IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

(DURBAN AND COAST LOCAL DIVISION)

CASE NO: 496/2006

In the matter between:

NEDBANK LIMITED Plaintiff

and

CHRISTOPHER JOHN HUGH CHANCE First Defendant

WILLIAM JOHN FERGUSON CHANCE Second Defendant
JAMES WILLIAM FREDERICK CHANCE Third Defendant
RICHARD GEORGE FERGUSON CHANCE Fourth Defendant
LOUIS VAUGHAN ESSERY Fifth Defendant
CHANCE BROTHERS (PROPRIETARY) LIMITED (IN LIQUIDATION) Sixth Defendant

JUDGMENT

Date of Hearing: 26 & 27 November 2007
Date of Judgment: 28 January 2008

THERON J

[1] The plaintiff ('Nedbank') sues the first, second, third, fourth and fifth defendants ('the defendants') in their capacity as sureties for the sixth defendant's ('Chance Brothers') indebtedness to the plaintiff. The only question before this court is whether Nedbank is entitled to claim rectification of an agreement entered into between it and Chance Brothers.

[2] This matter was argued on the basis of an agreed set of facts. On 17 April 1998,

Chance Brothers was placed in provisional liquidation at the instance of Nedbank. During October 1998, the parties entered into an agreement ('the reorganisation agreement') with the purpose of restructuring Chance Brothers' indebtedness to Nedbank and to ensure Chance Brothers' removal from provisional liquidation. It was recorded in the reorganisation agreement that Chance Brothers was indebted to Nedbank, as at the date of signature of the agreement, in an amount in excess of R10 million. It was also recorded that the defendants had personally guaranteed the obligations of Chance Brothers to Nedbank in terms of suretyship agreements executed during 1993.

[3] In terms of the reorganisation agreement a portion of the debt owed by Chance Brothers, R3.5 million, was to be repaid to Nedbank by the issue to the latter of 3.5 million cumulative redeemable preference shares. The parties agreed on the issue price of one rand per preference share, with a cost of one cent and a premium of ninety nine cents per share. The shares were issued subject to the terms and conditions set out in the annexure to the reorganisation agreement. Chance Brothers' remaining indebtedness to Nedbank was to be dealt with in terms of a loan agreement concluded by the parties during 1996.

[4] On 18 December 2002 an application was launched for Chance Brothers' winding-up and on 20 December 2002 a provisional winding-up order was granted.

[5] In this action Nedbank claims from the defendants the balance which it contends was

owed to it by Chance Brothers on the winding-up of the latter. This balance is calculated with reference to what Nedbank alleges was the total indebtedness of Chance Brothers to it at the date of winding-up, less dividends paid to Nedbank by the liquidators following the winding-up. Nedbank's claim against Chance Brothers was R 10 752 119,85 and included an amount of R3,5 million being the redemption value of the preference shares. Nedbank's claim was accepted by the liquidators. The liquidators' first, and second and final liquidation and distribution accounts were confirmed by the Master of the High Court on 9 March 2004 and 31 May 2007, respectively. It was common cause that the liquidators had paid dividends to the plaintiff in the amount R 7 936 835, 81.

[6] The defence raised by the defendants is that the reorganisation agreement cannot, as a matter of law, be rectified after the winding-up of Chance Brothers. The parties were agreed, in relation to the issue of rectification, on the following facts alleged by Nedbank in its particulars of claim:

'11(a) Annexure "B" to the reorganisation agreement does not reflect the common intention of the parties, which was that:

i) the preference shares would be redeemable at the issue price per preference share;
ii) in the event of a winding-up of the sixth defendant, the plaintiff would be entitled to the issue price of the preference shares.

11(b) The failure of the reorganisation agreement to reflect the common intention of the parties in the aforesaid respects was occasioned by a common error of the parties, who signed the agreement in the *bona fide*but mistaken belief that it recorded the true agreement between them, alternatively their true common intention.'

[7] The clauses in respect of which rectification is sought, reads:

'1.1.4 Subject to the provisions of the Companies Act, No. 61 of 1973 and clause 1.1.3 above, Chance Brothers shall be obliged to redeem the preference shares, at par per preference share ("**the redemption price**"), not earlier than 3 years and one day after the date of their issue unless redeemed earlier by Chance Brothers.

…

1.4 In the event of a winding up of Chance Brothers, Nedcor as a holder of preference shares shall be entitled to receive in full out of the assets of Chance Brothers, in priority to the holders of all other classes of shares in the share capital of Chance Brothers, the nominal amount of preference shares together with a sum equivalent to any arrears of and the then current preference dividend, whether declared or undeclared and whether or not there shall be any profits available for the payment of such dividends, calculated down to the date of payment to the holders of the preference shares of the amount payable to them in terms of this clause.'

The parties were agreed that in the event of the plaintiff being successful in its claim of rectification the words 'the issue price' should be substituted for the word 'par' in clause 1.1.4 and 'issue price' for the words 'nominal amount' in clause 1.4.

[8] It was common cause that the reorganisation agreement, as it stands, entitled Nedbank, on the winding-up of Chance Brothers, to payment of R35 000 in respect of the redemption value of the preference shares calculated at one cent per share. In the event that the agreement is rectified, the redemption value would be R3,5 million, calculated at one rand per share. It was further common cause that if Nedbank failed in its claim of rectification there would be no outstanding balance which the defendants would be required to pay.

[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.*'[1] [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.[2] 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.[3] 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*.[4] The same must hold for a creditor who seeks rectification to improve its position from that of a preferent creditor in a certain amount, to a preferent creditor in a greater amount. This approach is in line with the general principle that the claim of each creditor must be dealt with as it existed at the date of liquidation. Rectification post *concursus* would almost inevitably prejudice the rights of other creditors.

[10] It does not avail the plaintiff that the liquidators accepted its claim as rectified and that the claim has been confirmed by the Master. In terms of section 408 of the Companies

Act[5] confirmation of a liquidation and distribution account by the Master has the effect of a

1 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.
2 *Vather v Dhavraj* 1973 (2) SA 232 (N) at 236B-C.
3 *Incledon (Welkom) (Pty) Ltd v QwaQwa Development Corporation Ltd* 1990 (4) SA 798 (A) at 803G-J.
4 *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.
5 Section 408 reads:

final judgment but not in the sense that each item in the account has the effect of a final judgment.[6] Confirmation of the account does not have the effect of a final judgment against a party reflected as a debtor in the account, and such party is not precluded from resisting payment merely because it had not objected to the account.[7] In any event, if finality of the account had been the plaintiff's cause of action, that should have been pleaded.

[11] In the circumstances, the plaintiff's claim for rectification is dismissed with costs. Such costs to include those consequent of the employment of two counsel.

Plaintiff's counsel:	R Salmon SC
Plaintiff's attorneys:	De Villiers, Evans & Petit
1st, 2nd, 3rd, 4th and 5th Defendants' counsel:	J Gauntlett SC with J Muller SC

'Confirmation of account – When an account has lain open for inspection as prescribed in section 406 and—

a) no objection has been lodged; or

b) an objection has been lodged and the account has been amended in accordance with the direction of the Master and

has again lain open for inspection, if necessary, as in section 407(4)(b) prescribed, and no application has been made to the Court within the prescribed time to set aside the Master's decision; or

c) an objection has been lodged but has been withdrawn or has not been sustained and the objector has not applied to the Court within the prescribed time,

the Master shall confirm the account and his confirmation shall have the effect of a final judgment, save as against such persons as may be permitted by the Court to re-open the account after such confirmation but before the liquidator commences with the distribution.'

6 *Kilroe- Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (A) at 627D-F; P M Meskin, *Henochsberg on the Companies Act* (2007 rev) Vol 1 p 865.

7 *Rulten NO v Herald Industries (Pty) Ltd* 1982 (3) SA 600 (D) at 604F-605A; *Henochsberg on the Companies Act*, *supra*.

1st, 2nd, 3rd, 4th and 5th Defendants' attorneys: Bowman Gilfillan Inc
c/o Garlicke & Bousfield Inc