REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 23733/12

REPORTABLE: NO

OF INTEREST TO TOTHER JUDGES: NO

DATE: 06/10/2017

In the matter between:

LAND & **AGRICULTURAL DEVELOPMENT BANK**

OF SOUTH AFRICA

Plaintiff

and

MELITA MEISEL N.O.

1st Defendant

LYDIA MOROESI SIHLANGU N.O.

2nd Defendant

MANDLA JONATHAN SHUMBA

3rd Defendant

DESMOND KHALID GOLDING

4th Defendant

LINDIWE MICHELLE MASEKO

5th Defendant

KENELIWE LYDIA SEBEGO

6th Defendant

JUDITH SUSAN BORNMAN

7th Defendant

GEZINA DOROTHEA VAN ROOYEN

8th Defendant

NGWANE ROUX SHABANGU

9th Defendant

ANTON JOHANNES DU PLESSIS

10th Defendant

VAN ROOYEN N.O.

11th Defendant

JUDGMENT

AC BASSON,J

[1] This is a claim by the plaintiff (the Land & Agricultural Development Bank of South Africa) for payment in the sum of R82 million, jointly and severally by the 2nd to 10th defendants, in terms of a deed of suretyship that was concluded between the plaintiff and the defendants in July 2006, read together with an alleged acknowledgement of debt, dated 13 February 2009 by the principal debtor, Westside Trading 570 (Pty) Ltd (hereinafter referred to as "Westside"). The plaintiff is a bank established in terms of section 3 of the Land and Agricultural Development Bank Act ("the Act").[1]

[2] Westside has since been· wound up. The 1st and 11th defendants are the liquidators of the Westside. They have acknowledged the plaintiff's right to claim against the estate of Westside. Their claim against Westside is, however, not in issue in these proceedings. The

1st and 11th defendants ("the liquidators") have been cited purely on account of their interest in this matter.

[3] Both the 2nd and 1oth defendants have passed on and therefore did not participate in the proceedings. The claim therefore proceeded against the 3rd to 9th defendants. The 3rd , 5th, 6th and 7th defendants were represented by Mr. Snyman. The 4th and ath defendants were represented by Mr. De Beer and the 9th defendant was represented by Mr Sasson. (I will refer to the defendants jointly as "the defendants" unless the context requires differently.) The plaintiff was represented by Mr. Soni SC and Mr. Seleka SC.

[4] Only two witnesses gave evidence: Mr. Charova on behalf of the plaintiff and Mr. Golding (the 4th defendant). At the relevant time, Mr. Golding was the Financial Director of Westside. The 3rd, 5th, 6th, 7th and 9th defendants closed their respective cases without leading any evidence whatsoever. After Mr. Charova testified, the plaintiff closed its case whereafter the defendants brought an application for absolution which application was dismissed. Mr. Golding was thereafter called as a witness.

[5] The plaintiff and Westside have entered into a loan agreement on 6 July 2006 in terms of which an amount of R100 million would be advanced to Westside for the purpose of acquiring and developing certain identified properties on the farm Hartebeestfontein in the North West Province. At the time the identified properties were zoned as agricultural. In terms of the loan agreement an amount of R51 million would be advanced for the acquisition of certain identified properties. Thereafter an amount of R49 million would be advanced for township establishment and engineering service fees as indicated in "Annexure A" to the loan agreement. The loan agreement also required that Westside provide security to the plaintiff to secure its indebtedness under the loan agreement in the form of, *inter alia,* a mortgage bond and a written deed of suretyship which the plaintiff

concluded with the 2nd to 10th defendants who were all shareholders of Westside at the time.

The particulars of claim

[6] In terms of the original particulars of claim (in respect of the action instituted on or about 26 April 2012), the plaintiff based its claim on four courses of action. The particulars of claim were thereafter amended. The principal effect of the amendment was to now only pursue the claim based on the deed of suretyship in terms of which the nine sureties (the 2nd to 101h defendants) are required to pay the plaintiff the sum of R82 million in terms of the acknowledgment of debt, as recorded in the letter dated 13 February 2009.

Only the 4th and sth defendants have pleaded to the amended particulars of claim. The other defendants have not delivered amended pleas.

[7] In essence, the plaintiff alleges the following in the particulars of claim: (i) the plaintiff and Westside concluded the loan agreement on 6 July 2006; (ii) on 3 August 2006, the plaintiff caused a covering bond to be executed in respect of all amounts Westside owed or will owe, to the plaintiff; (iii) pursuant to the loan agreement, the plaintiff advanced a total amount of R62 617 214.54 to Westside; (iv) during 2007, the plaintiff became aware that the conclusion of the agreement and the amount advanced was not authorised; (iv) in February 2009 Westside acknowledged, in writing, that it was indebted to plaintiff the amount of R82 million. A copy of the acknowledgement of debt dated 13 February 2009 is annexed to the original particulars of claim as "Annexure B". This is a letter from the plaintiff to Westside for the attention of the 4th defendant (Mr Golding) who was Westside's Financial Director at the time; (vi) notwithstanding the fact that payment was due by 30 April 2009, plaintiff has not been paid; (vii) sometime between 6 and 20 July 2006, the plaintiff and the defendants entered into a deed of suretyship in terms of which the defendants are jointly and severally liable to pay, to the plaintiff, R82 million, sinceWestside has since been placed under final liquidation.

[8] In terms of the plea of the 3rd , 5t h, 5th and 7th defendants it is, *interalia,* pleaded that the suretyship (and the mortgage bond) is invalid, illegal, void or unenforceable because the principal loan agreement and the purpose of the loan, are contrary to the Act. These defendants admit that the letter dated 13 February 2009, was sent by the plaintiff to Westside. They, however, dispute the following: that this letter was received by Westside; the correctness of what is recorded in the letter; that the letter was signed as appears on the face of it; and lastly that the contents of the letter constitute an acknowledgment of liability. It is further pleaded that, because the (original)loan agreement is invalid, illegal and unenforceable and because the suretyship signed by the defendants and the bond, are accessory to that agreement, they are similarly unenforceable, illegal or void.

[9] The 4th and ath defendants pleaded to the amended particulars of claim. These defendants pleaded that, had they been aware, at the time of the conclusion of the loan agreement and the suretyship agreement, that the loans were unauthorised under the Act they would not have concluded this agreement and would not have bound themselves as sureties. The 4th and 8th defendants also deny the authenticity and originality of the letter dated 13 February 2009, as well as the contents thereof. They deny, in particular the fact that the amount of R94 950 089.32, was outstanding at 31 January 2009 and that there was an agreement to settle Westside's indebtedness in the amount of R82 million by the end of April 2009. It is further denied that the appending of the signature to the letter dated 13 February 2009 confirmed the contents of the letter or Westside's acknowledgement of liability or a settlement of its alleged indebtedness.

[10] The 9th defendant denies, *inter alia,* that a written loan agreement had been entered into and that the sum of R62 617 214.54 had been advanced by the plaintfif. It is also denied that Westside had acknowledged its debt to the plaintiff as set out in the acknowledgment of debt dated 13 February 2009 and that Westside was obliged to pay the sum of R82 million. It is also denied that Westside's indebtedness is covered by any

item in the deed of suretyship.

The validity of the loan agreement

[11] Pursuant to the loan agreement and in 2007, the plaintiff became aware that it was not entitled to loan money to Westside for the intended project. During this time the plaintiff had concluded approximately 15 or 16 similar loan agreements with other entities. In all of these matters the plaintiff only realised, after the loan agreements have been concluded, that it was not entitled in terms of section 3[2] of the Act, to conclude a transaction for the development of a township on agricultural land.

[12] In a similar matter, the Supreme Court of Appeal in *Panamo Properties 103 (Pty) Ltd v Land and Agricultural Development Bank of South Africa**[3]*** held that the Land Bank is obliged and empowered to use its funds *only* for the purposes set out in section 3 of the Act. The Land Bank is not empowered to enter into transactions not falling within its powers. The Court concluded that the loan to *Panamo* for the purpose of acquiring land for the establishment of a township is clearly not authorised by the Act. Consequently, the loan agreement is in contravention of the Act and therefore invalid. In another matter *Land and Agricultural Development Bank of South Africa v Impande Property Investments (Pty) Ltd**[4]***, Bashall AJ found in a similar matter that the transaction was void since it was not in furtherance of the objects of the Act.

[13] The present matter therefore proceeded on the common understanding that the loan agreement entered into between the plaintiff and Westside was invalid for the reasons as set out in the *Panamo* and *Impande* cases.

The loan agreement

[14] It is the applicant's case that on 6 July 2006 the plaintiff and Westside concluded the loan agreement for the acquisition of certain identified fixed property and township development. Save for the 9th defendant, all defendants admit that the loan agreement was concluded between the plaintiff and Westside. They also do not dispute the terms of

the loan agreement and also do not deny that Westside was duly represented by the 7th defendant and that she was authorized to enter into the agreement. I have already pointed out that it is common cause that the loan agreement is invalid. Some of the defendants pleaded that because the original loan agreement is invalid, the suretyship agreement is similarly invalid and unenforceable. I will return to this issue,

[15] The loan was secured by a mortgage bond and by a written deed of suretyship concluded with the defendants as the shareholders of Westside.

[16] Mr. Golding confirmed in his evidence that properties were identified in the Hartebeestpoort _Dam and that the intention was to establish a real estate development. He confirmed that the other defendants that are cited in these proceedings were co-directors of Westside. After the relevant properties were identified, the directors began looking around for funding and approached the plaintiff. At that time the directors were under the impression that the plaintiff was able to offer loans for real estate development. Mr. Golding confirmed that the directors - including himself - bound themselves as surety in favour of the plaintiff for the debts of Westside. At the time, the directors were of the strong view that the property had the potential of generating an income that would enable them to repay the loan and also generate a profit. He confirmed that the loan agreement was for a total sum of R100 million. An amount of R51 million was paid to Westside in order to acquire the land and to develop the property. The plaintiff had bonds registered over the properties. In total an amount of R62 619 214.54 was paid over to Westside in terms of the loan agreement.

[17] The fact that the loan agreement was concluded between the plaintiff and Westside was therefore confirmed by Mr. Golding. After the evidence of Mr. Golding, no disputes remain regarding the fact that the loan agreement had been entered into.

Deed of suretyship

[18] The plaintiff alleges that between 6 and 20 July 2006 the 2nd to 10th defendants

concluded a written deed of suretyship in favour of the plaintiff. Save for the g t h defendant, the other defendants do not dispute that they have entered into a deed of suretyship with the plaintiff nor do they dispute the terms of suretyship as set out in "Annexure C" to the particulars of claim.

[19] It is expressly recorded in the deed of suretyship that the plaintiff had, prior to the conclusion of the deed of suretyship, agreed to lend and advance R100 million to Westside and that plaintiff required security for the due and punctual repayment to it of the advances. The following are some of the material terms of the suretyship that are of importance for purposes of this action: (i) the sureties (the 2nd to 10th defendants) individually and collectively bind themselves as surety and co-principal debtor to the plaintiff for the due and punctual repayment by Westside to the plaintiff of the indebtedness (subject to clause 10 and the terms and conditions of the deed); (ii) the security created by the suretyship shall serve as a continuing covering security notwithstanding any temporary redemption or extinction of indebtedness and irrespective of whether the indebtedness existed on the date of signing of the deed or arose at a later date; (iii) the sureties accept that all admissions and acknowledgments by Westside in respect of the indebtedness shall be binding on the sureties, irrespective of whether they have been made expressly, tacitly or by implication; (iv) the sureties accept that the plaintiff shall in its sole discretion be entitled to enter into any accord, arrangement or compromise with Westside in respect of the indebtedness; (v) in the event of the insolvency or liquidation of Westside, no payment made by Westside under the indebtedness to the plaintiff shall prejudice the plaintiffs rights to recover from the sureties any liability which is due by Westside in terms of the deed; (vi) the suretyship remains in force until the debt of R100 million, fees and interest have been repaid and until the sureties are released from their liabilities in terms of the deed, by written notice to that effect from the plaintiff; (vii) the sureties acknowledge the following: all resolutions are

proper and due authority has been made; the execution of the suretyship is for the benefit of sureties individually; and each of the sureties has a material interest in securing the obligations of Westside; (viii) the sureties acknowledge and accept that a 9ertificate given under the hand of a manager or senior accountant of the plaintiff shall constitute *prima facie* proof of Westside's liability of the extent of Westside's liability and accordingly the sureties' liability towards the plaintiff under the indebtedness and that is due and payable; (ix) the parties acknowledge that the deed of suretyship constitutes the entire agreement between them and that no other conditions, stipulations or representations whatsoever have been made other than those specifically included; and (x) the sureties shall be responsible for all charges and expenses of whatsoever nature incurred by the plaintiff in enforcing its rights in terms of the suretyship, including legal costs on an attorney and own client basis.

[20] A material term of this agreement is that the sureties individually and collectively bind themselves as surety and co-principal debtor *in solidum* to the plaintiff for the punctual payment by Westside of the indebtedness (subject to clause 10).

[21] Any dispute regarding the conclusion of the deed of suretyship and the terms therefore also became academic after the evidence of Mr. Golding who confirmed that the directors have signed the deed of suretyship and that they are bound by the terms thereof. He also confirmed that, what is contained in the deed of suretyship which is annexed to the particulars of claim, are indeed the terms of the suretyship.

[22] I should pause here and point out that the fact that the loan agreement is invalid, does not mean that it necessarily follows that the deed of suretyship, being an ancillary agreement, is likewise invaild. In this regard the Supreme Court of Appeal in *Panamo**[5]*** held (albeit in the context of a mortgage bond) that it does not necessarily follow that, because the principal agreement is invalid, the ancillary agreement is also invalid.

The mortgage bond

[23] On or about 3 August 2006 the plaintiff caused covering bond 812317801 to be executed at the Registrar of Deeds in Pretoria in favour of the plaintiff. The properties referred to in the loan agreement were mortgaged as security for the payment of the capital amount or any part thereof.

The acknowledgement of debt

[24] After the plaintiff became aware that it was not entitled to loan money for the project intended by the. defendants, it engaged with Westside and communicated this development to them. According to the plaintiff, negotiations between the plaintiff and Westside ensued and resulted in an agreement concluded in February 2009, in terms of which it was agreed that Westside would pay R82 million to the plaintiff by the end of April 2009, notwithstanding the fact that its outstanding loan balance as at 31 January 2009 (the money advance together with interest) totalled nearly R92 million (the disputed acknowledgement of debt).

[25] The fact that such negotiations took place is not in dispute. What is in dispute is whether the negotiations led to a settlement agreement having been concluded on 13 February 2009 and whether Mr. Golding had signed the letter dated 13 February 2009, which contains the terms of the settlement agreement (the disputed acknowledgement of debt).

[26] The plaintiff initially instituted action against Westside as the principal debtor. Westside was finally wounded up in September 2012. The plaintiff is now confining its claim againt the defendants, as sureties and on the acknowledgment of debt, dated 13 February 2009 that was allegedly entered into between the plaintiff and Westside.

[27] This acknowledgement of debt is central to the dispute between the parties and forms the basis upon which the plaintiff instituted action against the defendants as sureties.

[28] The acknowledgement of debt consists of a two-page letter and is addressed to the Financial Director, Mr. Golding. On the first page of the letter it is recorded that discussions

were held between the plaintiff and Westside and that Westside had successfully negotiated an offer of R82 million in full and final settlement of its indebtedness to plaintiff, notwithstanding the fact that its outstanding loan balance at 31 January 2009, was R94 900 589.32. It is further recorded that Westside had undertaken to pay the settlement amount *"on conclusion of the transaction"* with a potential buyer with whom a Deed of Sale had been signed. The letter further confirms that the plaintiff had informed Westside that the loan advanced to it fell outside the plaintiff's mandate and that the plaintiff could not make any further advancements to Westside under the loan, hence the need for Westside to find alternative finance. Westside was further specifically informed that "*it is imperative that the outstanding balance of the loan be repaid in full by the end of April 2009. An extension of the deadline may be granted by the Bank in its sole discretion."*

[29] On the second page of the letter Mr Hadebe -the CEO on behalf of the plaintiff - signed the letter and inserted the date of 13 February 2009, in handwriting. The letter then goes on to specifically request the following from Westside:

> *"Kindly acknowledge receipt of the letter, and the attached schedule, for and on behalf of Westside Trading 570 (Pty) Ltd as confirmation of the information contained herein. In the event of the information supplied not being applicable or correct, please indicate as such in your reply. Please respond by no later than 28 February 2009."*

[30] The letter was signed for and on behalf of Westside, on the face of it, by Mr. Golding.

<u>The issues before the court</u>

[31] I have already referred to what initially were the issues in dispute at the commencement of the trial and in this regard I have referred in some detail to what was pleaded on behalf of the various defendants. After the evidence of Mr. Golding the issues became more confined.

[32] After the evidence of Mr. Golding, the principal dispute between the parties centred on

the acknowledgement of debt. In essence, the defendants disputed the acknowledgement of debt on the following basis: firstly, only a copy of the acknowledgement of debt was available. The copy available to the Court is the exact same copy that was annexed as "Annexure B" to the original particulars of claim. I will return to the status of this document in more detail. Secondly, the defendants disputed that the acknowledgement of debt was signed by Mr. Golding on behalf of Westside and during the trial it was also disputed that Mr. Golding, in any event, had the necessary authority to bind Westside to the terms of the acknowledgement of debt. Thirdly, the defendants disputed that it agreed to settle the debt for an amount of R82 million by the end of April 2009. Fourthly, it was submitted that, at best for the plaintiff, the signature on the second page of the acknowledgement of debt, was an acknowledgement that the letter was received. Fifthly, during the trial Mr. Golding suddenly took issue with the contents of the first page of the letter and testified that something was *"amiss"* on the first page. Sixth, it was also disputed that the acknowledgment of debt, constitutes a debt as contemplated by the deed of suretyship. Seventh, the defendants also alleged, with reference to the first page of the acknowledgement of debt, that the acknowledgement was conditional on the sale of the properties.

Admissibility of the letter of 13 February 2009

[33] It is common cause that an original version of the letter dated 13 February 2009 was not placed before the Court. The plaintiff was only able to present a copy of the acknowledgement of debt. As already pointed out, the copy that was placed before the Court is the same copy that was annexed as "Annexure B" to the original particulars of claim.

[34] The defendants took issue with the status of this letter and submitted that a party is required to produce the original document if it seeks to rely on its terms. It was further submitted that, because the plaintiff is not able to produce the original acknowledgment of

debt, the document was not admissible.

[35] It is accepted that where a document is directly in issue, the original document must be produced (the so-called best evidence rule). See in this regard: *Welz and Another v Hall and Others**[6]***:

> *"As far as the best evidence rule is concerned, it is* a *rule which applies nowadays only in the context of documents and then only when the content of a document is directly in issue. It does not apply where the document serves to record the fact capable of being proved outside the document. It provides that the original of* a *document is the best evidence of its contents. The rule is* a *very ancient one. It goes back to the Dark Ages, well perhaps the twilight days, before faxes and photocopying machines, when making copies was difficult and such copies as were made often inaccurate. Under those circumstances Courts, naturally, insisted upon production of the original document* as *being the most reliable evidence of its contents."*

[36] Where the original document is not available, the document may still, in certain circumstances, be admitted and if secondary evidence is the only means of proving the document, it may be admitted. The Court in *Singh v Govender Brothers Construction**[7]*** summarized the general principles and the importance of the Court being satisfied that, notwithstanding a thorough search, the document cannot be found:

> *"The general rule of the law of evidence is that, when the purpose is to establish the terms of* a *writing, the writing itself must be produced but that secondary evidence may be given of the contents when the original has been destroyed or lost and proper search has been made for it. It is necessary to prove that proper search has been made for the original and that it could not be found (R v Amod* & Co *(Ply) Ltd and Another 1947 (3)* SA *32 (A) at 40).*
>
> *In Ex parte Roche et Uxor 1947 (3)* SA *678 (0) MILNE AJ (as he then was) held (at*

683) that a document may *properly be said to be lost*

> *"when, although its existence is presumed, the precise place of its existence cannot be remembered by anyone who can reasonably be expected to have known it, and it cannot be found despite adequate search".*
>
> *(The italics are mine.)*

The importance of the search and its adequacy is emphasised in S v Tshabalala 1980 (3) SA 99 (A). It was *there pointed out that the question is not whether* a *witness is convinced that* a *document cannot be found but whether the Court is satisfied that notwithstanding* a *thorough search the document cannot be found. The effect of that decision and the Jaw generally is correctly summed up in Hoffmann and Zeffertt SA Law of Evidence at 306 as follows:*

> *"The contents of* a *document may be proved by secondary evidence if it is shown to have been destroyed, or there is evidence that after* a *proper search it could not be found - the search has to be thorough and it is not good enough for* a *person to* say *that the document has gone altogether.""*

[37] Mr. Charova explained in his evidence that he was familiar with the letter and with its contents. In this regard he explained that he was part of the committee that had to deal with the problems that arose after the plaintiff was made aware of the fact that it was not entitled to grant loans for property development. He explained that he was specifically tasked to look for the original letter and that he personally searched all client files but that he could only find copies of the letter. He also testified that he spoke to the various relations managers of the parties but that the original letter could not be located. In respect of his knowledge of the letter and the contents thereof, Mr Charova testified that the committee (of which he was part) negotiated on behalf of the plaintiff with customers (including Westside) in respect of the invalid loans. The letter was prepared by the committee and was thereafter forwarded to Mr. Hadebe (the CEO of the plaintiff) as the

accounting officer, for his signature. Mr. Charova confirmed that the contents of the letter were discussed at the committee. He also confirmed the signature of Mr. Hadebe and testified that he was familiar with his handwriting since he had worked with Mr. Hadebe for 6 years. Mr. Charavo also confirmed that after the letter was signed by both Mr. Hadebe and Mr. Golding, the letter was presented to the commtitee.

[38] The defendants disputed that the evidence of Mr. Chirovain respect of his efforts to locate the original document, was sufficient to persuade this Court that a proper search has been done to locate the original letter.

[39] Despite the respondents' criticism of Mr. Charova's explanation in respect of the attempts that have been made to locate the original letter, I am, however, satisfied that, despite a thorough search, the original document could not be found. I am therefore satisfied that the letter of 13 February 2009 is in fact a true copy of the original.

[40] The letter of 13 February 2009 essentially confirms the outcome of the negotiations between Mr. Golding, on behalf of Westside and the plaintiff, in respect of the repayment of the loan: Westside will pay an amount of R82 million in full and final settlement of its indebtedness to the plaintiff by the end of April 2009. This letter was preceded by a letter from Mr. Golding on behalf of Westside dated 5 February 2009 and entitled: "SUBJECT: WESTSIDE REPAYMENT OF THE BANK'S LOAN". This letter was not disputed. The contents of this letter is important in that it supports the contention on behalf of the plaintiff that the agreement, finally reached and encapsulated in the letter of 13 February 2009, was that Westside would pay to the plaintiff R82 million in full and final settlement of the invalid loan. In this letter Mr. Golding, purportedly acting on behalf of the directors, offered to settle the matter for an amount of R82.million:

> *"The above matter refers.*
>
> *Following to your correspondence on the above matter, we would like to propose that the Bank accepts our proposition for settlement of R82 million as full and final*

settlement.

We will ensure that the discussions with our buyers and other due legal related processes are speed up to ensure that by or before the 30 March 2009 the settlement payment is transmitted to the Bank."

[41] Mr. Golding confirmed that he was invited to meet with the plaintiff towards the end of October 2007. He also confirmed that they had a meeting with Mr. Charova. During this meeting the plaintiff informed Mr. Golding and Mrs. Bornman (the 7th defendant) that the plaintiff was not mandated to enter into loan agreements in respect of real estate development. He testified that they had registered their grave dissatisfaction with the information conveyed to them and that, at the time, they were of the view that the plaintiff was in breach of the loan agreement. Mr. Golding testified that they were effectively set up for failure, as they would not be able to proceed with the development.

[42] Mr. Golding also referred to a letter dated 29 January 2008 written by him and addressed to the Head Corporate Finance (Mr. Van der Westhuizen) of the plaintiff. In this letter the discussion held with the plaintiff during the latter part of 2007 are confirmed. Mr. Golding confirms in this letter that the directors of Westside are in agreement that there should be an amicable settlement of the matter. Mr. Golding, clearly on behalf of the directors of Westside, further conveys to the plaintiff that the Board of Directors had taken certain resolutions. One of the resolutions was that the plaintiff should fund the project until the end of April 2008, whilst Westside endeavour to secure alternative funding to proceed with the project. Mr. Golding further confirms that they (the directors) knew that the property would ultimately have to be sold in order to meet their financial obligations. The salient part of this letter reads as follows:

"We as directors of Westside are in agreement with the Bank that this should be resolved in a *way that retains* a *sound relationship for both parties allowing ourselves to settle this matter amicably and thus creating* a *good relationship*

going forward.

This matter was presented to the Board of Directors and they all underscored the sentiment that the settlement must be amicable without any legal battles as this would not be beneficiary to either of the parties.

The Board resolved the following:

- …..
- *That Land Bank fund the project until end of April 2008 while Westside 570 (Pty) Ltd secures alternative funding to proceed with the project or decide otherwise.* ....."

[43] Although Mr. Golding admitted that there were various discussions with representatives of the plaintiff and that attempts were made to settle the matter, he denied that there was ever a firm agreement as to an amount that will be paid. According to him, various amounts were mentioned. However, if regard is had to Mr. Golding's letter offering to settle the loan for R82 million and the eventual acknowledgement of debt, I am persuaded that the parties had indeed agreed to settle the loan for R82 million. He also maintained that Westside would only pay the plaintiff once the properties were sold. (I will return to the question whether the offer to settle was conditional.)

Did Mr. Golding sign the acknowledgement of debt on behalf of Westside?

[44] One of the disputes that pertinently featured in the trial was whether Mr. Golding had signed the acknowledgment of debt (13 February 2009) on behalf of Westside. In fact, when Mr. Charova was cross-examined by Mr. De Beer, it was put to him that Mr. Golding has no recollection that he has signed the letter dated 13 February 2009. To this statement, Mr. Charova responded that Mr. Golding did sign the letter, that he was familiar with the signature of Mr. Golding and that the signature was consistent with that of Mr. Golding.

[45] At the outset I should point out that Mr. Golding had great difficulty in answering direct

and simple questions regarding him having signed the acknowledgement of debt. His answers were evasive and the Court gained the impression that Mr. Golding wanted to avoid, at all costs, admitting to the fact that he had in fact signed the acknowledgement of debt despite the clear evidence of Mr. Charova that he was familiar with the signature of Mr. Golding. I also find it difficult to accept that Mr. Golding could have no recollection of having signed such a momento.us document after having personally been involved in extensive negotiations to settle the outstanding loan with the plaintiff.

[46] In his evidence in chief he was specifically asked whether he recognised the signature (on the second page of the acknowledgement of debt). He respondent as follows:

> *"Ja. Well, I do see the signature. It appears to be closer to* a *signature, which would be mine. It is here"*

Mr. De Beer again asked him whether it looked like his signature to which he replied:

> *"Well, it appears to be, although, you know, although is actually curves down, but is does appear to be my signature, on the face of it. Ja."*

Mr. De Beer then directly asked him whether he would be prepared to say that the signature was definitely *not* his, he stated as follows:

> *"Well, as I'm saying that it does appear to be my signature. Yes."*

[47] Mr. Golding was also asked whether he could recall the paragraph that appears directly above his signature.[8] Mr. Golding responded, again somewhat vaguely, that *"there was* a *lot of correspondence"* between them (Westside) and the plaintiff and that there *"would have been* a *lot of acknowledgment of letters that we could have received from the Land Bank'.* Despite again trying his best not to directly answer questions relating to him having signing the letter dated 13 February 2009 and having seen the paragraph immediately above his signature, Mr. Golding did not in his evidence in chief, unequivocally denied having seen this specific paragraph nor that he had signed the letter dated 13 February 2009.

[48] Mr. Golding was also referred to the first page of the letter dated 13 February 2009. He testified that something seemed to be *"amiss"* on the first page of the two-page letter. He could, however, not explain to the Court what exactly was "amiss" on the first page of the letter. He also denied that he had the necessary authority to conclude an agreement with the plaintiff based on the negotiations.

[49] In cross-examination, Mr Soni referred Mr. Golding to the papers that served before the Court in the application for summary judgment. At the time the original particulars of claim served before the Court. Mr. Golding was specifically referred to the affidavit opposing summary judgment, deposed by him, as the first defendant in the summary judgment proceedings. Mr. Golding was asked whether he could recall having made this affidavit. Again, somewhat vaguely, he answered as follows:

> *"Well, to the best of my knowledge and looking at the signature and where it was done, I would say, to the best of my knowledge, it is more likely that I signed the affidavit. Yes.. .....* So, *that is why I* am *saying that to the best of my recollection, this affidavit would have been signed by myself "*

[50] Despite again having great difficulty to concede that he had deposed to the affidavit opposing summary judgment, Mr. Golding, nonetheless confirmed that he would have read the affidavit before he signed it and also conceded that he would have made sure that the information contained in the affidavit (deposed to by him) was correct before he would have signed it.

[51] Mr. Golding was then referred to paragraph [32] and [33] of the original particulars of claim (to which he deposed his affidavit opposing summary judgment) where the plaintiff stated the following:

> *"32. On or about 13 February 2009 the plaintiff sent* a *letter to the first defendant* a *copy of which is attached marked "D" [the acknowledgment of debt].*
>
> *33. The plaintiff recorded in the letter that:*

33.1 the first defendant's outstanding loan balance as at 31 January 2009 stood at R94 900.32.

33.2 the first defendant and plaintiff agreed to fully and finally settle first defendant indebtedness to the plaintiff payment of R82 million.

33.3 The outstanding balance to pay in full by the end of April 2009.

34. The first defendant appended its signature to the letter and thereby acknowledged receipt of the letter and confirming the contents of annexure "D", thereby confirming its acknowledgment of liability and/or settlement of its indebtedness to the Plaintiff in the sum of R82 million".

[52] In his answering affidavit opposing summary judgment, Mr. Golding denied that that this letter constituted an acknowledgment of indebtedness towards the plaintiff and stated that *" as it is clear from the wording of the said letter that the Plaintiff merely recorded the requirement that the outstanding balance be repaid in full by the end of April 2009".* In respect of the allegation that the letter was signed, Mr. Golding unequivocally acknowledged in his affidavit that he had signed the letter, notwithstanding the fact that the plaintiff did not even allege in the particulars of claim that it was Mr. Golding who had signed the letter on behalf of Westside.

"I placed my signature upon the letter merely as confirmation of receipt and the noting of the content thereof. I never bound the First Defendant to an acknowledgment of indebtedness as alleged to by the Plaintiff by the affixing of my signature to the letter and is [sic] the Plaintiff put to the proof thereof."

[53] After having been confronted with what he had stated in previous court proceedings, in respect of him signing the letter dated 13 February 2009, Mr. Golding eventually conceded that he had signed the letter:

"It looks like my signature and I have no reason to doubt that is not my " *signature. Therefore, it would be correct. Ja."*

[54] It is significant that, in his affidavit opposing summary judgment, Mr. Golding did not allege as he is doing now, that he did not have the necessary authority to sign the letter on behalf of Westside. Mr. Golding also did not mention anything in his affidavit about something being *" amiss"* in the letter. In this regard I have already referred to the fact that Mr. Golding in his evidence in chief and with which he persisted with in cross- examination, testified that there was something *"amiss"* on the first page of the acknowledgment of debt. In cross-examination it was, however, pointed out to Mr. Golding that the acknowledgment of debt that was now placed before Court (and in respect of which he now has a problem with) was in fact the same as the acknowledgment of debt annexed to the original particulars of claim to which he (Mr. Golding) deposed to an affidavit opposing summary judgment. Mr. Golding again reluctantly conceded that he would have seen the letter when he deposed to his affidavit. Mr. Golding could, however, not explain why he did not at the time raise his concerns with the first page of the acknowledgement of debt in his answering affidavit. When confronted with this issue Mr. Golding again tried his best to get out of this predicament by insisting that something was *" amiss"* on the first page of the disputed acknowledgement of debt. Mr, Golding, however, was again not able to tell the Court what in fact is *" amiss"* on this page. He further explained that he was placed in a predicament because the original document was not before Court and that he had to rely on "*secondary documentation"* and that *"there is just something that does not tally'.*

[55] In summary therefore: despite Mr. Golding's difficulty in making a frank admission that he had signed the acknowledgement of debt, I am satisfied that he signed the letter on page two of the two-page letter. I pause to restate that Mr. Golding's evidence on this issue was evasive and non-committal and the Court had the impression that he was trying his best to avoid making a frank admission in this regard.. However, despite his obvious reluctance and evasiveness to concede that he had in fact signed the acknowledgement of debt, he did in the end concede that the signature at least looked like

his. Mr. Golding's reluctance to admit that he had signed the acknowledgement of debt must also be viewed against the fact that Mr. Golding previously and unsolicited volunteered the information in his affidavit opposing summary judgment that he had in fact signed the acknowledgement of debt. Mr Golding even had difficulty in conceding that he had signed the answering affidavit opposing summary judgment and was only prepared to concede that, to the best of his recollection, he had signed the answering affidavit. He also testified that to the best of his knowledge, it was more likely that he had signed the answering affidavit. He was, however, prepared to concede that the Commissioner of Oaths had asked him if he confirmed the contents of the affidavit as being true and correct.

[56] The evidence of Mr. Charova stands in stark contrast to the evidence of Mr. Golding who, as already pointed out, was in all respects an evasive and unsatisfactory witness. Mr. Charova explained in his evidence that he was aware of the contents of the letter and that the letter emanated from the committee of which he was a member. He also confirmed the contents of the letter.

[57] Also, despite Mr. Geldings protestations that something was *" amiss"* on the first page of the acknowledgement of debt, the terms of the acknowledgement of debt is similar to the offer of settlement that Mr. Golding himself addressed to the plaintiff.[9] In this regard I can find no reason to reject the evidence of Mr. Charova, who testified that the copy of the acknowledgement of debt that served before the Court is in fact that one that was drafted and sent to Mr. Golding for his signature. Mr. Golding also never disputed the first page of the acknowledgment of debt until now even thought he had an opportunity to do so in his answering affidavit opposing summary judgment. Furthermore, as already pointed out, Mr. Golding was very vague and evasive in his evidence regarding what was *"amiss"* or wrong on the first page of the letter.

Is the acknowledgment of debt covered by the suretyship?

[58] I have already pointed out that, after the evidence of Mr. Golding, it was no longer in

dispute that the plaintiff and Westside had concluded a loan agreement and that the various defendants had concluded a deed of suretyship. After Mr Golding's evidence it was also no longer in dispute what the terms of the deed of suretyship are. I will therefore proceed to evaluate the evidence on the basis that it has now been established that the plaintiff has a deed of surety with each of the defendants. Is the acknowledgement of debt, a debt contemplated by the deed of suretyship?

[59] I am persuaded that, on a reading of the terms of the deed of suretyship, the acknowledgement of debt is one that is contemplated by the deed of suretyship. I have already referred, in some detail, to the terms of the deed of suretyship. The sureties accepted that all admissions and acknowledgements by the debtor in respect of its indebtedness, shall be binding on the sureties, irrespective of whether they have been made expressly, tacitly or by implication (clause 4). In terms of clause 3, the security created by the deed of surety served as a continuing covering security notwithstanding any temporary redemption and irrespective of whether the indebtedness existed on the date of signing of the deed of surety or arose at a later date. The sureties also accepted that all admissions and acknowledgements by Westside, in respect of its indebtedness, shall be binding on these sureties. More in particular, the sureties accepted that the plaintiff has a discretion to enter into any accord, arrangement or compromise with the debtor in respect of the indebtedness and may enter into any arrangement or compromise with any one or more of the sureties (clauses 5.5 and 5.6).

[60] In this matter, it is the plaintiffs case that, although the indebtedness of Westside was more than R94 million, Westside had compromised its liability towards the plaintiff and had agreed to reduce it to R82 million and that it did so when Mr. Golding signed the acknowledgement of debt dated 13 February 2009. I am therefore satisfied that the acknowledgment of debt constitutes a debt of contemplated by the suretyship.

<u>Mr. Golding's authority to sign the acknowledgment of debt</u>

[61] Mr. Golding endeavoured to persuade the Court that he, in any event, had no authority to settle any dispute with the plaintiff and that it was resolved by the Board that Mr. Anton du Plessis and Ms. Judy Bornman were authorised to engage with the plaintiff.
[62] Mr. Golding essentially relied on two earlier company resolutions to demonstrate that he did not have the necessary authority to act on behalf of Westside when he signed the acknowledgement of debt. The one resolution is dated 3 April 2006 (but signed 18 May 2006) and the other is dated 27 April 2006. Mr. Soni submitted on behalf of the plaintiff that, if regard is had to the wording of the two resolutions, the contention by Mr. Golding cannot stand for the following reasons: the resolution dated 3 April 2006 as well as the one dated 27 April 2006, were clearly taken in the context of a loan application in respect of the proposed development. The acknowledgement of debt was not a funding application or an application for loan finance by Westside. The letter was the outcome of negotiations between the plaintiff and representatives of Westside to reach an amicable resolution in respect of the invalid loan agreement. I am in agreement with his submission.
Furthermore, apart from the fact that Mr. Golding was the author of all the letters to the plaintiff pertaining to the invalid loan, Mr. Golding also admitted that he attended the negotiations on behalf of Westside with the plaintiff in order to find an amicable solution for the problem. I have also previously pointed out that, if regard is had to the letters sent to the plaintiff by Mr. Golding, it is clear from the context thereof that he was acting on behalf of Westside. Also, if regard is had to the acknowledgement of debt, it is patently clear that Mr. Golding acted on behalf of Westside when he attached his signature to the letter. Moreover, except for the 4th defendant, none of the other defendants placed in dispute the 4th defendant's authority to sign the letter on behalf of Westside. Telling also is the fact that Mr. Golding never dispute in his affidavit opposing summary judgment that he, in any event, did not have the necessary authority to sign the letter on behalf of Westside. Lastly, if regard is had to the offer of settlement made to the plaintiff in the letter of 5 February

2008, it can hardly be contended that Mr. Golding did not have the necessary authority to act on behalf of Westside in the negotiations. After all, Mr. Golding was the one who wrote the letter dated 5 February 2008. Further, if regard is had to the wording of the letter - particularly the employment of the words *"we will ensure"*- one cannot but come to the conclusion that Mr. Golding duly acted on behalf of Westside in the settlement negotiations in respect of the invalid loan.

The effect of Mr. Golding's signature on the acknowledgment of debt

[63] I have already referred to the fact that Mr. Golding had indicated in his affidavit opposing summary judgment that, when he placed his signature on the letter dated 13 February 2009, he merely did so as confirmation of receipt thereof and for purpose of noting the content thereof. His signature therefore did not have the effect of binding Westside to an acknowledgment of indebtedness as alleged by the plaintiff.

[64] There is no merit in this submission and in this regard I am in agreement with the decision in *Land and Agricultural Development Bank of South Africa v Impande Property Investments (Pty) Ltd**[10]*** where the Court considered a letter, similar to the letter of 13 February 2009 and the effect of it being signed without placing in dispute its correctness. The Court pointed out that:

> *"There is no dispute by the Defendant of the contents of the body. Despite the expressed invitation to raise the information as not being correct the Defendant not only signed it but was and remained silent.*"[11]

The Court rejected an argument that the defendant's signature merely indicated that the letter had been received but that it did not necessarily signify that the defendant accepted its correctness.

[65] In the present matter Mr. Golding likewise did not respond by disputing the information contained in the acknowledgment of debt despite an invitation to do so. By not doing so, Mr. Golding accepted on behalf of Westside the terms of the letter. When reading the letter

dated 13 February 2009, it is clear that Westside has successfully negotiated an offer of R82 million in full and final settlement of its indebtedness to the plaintiff and that the outstanding balance of the loan would be repaid in full by the end of April 2009.

Was the obligation to pay conditional?

[66] One further aspect should be considered and that is the submission on behalf of the defendants that the obligation to pay was conditional upon the successful sale of the relevant properties. In this regard the Court was referred to the clause in the acknowledgement of debt that reads as follows;

> *"The company has undertaken to repay Land Bank on conclusion of the transaction with the third party interested in buying the development and with who* a *Deed of Sale has been signed."*

[67] Before deciding the issue, it is necessary to briefly consider what approach must be followed in interpreting the terms of the acknowledgement of debt. In *Natal Joint Municipal Pension Fund v Endumeni Municipality**[12]*** the Supreme Court of Appeals set out the proper approach to be followed to the interpretation of documents:

> *"[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pfy) Ltd v General Hendrik Schoeman Primary School. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in* a *document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its*

coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as *reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in* a *contractual context it is to make* a *contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."*

[68] The letter of 13 February commences by setting out how it came about that the plaintiff had come to its decision. Importantly, the letter points out that it was *" imperative"* that the outstanding amount be paid in full by the end of April 2009. Having regard to the plain language of the letter, I am in agreement with the submission on behalf of the plaintiff that this express sentence is destructive of any suggestion that the payment was conditional on the sale transaction being concluded.

Conclusion

[69] I am satisfied on the evidence and on an interpretation of the relevant documents that the 2nd to 1Oth defendants are liable to pay the plaintiff R82 million jointly and severally, the one paying the other to be absolved, on the basis of the suretyship read together with the acknowledgement of debt.

Costs

[70] In respect of costs it was submitted on behalf of the plaintiff that the defendants should pay the costs of two counsel on the scale as between attorney and client as provided for in clause 20 of the deed of surety. Mr. Snyman, however, submitted that the Court should not order the costs of two counsel.

[71] It was further submitted that, in the event that the Court finds for the plaintiff, the Court should order the plaintiff to pay the costs of the two days that were wasted at the commencement of trial. When the matter was called on the Monday (the first day of the trial), the matter was first referred by the Deputy Judge President ("DJP") to my learned brother Fabricius, J to consider the objections raised on behalf of the defendants in respect of why the matter could not proceed to trial. After Fabricius, J decided that the matter was ready to proceed to trial the matter was allocated to me by the DJP. The same objections as to why the matter could not proceed to trial were again raised before me and resulted in an even further delay. Most of the objections raised related to the invalidity of the loan agreement and the deed of surety and the fact that the original acknowledgement of debt was not before Court. If regard is had to the evidence of Mr. Golding who confirmed not only the loan agreement but the deed of suretyship, these objections clearly were, in my view, an attempt to derail the commencement of the trial. I can therefore find no reason why the plaintiff should be blamed for the delay. I am also satisfied that the employment by the plaintiff of two counsel was warranted particularly in light of the fact that the different defendants were represented by three counsels.

[72] What remains is the issue of costs in respect of the removal of the matter that was set down on Friday the 9th of March 2016. The matter was removed two days before the trial by agreement and costs were reserved. In respect of the reserved costs of the 9th of March 2016, Mr. Snyman submitted that the plaintiff should be ordered to pay the costs occasioned by the removal of the matter two days prior to the hearing. Mr. De Beer argued

that, should the Court find that no one can be blamed for the removal of the matter, no order as to costs should be made.

[73] It appears that the trial was previously enrolled for the 9th of March which fell on a Friday. Because the matter was anticipated to run for more than a day, the attorney on behalf of the plaintiff requested the DJP to enrol the trial for the Monday. The DJP, however, directed that the matter be removed from the roll and that an application be made for a preferential trial date. In respect of the reserved costs I am of the view that, in light of the aforementioned directive, no order of costs should be made in respect of the reserved costs.

[74] Order:

1. The 2nd to 10th defendants are ordered, jointly and severally, the one paying the other to be absolved, to pay the amount of R82 million to the plaintiff together with interest on the aforesaid sum at the rate of 15.5% per annum a *tempore morae.*

2. The 2nd to 10th defendants are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs on an attorney and client scale, such costs to include the costs occasioned by the employment of two counsel.

3. In respect of the reserved costs occasioned by the removal of the matter from the roll on 9 March 2017 there is no order as to costs.

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AC SASSON

JUDGE OF THE HIGH COURT

Appearances:

For the plaintfif:

Adv V Soni SC and Adv PG Seleka SC

Instructed by:

Mkhabela Huntley Attorneys Inc.

For the 3rd, 5th , 5th and 7th defendants: Adv Snyman

Instructed by:

Dibakwane Attorneys c/o Mou Makoe Attorneys

For the 4th and 8th defendants: Adv de Beer

Instructed by:

Nel & Richter Incorporated Attorneys

For the 9th defendant: Adv

Sasson

Instructed by:

Ettienne Naude Attorneys

[1] Act 15 of 2002.

[2] Section 3 sets out the objects of the Act as follows: *"(1) The objects of the Bank are the promotion, facilitation and support of - (a) equitable ownership of agricultural land, in particular the increase of ownership of agricultural land by historically disadvantaged persons; (b) agrarian reform, land redistribution or development. programmes aimed at historically disadvantaged persons . . . for the development of farming enterprises and agricultural purposes; (c) land access for agricultural purposes;*

(d) agricultural entrepreneurship; (e) the removal of the legacy of past racial and gender discrimination in the agricultural sector; (f) the enhancement of productivity, profitability, investment and innovation in the agricultural and rural financial systems; (g) programmes designed to stimulate the growth of the agricultural sector and the better use of land; (h) programmes designed to promote and develop the environmental sustainability of land and related natural resources; (i) programmes that contribute to agricultural aspects of rural development and job creation; (j) commercial agriculture; and

(k) food security."

[3] **32016 (1) SA202 (SCA).**

[4] 2014 JDR 2084 (GJ) (Unreported)

[5] *Supra* at paragraph [31]: *"In the first place, the bond is* a *covering bond. A covering bond may provide security for more than one specific debt. The bond may therefore afford security for more than obligations arising under the loan. It is not necessarily extinguished merely because the loan is void. It complies with the formalities required by s 51 of the Deeds Registries Act for those covering future indebtedness. The nature of the bond thus does not exclude the possibility that an enrichment claim may be covered".*

[6] 1996 (4) SA 1073 (C) at 1079C - E.

[7] 1986(3) SA 613 (N) at 6161 - 617E.

[8] Quoted in *supra* at paragraph [29].

[9] See paragraph [57] *supra* where the salient parts of the letter is quoted.

[10] 2014 JDR 2084 (GJ).

[11] *Ibid* at page 28 lines 12-14..

[12] 2012 (4) SA 593 (SCA) at paragraph (18].