kirsten had a contractual right to make delivery up until 31 July 2015. In any event, at all times Silostrat sought specific performance under the three sale agreements and, even after 31 July 2015, it continued to seek delivery, based on Kirsten's assurances. It follows that the high court cannot be faulted in its conclusion that the second condition had not been met.

[53] Insofar as Silostrat's counterclaim against Suidwes is concerned: the appeal by Silostrat against paragraph 3 of the High Court's order is conditional upon the success of Standard Bank's appeal. If Standard Bank's appeal fails, as I have shown it must, Silostrat's appeal must follow that result.

The Suidwes Appeal

[54] The issues that arose in the Suidwes appeal have been considered above. I may only reiterate that in the light of the conclusion that the Standard Bank cession did not relate to the proceeds of Kirsten's produce, it is unnecessary to determine the ranking thereof as against the Suidwes cession.

[55] With regard to the Suidwes and Technichem cessions it is indisputable that the Technichem cession, having been executed on 5 October 2014, predated the Suidwes cession, which was executed on 24 October 2014. It was in this context that Suidwes maintained that its earlier cessions, executed between 2009 and 2013, were evergreen. The finding of the high court that they were not evergreen was not contested.

Against the costs order

[56] The basis of the Suidwes appeal against the costs order awarded against it was that the dispute between itself and Technichem was limited. Therefore, the order as to costs should have been limited to the third party proceedings only. Also the costs order should have been made against Standard Bank as well, it was argued.

[57] However, although the issues between Technichem and Suidwes were limited to the ranking of the respective cessions, Technichem had to participate in all the proceedings in order to protect its interests. The manner in which the litigation unfolded was relevant to the question of costs. The proceedings in the high court started with Standard Bank's claim against the Trustees and Suidwes together with the Land Bank. However, it became necessary for the court to consider all three cessions. It would appear that although the contest for the primacy of each of the cessions was between the three entities, the fact that Standard Bank had only instituted a claim against the Trustees and Suidwes/Land

Bank, and not against Technichem, must have weighed heavily with the court when considering the issue of costs. Hence there was no costs order against the bank.

[58] It was Technichem that had instituted proceedings against Suidwes insofar as the ranking of the cessions was concerned. After Silostrat had been joined by agreement between the two parties it (Silostrat) counterclaimed against the Trustees, Standard Bank and Suidwes. The trial lasted 10 days. As stated, Techichem had to be present throughout the proceedings in the high court to protect its interests. There is no valid basis on which this Court can interfere with the exercise of the high court's discretion in awarding costs against Suidwes in these circumstances.

[59] In the result:

The appeal in each instance by:

- (i) the first appellant, Silostrat (Pty) Ltd, against paragraphs 2 and 3;
- (ii) the second appellant, Standard Bank, against paragraph 1; and
- (iii) the third appellant, Suidwes Landbou (Pty) Ltd, against paragraph 6;

of the order of the court below is dismissed with costs, including those of two counsel where so employed.



DAMBUZA N
JUDGE OF APPEAL

Appearances:

- For the First Appellant: J G Bergenthuin SC with B Bergenthuin
Instructed by: Basson Olivier & Coetzee Attorneys,
Pretoria
Du Plooy Attorneys, Bloemfontein
- For the Second Appellant: K W Lüderitz SC with G W Amm
Instructed by: Norton Rose Fulbright South Africa Inc,
Sandton
Webbers Attorneys, Bloemfontein
- For the Third Appellant: J P Daniels SC with J Smit
Instructed by: Cliffe Dekker Hofmeyr Inc, Sandton
Pieter Skein Attorneys, Bloemfontein
- For the First Respondents: F H Terblanche SC with H Fourie SC and
M G Mokwena
Instructed by: Loubser & Loubser Attorneys, Pretoria
EG Cooper Majiedt Inc, Bloemfontein
- For the Second Respondent: MP van der Merwe SC with N Komar
Instructed by: Ningiza Horner Inc, Petoria
Matsepes Inc, Bloemfontein
- For the Third Respondent: J J Pretorius
Instructed by: Gerrit Coetzee Inc, Potchefstroom
Horn and Van Rensburg Attorneys,
Bloemfontein.