CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 215/18

In the matter between:

NGWANE ROUX SHABANGU	Applicant
and	
LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA	First Respondent
MELITA MEISEL N.O.	Second Respondent
MANDLA JONATHAN SHUMBA	Third Respondent
DESMOND KHALID GOLDING	Fourth Respondent
LINDIWE MICHELLE MASEKO	Fifth Respondent
KENELIWE LYDIA SEBEGO	Sixth Respondent
JUDITH SUSAN BORNMAN	Seventh Respondent
GEZINA DOROTHEA VAN ROOYEN	Eighth Respondent
ADRIAAN WILLEM VAN ROOYEN N.O.	Ninth Respondent

Neutral citation:	*Shabangu v Land and Agricultural Development Bank of South Africa and Others* [2019] ZACC 42
Coram:	Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ

Judgment: Froneman J (unanimous)

Heard on: 1 August 2019

Decided on: 29 October 2019

Summary: Land and Agricultural Development Bank Act 15 of 2002 — invalid loan agreement with organ of state — acknowledgment of debt — compromise or novation — compromise invalid if it perpetuates invalidity of loan agreement

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ORDER

On appeal from the High Court of South Africa, Gauteng Division, Pretoria:

1. The second to ninth respondents' applications to intervene as applicants are dismissed.
2. Leave to appeal is granted.
3. The appeal succeeds with costs, including the costs of two counsel.
4. The High Court order is replaced with the following:
   "The plaintiff's claim is dismissed with costs".

JUDGMENT

FRONEMAN J (Mogoeng CJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ concurring):

Introduction

[1] The applicant and second to ninth respondents[1] (sureties) stood written surety for loans advanced by the first respondent (Land Bank) to the principal debtor, Westside Trading 570 (Pty) Limited (Westside), for the development of urban property. The Land Bank was subsequently advised that the transaction (loan agreement) was beyond its statutory powers in terms of the Land and Agricultural Development Bank Act (the Act),[2] because these powers were confined to promoting, facilitating and supporting the equitable ownership and development of agricultural land by historically disadvantaged persons.[3]

[2] Upon receipt of this advice, the Land Bank stopped advancing funds to Westside. By then R51 million had been spent by Westside on purchasing properties and approximately R11.5 million of the planned R49 million for township establishment and professional fees as envisaged. The Land Bank asserted that together with interest, Westside owed it some R95 million. Westside disputed this amount. Its financial director then signed an acknowledgment of debt in which Westside accepted liability to repay R82 million to the Land Bank in full and final settlement of its indebtedness.

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[1] The position of the second to ninth respondents is dealt with at [11] to [12] below.

[2] 15 of 2002.

[3] Section 3 of the Act provides:

> "(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 or groups of such persons for the development of farming enterprises and agricultural purposes;
>
> . . .
>
> (2) The Bank must achieve its objects by—
>
> (a) providing financial services to promote and facilitate access to ownership of land for the development of farming enterprises and for agricultural purposes by historically disadvantaged persons;
>
> (b) providing financial services in support of any of its objects;
>
> (c) facilitating and mobilising private sector finance to the agricultural sector; and
>
> (d) providing such assistance as is necessary for carrying out the objects of the Bank."

[3] Westside failed to repay the amounts claimed by the Land Bank. The Land Bank then instituted proceedings against Westside and the sureties on various bases for payment, as well as for an order declaring the development properties executable in terms of a covering mortgage bond in its favour.

[4] After the institution of proceedings, Westside was liquidated. The Land Bank then amended its claim. It did not pursue its claim against Westside but persisted in a claim against the sureties – not directly based on the original principal debt under the loan agreement for payment of R82 million, but on the sureties' alleged liability for the R82 million acknowledgement of debt.

High Court

[5] The Land Bank succeeded in its claim against the sureties in the High Court.[4] Basson J approached the matter on the basis that the fact that the loan agreement was invalid did not mean that it necessarily followed that the deed of suretyship was also invalid:

> "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 invalid. In this regard the Supreme Court of Appeal in *Panamo* 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."[5]

[6] She then disposed of the matter on the basis that the acknowledgment of debt was properly proved and that the debt it acknowledged was covered by the suretyship:

> "I am satisfied on the evidence and on an interpretation of the relevant documents that [the sureties] are liable to pay the plaintiff R82 million jointly and severally, the one

[4] *Land and Agricultural Development Bank of South Africa v Meisel N.O.*, unreported judgment of the Gauteng High Court, Pretoria, Case No 23733/12 (6 October 2017) (High Court judgment).

[5] Id at para 22.

> paying the other to be absolved, on the basis of the suretyship read together with the acknowledgment of debt."[6]

[7] After unsuccessful efforts to obtain leave to appeal to the Supreme Court of Appeal, the applicant sought leave to appeal to this Court.

In this Court

Submissions

[8] The sureties submitted that the only debt acknowledged in the acknowledgement of debt was the alleged liability of Westside under the invalid loan agreement. It did not cover any possible enrichment claim. The acknowledgment of debt thus suffered from the same taint as the invalid loan agreement, especially so as the Land Bank is an organ of state. No ancillary obligation under the suretyship could accordingly extend to any obligation arising from the similarly invalid acknowledgement of debt. The Supreme Court of Appeal's decision in *Panamo* did not assist the Land Bank because that case concerned the question whether the mortgage bond in issue was capable of covering a valid enrichment claim, which was not the case here.[7]

[9] Two of the sureties raised a further issue not dealt with in the High Court judgment. It related to the defence raised by them in their plea, amended shortly before trial, to the effect that the Land Bank's failure to perform in terms of the loan agreement caused them substantial prejudice that they had not been prepared to risk and that this released them from their surety obligations.

[10] The Land Bank contended that the acknowledgment of debt constituted a compromise and not a novation and was thus not tainted by the invalid loan agreement. In accordance with the approach of the Supreme Court of Appeal in *Panamo*, the deed

[6] Id at para 69.

[7] *Panamo Properties 103 (Pty) Ltd v Land and Agricultural Development Bank of South Africa* [2015] ZASCA 70; 2016 (1) SA 202 (SCA) (*Panamo*) at para 30.

of suretyship, like the mortgage bond there, covered the debt contemplated in the acknowledgement of debt and the sureties are thus liable.

The second to ninth respondents

[11] The second to ninth respondents were cited in the application for leave to appeal to this Court by the applicant. They did not themselves originally seek leave to appeal. The first respondent requested clarity on the status of the other respondents. In light of their direct and substantial interest, we determined that they should remain as parties but that it made no difference whether they were cited as applicants or respondents. The fourth and eighth respondents submitted written arguments and raised a separate ground of appeal.[8] Shortly before the hearing, the third, fifth, sixth and seventh respondents sought leave to intervene as applicants. We indicated that these applications would be dealt with at the hearing and in this judgment.

[12] The citation of the second to ninth respondents by the applicant was necessary to ensure that the outcome was binding on all. No costs were sought against them. The later application of the third, fifth, sixth and seventh respondents to intervene as applicants was opportunistic in view of their earlier failure to apply for leave to appeal. Materially, they brought little of value to the issues already raised by the applicant and the first respondent. Granting them leave to intervene as applicants will have no additional effect on the binding nature of this judgment on all the parties concerned. The applications to intervene must therefore be dismissed.

Issues

[13] The issues for determination are:

(a) Jurisdiction and leave to appeal;

(b) If leave is granted, the merits of the appeal, namely the effect of the invalidity of the principal agreement on—

(i) the validity of the acknowledgement of debt; and in turn

[8] See above at [9].

(ii) the liability of the sureties under the suretyship agreement in respect of the acknowledgment of debt.

Jurisdiction and leave to appeal

[14] The question whether the Supreme Court of Appeal's decision in *Panamo* governs a situation where a suretyship, not a mortgage bond, is alleged to cover the principal obligation is not yet settled in our law. Nor is the question whether it covers not the original principal agreement, but one entered into after recognition of the invalidity of the original principal agreement. These issues are interlinked arguable points of law of general public importance. Clarity on them will not only affect the immediate parties, but also many others in similar positions.[9] That the invalidity in question here stems from exceeding statutory powers adds a constitutional dimension to the issues, as does the complaint that the failure to deal with a pleaded defence involves a denial of access to justice.[10]

[15] And as we will see, there are reasonable prospects of success. It is in the interests of justice to grant leave to appeal.

Merits of the appeal

Validity of the acknowledgment of debt

[16] As noted earlier,[11] the High Court, with reliance on *Panamo*, approached the matter on the basis that the fact that the loan agreement was invalid did not mean that it necessarily followed that the deed of suretyship was also invalid. But that approach missed a crucial step, namely whether the debt in the acknowledgment of debt was not

[9] In *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 26, this Court highlighted that "[i]n sum, for a matter to be of general public importance, it must transcend the narrow interests of the litigants and implicate the interest of a significant part of the general public".

[10] Section 34 of the Constitution provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[11] See above at [5].

itself tainted by the invalid loan agreement. *Panamo* did not address that issue. It merely held that if the terms of a security agreement (in that case a mortgage bond) establish accessory liability for principal debts untainted by the original invalidity, and those untainted debts are sought to be enforced, the accessory security provider may be held liable.[12] So the first issue here is to determine whether the taint of invalidity of the loan agreement also stretched to taint the acknowledgement of debt.

[17] The purpose of the loan agreement was to provide financing for the proposed urban township development. The money advanced was to be used, first, for the acquisition of the properties on which the development would take place (R51 million) and, second, for the establishment of the township and professional services in doing so (R49 million). As we have seen, R51 million was spent by Westside on purchasing the properties as stipulated and approximately R11.5 million of the planned R49 million for township establishment and professional fees as envisaged. There is no suggestion that the money so advanced was used improperly or that any of the sureties gained any unjustified benefit from the payments to Westside.

[18] It is also important to note that the acknowledgment of debt was signed after the Land Bank had been advised that the original loan agreement was invalid because it lacked the powers to provide finance for urban land development. Westside was aware of this too. There was no dispute between them that the original loan agreement was invalid.

[12] The facts before the Supreme Court of Appeal in *Panamo* above n 7 were that the Land Bank had entered into a loan agreement and, as security for advancing the loan amounts under the loan agreement, a mortgage bond was registered in favour of the Land Bank over Panamo's property. The issues for determination were threefold. First, whether the loan agreement entered into between the Land Bank and Panamo was invalid because the Land Bank acted beyond the scope of its empowering legislation. Second, whether the mortgage bond as an accessory obligation could survive in circumstances where the principal obligation was invalid. Last, whether the mortgage bond, on its terms, was broad enough to cover as security the Land Bank's claim for unjustified enrichment. The Supreme Court of Appeal held at para 29 that the loan agreement was invalid, but that "even though the loan is void, this does not in itself mean that there is no obligation secured by the [mortgage] bond". The Supreme Court of Appeal further held that the mortgage bond could secure more than obligations arising under the loan and was therefore not necessarily extinguished merely because the loan agreement was void. As a result, the Supreme Court of Appeal concluded at para 31 that "[t]he nature of the [mortgage] bond thus does not exclude the possibility that an enrichment claim may be covered".

[19] The relevant parts of the acknowledgement of debt read:

> "1. The company has successfully negotiated an offer of R82 million in full and final settlement of its indebtedness with [the] Land Bank. Notwithstanding, for your records we attach a schedule of the company's loan balance as at 31 January 2009 amounting to R94 900 589.32 . . .
> 2. The company has undertaken to repay [the] Land Bank on conclusion of the transaction with the third party interested in buying the development and with whom a Deed of Sale has been signed;
> 3. Land Bank has informed the company that the loan advanced to the company fell outside of the Land Bank's mandate . . .
>
> . . .
>
> [I]t is imperative that the outstanding balance of the loan be repaid in full by the end of April 2009."

[20] There can be little doubt that the debt of R82 million related to the invalid loan initially advanced to Westside by the Land Bank. The "full and final settlement" was in respect of its "indebtedness with" the Land Bank. There is no reference to any form of indebtedness to the Land Bank other than the "loan balance", "loan advanced" or "outstanding balance of the loan". The "full and final settlement" was not in respect of a dispute about the invalidity of the original loan agreement. At best it was about payment of a reduced amount still owing under the invalid loan agreement. The Land Bank was claiming an amount in the acknowledgment of debt they actually advanced together with interest accruing from that money. This illustrates that it was attempting to derive some form of benefit from an invalid contract.

[21] The applicant sought to draw a distinction between the position of the Land Bank, as an organ of state, and private entities when assessing the validity of the subsequent acknowledgement of debt. If the Land Bank lacked the necessary statutory powers to conclude the loan agreement, it could not have the power to compromise a claim for any debt owed in terms of the invalid loan agreement. As a result, the applicant contends, the acknowledgment of debt was also invalid.

[22] This argument is sound as far as it goes, but the rigid distinction between public and private in relation to state commercial activity is not necessary to arrive at the same conclusion.[13] A subsequent agreement between private parties that seeks to resuscitate an invalid agreement itself remains tainted with invalidity, even if the invalidity does not stem from illegality or immorality. In *Gibson*, Fagan JA stated:

> "In the matter before us the claim arose out of a betting transaction which was neither illegal nor immoral, so there is no room for an inquiry whether its connection with some other transaction taints the latter with illegality or immorality, for the original transaction itself was not so tainted. *The test in such a case, to my mind, should be whether the court is asked, in effect, to enforce the unenforceable claim; in other words, is the later transaction on which the plaintiff relies merely a device for enforcing his original claim, is it merely his original claim clothed in another form or with some term or condition added to it, or a ratification or even novation of the original claim which leaves its essential character unchanged*; if so the plaintiff must fail."[14]

[13] As Quinot reminds us in *State Commercial Activity: A Legal Framework* (Juta, Cape Town 2009) at 223:

> "When the state acts it always does so with public power and its actions are always public action. The principle of legality thus always applies to the state."

See also Hoexter *Administrative Law in South Africa* 2 ed (Juta, Cape Town 2016) at 185-9. On numerous occasions, this Court has recognised that the exercise of all public power is subject to the principle of legality: see, for example, *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 49; *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (8) BCLR 872 (CC) at paras 612-3; *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (7) BCLR 725 (CC) at para 148; and *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 85. This Court has also emphasised, in varied contexts, that the so-called public/private divide is often more apparent than real: see, for example, *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (*AllPay Remedy*) at paras 52-7; *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at paras 20-1; and *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at paras 40-1.

[14] *Gibson v Van der Walt* 1952 (1) SA 262 (A) at 270A-B. Fagan JA went on to hold at 271C-D:

> "I am inclined to agree with Blackwell J that the conversation relied on in the case now before us did not amount to a fresh agreement to pay, but was merely an admission of the original debt plus the addition of a time stipulation to it. However, even if we construe it as a fresh undertaking, it was an undertaking to pay the betting debt and was, on the test I have indicated, unenforceable. It follows that the claim of the plaintiff (the present appellant) had to fail, and that the order made by the Transvaal Provincial Division was correct."

[23] The Land Bank also sought to distinguish the acknowledgment of debt as a compromise and not a novation.[15] Even characterised as a compromise, however, the sureties are correct in asserting that the acknowledgement of debt was invalid because it related to the same indebtedness flowing from the invalid agreement. In *Weltmans*, the Supreme Court of Appeal held that a compromise was invalid as it differed from the original agreement only in relation to the amount payable and the method of payment but it did not alter the essence of the creditor's claim or the debtor's obligation.[16] It suffices to say that, in this case, the acknowledgement of debt was similarly a mere resuscitation of the invalid agreement which did not change the essential claim of the Land Bank or the obligations of Westside as debtor.

[24] Where, as here, there is no dispute that the subject-matter of the original loan agreement – financing urban, not rural development – was invalid, there is no scope for arguing that the mere acknowledgement of a lesser sum owing transforms the nature of the original invalid agreement into something new and valid. In logic, and on first principles, the subsequent agreement may only be valid if the original invalidity may be overcome in one way or another.

[25] The first and obvious way to do this is if the cause of the original invalidity can be removed. In the case of state organs that may lie in removing the legality impediment. That cannot help the Land Bank here: it remains an organ of state empowered to assist in land and agricultural development; it is not a public township developer.

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[15] In *Acacia Mines Ltd v Boshoff* 1958 (4) SA 330 (A) (*Acacia Mines*) at 337C, Beyers JA stated that "[n]ovation is essentially a question of intention: when parties novate they intend to replace a valid contract by another valid contract". From this definition it is apparent that the validity of the novation is dependent on the existence of a valid obligation. A compromise can be defined as an agreement between two or more persons for the purpose of preventing, avoiding or terminating a dispute. See also *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) at 921A-D.

[16] *Weltmans Custom Office Furniture (Pty) Ltd (In Liquidation) v Whistlers CC* [1999] ZASCA 45; 1999 (3) SA 1116 (SCA) (*Weltmans*) at para 16.

[26] The problem of the original invalidity may be addressed in another way. Recovery of what was transferred under an invalid agreement is governed either by enrichment or what was referred to in argument as the "no-profit principle" put forward by this Court in *AllPay Remedy*.[17]

[27] While there is some kind of overlap between the basis for an enrichment claim (restoring a legally unjustified imbalance) and the "no-profit principle" (not allowing profit from unlawfulness), there are differences. Enrichment is a valid claim that may arise from an unlawful contract, while the no-profit principle prevents the perpetuation of unlawfulness. The latter is part of regulating the just and equitable relief of suspending the declaration of unlawfulness in respect of a contract. It is therefore bound up in that just and equitable assessment and the continued (if suspended) operation/enforcement of an unlawful agreement, something different to the remedial nature of an enrichment claim.

[28] Whatever the merits or demerits are of substituting a just and equitable remedy, in keeping with the "no-profit principle", for an ordinary enrichment claim in invalid contracts by organs of state,[18] recovery for unjust enrichment or profit gained from an invalid agreement both seek to ameliorate or redress the consequences of the invalidity through the re-transfer of unjustified gains.

[29] So, the acknowledgement of debt could have embraced a valid principal obligation, in respect of which the sureties could have been liable, in relation to a claim for unjust enrichment if it were premised on there being an absence of a relationship of other legal indebtedness.[19] In other words, it could have validly grounded a principal

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[17] *AllPay Remedy* above n 13 at para 67.

[18] See Du Plessis and Coutsoudis "Considering Corruption through the *AllPay* Lens: On the Limits of Judicial Review, Strengthening Accountability, and the Long Arm of the Law" (2016) 133 *SALJ* 755 at 771; compare Sonnekus "Procurement Contracts and Underlying Principles of the Law – No Special Dispensation for Organs of State (Part 2 – Developing the Common Law, Consequences and Remedies)" (2014) *TSAR* 536 and Finn "*AllPay Remedy*: Dissecting the Constitutional Court's Approach to Organs of State" (2016) 6 *Constitutional Court Review* 258 at 270-1.

[19] At its heart, an enrichment claim arises from the absence of a relationship of indebtedness. The orthodox view in South African law is that this absence of liability, without more, will generally ground a restitution claim: see,

obligation if it recognised the invalidity of the debt in terms of the loan agreement. On its terms, however, it did not do so: it was common cause that the acknowledgement did not cover any enrichment claim. This absence of a relationship of indebtedness is also the reason that the Supreme Court of Appeal could find in *Panamo* that the enrichment claim was validly covered by the mortgage bond.

[30] How does this impact on the conventional wisdom that the validity of a subsequent agreement entered into between the same parties following upon an earlier invalid agreement depends on whether it amounts to a novation (in which case it remains tainted) or a compromise (not tainted)?[20]

[31] This matter concerns the so-called settlement of an admittedly undisputed invalid earlier loan agreement by way of the acknowledgment of debt. We hold that the terms of the acknowledgement of debt in effect perpetuated the original invalidity and must therefore also be invalidated. To that extent it follows the conventional notion of a novation that remains tainted.[21]

[32] This judgment also says, however, that an agreement in relation to an undisputed invalid earlier agreement may be possible if it relates to an enrichment claim which results from the invalidity of the earlier debt, but not if it seeks to enforce the earlier indebtedness.[22] If the terms of the accessory suretyship agreement are wide enough to cover the enrichment claim, the sureties may well also be liable.

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for example, Visser *Unjustified Enrichment* (Juta, Cape Town 2008) at 274-5. It is worth registering the recent challenge to this orthodox view posed by Scott *Unjust Enrichment in South African Law: Rethinking Enrichment by Transfer* (Hart, Oxford 2013), who contends that the absence of a relationship of indebtedness is a necessary, but not sufficient, condition for the restitution of enrichment by transfer (see, in particular, at 8-9).

[20] On the relevance of this distinction to the validity of the subsequent agreement, see *Benefeld v West* 2011 (2) SA 379 (GSJ) at paras 14-8. See further *Weltmans* above n 16 at 16; *Syfrets Mortgage Nominees Ltd v Cape St Francis Hotels* 1991 (3) SA 276 (SE) at 288E-G; *Tauber v Von Abo* 1984 (4) SA 482 (E) at 484G-I; *Dennis Peters Investments (Pty) Ltd v Ollerenshaw* 1977 (1) SA 197 (W) at 202; and *Acacia Mines* above n 15 at 337D.

[21] Although the reduced amount may be regarded as a compromise in relation to the extent, but not the nature of the claim – see [23] above.

[22] An enrichment claim is an independent and self-standing action and the extent of the claim is often uncertain until determined in court. That uncertainty may then conceivably result in a valid compromise of the enrichment claim.

[33] What this judgment does not deal with are compromises by organs of state where the validity of the agreement remains disputed. This is an issue that was not canvassed before us. Suffice it to say that if a compromise or settlement of that kind is sought to be made an order of court, it will only be sanctioned if it accords with the Constitution and the law.[23] And if it is not sought to be made an order of court it risks later challenge. But the judgment does not impact on the ability of the state to enter into compromise agreements in respect of indubitably invalid original agreements when there are uncertain associated claims that may be founded on unjust enrichment or the no-profit principle. It is important that it was common cause in this matter that the acknowledgement of debt did not cover any enrichment claim.

[34] This outcome makes it unnecessary to deal with the High Court's interpretation of whether the suretyship agreement covers the indebtedness acknowledged in the acknowledgment of debt. Simply put, if no claim lies against Westside, no claim could possibly lie against the sureties.

[35] However, for purposes of distinguishing *Panamo* from the facts of this case, it is important to elucidate why the suretyship agreement does not cover the acknowledgement of debt. In terms of clause 2 of the suretyship agreement, the sureties agreed to be bound only for the "indebtedness" which flowed from the invalid agreement.[24] This is further evident from the fact that their release as sureties, in terms of clause 10 of the suretyship agreement, coincided with the full repayment of the amount of "indebtedness" (R100 million). Clause 2 is subject to clause 10 of the suretyship agreement.[25] This clearly shows an intention by the sureties to be bound

[23] *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) at para 26.

[24] Clause 2 of the deed of suretyship states as follows:

> "The Sureties individually and collectively hereby bind themselves as surety and co-principal debtor *in solidum* to [the] Land Bank, its orders or assigns for the due and punctual payment by the Debtor to [the] Land Bank of the Indebtedness subject to clause 10 and the terms and conditions set out herein."

[25] Clause 10 of the deed of suretyship states as follows:

only for the "indebtedness" arising out of the invalid agreement and is distinguishable from *Panamo* where the mortgage bond itself stipulated that a bond would be passed to cover "in general . . . any existing or future debt that Panamo owes or may owe to the [Land] Bank".[26] That is the reason the Supreme Court of Appeal held:

> "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. . . . The nature of the bond thus does not exclude the possibility that an enrichment claim may be covered."[27]

[36] Even on the assumption that the High Court's interpretation of the deed of suretyship is correct, the acknowledged indebtedness remains tainted and cannot found suretyship liability.

[37] Similarly, it also becomes unnecessary to determine whether the sureties could be held liable when the object and purpose of the original loan agreement had been frustrated. That issue has become moot between the parties.

Order

[38] In the result, the following order is made:

1. The second to ninth respondents' applications to intervene as applicants are dismissed.
2. Leave to appeal is granted.
3. The appeal succeeds with costs, including the costs of two counsel.
4. The High Court order is replaced with the following:
   "The plaintiff's claim is dismissed with costs".

> "This suretyship agreement remains in force until the debt of one hundred million rand (R100.000.000) referred to in clause 1 herein and interest and fees thereto have been repaid and until the Sureties are released from their liabilities in terms hereof, by written notice to that effect from [the] Land Bank."

[26] *Panamo* above n 7 at para 33.

[27] Id at para 31.

For the Applicant:	M Chaskalson SC and C Avidon instructed by Etienne Naudé Attorneys and Conveyancers
For the First Respondent:	V Soni SC instructed by Mkhabela Huntley Attorneys Inc.
For the Third, Fifth, Sixth and Seventh Respondents:	M Snyman instructed by Dibakwane Attorneys
For the Fourth, Eighth and Ninth Respondents:	L de Beer and R Raubenheimer instructed by Nel and Richter Incorporated Attorneys