THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20051/2014

In the matter between:

PANAMO PROPERTIES 103 (PTY) LTD **APPELLANT**

and

LAND AND AGRICULTURAL DEVELOPMENT BANK

OF SOUTH AFRICA **RESPONDENT**

Neutral Citation: *Panamo Properties v Land and Agricultural Development Bank* (20051/2014) [2015] ZASCA 70 (22 May 2015)

Coram: Lewis, Pillay, Willis JJA and Schoeman and Gorven AJJA

Heard: 7 May 2015

Delivered: 22 May 2015

Summary: Agreement of loan made in contravention of the Land and Agricultural Development Bank Act 15 of 2002 invalid: mortgage bond registered as security for moneys lent and advanced would nonetheless secure a claim based on unjustified enrichment.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Claassen J sitting as court of first instance): judgment reported *sub nom Land and Agricultural Development Bank of South Africa v Panamo Properties 103 (Pty) Ltd* 2014 (2) SA 545 (GJ).

The appeal is dismissed with costs including those occasioned by the use of two counsel.

JUDGMENT

Lewis JA (Pillay and Willis JJA and Schoeman and Gorven concurring)

[1] This appeal concerns the validity of a transaction concluded between the appellant, Panamo Properties 103 (Pty) Ltd (Panamo), and the Land and Agricultural Development Bank of South Africa (the Bank), the respondent. Also at issue is the validity of a mortgage bond registered over Panamo's property as security for the indebtedness of Panamo to the Bank. These issues themselves depend on an interpretation of the Land and Agricultural Development Bank Act 15 of 2002, and of the mortgage bond in question.

[2] The dispute between the parties was heard by the Gauteng Local Division of the High Court (C J Claassen J) after referral to it by the Bank as the plaintiff, and Panamo as the defendant, of a stated case. The court a quo found that the loan agreement between the parties was invalid since the Bank did not have the power to enter into the transaction in question, but that the mortgage bond was nonetheless enforceable. The court a quo also found that the Bank was not estopped from asserting that the contract was invalid. That aspect of the decision is no longer contested in the appeal, which lies with the leave of the court a quo.

[3] The parties asked the court a quo to order the separation of certain issues, which were defined in the stated case, and to postpone the determination of other issues. That order was granted. They defined the issues for determination in terms of the stated case; annexed the agreement between them and the terms of the mortgage bond (amongst other documents); agreed common cause facts and listed their respective contentions.

[4] The background to the stated case was that on 5 April 2007 the parties entered into a written agreement in terms of which the Bank would lend to Panamo the sum of R52 919 845, which would be used by Panamo for the acquisition of certain agricultural properties and the development of a township, with the services required and engineering fees, on the properties. A mortgage bond was registered over the properties giving the Bank continuous covering security for any existing or future debt that Panamo might owe up to an amount of R76 million.

[5] The agreement was the culmination of negotiations between the parties, commencing in August 2006 when Panamo asked the Bank for a loan for the purpose of acquiring and developing the properties. In December 2006 the Bank wrote to Panamo advising that it had agreed to make the finance requested available. It also stated that it was a condition precedent to concluding the loan that Panamo submit its shareholders' agreement to the Bank, and that that had to reflect a minimum 50.1 per cent black economic empowerment ownership of Panamo. The offer was accepted on the same day.

[6] A term of the agreement that was concluded on 5 April 2007 was that a Panamo Profit Sharing Agreement, in terms of which the Bank would participate in the profits made on the sale of any properties, would also be concluded. A letter sent by Panamo to the Bank on 9 May 2007 stated that the profit sharing agreement would be entered into. The parties proceeded as if the loan agreement was in effect

and Panamo borrowed R18 500 000 from the Bank. However, on 17 January 2008 the Bank wrote to Panamo contending that the contract for the loan to it was invalid.

[7] In July 2010 the Bank instituted action against Panamo, claiming enforcement of the contract. Panamo counterclaimed. In 2012 the Bank amended its particulars of claim and asked for a declaration that the contract was invalid. The Bank contended that the agreement of loan was unauthorized and void in that it did not comply with s 3 of the Act which sets out the objects of the Act – what it is intended to achieve; secondly, that the agreement was in contravention of the provisions of s 23 which prohibits the investment of funds by the Bank in unlisted companies, trusts, business undertakings or ventures without the prior written approval of the Minister responsible for agriculture; and, thirdly, in contravention of s 66 of the Public Finance Management Act 1 of 1999 (the PFMA). It contended also that despite the invalidity of the agreement of loan, the mortgage bond over Panamo's property remained valid and enforceable.

[8] Panamo denied these contentions and pleaded that the Bank was estopped from denying the invalidity of the agreement; alternatively that, on the basis of the Turquand Rule, it was precluded from denying that the Minister had given her prior written approval of the agreement. As I have said, the defences based on estoppel and the Turquand Rule were abandoned at the hearing of the appeal, and rightly so.

[9] And that was the background to the determination of the legal issues by the court a quo. These were framed as follows. 'Whether or not the agreement is unauthorized and thus void for . . . alleged want of compliance with the Act and the PFMA; whether or not the mortgage bond concluded pursuant to the Agreement is enforceable notwithstanding the alleged invalidity of the Agreement; . . . .' The parties agreed that the Bank bore the onus of proving that the agreement was invalid and that the bond was enforceable.

[10] The facts that were common cause, and that are germane to the issues are: (a) that the Bank agreed to lend to Panamo the sum of R52 919 845; (b) of that amount, R18 500 000 would be used for the acquisition of two properties, as described in the stated case; (c) the balance of R34 419 845 would be used for township establishment and engineering service fees, as described in the loan agreement; (d) the agreement was subject to a number of suspensive conditions relating to the conclusion of further agreements, all of which were either fulfilled or waived; (e) at all material times the parties intended to enter into the agreement and be bound by it; (f) the Bank in fact lent Panamo the sum of R18 500 000 to finance the acquisition of the properties and undertook to advance a further amount of R34 419 845; (g) the parties intended that the capital amount lent to Panamo, plus interest, would be repaid to the Bank; (h) Panamo was an unlisted company, trust or other equivalent legal entity, business undertaking or venture as contemplated by s 23 of the Act; and that (i) the agreement constituted an 'investment' in one of the entities identified in s 23. The last 'fact' was qualified by a statement that Panamo did not agree that the agreement was 'exclusively' an investment as contemplated in s 23.

[11] The Bank's contentions, set out in the stated case, were, in summary, these. The loan fell outside the scope of the Act and did not comply with the PFMA and was thus void. The fact that moneys had been advanced pursuant to the agreement did not affect the validity of the agreement and the advances were *sine causa.* The mortgage bond registered pursuant to the agreement remained valid, having regard to its terms. The profit sharing agreements had not been concluded, but the conditions of the loan agreement that they be entered into had been waived.

[12] Panamo contended that on a construction of the agreement and the Act the Bank was empowered to enter into the agreement. Such agreements were not expressly prohibited by the Act, and there was no *numerus clausus* of all the juristic acts that the Bank was empowered to perform. The agreement was intended to achieve the objects of the Act indirectly, which was not prohibited by the Act. Accordingly, the agreement was not *ultra vires*: the Bank had the power to conclude

it because indirectly it would achieve the objects of the Act set out in s 3. I shall deal with further contentions in respect of the achievement of the objects of the Act, and whether the transaction amounted to an investment, as they are set out in the stated case, when dealing with the legal framework within which the validity of the loan agreement must be determined.

[13] Claassen J found that the loan agreement was invalid. It was not within the power of the Bank to conclude a transaction for the development of a township on agricultural land. In this regard, he relied on a decision of Bashall AJ in *Land and Agricultural Development Bank of South Africa v Impande Property Investments (Pty) Ltd* (GSJ case No 2010/35355, 9 April 2013) where it was found that a very similar transaction was void since it was not in furtherance of the objects of the Act.

[14] Those objects are set out in s 3 of the Act:

'3(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 entrepeneurship;
(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.'

[15] It seems apparent that the acquisition of agricultural land for the purpose of transforming it into an urban township is not only not consonant with the objects of the Act, but also completely contrary to that which the Bank is supposed to achieve. That was the finding of Bashall AJ in *Impande* and of Claassen J in this matter. But, contended Panamo, it was a condition of the offer made by the Bank that 50.1 per cent of its shareholders would be previously disadvantaged people, and the land acquired was agricultural. That meant that the promotion, facilitation and support of equitable ownership of agricultural land and the removal of the legacy of racial discrimination were achieved – meeting at least two of the objects of the Act. And the investment of the funds for township establishment and engineering services resulted in a better use of the land, within the ambit of s 3(1)*(g)*.

[16] These contentions were not hard-pressed on appeal. The transformation of agricultural land to an urban township can hardly be regarded as use of agricultural land, and ownership of a township development company cannot be said to give greater access to agriculture by historically disadvantaged people. The contention was perverse. Counsel for Panamo sought to avoid this conclusion by arguing that by entering into the profit sharing agreement Panamo was contributing to the funds of the Bank, which could then better achieve the objects of the Act. It was thus indirectly achieving the objects of the Act.

[17] But that, it seems to me, is no more than making an investment – contributing to the Bank's funds. It is correct that the Bank is given the power to make investments by the Act. And an investment need not be made in order to achieve the objects of the Act. However, investments by the Bank require the consent of the Minister. Section 23 of the Act, which governs investments by the Bank, states that the Board must adopt an investment policy, approved in writing by the Minister. Section 23(2) provides that: 'The Bank may not, without the prior written approval of

the Minister, invest money in an unlisted company, trust or other equivalent legal entity, business undertaking or venture.'

[18] It was common cause in the stated case that Panamo was such an entity and thus the Minister's written approval was required in order for the investment to be made. It was implicit in the facts stated and the arguments made that ministerial approval had not been granted. At the hearing counsel sought to distance Panamo from the agreement that an investment had been made. The common cause fact, it was argued, was no more than a view of law. But the argument is in any event of no moment because even if the transaction did not amount to an investment it has still to be determined whether it was within the power of the Bank.

[19] And the question remains whether the Bank had the power to conclude the transaction even if it did not conform with the objects of the Act. In my view, this question is determined by s 26 of the Act, which deals with the conduct of business by the Bank. It reads:

'(1) The business of the Bank is to provide agricultural and rural financial services in furtherance of the objects of the Bank contemplated in section 3, against security or on such alternative conditions as the Board may from time to time determine, or in such other manner as may be provided for by this Act.

(2) The Bank may conduct its business by way of any operation, method or practice envisaged in this Act or in any other applicable law, including but not limited to—

(a) providing finance for the purposes contemplated in section 3;

(b) investing money*;*

. . .

(m) in general, making all such advances and performing all such acts as the Bank may by this Act or any other law be authorized to make or perform or which reasonably form part of or are generally associated with agriculture or developmental financial services.'

[20] Section 26(3) provides that ministerial authority is required for investing money (as well as for other acts referred to in the subsections I have not quoted). But written approval of the Minister is not required for s 26(2)*(m)*. Panamo thus argued that the loan transaction fell under that subsection: the Bank made an advance to it which reasonably formed part of or was generally associated with agricultural or developmental financial services. This argument must also fail. One cannot read s 26(2) apart from s 26(1). The latter qualifies the acts and transactions referred to in s 26(2): they must all be in furtherance of the objects of the Bank set out is s 3.

[21] The Bank is thus obliged and empowered to use its funds only for the purposes set out in s 3: other transactions are not within its powers. Its powers are conferred by the Act and it has no others. As a public entity the Bank may do only those things that the Act authorizes. The loan to Panamo for the purpose of acquiring land for the establishment of a township is clearly not authorized by the Act. The loan agreement is thus in contravention of the Act, and, as the Bank contended, is invalid.

[22] While not every contravention of a statute results in invalidity of the contravening act or contract, where its recognition would defeat the purpose of the statute, the act or contract will be void. (See *Standard Bank v Estate Van Rhyn* 1925 AD 266; *Pottie v Kotze* 1954 (3) SA 719 (A); *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A).) But it is not necessary in this matter to consider whether the Act intended to render the transaction invalid as the issue is determined by the PMFA. Sections 66 and 68 of that Act provide that where a public institution, as the Bank is, enters into a transaction that is not authorized by legislation governing the institution, it will not be bound by the transaction. Accordingly the loan agreement between the parties cannot be enforced. I turn then to the second issue.

[23] The Bank may well have an enrichment claim against Panamo for the money that it advanced pursuant to the invalid contract. Thus while the Bank contended for

invalidity, it nonetheless argued that the mortgage bond registered in its favour is valid and constitutes real security for a possible enrichment claim.

[24] Claassen J in the court a quo concluded that the bond was valid despite the fact that the contract pursuant to which it was passed was not. The bond agreement, he said (para 18), was a separate agreement of hypothecation and its 'validity is not dependent upon the validity of the anterior transaction'. A mortgage bond is of course always accessory to an obligation, no matter its origin. If the obligation is unenforceable the security in respect of it is unenforceable too. Authority for this is to be found in *Albert v Papenfus* 1964 (2) SA 713 (E) at 717H in fin where the court referred to the principle as 'trite', and cited *Voet* 46.1.9,11 (Gane's translation vol 7 at 22 and 28). See also *Bay Loan Investment (Pty) Ltd v Bay View (Pty) Ltd* 1972 (2) SA 313 (C) at 316E-F; Badenhorst, Pienaar and Mostert *Silberberg's The Law of Property* 5 ed (2006) at 359; 17 (Part 2) *Lawsa* 'Mortgage and Pledge' para 327; and T J Scott and Susan Scott *Wille's Mortgage and Pledge* 3 ed (1987 at 6).

[25] That does not mean that a principal obligation must exist before a mortgage is entered into: it may be given as security for a future debt or as a covering bond. But when enforcement of the bond is sought it must be in respect of a valid obligation. And when determining whether an obligation is secured by a bond, one must have regard to its particular terms.

[26] In *Impande* Bashall AJ found that the bond purportedly securing the Bank's obligation was invalid too. He cited the authorities referred to above as support for this conclusion, and found that an enrichment claim was not covered by the terms of the bond which were confined to moneys borrowed and advanced.

[27] Claassen J declined to follow this reasoning. He pointed out that Bashall AJ in *Impande* had not been referred to the decision of this court in *Thienhaus NO v Metje and Ziegler Ltd* 1965 (3) SA 25 (A) in which it was held that a formal defect in the

description of a party (a slip of the pen that referred to an individual instead of a company bearing his name) did not render the bond invalid. As I have said, the question whether the bond secures a claim for enrichment must be determined by construing the terms of the bond itself. My colleague Gorven AJA will deal with this issue.

Gorven AJA (Lewis, Pillay and Willis JJA and Schoeman AJA concurring)

[28] The mortgage bond in this matter was registered pursuant to the loan agreement. The issue is whether it is enforceable in the face of a finding that the loan is void. All mortgage bonds are accessory to another obligation, as the authorities cited above show. This is because the fundamental nature of a mortgage bond is the provision of security for an underlying obligation. In *Kilburn v Estate Kilburn*,[1] this court held as follows:

'The settlement of a security divorced from an obligation which it secures seems to me meaningless. It is true that you can secure any obligation whether it be present or future, whether it be actually claimable or contingent. The security may be suspended until the obligation arises, but there must always be some obligation even if it be only a natural one to which the security obligation is accessory.

. . .

It is therefore clear that by our law there must be a legal or natural obligation to which the hypothecation is accessory. If there is no obligation whatever there can be no hypothecation giving rise to a substantive claim.'

And in *Lief NO v Dettmann*,[2] Van Wyk JA said:

'. . . real rights, however, can only exist in respect of a debt, existing or future, and it follows that they cannot be divorced from the debt secured by them'.

[29] It is clear that the bond was initially passed to secure the performance of Panamo under the loan. Its terms make it accessory to the loan. Once the loan is set aside as invalid, unless the bond is accessory to a different obligation than the loan, it must suffer the same fate as does the loan and be subject to cancellation. However, even though the loan is void, this does not in itself mean that there is no obligation secured by the bond.

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[1] *Kilburn v Estate Kilburn* 1931 AD 501 at 505-6.
[2] *Lief NO v Dettmann* 1964 (2) SA 252 (A) at 259.

[30] The Bank says that it has a claim for unjust enrichment under one of the *condictiones*. No such finding can be made on this issue here. I assume, for the purposes of deciding the question, that such a claim is valid. An enrichment claim gives rise to indebtedness. I know of no reason why a mortgage bond cannot secure a debt arising from an enrichment claim.[3] Indeed, no argument was advanced before us why a debt of that nature cannot be covered. The question is whether that kind of debt is secured by this particular bond.

[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[4] for those covering future indebtedness. The nature of the bond thus does not exclude the possibility that an enrichment claim may be covered.

[32] In the preamble, the passing of the bond is said to have given expression to an undertaking. This undertaking was by Panamo to pass a 'continuous covering bond as security for [Panamo's] liability towards the Land Bank for whatsoever reason'.[5] It therefore goes further than one to pass a bond to cover indebtedness under the loan and, indeed, under only some form of an agreement. It is stated in the broadest possible terms. The preamble therefore describes the circumstances under which the bond came into existence.

[33] Clause 2.1 provides that the bond affords continuing covering security for four distinct and separately stated categories of debt: (a) money borrowed and advanced; (b) money to be borrowed and advanced; (c) money that the Bank may from time to time in the future lend and advance to Panamo; and (d) in general, for any existing or future debt that Panamo owes or may owe to the Bank. On a straightforward reading of this clause, the fourth category gives expression to the undertaking referred to in

[3] *Silberberg* above at 359.
[4] Deeds Registries Act 47 of 1937.
[5] I have not used the same formatting as in the bond when quoting from it.

the preamble: to pass a bond which will cover 'liability towards the Land Bank for whatsoever reason'. Once again, this clause does not restrict the cover to indebtedness arising from the loan agreement or some other agreement.

[34] Clause 8 concerns the circumstances under which the Bank is entitled to have the mortgaged properties declared executable. It is headed 'Default' and reads, in its material parts, as follows:

'Should the Mortgagor be in breach of or fail to comply with any written agreement or agreements between the Mortgagor and the Land Bank in respect of any amounts secured by this bond, or should the Mortgagor be in breach of or fail to comply with any of the terms and conditions of this bond or should the Mortgagor, at the request of the Land Bank, fail to pay to the Land Bank any sum which the Land Bank may lawfully claim, or should the Mortgagor fail to meet any obligation or commitment to the Land Bank on the expiry date thereof . . . the Land Bank shall be entitled to institute legal action for the recovery of all such amounts and have the property mortgaged in terms of this bond declared executable.'

There are other circumstances referred to but these do not bear on the issue at hand.

[35] It can therefore be seen that the defaults cited above comprise four distinct categories: (a) a breach or failure to comply with a written agreement; (b) a breach or failure to comply with a term of the bond; (c) a failure to pay on demand any sum which the Bank may lawfully claim; and (d) a failure to meet an obligation by the expiry date. If the bond is construed to cover only debts arising from an agreement of sorts, the third of these categories is redundant. The first, a failure to comply with the terms of a written agreement, would cover all circumstances in which the security may be invoked. The second basis, concerning the terms of the bond, would also be unnecessary. I can conceive of no circumstance in which a further category of default could arise. But the failure to pay any sum which the Bank may lawfully claim is set up in addition to these first two. There is a presumption against superfluity in construing documents.[6] The inclusion of this category shows conclusively that a basis exists for invoking the security which need not arise from an agreement or

[6] *National Credit Regulator v Opperman & others* 2013 (2) SA 1 (CC) para 99; *African Products (Pty) Ltd v AIG South Africa Ltd* 2009 (3) SA 473 (SCA) para 13.

even the terms of the bond. The security afforded by the bond thus clearly covers a lawful claim by the Bank which falls outside of the terms of any agreement or the bond.

[36] In addition, clause 15 is phrased widely. It hypothecates the properties as 'security for the proper and timeous payment of the capital sum or any part thereof plus interest and other money recoverable in terms of this bond or which may at any time become owing or payable to the Land Bank from whatsoever cause . . .'. Once again, a number of distinctive categories are mentioned. The first, timeous payment, arises from the loan or any other agreement. The second is money recoverable under the bond. The third is 'other money . . . which may at any time become owing or payable from whatsoever cause'. This category is stated to be an alternative to money recoverable in terms of an agreement or the bond.

[37] The three clauses dealt with above pertinently afford the security under the bond to indebtedness other than that arising from an agreement and the bond. They would clearly cover a debt arising from an enrichment claim. Reading these together with the preamble, which deals with the circumstances in which the bond came into existence, it would thus require clear wording to exclude recovery of a claim under one of the *condictiones*.

[38] It must therefore be considered whether any of the terms of the bond do exclude such a debt. In this regard, clauses 2.2 to 2.4, 3, 5, 6 and 13, which might indicate the contrary, shall be considered in turn.

[39] Clauses 2.2 and 2.3 deal with the primary source of indebtedness envisaged: the loan. This is natural and understandable but does not function to exclude the broad fourth category in clause 2.1 dealt with in paragraph 6 above. In passing, clause 2.2 is clearly tailored to ensure that the bond complies with the provisions of

s 51(1)(*b*) of the Deeds Registries Act.[7] Clause 2.4 provides security for costs incurred in the preservation and realisation of the hypothecated properties. This applies to the security and is not dependent on the nature of the claim.

[40] Clause 3 provides that 'the causes of said debt and this bond may emanate from one or more of the following'. Clause 1 contains a declaration of indebtedness in the sum which is stated to be 'the capital sum emanating from one or more of the hereinafter mentioned causes of debt . . .'. This spells out what is meant in paragraph 1. It primarily relates to the loan. It in no way qualifies the cover of the bond where it is said to go beyond the first three categories in clause 2.1.

[41] In addition, clause 3.1 is to the following effect:

'All amounts whatsoever already owed or may be owed hereafter in terms of advances, cash credit accounts, fixed loans, credit, promissory notes, loan agreements, instalment sale agreements, lease agreements, other agreements, any facilities granted to the Mortgagor'.

The clause specifically differentiates between advances and a number of agreements, including loan agreements. In other words it covers advances made outside of agreements as well as those made pursuant to them. It is clear that the moneys forming the basis for the enrichment claim were advanced; they were simply advanced without there being a legal basis for doing so.

[42] Clause 5 regulates the terms of advances. They should only be disbursed if the terms and conditions of an agreement have been met. The question arises as to what can be done by the Bank if an advance is made which does not comply with clause 5. It does not mean that money has not been advanced. It is still an advance, but the advance contravenes clause 5 of the bond. It should therefore not have been made because this clause regulates how advances should be disbursed and when they can be claimed. Since such a payment has no lawful basis, a claim for repayment would have the character of the enrichment claim relied on by the Bank in this matter. This does not mean that advances made in conflict with this clause do

[7] This requires that 'a sum is fixed in the bond as an amount beyond which future debts shall not be secured by the bond'.

not qualify as advances. It simply sets out when an advance has been made pursuant to a lawful underlying causa under the bond.

[43] The concluding sentence of clause 5 incorporates the terms and conditions of the loan into the bond. It may be asked how terms and conditions of an invalid agreement can be so incorporated. The simple answer is that because the loan is a nullity, its terms are not incorporated. The terms of the bond stand alone, unaugmented by those of the loan. Many of the provisions of the bond do not apply because the loan is void and no other agreements between the parties exist. That would also be the position if the loan had been valid and all liability under it had been discharged but an enrichment claim remained.

[44] Clause 6 deals with the mechanism for the calculation of interest. It requires a written agreement where a particular basis and rate of interest is claimed. This does not mean that a debt free of interest is not secured by the bond. In any event, it may well be that, even if no agreement provided for interest, the common law relating to when and how much interest accrues on a debt would apply.[8] It is not necessary here to determine whether this is so or not. At worst for the Bank, this clause does not provide a basis for excluding an enrichment claim.

[45] Clause 13, the acceleration clause, clearly envisages an agreement. Acceleration does not apply to an enrichment claim. The fact that such a claim is not susceptible to acceleration does not exclude it from the cover of the bond. As mentioned earlier, it is understandable and appropriate that most of the clauses in the bond deal with agreements and the basis on which it affords security in relation to agreements.

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[8] F D J Brand 9 *LAWSA* 2 ed para 213, says: 'Interest which the defendant may have received on a sum of money paid to him or her *indebite* is apparently not regarded as fruit and need not be restored.' In footnote 4 on that page he goes on to say: 'The issue of interest actually received by the defendant should not be confused with the question whether the defendant is liable for interest *a tempore morae*. The basis for the claim of *mora* interest is not enrichment but compensation paid to the plaintiff for the loss that the plaintiff suffered through being deprived of the use of his or her money. Accordingly, liability for *mora* interest is determined by the legal principles regarding *mora* interest in general and not by the law of enrichment.'

[46] The bond is not a model of clarity. However, construing it as a whole, I can find no basis for limiting the broad, all-encompassing language contained in the preamble, clause 2.1, clause 8 and clause 15. I disagree with the submission that the bond must suffer the same fate as the loan. In my view, the bond affords security for a claim for moneys due under one of the *condictiones*.

[47] The second question was therefore correctly answered in favour of the Bank by the court below. There is no basis for an order declaring that the bond is not enforceable due to the invalidity of the loan if the Bank has a claim against Panamo for unjust enrichment.

[48] Accordingly, the appeal is dismissed with costs, including those occasioned by the use of two counsel.

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CH Lewis

Judge of Appeal

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T R Gorven

Acting Judge of Appeal

APPEARANCES

For Appellant:	J Roos SC (with him J K Berlowitz)
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