

FILED

STATE OF SOUTH DAKOTA
COUNTY OF SPINK

APR 22 2013

IN CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
5TH CIRCUIT CLERK OF COURT

CIV 12-044

IN THE MATTER OF THE ANDERSON
SEED CO., INC. GRAIN BUYER BOND

JUDGMENT AND ORDER

RECEIVED

APR 25 2013

**SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION**

This action comes before the Court on the Motion of the South Dakota Public Utilities Commission ("Commission") for approval of the Decision of Receiver; Proposed Findings of Fact, Conclusions of Law, and Decision. This action was initiated by the Petition to Appoint South Dakota Public Utilities Commission as Receiver ("Petition") filed by the Commission on April 9, 2012. The Petition requested that the Commission be appointed as receiver of the proceeds of the grain buyer bond of Anderson Seed Co., Inc. ("Proceeds") pursuant to SDCL 49-45-16.1 and SDCL Chapter 21-21, and to take possession of the cash proceeds of the grain buyer bond of Anderson Seed Co., Inc. On May 1, 2012, this Court issued an Order Appointing the South Dakota Public Utilities Commission as Receiver pursuant to which the Commission was appointed receiver over the Proceeds and the claims process for determination of the validity of claimants' claims and their entitlement to Proceeds. The Decision of Receiver; Proposed Findings of Fact, Conclusions of Law, and Decision filed with the Court describes in detail the proceedings and actions of the Commission in its capacity as receiver over the Proceeds claims process. This matter was scheduled for hearing on March 19, 2013, at 1:00 P.M. in the Spink County Courthouse. On February 11, 2013, Notices of Hearing and copies of the Decision of Receiver; Proposed Findings of Fact, Conclusions of Law, and Decision were served on all twenty-eight claimants against Proceeds advising them of their right to appear and be heard. On March 1, 2013, CHS, Inc. d/b/a Midwest Cooperatives served on the Commission an Objection of CHS, Inc. d/b/a Midwest Cooperatives to the Decision of Receiver and Proposed Findings of Fact, Conclusions of Law and Decision of Receiver. On March 4, 2013, the Commission served an Errata Notice and Exhibit A (Correct Version) on all parties. On March 12, 2013, the Commission served on all parties a Response to Objection of CHS, Inc. d/b/a Midwest Cooperatives to the Decision of Receiver and Proposed Findings of Fact, Conclusions of Law and Decision of Receiver. On March 15, 2013, CHS served on the parties a substitute Objection to Decision of Receiver signed by an attorney admitted to practice in this state and a Withdrawal of Objection of CHS, Inc. d/b/a Midwest Cooperatives to the Decision of Receiver and Proposed Findings of Fact, Conclusions of Law and Decision of Receiver.

This action came on for hearing as scheduled before the Court on March 19, 2013, the Honorable Tony L. Portra, Circuit Judge, presiding. The Commission and Ray Martinmaas on behalf of Martinmaas Dairy ("Martinmaas") appeared. The issues having been duly heard and, having reviewed the Decision of Receiver; Proposed Findings of Fact, Conclusions of Law, and Decision and the evidence and arguments presented to the Court and the Court having found

good and sufficient cause to enter a Judgment and Order approving the Commission's Proposed Findings of Fact, Conclusions of Law, and Decision except for those proposed findings of fact and conclusions of law which find and conclude that the Martinmaas claim should be denied as a voluntary credit sale, it is hereby

ORDERED and ADJUDGED:

1. That the proposed Findings of Fact and Conclusions of Law set forth in the Decision of Receiver; Proposed Findings of Fact, Conclusions of Law, and Decision of the Commission in its capacity as receiver, as filed with the Court, are approved by the Court except for Findings of Fact 23 through 28 and Conclusions of Law 6, 7, and 8, which are hereby rejected by the Court. The following Findings of Fact and Conclusions of Law are hereby substituted for the Receiver's Proposed Findings of Fact 23 through 28 and Conclusions of Law 6 and 7:

Findings of Fact Replacing Receiver's Proposed Findings 23 through 28

23. The Court finds that the receiver is in error with regard to Martinmaas Dairy's claim but concurs with and adopts the receiver's recommendations in all other respects.

24. The question before the court in regards to the Martinmaas claim is whether Martinmaas Dairy entered into a "voluntary credit sale" with Anderson Seed Co., Inc. as that term is defined in SDCL Ch. 49-45. If Martinmaas Dairy did enter into a voluntary credit sale with Anderson Seed, then clearly it is not entitled to participate in the proceeds of the bond. SDCL 49-45-9. A voluntary credit sale is defined in SDCL 49-45-1.1 (5) as "a sale of grain or seeds pursuant to which the sale price is to be paid more than thirty days after the delivery or release of the grain for sale, including those contracts commonly referred to as deferred-payment contracts, deferred pricing contracts and price-later contracts[.]"

25. Ray Martinmaas's testimony at hearing before the Commission as receiver provided facts that the transaction between Martinmaas Dairy and Anderson Seed would meet the elements of the voluntary credit sale definition. Martinmaas testified that although he delivered his grain to Anderson Seed in November 2011, he intended to defer payment until January 2012. TR p. 14. The difficulty, however, in finding the transaction in question to constitute a voluntary credit sale is that SDCL 49-45-11 provides that voluntary credit sales must be in writing: "All voluntary credit sales of grain entered into by a grain buyer shall be in writing. The commission may, by rules promulgated pursuant to chapter 1-26, prescribe the form and content of such writings." The commission then adopted an administrative rule setting forth the required contents of said writing in ARSD 20:10:12:13. The rule states, in relevant part, "[E]ach voluntary credit sale contract shall include the following ... (9) Signature and date of signature for both the seller and buyer[.]"

26. The commission ultimately found that the Deferred Payment Grain Purchase Agreement signed by Anderson Seed and sent to Martinmaas on December 19, 2011, constituted a sufficient writing to satisfy the statutes when considering SDCL 49-45-11 and SDCL 57A-2-201(3)(d)(iii) together, despite the fact that Martinmaas never signed the agreement.

27. When reviewing the commission's decision, it is important to keep some rules of statutory interpretation in mind as set forth by the South Dakota Supreme Court in *Meyerink v. Northwestern Public Service Co.*, 391 N.W.2d 180, 183-84 (1986):

Each statute must be construed according to its manifest intent as derived from the statute as a whole, as well as other enactments relating to the same subject. *Simpson v. Tobin*, 367 N.W.2d 757, 763 (S.D. 1985). Words used by the legislature are presumed to convey their ordinary, popular meaning, unless the context or the legislature's apparent intention justifies departure. *State v. Big Head*, 363 N.W.2d 556, 559 (S.D. 1985). Where conflicting statutes appear, it is the responsibility of the court to give reasonable construction to both, and to give effect, if possible, to all provisions under consideration, construing them together to make them harmonious and workable. *Karlen v. Janklow*, 339 N.W.2d 322, 323 (S.D. 1983); *Hartpence v. Youth Forestry Camp*, 325 N.W.2d 292, 295 (S.D. 1982). However, terms of a statute relating to a particular subject will prevail over general terms of another statute. *Id.*; *Clem v. City of Yankton*, 83 S.D. 386, 402, 160 N.W.2d 125, 134 (1968). Finally, we must assume that the legislature, in enacting a provision, had in mind previously enacted statutes relating to the same subject. *State v. Feiok*, 364 N.W.2d 536, 539 (S.D. 1985).

Using these rules of statutory construction, the Court finds that the commission's reliance on SDCL 57A-2-201 is misplaced. The commission's interpretation of that statute would nullify the plain meaning of SDCL 49-45-11 and ARSD 20:10:12:13. The court must construe the statutes together to attempt to give effect to all. *Id.* Further, SDCL 49-45-11 and ARSD 20:10:12:13 are the more specific provisions because they deal directly with voluntary credit sales, whereas SDCL 57A-2-201 deals more generally with agreements that must be in writing. The more specific provisions of the former prevail over the general provisions of the latter. *Id.*

28. There is also support in the record before the commission that SDCL 57A-2-201(3)(d) was not even meant to apply to voluntary credit sales. James Mehlhaff, the director of the Grain Warehouse Division for the Public Utilities Commission, testified before the Commission that he had testified in front of the legislature in 2009 when SDCL 57A-2-201 was amended to add section (3)(d) relating to the sale of grain and related products. TR pp. 46-47. He further informed the commission that he did not recall any discussion of the proposed amendment applying to voluntary credit sales and that all of the testimony in that regard concerned contracting for future delivery. TR p. 47.

28A. Steven Domm, the CEO of Central Farmers Cooperative in Marion, South Dakota, also testified in front of the commission. He also related to the commission his

experience testifying in front of the legislature at the time SDCL 57A-2-201 was amended in 2009. TR p. 64. He agreed with Mr. Mehlhaff that there was no discussion in the legislature about voluntary credit sales at that time as the reason for the amendment was forward grain contracts. TR p. 64.

28B. Considering the testimony of Mr. Mehlhaff and Mr. Domm, the Court does not find that the legislature ever intended for SDCL 57A-2-201(3)(d) to apply to voluntary credit sales. First, they were never asked to address that issue. Second, if they did so intend, we have to assume that they were aware of the laws pertaining to that subject, as well as the rules adopted in furtherance of those laws, and they would have acted accordingly to amend that legislation at the same time to make the laws consistent. By not doing so, they expressed their intention to leave the law with regard to voluntary credit sales unchanged.

28C. Even if the Court were to find that SDCL 57A-2-201(3)(d) applies to voluntary credit sales, the Court could not agree with the commission's finding that subsection (iii) was met. That subsection requires that a writing in confirmation of the contract and sufficient against the sender be received within "a reasonable time." There is no definition of "a reasonable time" provided by the statute, but the Court finds that requirement lacking in this case.

28D. Mr. Domm testified at length that the reason for the amendment to SDCL 57A-2-201 was that this industry is extremely volatile and things must get done in a hurry before there is time for a grain producer to come in and sign a contract. TR pp. 61-63. Therefore, the statute was amended to allow the parties to make an immediate agreement verbally with a follow up in writing within a reasonable time. He stated that the industry moves so fast that he could have a hundred thousand bushel contract sold and delivered before the farmer even receives the contract. TR p. 63. Due to that speed, one hundred percent of his contracts are verbal to begin with, but all of them are followed up with a written agreement by the end of the day. TR p. 75.

28E. Contrast that testimony with the facts of this case. Martinmaas Dairy delivered to Anderson Seed on November 4, 7, and 16, 2011, but Anderson Seed did not even send the Deferred Payment Grain Purchase Agreement until December 19, 2011. Although there is no hard and fast rule as to what is considered reasonable, this Court finds that waiting over a month is unreasonable given the testimony of Mr. Domm and considering the very purpose for the statute is speed.

28F. In conclusion, the Court finds that although Martinmaas Dairy and Anderson Seed started out to enter into a voluntary credit sale, it never successfully consummated such arrangement because it never entered into a written agreement as required by SDCL 49-45-11 and ARSD 20:10:12:13. Since the transaction is not deemed a voluntary credit sale by law, then Martinmaas Dairy is entitled to participate in the proceeds of the bond.

Conclusions of Law Replacing Receiver's Proposed Conclusions 6,7 and 8

6 Under the rules of statutory construction set forth in *Meyerink v. Northwestern Public Service Co.*, *supra*, the Court concludes that the Commission's reliance on SDCL 57A-2-201 is misplaced. The Commission's interpretation of that statute would nullify the plain meaning of SDCL 49-45-11 and ARSD 20:10:12:13. The court must construe the statutes together to attempt to give effect to all. Further, SDCL 49-45-11 and ARSD 20:10:12:13 are the more specific provisions because they deal directly with voluntary credit sales, whereas SDCL 57A-2-201 deals more generally with agreements that must be in writing. The more specific provisions of the former prevail over the general provisions of the latter. *Id.* This statutory interpretation is further supported by the proceedings before the legislative committees at the time 57A-2-201 was amended.

7. The Court further concludes that even if SDCL 57A-2-201(3)(d) applies to voluntary credit sales, the requirements of subsection (iii) were not met under the facts of this case. That subsection requires that a writing in confirmation of the contract and sufficient against the sender be received within "a reasonable time." Although there is no hard and fast rule as to what is considered reasonable, this Court concludes that the delivery of a writing in confirmation of terms over a month after the last product delivery is unreasonable given the testimony at hearing concerning the importance of promptness and considering that the very purpose for the statute is speed in establishing the terms of grain sales transactions.

8. The Court concludes that although Martinmaas Dairy and Anderson Seed started out to enter into a voluntary credit sale, they never successfully consummated such arrangement because they never entered into a written agreement as required by SDCL 49-45-11 and ARSD 20:10:12:13. Since the transaction is not deemed a voluntary credit sale by law, Martinmaas Dairy is entitled to participate in the proceeds of the bond.

2. That the proposed Findings of Fact and Conclusions of Law set forth in the Decision of Receiver; Proposed Findings of Fact, Conclusions of Law, and Decision, except as rejected and modified by the Court's Findings of Fact and Conclusions of Law set forth herein, are accordingly adopted by the Court as its Findings of Fact and Conclusions of Law in this matter and are hereby incorporated by reference in this Judgment and Order as if set forth herein in their entirety.

3. That the Commission as receiver, acting through its Executive Director and accounting staff, shall apply the claimants' percent of claims, as determined by the Commission and set forth in the "Including Martinmaas Dairy" section of Exhibit A (Correct Version) to the Decision of Receiver; Proposed Findings of Fact, Conclusions of Law, and Decision, and adopted by this Court, to the amount of Proceeds, plus accrued interest thereon, in the custodial account of the Commission as of the date of check issuance, and issue and mail checks to all claimants in such amounts.

4. That upon completion of the computation of final claims payout amounts and the mailing of checks, the Commission shall file with this Court a Report of Proceeds Distribution setting forth the particulars of final Proceeds distribution to claimants.

Dated at Aberdeen, South Dakota, this 19th day of April, 2013.

BY THE COURT



Tony L. Portra
Circuit Judge

ATTEST: Elisha Kulfeld
Clerk of Courts
by Teri Podraza, Deputy