IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Case Number: 64891/2015

9/5/2019

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LTD — Plaintiff

And

PIETER HENDRIK STRYDOM N.O. — First Defendant

DEON MARIUS BOTHA N.O.

CAROLINE MMAKGOKOLO LEDWABA N.O.

[In their capacities as joint provisional trustees of the
Insolvent Estate Frederick Barend Christoffel Kirsten]

SUIDWES LANDBOU (PTY) LTD — Second Defendant

SILOSTRAT (PTY) LTD — Third Defendant

THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA — Fourth Defendant

TECHNICHEM OESBESKERMING (PTY) LTD — Fifth Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

INTRODUCTION

[1] This matter centres around the extensive farming operations of a maize producer, Mr Frederick Barend Christoffel Kirsten ("Kirsten") in the Makwassie area, North West Province. Kirsten was well known in the area as a successful farmer and was by all accounts a revered member of the farming community.

[2] Due to his success as a maize producer and the extensive scale of his operations, Kirsten had easy access to credit facilities at various financial institutions.

[3] For reasons that do not appear from the evidence, Kirsten's financial position took a turn for the worse during 2015. This unfortunate event led to the sequestration of Kirsten in terms of a provisional sequestration order on 29 April 2016 and thereafter a final sequestration order issued on 31 August 2016.

[4] Kirsten's financial demise resulted in massive losses for all the parties involved in the present litigation. It appears that Kirsten executed a variety of cessions in favour of different entities in respect of the income of his 2015 maize crop.

[5] The validity of the different cessions executed by Kirsten forms the crux of the dispute between the parties.

PARTIES

[6] The plaintiff is **THE STANDARD BANK OF SOUTH AFRICA LTD**, a public company with limited liability and a registered bank ("Standard Bank"). Standard Bank advanced production credit to the tune of R 79 million to

Kirsten. Standard Bank relies on a Deed of Cession dated 22 November 2011 in support of its claim to the proceeds of Kirsten's 2015 maize crop.

[7] The first defendant is the duly appointed **TRUSTEES** of the Insolvent Estate of Kirsten ("the Trustees"). The Trustees oppose the relief claimed by Standard Bank.

[8] The second defendant is **SUIDWES LANDBOU (PTY) LTD**, a private company of limited liability with its principal place of business at Leeudoringstad, Northwest Province ("Suidwes"). Suidwes is an agricultural company that offers a variety of products and services in the agricultural industry. Suidwes advanced credit to Kirsten and the outstanding balance at the time of his sequestration was in the region R 129 million. Suidwes relies on a variety of Deeds of Cession, a General Notarial Bond and a perfection agreement in support of their claim to the income of the 2015 maize crop.

[9] The third defendant is **SILOSTRAT (PTY) LTD** a private company with limited liability ("Silostrat"). Silostrat specialises in the trade of grain products and entered into three forward contracts with Kirsten in respect of 35 000 tons of his 2015 maize crop. Kirsten failed to deliver in terms of the contracts and Silostrat instituted a claim against the Trustees for breach of contract. Silostrat also instituted conditional counterclaims against Standard Bank and Suidwes, respectively.

[10] The fourth defendant is **LAND & AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA** ('the Landbank"). Suidwes ceded its book debts, including the debt of Kirsten to the Landbank.

[11] The fifth defendant is **TECHNICHEM OESBESKERMING (PTY) LTD** a private company with limited liability ("Technichem"). Technichem sold and delivered agricultural chemicals to Kirsten. Kirsten did not pay for the products and owes Technichem an amount of R 7 665 946, 44. Technichem relies on a Deed of Cession signed by Kirsten on 5 October 2014 in support of its claim to the proceeds of the 2015 maize crop.

RELIEF

Standard Bank

[12] Standard Bank claims the following relief:

[12.1] rectification of clause 1 of the deed of cession, dated 22 November 2011, signed, executed and concluded by Kirsten in its favour;

[12.2] an order declaring that it's cession:

[12.2.1] is valid and enforceable;

[12.2.2] pre-dates the deeds of cession of Suidwes and Technichem;

[12.3] an order that it is entitled to all income and/or monies due and/or to become due and/or the proceeds realised in respect of the 2015 and 2016 maize crop harvest of Kirsten;

[12.4] payment by the Trustees, Suidwes and/or the Landbank and/or Silostrat of all proceeds realised and/or received by the respective parties in respect of the entire 2015/2016 maize crop harvests of Kirsten.

[13] I pause to mention that Standard Bank abandoned its claim to Kirsten's 2016 maize income at the inception of the trial. It, furthermore, became clear during the trial that there is no *lis* between Standard Bank and Silostrat in respect of Standard Bank's claim. As a result, Standard Bank did not persist with the relief claimed in paragraph 12.4 *supra* against Silostrat.

Silostrat

[14] At the inception of the trial, the Trustees and Silostrat settled Silostrat's claim against the insolvent estate of Kirsten.

[15] In the result, Silostrat only persisted with its condition counterclaims against Standard Bank and Suidwes, respectively.

Technichem

[16] Technichem claims an order that:

[16.1] its deed of cession, dated 5 October 2014, signed and executed by Kirsten in its favour is valid and enforceable;

[16.2] the cession pre-dates and/or supersedes Suidwes and/or the Landbank's cessions; and

[16.3] it is entitled to all income and/or monies due and/or to become due and/or realised to the Trustees in respect of Kirsten's 2015 maize crop income.

[16.4] Suidwes and/or the Landbank must pay all of the proceeds received in respect of Kirsten's 2015 maize crops to it.

[17] Technichem did not persist with the relief claimed in paragraphs 16.3 and 16.4 *supra*.

FACTS COMMON CAUSE

[18] The parties in writing agreed that the following facts are common cause:

"1. The parties admit the fact, conclusion and terms of the agreements on which the plaintiff (Standard Bank) relies as set out at paragraphs 5 to 12, 15 and 20 of the particulars of claim and the fulfilment and/or waiver (as the case may be) of all relevant suspensive conditions relating to the agreement.

2. The parties admit the fact, conclusion and terms of the agreements on which the second defendant (Suidwes) and/or the fourth defendant (Landbank) relies as

set out at paragraphs 12.2.1 (the revolving credit facilities), 12.2.2 (the 2009 to 2013 cessions), 12.2.4 (the notarial bond), 12.2.6 (the 2014 cession), 12.2.7 (the sale agreement), 12.2.8 (the SLA) and 12.3.4 (the perfection agreement) of Suidwes' plea.

3. *The parties admit the fact, conclusion and terms of the three sale agreements in terms of which the third defendant (Silostrat) purchased quantities of white maize from Kirsten as listed in paragraphs 5.1 and 5.1 of Silostrat's plea.*
4. *The parties admit the sale and delivery of chemicals to Kirsten as pleaded by the fifth defendant (Technichem) at paragraph 22.3 of Technichem's plea and the fact, conclusion and terms of the cession dated 5 October 2014 referred to in paragraph 22.8 of its plea.*
5. *Subject to section 45(3) of the Insolvent Act, 1936:*
    - 5.1 *the parties admit that claims have been submitted and proved in the insolvent estate by Standard Bank, Suidwes, Landbank and Technichem in terms of the spreadsheet attached marked "A".*
    - 5.2 *the Trustee's admit Silostrat's claim against Kirsten's insolvent estate.*
6. *Notwithstanding the above, the parties dispute, and do <u>not</u> agree on, the legal efficacy, legal validity and/or enforceability of:*
    - 6.1 *Standard Bank's, Suidwes and/or the Landbank's, and Technichem's respective cessions; and*
    - 6.2 *the aforesaid notarial bond and the perfection agreement.*
7. *The parties admit that Kirsten delivered 22 619-52 tons of WM1 of his 2015 maize crop to Suidwes silos."*

ISSUES IN DISPUTE

[19] Although the parties recorded in paragraph 6 of the agreement *supra* that the legal efficacy, legal validity and/or enforceability of Technichem's cession is in dispute, it became clear during the trial that Technichem's cession was not disputed by any of the parties.

[20] In the result, the following issues have to be determined:

[20.1] the interpretation *alternatively* rectification of clause 1 of Standard Bank's deed of cession dated 22 November 2011;

[20.2] whether rectification post *concursus creditorum* is possible;

[20.3] Suidwes and/or the Landbank's liability to pay the 2015 crop proceeds to Standard Bank and/or whether the crop proceeds form part of the insolvent estate;

[20.4] the validity and/or enforceability of:

[20.4.1] the cessions executed by Kirsten in favour of Suidwes during the period 2009 to 2014;

[20.4.2] the General Notarial Bond registered by Kirsten in favour of Suidwes on 6 May 2014 and the subsequent perfection agreement;

[20.5] the conditional counterclaims of Silostrat against Standard Bank and Suidwes, respectively.

STANDARD BANK

INTERPRETATION

Pleadings

[21] Clause 1 of the Deed of Cession dated 22 November 2011 reads as follows:

"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."

[22] In terms of clause 1, only income derived by Kirsten from the supply of maize to maize producers and/or agricultural produce purchased from agricultural producers and sold to buyers of the produce, was ceded to Standard Bank. This entails that Standard Bank has no claim to the proceeds of Kirsten's 2015 maize crop.

[23] In order to overcome this difficulty, Standard Bank first of all submitted that the clause should be properly interpreted to include a cession of crop income sold, not only to agricultural producers, but to any other party.

[24] The relevant allegations in the particulars of claim pertaining to the interpretation of clause 1 reads as follows:

> *"21. Properly construed and interpreted, the material and express, alternatively implied, further alternatively, tacit terms of the plaintiff's deed of cession include the following:*
>
> *21.1 Kirsten ceded and transferred in favour of the plaintiff all Kirsten's rights in and to Kirsten's entire maize crop and all income and/or monies due and to become due to Kirsten in respect of maize supplied and sold by Kirsten and/or agricultural produce purchased from agricultural producers and sold to buyers of the produce from time to time (clause 1);"*

Legal principles

[25] In adjudicating Standard Bank's claim for the correct interpretation of clause 1, it is apposite to first have regard to the legal principles applicable to the interpretation of contracts.

[26] *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* (106/2018) [2018] ZASCA 176 (3 December 2018) ("the

Tshwane judgment") is the most recent Supreme Court of Appeal judgment in respect of the principles pertaining to the interpretation of contracts.

[27] After referring to divergent views expressed by authors on the subject and contained in case law, the court remarked as follows at paragraph [61]:

> *"[61] It is fair to say that this court has navigated away from a narrow peering at words in an agreement and has repeatedly stated that words in a document must not be considered in isolation. It has repeatedly been emphatic that a restrictive consideration of words without regard to context has to be avoided. It is also correct that the distinction between context and background circumstances has been jettisoned.[1] This court, in Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 ZASCA 13; 2012 (4) SA 593 (SCA), stated that the purpose of the provision being interpreted is also encompassed in the enquiry. The words have to be interpreted sensibly and not have an un-business-like result. These factors have to be considered holistically, akin to the unitary approach."*

[28] The court emphasised that the point of departure is the language of the document in question. The *dissénsus* of the parties appears after all from the written document which in turn identifies the justiciable issue. Save for the content of the document, extrinsic evidence to contextualise the document may also be led. [See: par [66] of the *Tshwane* judgment.]

[1] *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) A 409I-410A.

[29] Guidance in the process to be undertaken is found in paragraph [71]:

"….Clause 6.16 has to be interpreted in relation to the other material clauses and with regard to the factual matrix underlying its conclusion, including its purpose. It has to be interpreted sensibly with a business-like result. We will, in due course, deal with the admissibility of evidence concerning negotiations and the exchanges between the parties during that process."

[30] In respect of the admissibility of evidence in relation to negotiations, the court held as follows at paragraphs [76] and [77]:

"[76] Insofar as the admissibility of evidence in relation to negotiations is concerned, this court has recently, in Van Aardt v Galway 2012 (2) SA 312 (SCA), para 9, with reference to Van Wyk v Rottcher's Saw Mills (Pty) Ltd 1948 (1) SA 983 (A) at 991, reaffirmed that evidence of the intention of the parties of their prior negotiations is inadmissible. In Delmas Milling Co. Ltd v Du Plessis 1955 (3) SA 447 (A), at 454, the court excluded, as a general rule, reference to 'actual' negotiations and 'similar statements'. It is true that at 455A-C there is a suggestion that 'conceivably', in contractual cases where, after regard is had to surrounding circumstances, the ambiguity in a written text persisted, one could have regard to what passed between the parties. It must be understood that this statement followed on what was understood to be admissible in relation to testamentary documents. It is also true that in Coopers & Lybrandt & others v Bryant [1995] ZASCA 64; 1995 (3) SA 761 (A), at 768D-E, the passage from Delmas at 455A-C is cited as support for

the view that evidence of negotiations could, in the face of enduring ambiguity, be admitted.[2]

[77] In our view, Van Aardt and Van Wyk should be followed. It would be in line with the parol evidence rule which we imported and have maintained and it is consonant with the modern approach to interpretation of contracts in English law, the development of which mirrors developments in our law. Allowing evidence in relation to negotiations will see further extensive evidence being led and will have the effect of minimising the words the parties have chosen to employ. Endumeni rightly emphasises the significance of the words the parties have chosen to record their agreement, though not above context.[3] *Permitting evidence of negotiations will lead to further uncertainty. The words, as an objective measure, are elevated above the partisan positions of parties in negotiations and litigation."*

Evidence

[31] Having established the legal principles, the evidence produced by Standard Bank in respect of the context, factual matrix underlying the conclusion of the cession and its purpose, needs to be considered.

[32] In doing so, I will disregard any evidence that pertains to the intention of Standard Bank and Kirsten and to their prior negotiations.

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[2] This of course finds support by commentators in favour of the subjective approach – like Myburgh and Kerr.
[3] See 603F-604A and 604E-F.

[33] Standard Bank in the past and prior to the conclusion of the 2011 cession provided credit facilities to Kirsten. The facilities were reviewed annually. During September 2011, Mr Lood Mathee ("Mathee"), the relationships manager at Standard Bank's Schweizer-Reneke branch, attended to the annual review of Kirsten's credit facilities.

[34] The review included a request by Kirsten for an overdraft facility in the amount of R 8 million as working capital to plant 4500 hectares of maize. Mathee, in an internal memo, summarised the request as follows:

"*Recommendation: Increased requested in FBC Kirstens name to R8 million as he plants 4500 hectares. In the past Senwes assisted him with R4 million production, but will not make use of that this year. The rest of his input costs will be provided for by selling the remaining 22 000 tons of maize in the silos [see attached print out]. He will run short on about R8 million which he wants to lend from us. FBC Kirstens financial position extremely strong and trading profitable. Equity supports the request and although the facilities are unsecured, we don't foresee it at risk as his boerdery praktyke is outstanding. Harvested 32 000 tons for the last season despite the wet conditions he had. Very well conducted accounts and very well respected in farming community. Positive CFP's. Recommend the increase in assistance.*"

[35] At that stage Standard Bank did not hold any security for the monies advanced to Kirsten.

[36] Mathee recommended the overdraft facility and forwarded his recommendation to Winnie Pienaar, a credit evaluation manager of Standard Bank.

[37] Pienaar sanctioned the request subject to certain suspensive conditions. One of the conditions required a cession of crop income from Kirsten.

[38] In order to comply with the suspensive condition, the 2011 cession was drafted and signed by Kirsten.

Discussion

[39] The obtaining of security for moneys lent and advanced by Commercial banks is a well-known business practice. In the present instance Standard Bank was requiring security in respect of an overdraft facility to be utilised as working capital in the production of maize. The security so required was contained in the Deed of Cession.

[40] A cession is an act of transfer to enable the transfer of a right to claim (*translatio juris)* to take place. In *Johnson v Incorporated General Insurances Ltd* 1983 (1) SA 318 AD the nature of a cession agreement was described as follows at 319G:

"It is accomplished by means of an agreement of transfer ("oordragsooreenkoms") between the cedent and the cessionary arising out of a justa causa from which the intention of the cedent to transfer the right to claim to the cessionary (animus transferendi) and the intention of the cessionary to become the holder of the right to claim (animus acquirendi) appears or can be inferred."

[41] *In casu*, Standard Bank's interpretation claim is aimed at broadening Kirsten's "*right to claim".*

[42] In terms of clause 1 the "*right to claim"* that was ceded by Kirsten to Standard Bank, consists of:

[42.1] all income and/or moneys due or to become due to Kirsten by agricultural producers in respect of maize supplied by Kirsten; and

[42.2] all income and/or moneys due or to become due to Kirsten for agricultural produce purchased by Kirsten from producers and sold to buyers from time to time.

[43] This is what Kirsten offered and what Standard Bank was prepared to accept.

[44] Mr Lüderitz SC, counsel for Standard Bank, disagrees. Having referred to a plethora of reported cases, he submitted as follows:

"In the present instance, specific regard is to be had to the uncontested (i) specific context, and surrounding circumstances leading, and accompanying intention of the parties pertaining to Standard Bank's calling for, and Kirsten's furnishing of, the Standard Bank 2011 cession and that Kirsten himself was an agricultural producer."

[45] The reference to the surrounding circumstances (negotiations) and the intention of the parties is, in view of the *Tshwane* judgment, manifestly wrong.

[46] Having regard to the context and factual matrix pertaining to the conclusion of the cession, Mr Lüderitz SC, submitted that the reference to *"Agricultural Producers"* did not make sense. Kirsten himself is a producer of maize and the possibility that he will supply/sell his maize to other *"Agricultural producers"* was, although possible, very slim. The income to be derived from supplying maize to *"Agricultural producers"* would most probably not realise.

[47] In the result, Mr Lüderitz SC, urged this court to give a reasonable, sensible, and business-like meaning to the words contained in clause 1.

[48] Does the present wording of clause 1 lead to an absurdity or to an un-business-like agreement? It is not clear why the drafter of the deed of cession limited the cession to income and/or monies due and to become due from maize supplied by Kirsten to Agricultural producers and/or agricultural

produce purchased from Agricultural producers and sold to buyers of the produce from time to time. It is possible for Kirsten to supply maize to other agricultural producers and to derive an income from such supply. It is also possible to purchase agricultural produce from agricultural producers and sell the products to buyers. Both activities will therefore render an income.

[49] Standard Bank's proposed interpretation of clause 1 will no doubt be more advantageous to Standard Bank's claim.

[50] The mere fact that Standard Bank chose to limit the cession might not make good business sense, but it does not result in an absurdity that justifies a detraction from the clear wording of clause 1. The principles applicable to the interpretation of contracts, does not allow for an interpretation on the sole ground that it would put the party claiming the interpretation in a better position.

[51] In the premises, Standard Bank's claim in respect of a proper interpretation of clause 1 is dismissed.

RECTIFICATION

[52] Standard Bank's claim for the rectification of clause 1 of the deed of cession is pleaded as follows:

"22. In the alternative to paragraph 21.1 above, clause 1 of the plaintiff's deed of cession (annexure POC11) falls to be rectified in the following circumstances and in the respects set out below:

22.1 the express wording of clause 1 of the plaintiff's deed of cession does not correctly record the true consensus and common intention of the plaintiff and Kirsten:

22.2 clause 1 of the plaintiff's deed of cession should have recorded the following (and which would have recorded the true consensus and common intention of the parties thereto):

"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."

22.3 the failure in clause 1 of the plaintiff's deed of cession to record the said true consensus and common intention was occasioned by a common and bona fide error in the drafting of clause 1 of the plaintiff's deed of cession and the furnishing of the plaintiff's deed of cession; and

22.4 Kirsten signed and executed the plaintiff's deed of cession, and the plaintiff accepted same, in the bona fide, but mistaken, belief that clause 1 of the plaintiff's deed of cession recorded the correct and true intention, understanding and agreement between them."

Legal requirements

[53] In *Amlers Precedents of Pleadings* 7th Edition LexisNexis South Africa by LTC Harms at page 336 it is stated as follows:

"The following facts must be alleged and proved:

(a) An agreement between the parties which was reduced to writing.

(b) That the written document did not reflect the common intention of the parties correctly. The common continuing intention of the parties, as it existed when the agreement was reduced to writing, must be established. It maybe deduced from an antecedent agreement, for instance.

(c) An intention by both parties to reduce the agreement to writing.

(d) A mistake in the drafting of the document.

The mistake must have been the result of:

(i) a bona fide mutual error; or

(ii) an intentional act of the other party.

(e) The wording of the agreement as rectified. It does not suffice to give the general import of the common intention."

[References to authorities omitted.]

Evidence

[54] Mathee during his evidence made it clear that he was a mere conduit between Kirsten and Standard Bank. He had no authority to approve Kirsten's credit application. Mathee, furthermore, was not authorised to reach an agreement with Kirsten on the terms and conditions pertaining to the granting of credit to Kirsten.

[55] As a consequence, his evidence did not take Standard Bank's claim for rectification any further.

[56] Pienaar, in her capacity as credit evaluation manager, was authorised to approve Kirsten's credit application on terms and conditions she deemed fit. Pienaar, however, did not interact with Kirsten directly and relied on Mathee to facilitate communication between herself and Kirsten.

[57] Pienaar testified that she received the internal memo from Mathee, referred to *supra*, in respect of Kirsten's request for credit facilities for the 2011 / 2012 financial year. On 29 September 2011, Pienaar informed Mathee via an internal memo that Kirsten's request for an overdraft increase to the amount of R 8 million for working capital requirements was sanctioned (approved). The internal memo clearly indicates that the expiry date of the sanction was 30 September 2011.

[58] The approval was subject to the following suspensive conditions:

"The increased limit is subject to the confirmation of the settlement of the outstanding debt at Suidwes Co-op.

Cession of ***crop*** *income as well as confirmed in writing by the co-op.*

Acceptable proof being provided of the maize being held by the Co-op."

[own emphasis]

[59] Kirsten, after some hesitation, agreed to the conditions and on 15 November 2011 Mathee completed a document titled *"COLLATERAL PREPARATION DETAILS"*. Under the heading *"Select documents to be prepared",* Mathee chose *"Pledges and Cessions"* and under the heading *"Items to be Pledged / Ceded"* he indicated *"Moneys due or to become due"*.

[60] Under the heading *"Moneys due and to become due"*, the following is stated:

"1. Amount of Pledge / Cession :Unrestricted/R

2. Full name(s) and ID / Reg. number(s) of debtor(s) i.e. The person / entity that owes the money to our customer :Suidwes Landbou [edms] Bpk

3. Address(es) of debtor(s) :PO Box 6 Leeudoringstad 1840"

[61] Mathee further indicated that the cession is on maize.

[62] The document was forwarded to Standard Bank's collateral division for the drafting of the deed of cession.

[63] An overdraft agreement was prepared by Standard Bank's Credit Risk division and forwarded to Mathee for signature. The document reflects the R 8 million overdraft facility and deals with collateral in clause 14. The clause reads as follows:

*"**14 Collateral***

14.1 Collateral required:

FBC Kirsten

*-Cession of **crop** income (confirmed in writing by the Co-Operation)"*

[own emphasis]

[64] Both the overdraft agreement and the cession was signed by Mathee and Kirsten on 22 November 2011.

[65] Pienaar testified that once the agreement was reached between herself and Kirsten in respect of the cession of crop income, the agreement was communicated to the security division. She has no say in the wording or content of the Deed of Cession. Her involvement in the transaction terminates once she had sanctioned the facility.

[66] Pienaar explained that a pre-drafted template is used to prepare the Deed of Cession. She has no insight in the document and does not know what is contained therein.

[67] For reasons unknown to the court, the drafter of the Deed of Cession was not called as a witness. It is, however, noteworthy that the content of a letter that accompanied the Deed of Cession differs substantially from the wording of clause 1. The letter was addressed to Suidwes and reads as follows:

"PLEDGE OF CROPS AND CESSION OF CROP INCOME:

Frederik Barend Christoffel Kirsten ([….])

The abovementioned party has pledged and ceded the following to our bank as continuing security:

- *all crops, including but not limited to Maize, whether purchased, produced, yielded or acquired;*

  and

- *all rights, title, interest and claims of whatsoever nature and howsoever occurring, arising out of and in connection with the sale proceeds of all crops, as described above."*

[68] The reference to *"crops"* is clearly incorrect. Pienaar confirmed during cross-examination that a cession can only be obtained in respect of crop income.

[69] Save for the aforesaid, the words *"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."*, was according to Pienaar's evidence never discussed or agreed upon by herself and Kirsten.

[70] It is clear that the drafter of the Deed of Cession and the letter had no idea what the agreement between Pienaar and Kirsten was. The use of templates by Standard Bank coupled with the fact that the drafter of the document does not have any knowledge of the exact agreement between the parties is unfortunate, to say the least.

[71] The facts pertaining to the common intention of Pienaar, on behalf of Standard Bank and Kirsten are therefore the following:

[71.1] on 16 September 2011 Kirsten requested an overdraft facility of R 8 million for working capital to plant 4500 hectares of maize. The facility pertained to the 2011/2012 planting season.

[71.2] Pienaar was prepared to grant the facility, but clearly stated that the facility will terminate on 30 September 2012. The facility was further granted on condition that Kirsten provided a cession of *"crop"* income. In view of the fact that the overdraft facility was only for the 2011/2012 season coupled with the fact that the facility expired on 30 September

2012, the reference to *"crop"* could only be the crop of the 2011/2012 season.

[72] There is simply no evidence that either Pienaar or Kirsten envisaged and/or intended that the cession will pertain to the income of future maize crops. To the contrary, Pienaar testified that she was only concerned with security for the overdraft increase in respect of the 2011/2012 financial year.

[73] In the result, Pienaar's evidence fells foul of the requirement that *"the common continuing intention of the parties, as it existed when the agreement was reduced to writing, must be established."*

[74] In the premises, the rectification contended for by Standard Bank does not reflect the true consensus between Pienaar and Kirsten and is dismissed.

CONCURSUS CREDITORUM

[75] Should I be incorrect in respect of the rectification claim, the question arises whether it is possible to claim rectification after *concursus creditorum*.

[76] *Concursus* was established on 24 April 2016 when the provisional order for sequestration was issued.

[77] Mr Terblanche SC, counsel for the Trustees, submitted that once *concursus* has been established rectification of an agreement entered into pre-sequestration is no longer possible. Should rectification be granted, Standard Bank will be in a better position than it was when *concursus* was established. Rectification would, as a result, have a negative impact on the rights of other creditors.

[78] The principle that rectification may not be claimed after *concursus* has been established is trite and appears from a long list of authorities dating back to 1911. Innes JA stated the following in *Walker v Syfret NO* 1911 AD 141:

"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."

[79] In *Ward v Barrett N.O and Another* 1963 (2) SA 546 AD, Steyn JA remarked as follows at 552H–553A in respect of a claim for the registration of a notarial bond after *concursus*:

"At that date, the appellant was entitled to claim registration of the notarial bond. But a concursus having supervened, she could not bring an action against the first respondent for specific performance (cf. Harris v Trustee of Buissinne, 2 Menz. 105; Lucas'Trustee v Ismail and Amod 1905 T.S. 239 at p. 248), and the latter had no authority to accede to any such claim, as the interests of other creditors will inevitably

have been prejudiced thereby. The appellant's personal right to the registration of the bond, could, therefore, not be converted into a jus in rem under a registered bond."

[80] The authority in *Ward supra* was followed in *Durmalingam v Bruce N.O.* 1964 (1) SA 807 DCLD, which dealt with the rectification of a notarial bond post *concursus*. At 811 G–H, the court held as follows:

"*At that date, the respondent was merely a concurrent creditor insofar as the proceeds of realisation of the certificates relating to the International bus are concerned. Assuming the correctness of the facts alleged in the declaration, the respondent was, at that date, entitled to claim rectification of the notarial bond so as to give him a preference in respect of such proceeds. The respondent's personal right against the insolvent could not be converted in a jus in rem under a registered bond. A mistake, moreover, can be rectified only so long as third parties are not injured thereby. Weinerlein v. Goch Buildings Ltd., 1925 A.D. 282 at p. 291*."

[Also see: *Nedbank Ltd v Chance and Others* 2008 (4) SA 209 D&CLD at par [9].]

[81] Mr Lüderitz SC contended that the decision in *Nedbank supra* was clearly wrong and should not be followed. The decision was, however, based on the long line of authorities on the subject of altering a creditor's rights post *concursus.* Paragraph [9] of the judgment reads as follows:

"*[9] On liquidation and by operation of the common law a concursus creditorum (concourse of creditors) comes into existence. The effect of a liquidation order is that it:*

> *'crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.'[4] [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.[5] 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.[6] 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.[7] 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

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[4] Per Innes JA in *Walker v Syfret* NO 1911 AD 141 at 166. Although these comments were made in respect of a sequestration order, they are equally applicable to a liquidation order.

[5] 2 *Vather v Dhavraj* 1973 (2) SA 232 (N) at 236B-C.

[6] 3 *Incledon (Welkom) (Pty) Ltd v QwaQwa Development Corporation Ltd* [1990] ZASCA 85; 1990 (4) SA 798 (A) at 803G-J.

[7] *Durmalingam v Bruce* NO 1964 (1) SA 807 (D) at 811G-H; *Thienhaus NO v Metje & Ziegler Ltd* 1965 (3) SA 25 (A) at 30A-C; *Klerck NO v Van Zyl & Maritz NNO* 1989 (4) SA 263 (SE) at 279F-G.

amount. This approach is in line with the general principle that the claim of each creditor must be dealt with as it existed at the date of liquidation. Rectification post concursus would almost inevitably prejudice the rights of other creditors."

[82] It does not assist Standard Bank to simply assert that the decision in *Nedbank* is wrong without dealing with each of the authorities on which the judgment is premised.

[83] Without convincing argument and reference to authorities that hold different views, I am not prepared to interfere with the clear reasoning and finding of the court in *Nedbank supra*.

[84] In the premises, the rectification claim could in any event not have succeeded in view of the *concursus creditorem* principle.

RESULT

[85] As a result of the findings *supra*, the remainder of the relief claimed by Standard Bank against the Trustees, Suidwes, the Landbank and Silostrat falls away.

TECHNICHEM

[86] In order to adjudicate Technichem's claim in respect of the ranking of its cession, it is necessary to have regard to Suidwes and the Landbank's

contending claims. It is common cause that Technichem's cession in respect of the proceeds of the 2015 crop was executed on 5 October 2014. Suidwes' cession for the same crop proceeds was executed on 28 October 2014. In the result, Technichem's cession precedes Suidwes' cession. As will appear more fully *infra* Suidwes ceded its rights in terms of the 28 October 2014 cession to the Landbank.

[87] Although it is common cause that Technichem's 2014 cession precedes Suidwes' 2014 cession, Suidwes and/or the Landbank claim that they are still entitled to Kirsten's 2015 crop income by virtue of previous cessions and a General Notarial Bond coupled with a perfection agreement.

Suidwes and/or the Landbank

2009 to 2013 cessions:

[88] In Suidwes' plea, the following is alleged in respect of the 2009 to 2013 cessions:

"*12.2.1* *during the period 2009 to 2013, Kirsten acting personally and the second defendant, duly represented, entered into written revolving credit facilities, true copies of which are attached as "S1" to "S5".*

12.2.2 *during the period 2009 to 2013, Kirsten executed cessions in favour of the second defendant, true copies of which are attached as "S6" to "S10".*

12.2.3 in terms of each of the cessions, Kirsten ceded to the second defendant his right, title and interest in the total proceeds of crops for the 2009 to 2014 production seasons ***and for all future crops which Kirsten may in the future plant;"*** [own emphasis]

[89] In the premises, the question arises whether the 2009 to 2013 cessions pertain to future crop income, including the 2015 crop income.

[90] Each of the cessions define the *"right to claim"* i.e. the subject-matter of the cession in similar terms. The first cession signed during 2008 reads as follows:

"1. Die kliënt sedeer 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 2009 produksieseisoen geproduseer word, van watter aard 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 op die land is; en

1.3 alle oeste wat die kliënte in die toekoms mag aanplant."

[91] *"Alle oeste"* (all crops) in clause 1 is defined as all crops that has or will be cultivated during the 2009 season. In other words, only the 2009 crop income is ceded in terms of the cession.

[92] The reference in clause 1.3 to all crops that may be planted in future, clearly refers to crops that might be planted after signature of the cession. Such crops will, as a result, still form part of the 2009 production season.

[93] In support for its contention that the cession includes future crops, Suidwes relies on clauses 2 and 3, which read as follows:

> *"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.*
>
> *3. Hierdie sessie neem 'n aanvang op datum van ondertekening hiervan deur die kliënt en bly van krag totdat alle bedrae wat aan Suidwes verskuldig is deur die kliënt betaal is en Suidwes, na betaling van sodanige bedrae, die sessie skriftelik gekanselleer het."*

[94] In view of the clearly defined subject-matter that was ceded, i.e. the crop income of the 2009 production season, the words *"Die sessie"* (this cession) in clause 2 and *"Hierdie sessie"* (this cession) in clause 3 pertain to the crop income of the 2009 production season. Once the 2009 crop income is depleted, the subject-matter that was ceded ceases to exist.

[95] Consequently, reliance on the 2009 to 2013 cessions does not assist Suidwes and/or the Landbank in their claim to the entire 2015 crop income.

General Notarial Bond and Perfection Agreement

[96] The allegations pertaining to the General Notarial Bond and Perfection Agreement read as follows:

"12.2.4 on 6 May 2014, Kirsten registered a general notarial bond in favour of the second defendant under registration number BN14/18473 ('the notarial bond"), a true copy of which is attached as "S11";

12.2.5 in terms of the notarial bond, Kirsten inter alia: (a) agreed that all his movable assets would serve to secure his indebtedness to the second defendant; and (b) ceded to the second defendant all his incorporeal assets;

12.2.6 ….

12.2.7 on 28 August 2013 and at Centurion, the second defendant duly represented by LJ Smit and the fourth defendant, duly represented by Theuns Coetzee and Vincent Potloane, entered into a written Sale Agreement ("the Sale Agreement"), a true copy of which is attached as "S12";

12.2.8 on 26 August 2013 at Centurion, the second defendant and the fourth defendant duly represented as aforesaid, entered into a written Service Level Agreement ("the SLA"). A true copy of the SLA, is attached marked "S13".

12.2.9 in terms of the sale agreement the second defendant agreed to cede to the fourth defendant its existing and future "A" Sale Book Debts and "B" Sale Book Debts including all right, title and interest both present and future, in and to the related security (clause 6 of the sale agreement);

12.2.10 the debts of Kirsten to the second defendant formed part of the A Sale Books Debts [with the exception of the month account and code 10 account] and are secured inter alia by the cessions (annexures S1 to S10) which constituted the "related security" and the notarial bond (annexure S11) which constituted the "real security" as contemplated in clause 6 of the Sale Agreement.

12.2.11 the fourth defendant therefore became the cessionary of the claims of the second defendant against Kirsten, the cessionary in terms of the cessions and the holder of the notarial bond; and

12.2.12 notwithstanding the cession to the fourth defendant, the second defendant remains a concurrent creditor of the estate in the amount of R93,925.67 in terms of a month account."

[97] In terms of the Sale Agreement dated 27 August 2013, Suidwes sold and ceded its present and future claims against Kirsten to the Landbank. The agreement excluded Kirsten's code 10 and monthly account.

[98] As a consequence, Suidwes was divested from its right to claim payment from Kirsten in respect of the debts it ceded to the Landbank. At the conclusion of the cession agreement, the Landbank as cessionary became entitled to the right transferred in terms of the cession. [See: *First National Bank of SA Ltd v Lynn NO and others* 1996 (2) SA 339 AT 345 G-J.]

[99] The General Notarial Bond was registered on 6 May 2014 over all the specified corporeal and or incorporeal movable goods of Kirsten. The Bond was registered in favour of Suidwes in respect of any debt owed by Kirsten to Suidwes. At that stage, Kirsten was indebted to Suidwes in the amount of R 122 613, 77 in respect of the monthly account.

[100] The security held by Suidwes in terms of the Bond, i.e. the real right, was ceded to the Landbank on 6 May 2014. Suidwes, however, did not cede its personal right to claim the amount due by Kirsten in terms of the monthly account to the Landbank. The Landbank as a result obtained security for a debt owed to Suidwes and Suidwes was in turn divested of its security.

[101] The Agreement to Perfect the General Notarial Bond (Perfection Agreement) was concluded between Kirsten and Suidwes on 8 May 2015. In view of the cession of its security in terms of the Bond to the Landbank, Suidwes could no longer exercise its rights in terms of the Bond.

[102] In the result, neither the Bond not the perfection agreement provides security to either Suidwes or the Landbank.

[103] Consequently, Technichem's cession in respect of Kirsten's 2015 crop income precedes Suidwes and/or the Landbank's cession.

SILOSTRAT

[104] Silostrat's claim is based on three written sale agreements in terms of which it purchased 35 000 tons of maize from Kirsten. Upon conclusion of the agreements with Kirsten, Silostrat immediately re-sold the maize and had to deliver the maize thus sold on the same day that Kirsten had to deliver in terms of the three purchase contracts concluded with him.

[105] It is common cause that Kirsten failed to deliver any maize in terms of the three purchase agreements to Silostrat. Kirsten did deliver 22 619, 52 tons of maize to Suidwes' silos.

[106] As a consequence of Kirsten's breach of contract, Silostrat had to purchase maize of the same quality as reflected in the three purchase agreements to enable it to comply with its obligations in terms of the re-sale agreements entered into by Silostrat, subsequent to the purchase agreements entered into with Kirsten.

[107] In the premises, Silostrat alleges that it had suffered damages in the amount of R 35 288 000, 00.

Conditional counterclaim: Standard Bank

[108] Silostrat's conditional counterclaim against Standard Bank is premised on the following allegations:

"5.6.5 Third Defendant contends that:

5.6.5.1 ….

5.6.5.2 In the event of the Court finding that rights acquired by Second Defendant in terms of a Deed of Cession as reflected in Annexure "POC22" to the Particulars of Claim trumped and/or supersede Plaintiff's rights in respect of the Deed of Cession reflected in Annexure "POC11' to the Particulars of Claim and the sale of 35 000 tons of maize by Kirsten to Third Defendant is unenforceable and/or void ab initio, that:

5.6.5.2.1 Plaintiff breached the duty upon it to ensure that the maize produced by Kirsten was unencumbered and Kirsten's rights thereto unassailable; and to prevent damages to Third Defendant;

5.6.5.2.2 Plaintiff acted negligent because Plaintiff did not take all reasonable steps to establish the existence of the Deed of Cession in favour of Second Defendant: and

5.6.5.2.3 *But for the breach of duty and the negligence referred to above, the agreements reflected in Annexures "POC23", "POC24" and "POC25" would not have been concluded, and Plaintiff would not have suffered any damages;*

5.6.5.2.4 *consequently Plaintiff is liable to make payment of the damages suffered by Third Defendant to it:"*

[109] A defendant may, in terms of the provisions of rule 24(4) of the Uniform Rules of Court, counterclaim conditionally upon the claim or defence in convention failing. *"Conditional"* is defined in the *Shorter Oxford English Dictionary,* Vol 1, 5th edition as:

"Subject to one or more conditions; depending (on, upon); not absolute; made or granted on certain conditions or terms."

[110] Silostrat's counterclaim against Standard Bank is subject to the following conditions:

[110.1] a finding that the rights acquired by Suidwes in terms of the Deed of Cession dated 28 October 2014 trumped and/or superseded Standard Bank's claim in respect of its Deed of Cession dated 22 November 2011; and

[110.2] that the sale of 35 000 tons of maize by Kirsten to Silostrat is unenforceable and/or void *ab initio*.

[111] In respect of the of the first condition, I held that Standard Bank did not have a valid cession in respect of Kirsten's 2015 maize crop income. I, furthermore, held that Suidwes' Deed of Cession dated 28 October 2014 is valid.

[112] In the result, the first condition pertaining to Standard Bank's conditional counterclaim has been met.

[113] In respect of the second condition, the parties agreed at the inception of the trial that:

"The parties admit the fact, conclusion and terms of the three sale agreements in terms of which the third defendant (Silostrat) purchased quantities of white maize from Kirsten as listed in paragraphs 5.1 and 5.1 of Silostrat's plea."

[114] Although Suidwes held otherwise, the evidence overwhelmingly established that Silostrat's sale agreements are valid and enforceable.

[115] This finding is further borne out by the settlement agreement entered into between the Trustees and Silostrat.

[116] Consequently, the second condition pertaining to Silostrat's counterclaim against Standard Bank was not met and the conditional counterclaim is dismissed.

Conditional counterclaim against Suidwes

[117] The conditional counterclaim against Suidwes is premised on the following averments:

"5.6.1 Kirsten did not comply with his obligations in terms of the agreements reflected in Annexures "POC23", "POC24" and "POC25" to the Particulars of Claim; and did not deliver any maize as he was obliged to do in terms of the three agreements to Third Defendant.

5.6.2 Second Defendant took delivery of 22 619, 52 tons of maize produced by Kirsten; and appropriated such maize as its own alternatively disposed of the maize, and refused to deliver any Maize to Third Defendant, notwithstanding demand by Third Defendant for delivery of Kirsten's maize in terms of the three purchase agreements.

5.6.3 As a result of the breach of contract by Kirsten and the appropriation and/or disposal of the maize for itself by Second Defendant, Third Defendant had to purchase white maize of the same quality as reflected in Annexures "POC23", "POC24" and "POC25", at a price of R 3 179-00, to enable Third Defendant to comply with its obligations in terms of the re-sale agreements entered by Third Defendant, subsequent to the purchase agreements entered into with Kirsten,

5.6.4 In the premises, Third Defendant suffered damages in an amount of R 35 288 888-00 that is R 1 008, 23 per ton, the calculation of which appears from columns 4, 5 and 6 above."

[118] The claim is couched as follows:

"5.6.5.3 In the alternative, and in the event of the Court finding that the Second Defendant did not acquire rights in terms of the Deed of Cession reflected in Annexure "POC22" to the Particulars of Claim, and that the rights of the Second Defendant did not tramp and/or supersede Plaintiff's rights in respect of Plaintiff's Deed of Cession reflected in Annexure "POC11" to the Particulars of Claim, Third Defendant contends that:

5.6.5.3.1 Second Defendant unlawfully interfered with the rights obtained by Third Defendant in terms of the three purchase agreements reflected in Annexures "POC23", "POC24", and "POC25", whilst Second Defendant was under a legal duty according to the convictions of the community not to do so, in particular because:

5.6.5.3.1.1 Second Defendant was informed by Third Defendant of Third Defendant's right in terms of the purchase agreements before appropriation and/or disposal of the maize by Second Defendant; and

5.6.5.3.1.2 Second Defendant had undertaken, orally and in writing, not to dispose of the maize pending determination of disputes relating to the rights, title and interest in the maize. A copy of the written undertaking is annexed hereto as ***ANNEXURE "Z"****.*

5.6.5.3.2 Second Defendant intentionally and recklessly took delivery and/or disposed of 22 619. 52 tons of maize which had to be delivered to Third Defendant, and which would have enabled Third Defendant to partly comply with its obligations in terms of the re-sale agreements relating to the maize; and

5.6.5.3.3 Consequently Second Defendant is indebted to make payment of the damages suffered by Third Defendant due to non-delivery of 22 619.52 tons of maize to Third Defendant, amounting to R 22 805 646-34."

[119] It is common cause that:

[119.1] Suidwes was aware of the three sale agreements between Silostrat and Kirsten in respect of the maize produced by Kirsten for the 2015 production season;

[119.2] 22 619, 52 tons of maize produced by Kirsten was delivered at Suidwes' silos;

[119.3] Silostrat demanded delivery of the maize that Kirsten delivered at Suidwes' silos;

[119.4] Suidwes did not deliver the 22 619, 52 tons of maize received from Kirsten to Silostrat;

[119.5] Silostrat had to purchase white maize of the same quality in order to fulfil its obligations in terms of the re-sale agreements; and

[119.6] Silostrat suffered damages.

[120] The factual dispute pertains to the question whether Suidwes did appropriate and/or disposed of the maize.

[121] Should the answer be in the affirmative, the legal question pertaining to Suidwes' liability for the damages suffered by Silostrat arises.

Evidence

[122] Silostrat presented the evidence of Mr van Zyl ("Van Zyl"), a director of Silostrat. Van Zyl confirmed that the three sale agreements were concluded with Kirsten and that Silostrat, in turn, sold the maize purchased from Kirsten on the Johannesburg Stock Exchange ("JSE").

[123] Due to the fact that Standard Bank financed the crop production costs, Silostrat received a notification from Standard Bank of its cession on the crop income and a request that all monies received from the sale of the maize be paid to Standard Bank.

[124] Van Zyl explained the business practice applicable to the grain industry. In terms of the practice Kirsten had to deliver the maize he had sold to Silostrat at a silo registered with the Johannesburg Stock Exchange (JSE) as a delivery point.

[125] Once the maize has been delivered to a silo, the operator of the silo issues a silo certificate to the owner of the maize, in this instance, Kirsten. The certificate is a negotiable instrument which is delivered to the JSE. Once the certificate is delivered, payment of the amount agreed in the written sale agreement is made to the owner of the maize. The silo certificate is then utilised by Silostrat to perform in terms of the back-to-back contracts it concluded on the JSE.

[126] Van Zyl testified that he visited Kirsten towards the end of April 2015 to discuss the delivery of the maize. Kirsten indicated that he would prefer to deliver the maize at Suidwes' Makwassie silos, as the silos were the closest to his farms. Van Zyl stated that the Makwassie silos were registered as a

delivery point at the JSE and that he consequently had no problem with the arrangement.

[127] Van Zyl confirmed that the crops were impressive and that he did not foresee any problems with delivery.

[128] Van Zyl's optimism was, however, short-lived. He testified that his co-director, Mr Kruger ("Kruger") during early May 2015, contacted a certain Anton Jordaan ("Jordaan") at Suidwes in order to appraise him of the delivery of the 35 000 tons of maize. During the conversation, Jordaan informed Kruger that Suidwes also had a right to Kirsten's crops.

[129] On 5 May 2015 Suidwes forwarded a copy of the Deed of Cession that was executed by Kirsten in its favour. The cession pertained to the income of Kirsten's 2015 crop.

[130] Silostrat was requested to pay all income derived from the sale of the maize to Suidwes.

[131] Suidwes was made aware of Standard Bank's cession and in a letter dated 5 May 2015 directed to Silostrat and Standard Bank, Suidwes gave an undertaking that Kirstens' 2015 crop will not be disposed of pending the

finalisation of any disputes in respect of the right, title and interest to the crop income.

[132] During cross-examination by Mr Daniels SC, counsel for Suidwes, Van Zyl stated that their case against Suidwes is based on the fact that Suidwes took the maize that was delivered at its silos whilst being fully aware of the contracts Silostrat had with Kirsten.

[133] Van Zyl admitted that Africum, a division of Suidwes, bought the maize from Kirsten. Van Zyl, however, maintained that Africum is part and parcel of Suidwes and as a result Suidwes is the actual purchaser of the maize.

[134] Mr Oelofse ("Oelofse") from Quatro-Vest was the next witness on behalf of Silostrat. Mr Oelofse's evidence pertains to the business relationship between Standard Bank, Quatro-Vest and Silostrat. His evidence did not take the conditional counter-claim against Suidwes any further.

[135] Mr Kruger, also a director of Silostrat, testified next. He testified that Silostrat had, at the time, a "*folio number*" with Suidwes. The folio number enabled grain producers to deliver grain at a Suidwes silo to Silostrat.

[136] Kruger was referred to a document dated 26 May 2015, prepared on the letterhead of Africum Commodities. The document is titled *"Goedgekeurde*

premies vir die 2015/16 lewering seisoen" and indicates Kirsten as the producer. It contains detailed information in respect of the tonnage of maize to be delivered, the silo where the maize will be delivered as well as premiums pertaining to transport and handling of the maize. The summary of the information concludes with the word *"Basis"* against which certain figures appear.

[137] Kruger responded that he was not sure what the document is, but that it seemed to provide a basis on which Africum was prepared to buy maize from Kirsten.

[138] During cross-examination by Mr Daniels SC, Kruger testified that Suidwes sold the maize delivered to its silo's through Africum. Kruger confirmed that there was no contractual obligation on Suidwes to deliver the maize deposited by Kirsten in its silos to Silostrat. Kruger, however, maintained that Suidwes was fully aware of the three purchase contracts concluded between Silostrat and Kirsten. In view of the aforesaid knowledge, Suidwes should have accepted the maize on behalf of Silostrat and not on its own behalf.

[139] Upon further questioning, Kruger testified that Kirsten could have delivered the maize on Silostrat's folio number, but was prevented by Suidwes from doing so. When Kruger could not provide the name of the person at Suidwes

who prevented Kirsten from delivering the maize on Silostrat's folio number, he testified that Kirsten was forced by Suidwes to deliver the maize to them.

[140] The following exchange between Kruger and Mr Daniels SC is of particular relevance to Silostrat's claim against Suidwes:

"MNR DANIELS: *Wie het die mielies by – gelewer by Suidwes?*

MNR KRUGER: *Ons weet mos meneer – U Edele, die mielies wat van – volgens Suidwes se inligting wat hulle verskaf het wat inlig, is 'n brief wat van mnr Kirsten by hulle gelewer is.*

MNR DANIELS: *Ja, wie was die eienaar van die mielies wat gelewer is by Suidwes deur Mnr Kirsten?*

MNR KRUGER: *Volgens die inligting verskaf deur Suidwes wat ek nou net gesien het, is dit mnr Kirsten wat dit gelewer het, U Edele, eksuus.*

MNR DANIELS: *En mnr Kirsten, as eienaar, kon besluit aan wie hy wil besit oorhandig van die mielies, is dit korrek?*

MNR KRUGER: *U Edele, hy kon besluit of hy kon geforseer geword het. Ek weet nie wat gebeur het nie."*

[141] That concluded the evidence on behalf of Silostrat.

Discussion

[142] In its pleadings Silostrat relied on the following factual allegations in support of its claim that Suidwes unlawfully interfered with its rights:

[142.1] Suidwes was aware of Silostrat's rights in terms of the purchase agreements with Kirsten when it appropriated and/or disposed of the maize; and

[142.2] Suidwes gave an undertaking not to dispose of the maize pending determination of the dispute between the parties.

[143] It became clear during the trial that Suidwes withdrew the undertaking, relied upon by Silostrat, on 23 July 2008.

[144] Silostrat further alleges that Suidwes intentionally and recklessly took delivery and/or disposed of 22 619.52 tons of maize which had to be delivered to Silostrat.

[145] The crux of the factual allegations is therefore, that Suidwes appropriated *alternatively* took delivery *alternatively* disposed of the maize.

[146] It is common cause that Kirsten did deliver maize at Suidwes' silos. There is, however, no evidence that Suidwes *"appropriated"* and/or sold Kirsten's maize. To the contrary and on Kruger's evidence, Kirsten delivered the maize on his own folio number in his own name and sold the maize to Africum.

[147] In the result, the evidence presented by Silostrat does not prove the factual allegations relied upon in support of its condition counterclaim against Suidwes and the conditional counterclaim is dismissed.

COSTS

[148] The only remaining issue pertains to costs.

[149] Standard Bank's claim against the Trustees, Suidwes and the Landbank failed and costs should follow suit.

[150] Silostrat's conditional counterclaims against Standard Bank and Suidwes failed and as a result Standard Bank and Suidwes is entitled to their costs.

[151] Technichem's claim succeeded. In its particulars of claim, Technichem only requested a cost order against Suidwes and such order will follow.

ORDER

[152] It is ordered that:

1. The plaintiff's claim against the first, second and fourth defendants is dismissed with costs, which costs will include the costs of two counsel.
2. The third defendant's conditional counterclaim against the plaintiff is dismissed with costs, which costs will include the costs of two counsel.

3. The third defendant's conditional counterclaim against the second defendant is dismissed with costs, which costs will include the costs of two counsel.
4. The fifth defendant's deed of cession dated 5 October 2014 is valid and enforceable.
5. The fifth defendant's deed of cession dated 5 October 2014 pre-dates the cessions relied upon by the second and/or fourth defendants in respect of Kirsten's 2015 crop income.
6. The second defendant is ordered to pay the fifth defendant's costs.

N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD 18 February 2019

JUDGMENT DELIVERED 9 May 2019

APPEARANCES

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