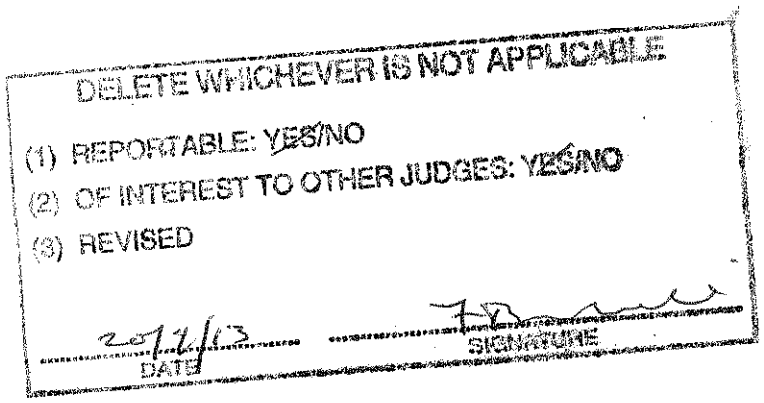
IN THE HIGH COURT OF SOUTH AFRICA (SOUTH GAUTENG)

JOHANNESBURG

CASE NO: 35355/10

DATE: 09.04.2013



In the matter between

LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA Plaintiff

and

IMPANDE PROPERTY INVESTMENTS ((Pty) Ltd Defendant

J U D G M E N T

BASHALL, AJ: This is a stated case. The background is set out as follows:

"1. The dispute in this matter stems from a purported Loan Agreement concluded between the parties in which the Plaintiff advanced certain monies to the Defendant for the financing of: -

1.1 The acquisition of an agricultural property (*viz* 29 Rand Collieries Small Holdings, Brakpan, measuring 4,2827 hectares) and,

1.2 A township establishment and engineering fees.

2. Although the agreed capital amount was R11 244 544.00, the sum that the Plaintiff advanced to the Defendant was R6 951 973.86..."

The document continues,

"12. The Plaintiff avers, *inter alia* that: -

12.1 The conclusion of the purported Loan Agreement was *ultra vires* the provisions of the Land Bank Act and it is accordingly void;

12.2 The sum advanced by the Plaintiff to the Defendant was made in the *bona fide* and reasonable but mistaken belief that it could be made.

12.3 Alternatively the said advance was made *sine causa* and therefore unjustifiably enriched the Defendant at the Plaintiff's expense.

12.4 The Plaintiff avers in its alternative claim that it is entitled to payment in terms of the Loan Agreement;

12.5 In the further alternative, that Plaintiff alleges that annexure "IMP4" attached to its particulars of claim constitutes an acknowledgement of debt;

12.6 As a further claim the Plaintiff alleges that the mortgage bond registered over the property purchased pursuant to the advances made in terms of the Loan Agreement is capable of being enforced and an order is sought for the executability of the

said property based on the security held in accordance with the mortgage bond."

The version for the Defendant is framed thus;

"13. The Defendant denies liability of the Plaintiff as averred, and in turn alleges: -

13.1 In respect of claim A the Plaintiff's claim has prescribed; and

13.2 In respect of claim A and if the Loan Agreement is void, the Plaintiff was a party to an invalid Loan Agreement and therefore acted *in par delicto potier est conditio possidentis*;

13.3 In respect of claim A, that the Plaintiff was not enriched in any respect or at all;

13.4 In respect of claim A, that the Loan Agreement was not *ultra vires* the provisions of the Land Bank Act;

13.5 That the Plaintiff cannot sustain the relief sought in claim A on the basis of its failure to tender the deregistration of the mortgage bond referred to in the Plaintiff's particulars of claim;

13.6 In respect of the Plaintiff's alternative claim for the enforcement of the Loan Agreement (claim B) the Defendant pleads that the Plaintiff's claim does not disclose a cause of action for want of pleading a suspensive condition and for want of pleading that the Plaintiff complied with its obligations in accordance with the terms of the Loan Agreement. Furthermore, the Defendant pleads that the Loan Agreement was not breached by it in any respect or at all and it was in fact the Plaintiff that did not

advance the full "Capital Amount" in accordance with the terms of the Loan Agreement...

13.7 In respect of the Plaintiff's claim to the effect that annexure "IMP4" to the applicant's particulars of claim constitutes an acknowledgement of debt, same is denied by the Defendant. The Defendant pleads that the signature on the said letter confirms its acknowledgement of receipt of the said letter and nothing further;

13.8 In respect to the Plaintiff's claim for executability of the property in accordance with the mortgage bond referred to in the Plaintiff's particulars of claim, the Defendant pleads that the mortgage bond is accessory to the Loan Agreement and if the Loan Agreement is invalid so is the security..."

The agreed facts are;

"Common Cause Facts.

14. The parties have agreed that the following facts are common cause; -

14.1 The allegations regarding the description of the parties;

14.2 All the allegations regarding the conclusion of the purported Loan Agreement and the advance made by the Plaintiff to the Defendant in the sum of R6, 951, 973.8, (sic) on the dates as set out on in clauses 2.1 to 2.4 of the Defendant's plea and the drawdown schedule attached hereto as annexure "A3";

14.3 The express terms of the purported Loan Agreement;

14.4 The purpose of the purported Loan Agreement being the provision of finance by the Plaintiff to the Defendant in order for the Defendant: -

14.4.1 To acquire the property *viz* 29 Rand Collieries Small Holdings...

14.4.2 To establish a township on the property and to pay for engineering service fees.

...

14.6 The property referred to in the Loan Agreement and in the Plaintiff's particulars of claim is agricultural land.

14.7 The underlying *causa* for the registration of the mortgage bond was the Loan Agreement.

14.8 The Plaintiff would not advance to the Defendant any further sums (despite) the Loan Agreement from October 2008."

Originally paragraph 14.8 read "in accordance with" but this was amended during the hearing to "despite."

The issues for determination are set out as follows:

"Issues For Determination.

20. The parties have agreed that the following.... (deleted) issues be determined as a stated case; -

20.1 Whether the Loan Agreement is void for want of compliance with the provisions of Section 3 of the Land Bank Act;

20.2 Whether the mortgage bond concluded pursuant to the Loan Agreement is enforceable, notwithstanding the invalidity of the Loan Agreement and further whether the mortgage bond is

enforceable *vis-à-vis* the Plaintiff's claims A and C of its particulars of claim;

20.3 Whether the Defendant's contention for damages can be sustained (on the basis of alleged misrepresentation) even if the Defendant is found liable to the Defendant upon any or all of the grounds raised by the Plaintiff in its particulars of claim;

20.4 Whether the document marked A4 constitutes an acknowledgement of liability and/or debt by the Defendant to the Plaintiff in the advanced sum;

20.5 Whether on a construction of the Loan Agreement and the allegations as contained in the Plaintiffs' claim B and the Defendant's defences as raised in its plea defeats the Plaintiff's claim B;

20.6 If the Loan Agreement is void whether the Plaintiff is entitled to relief in terms of its enrichment when it has not tendered the deregistration of the mortgage bond referred to in its particulars of claim;

20.7 If the Loan Agreement is void whether the Plaintiff acted in *par delictum* and if so whether recovery of the amount of the Plaintiff's claim A is barred;

20.8 If the Loan Agreement is void whether the Defendant has been enriched;

20.9 Whether the Defendant's plea of prescription is to be upheld based on the allegations in the Defendant's special plea of prescription and the Plaintiff's replication filed therein to the

effect that annexure IMP4 to the applicant's (sic) particulars of claim constitutes an interruption of the running of prescription and set out therein."

The First Issue

The Land and Agricultural Development Bank Act 15 of 2002 ("the Act") repealed its predecessor the Land Bank Act 13 of 1944. Section 2 of the Act provides for the continued existence of the Bank initially established in terms of the Land Bank Act 18 of 1912. The preamble to the Act states

"Preamble recognising that racially discriminatory practises and laws of the past and apartheid deprived historically disadvantaged people of land resulting in the exclusion from the agricultural sector and racially skewed patterns of ownership of land in South Africa;

In order to effect a change in the pattern of land ownership by promoting greater participation in the agricultural sector by historically disadvantaged persons and an increase in ownership of agricultural land by such persons through the provision of appropriate financial services;

In order to promote sustainable agrarian reform and development of agricultural resourses;

In order to strengthen existing agricultural financial services and in order to promote a competitive and profitable agricultural sector;

Be it enacted..."

Section 3 of the Act provides;

"3, Objects of Bank; -

(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 of development programmes aimed at historically disadvantaged persons or groups of such 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 recourses;

i) Programmes that contribute to agricultural aspects of rural development and job creation;

j) Commercial and agriculture and;

k) Food security.

(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."

Section 26 (1) is as follows;

"26. Conduct of business and security arrangements.

(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."

For the Plaintiff it is submitted that the Loan Agreement was to finance the acquisition of land for township development and engineering service fees. The Loan Agreement provided in clause 3;

"3, purpose of the advance;

3.1 The borrower is purchasing the property under the sale agreement and requires financing,

3.2 An application for financing the acquisition of the property and professional fees detailed in the proposal was submitted to Land Bank on behalf of the Borrower and the Land Bank has agreed to advance the Capital Amount to the Borrower on the terms and the conditions in this Agreement.

3.3 The advance shall be utilised as follows:

3.3.1 The amount of.... R5 500 000.00 for the acquisition of the property and to this end Land Bank will issue a guarantee to the seller or its bankers,

3.3.2 Amount of.... R5 744 504.00 for township establishment and engineering services fees as indicated in annexure "A."

3.4 The Land Bank shall be under no obligation to monitor and/or ensure that the capital amount is utilised for its intended or authorised purpose and any such utilisation of the capital amount shall not affect the borrower's obligation under this Agreement to the Land Bank."

Clause 4.2 read with 4.2.2 provides;

"4.2 The Borrower authorises the Land Bank to pay the capital amount as follows:

...

4.2.2 The amount of.... R5 744 504.00 that is required to defray town establishment and engineering service costs, will be paid to the

providers of the professional fees and services on presentation of invoices."

The property is defined in clause 1.1.3.23 as;

"1.1.3.23 'property' means 29 Rand Collieries Small Holdings in Brakpan registration division IR Gauteng Province and measuring 4,2827 hectares in extent."

The Defendant refers to Section 3 (1) of the object being "the promotion, facilitation and support of" those. The land to be purchased was agricultural (see paragraph 14.6 of the common cause facts) and it was thus submitted for the Defendant that this was the primary purpose i.e. the purchase of land that was agricultural land and that "the provision of services for township establishment and engineering services are ancillary to the said purpose."

Clause 3.3 *supra* of the Loan Agreement is framed in a more direct form than that.

It is also contended for the Defendant that the Plaintiff had satisfied itself that the loan fell within the ambit and purpose of the Act and that this was now raised as contrary to its assertions that the agreement. It is not clear what relevance this contention has, estoppel has not been raised. If the agreement was *ultra vires* the powers conferred by the Act then it is void as to which see below.

It is contended further for the Defendant that Section 3 (1) (a) (b), (d) and (f) cover the purchase of agricultural land as do Section 3 (2) (b) and (d).

Section 3 is not the only provision enabling advances of loans. Section 33 (6) of the Act does expressly enable the Plaintiff to make an advance but that advance is restricted to assistance on the sale in execution of property secured and significantly that is not circumscribed to such purchase falling within the objects of the Act.

A concise statement of the approach to statutory interpretation is that of Wallis, JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) in paragraph 18 at 604C (quoting the Master of the Rolls, Lord Neuburger cited in footnote 16.)

"(18) 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 of 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 materials known to those responsible for its

production. Where more than one meaning is possible each possibility must be weighed in the light of all of 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 a 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 that they in fact made. The 'inevitable point of departure is the language of the provision itself', read in the context and having regard to the purpose of the provision and the background to the preparation and production of the document."

In the introduction to the topic of Financial Assistance to Farmers and Debt Management it is stated in LAWSA volume 1 Agriculture 2nd Edition page 229: -

"Financial assistance for the promotion of agricultural is provided principally in terms of the land and Agricultural Development Bank Act which is under the control of the Minister of Finance."

The objects of the Act including those referred to for the Defendant namely (3) (a), (b), (d), (f), (2) (b) and (d) are aimed at the promotion, facilitation and support of agriculture. They

are not either expressly or by necessary implication intended to promote other fields of endeavour.

Agriculture and agricultural purposes are not defined in the Act. *Kuper, J* in *Mosowitz v Johannesburg City Council* 1957 (4) SA 569 (T) at 570D referred to the Shorter Oxford English Dictionary in these terms:

"It was held in the case of *Randfontein Estates GM Co Ltd v Randfontein Town Council* 1943 AD 475 at 485 that one of the conditions to be fulfilled in order that the owner of land described in Section 19 (1) (i) may obtain the benefit of the lower rate relates to the actual use made of the land and that actual use must be restricted to purely agricultural purposes. The term 'agricultural purposes' is not defined in the Ordinance and consequently those words are used in their ordinary signification. The word 'agriculture' is defined in the Shorter Oxford English Dictionary as meaning the science and art of cultivating the soil, including the gathering in of the crops and the rearing of livestock. In my view the words 'agricultural purpose' must be read in that signification and it follows that the stabling of racehorses cannot be regarded as an agricultural purpose. In the case of *Carr v Uzent* 1948 (4) SA 383 (W) Price J had occasion to consider whether another stand in the Klipriviersberg Estate which was laid our and certified as an agricultural holding under the 1919 Act which was used for the purpose of stabling racehorses was a farm

and he came to the conclusion (at p. 388) that a property used merely to stable or keep animals was not a farm unless the animals subsists substantially upon the crops, grass or fodder raised on that land."

A further indication that the intention of the advances is that they are to be used in furtherance of the overriding object of agricultural is to be found in the statutory pledges created in terms of Section 30 (1). This provision gives rise to an automatic pledge, whilst an advance is still owing, of all agricultural produce or products manufactured therefrom, with the money so advanced to such debtor. Again the purpose of the advances subject to the endorsement of charges on the title deeds as provided for in Section 30 (1) is clearly agricultural.

I return now to the objects in Section 3 more particularly those lit upon by the Defendant. It is clear that the intention of Section 3 is directed at agricultural purposes with the stated preference for historically disadvantaged persons. It is not intended for the promotion, facilitation or support of township development or engineering service fees and nowhere is that purpose expressly or impliedly to be found. On the facts, as agreed, the development of townships and the payment of engineering services is not covered by equitable ownership as contemplated in Section 3 (1) (a). Likewise they are not covered by agrarian reform, land redistribution or development

programs as set out in Section 3 (1) (h) nor by agricultural entrepreneurship as opposed to property entrepreneurship (Section 3 (1) (d). Similarly they do not fall within the agricultural systems and rural financial systems whether read conjunctively of disjunctively (Section 3 (1) (f).

To pivot the enquiry upon merely the zoning of the land as agricultural holdings or agriculture, without more, leads to patent absurdity. Thus it could be argued that on a parity of the submission for the respondent that Ringling's could obtain an advance to establish a circus on agricultural land or agricultural holdings which circus would serve the community.

The Plaintiff is a creature of statute. It finds its origin in the Land Bank Act 18 of 1912. It has mutated in its objects through ensuing enactments but it is clear that its objects do not include advances for township development and engineering service fees whether or not the land is initially zoned as agriculture or agricultural holding. Neither are they sanctioned in Section 30. Such use or purpose is *ultra vires* the powers of the applicant.

See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) paragraphs 56 and 58).

Compare S *v Walters* 2002 (4) SA 613 (CC) paragraph 73.

The Loan Agreement, being *ultra vires,* is void for want of compliance with section 3 of the Land Bank Act.

Pole v Commissioner of Grahamstown Municipality (1851) Searle 131.

Dixies Executor v Green Point Municipality (1864), 1 Roscoe 197.

London and South African Exploration Company Ltd v Beaconsfield Town Council (1864), 3HCG, 323 at 329.

The Second Issue

The mortgage bond was concluded pursuant to the Loan Agreement.

That Loan Agreement is void. The mortgage bond is likewise void. See *Albert v Papenfus* 1964 (2) SA 713 (E).

Bay Loan Investment (Pty) Ltd v Bayview (Pty) Ltd 1972 (2) SA 313 (C) at 316.

Indeed the Act itself contemplates, in Section 28, security for an advance.

The accessory nature of a mortgage bond is dealt with by the authors Badenhorst *et al* in the 5th Edition of Silberberg and Schoeman, the Law of Property page 358.

"16.2.1 Accessory Nature of a Mortgage.

It follows from the definition of a mortgage (using the term in its wider sense in which it indicates pledge, lien or other forms of hypothecation) as a right, which secures the fulfilment of an obligation that is always accessory to a principal obligation. In other words, in the same way as a surityship, a mortgage cannot exist without a valid principal obligation. Thus it was held in

Albert v Papenfus that a mortgage bond over the assets of a company to secure an obligation which arose from a contract, in terms of which the company had provided financial assistance for the purchase of its own shares, was invalid as the principal obligation offended against Section 86 (bis) (2) of the Company's Act."

Wille Mortgage and Pledge 3rd Edition page 6 is to the same effect.

LAWSA 2nd Edition volume 17, paragraph 328 at page 292 the author Lubbe, as revised by Scott, states:

"Its accessory nature is of primary importance. This means that the creation and continued existence of the real rights predicate the existence or coming into existence of the principal obligation which the mortgage is intended to secure. This aspect distinguishes the real right of mortgage from other limited real rights known to the law."

See further op. cit. paragraph 380, page 350 footnote 8.

The invalidity of the mortgage bond precludes its enforceability in respect of claims A and C.

Further claim A is based upon a claim of unjust enrichment and claim C upon an alleged acknowledgement of indebtedness. The debt set out in clause 1 of the mortgage bond is not, in terms, covered by that clause. The wider terms of clause 2 are again confined to monies borrowed and advanced which must be read as lawfully borrowed and advanced. The mortgage bond is not

enforceable and not enforceable *vis-à-vis* claims A and C. Neither claim A nor claim C are so covered expressly or impliedly.

The Third Issue

The third issue relates to a counter claim instituted by the Defendant against the Plaintiff. The ambit of the issue is, however, framed as a "conditional counter claim." The premise underlying it is based upon the event that the court finds that the Defendant is liable to the Plaintiff in accordance with the claim A i.e. unjust enrichment and that the Loan Agreement is *ultra vires* and invalid. There is no reference to claims B or C.

The counter claim is framed thus.

"38. At all material times during and after the conclusion of the Loan Agreement a duly authorised representative of the Plaintiff who concluded the Loan Agreement on behalf of the Plaintiff acted within he course and scope of his/her employment with the Plaintiff.

39. At all material times both prior to and during and after the conclusion of the Loan Agreement the Plaintiff was aware that the Defendant required funding in order to acquire agricultural property for the purpose of the establishment of a township thereof.

40. At all material times prior to the conclusion of the Loan Agreement the duly authorised representative of the Plaintiff with the intention of inducing the Defendant concluded the

Loan Agreement aforesaid represented to the Defendant that the Loan Agreement fell within the objects, capacity and scope of the Plaintiff.

41. The representation aforesaid was material and induced the Defendant to enter into the Loan Agreement with the Plaintiff.

42. The Plaintiff duly concluded the Loan Agreement by relying on the truth of the Plaintiff's representation aforesaid and in accordance with the Plaintiff's representation the Plaintiff advanced the amount of R6 951 973.66 to the Defendant at the dates and times as reflected on annexure IMP2 to the Plaintiff's amended particulars of claim.

43. ...

44. The representation aforesaid was false in that the conclusion of the Loan Agreement and the advance therein was not in accordance with the objects of the Plaintiff and in accordance with the Land and Agricultural Development Bank Act 15 of 2002 yet such representation induced the Defendant to conclude the Loan Agreement with the Plaintiff whereas had it known of the true facts it would not have concluded the Loan Agreement in any respect or at all."

No exception was filed by the Plaintiff to the counterclaim.

The Defendant's various contentions in the heads of argument filed on its behalf likewise do not deal with claims B and C but with only unjust enrichment.

The arguments variously advanced are stated thus. "Essentially the Defendant counterclaims for the amount that the Court will find liability for, in the event of the Loan Agreement having been found void as contrary to Section 3 of the Land Bank Act. This is the amount the Defendant alleges its patrimony will be diminished in accordance with which it will suffer loss. The Defendant specifically ties the damages directly to the judgment of the court to the extent that any enrichment is indeed found. Therefore, should no enrichment be found then no counter claim will be allowed. This raises the question of the Defendant's patrimonial position that the Defendant's patrimonial position could never be diminished based upon the fact that the court will be remedying the unjust enrichment of the Plaintiff. The test for damages invariable (sic) boils down to the question of whether the Defendant's patrimonial position has been negatively effected (sic) by virtue of the representation that is, has the Defendant's patrimonial position diminished due to the said representation. The question that is required to be asked is what the position would have been had the representation not been made. In this regard the Defendant would not be in a position to effect payment of any judgment amount in accordance with the terms of the judgment. In my view the Defendant's patrimonial position will be diminished by the amount of the judgment because of a liability being declared due by the Court from the Defendant to the Plaintiff.

Put differently, the Defendant must be placed in a patrimonial position he was in before the conclusion of the agreement. In this regard the Defendant's patrimony as seen in this context the Defendant's patrimony (sic) has indeed been reduced due to the fact that it is now responsible for a judgment debt when in fact it was never ever contemplated by the parties (see the Law of Damages, Visser and Potgieter published in 1993, at pages 336 to 336 for the measure of damages in respect of such claim. In the premises I request an affirmative answer to the question raised in paragraph 20.3 of the stated case.

The Plaintiff will no doubt rely on the fact that the principal (sic) of legality requires that the Plaintiff must act at all material times within the bounds of the statutory power. One cannot dispute that. However, this does not detract from a claim in law against the Plaintiff should its employees act outside the terms of its mandate. I know of no authority in this regard to the contrary."

The argument for the Defendant proceeds further to raise legal policy in the context of unlawfulness and the contention that legal policy should allow such delictual claim on various grounds set out on page 29 of the heads of argument.

These grounds include the following:

The Defendant has little recourse by way of interdict or other pubic remedy to recompense for any loss.

Also the Plaintiff contractually agreed that the purpose of the loan was within the power of the Land Bank.

Furthermore the Land Bank is simply a creature of statute and the state is the sole shareholder.

It is also contended that the Plaintiff must be administered in accordance with the Act and the Land Bank operates on a preferential level and is immunised to a certain extent.

It is contended too that the Plaintiff advances a portion of the and then fails to advance the balance.

The next contention is that on the requirement of unlawfulness clearly infringes the *bono mores* (sic) and convictions of the community in any given scenario.

Finally it is submitted that the Defendant's claim is one based on a fraud.

There seems to be some confusion as to the patrimonial loss. That aspect was not raised by way of exception. Prior to the invalid loan there was no advance of any money to the Defendant. Pursuant to the void loan monies were advanced. It is contended that this was *indebiti* or *sine causa*. The premise is that this is correct and the advance is recoverable by means of a condictio the Defendant being unjustly enriched. *Prima facie* there appears to be no patrimonial loss.

The Plaintiff raises clause 22.4 of the Loan Agreement. This provides that no party shall be bound by any express or implied term, representation, warranty, a promise or the like which is

not recorded in the Loan Agreement. The agreement is void and it is not open to the Plaintiff to rely on the terms thereof.

Quite apart, however, from the apparent absence of patrimonial loss by the Defendant it would be incompatible with public policy to permit the Defendant to benefit from entering into the agreement, which is void as being contrary to the Act.

Visser en 'n Ander v Rosseau en Andere NNO 1990 (1) SA 139 (AD).

Krokow v Sullivan, 2006 (1) SA 259 (SCA) at 261 paragraph 25 *ad fin.*

Municipal Manager Quakeni v Eastern Cape Provincial Government 2010 (1) SA 356 (SCA) at paragraphs 22 to 24.

At paragraph 23 of the last mentioned authority Leach, AJA, said the following.

"...This argument cannot be upheld the court has on several occasions stated that, depending on the legislation involved and the nature and functions of the body concerned, a public body may not only be entitled but also duty – bound to approach a court to set aside its own irregular administrative act: See *Pepcore Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA) 2003 (3) All SA 21 at paragraph 10. Consequently in *Rajah and Rajah (Pty) Ltd and Others v Ventersdorp Municipality and Others* 1961 (4) SA 402 (A) at 407D to E it held that the interest a municipality had to act on behalf of the public entitled it to approach a court

to have its own act in granting a certificate to obtain trading licensed declared a nullity. Similarly in *Transair (Pty) Ltd v National Transport Commission and Another* 1977 (3) SA 784 (A) at 792H to 793G this court held that an administrative body which held wide powers of supervision over air services to be exercised in the public interest, had the necessary *locus standi* to ask a court to set aside a license it had irregularly issued. Finally in *Premier Free State and Others v Firechem Free State (Pty) Ltd supra* Schutz, JA concluded in giving the unanimous judgment of this court that 'the province (the appellant) was under a duty not to submit itself to an unlawful contract and (was) entitled, indeed obliged, to ignore the delivery contract and to resist the respondent's attempt at enforcement."

The contentions advanced by the Defendant as set out above do not displace this conflict with public policy. The result is the Defendant's contentions for damages cannot be sustained even if the Defendant is found liable on all or any of the grounds raised by the Plaintiff in its particulars of claim.

The Fourth Issue

The fourth issue is whether A4 constitutes an acknowledgement of liability or debt in the sum advanced.

The question cannot be answered in the abstract. The context is clearly the Prescription Act 68 of 1969 and more particularly Section 14.

In *Cape Town Municipality v Allie NO* 1981 (2) SA 1, (C) at 6A Marais, AJ, as he was then, said:

"The expression 'acknowledgment of liability' is not defined in the Act. The words must, therefore, be given their ordinary meaning having due regard to the object of the statute in which they appear. The concept of acknowledging liability is as old as the concept of litigation itself. Unless there are clear indications to the contrary, s 14 (1) must be interpreted in conformity with the common law. I can find no such contrary indications in the Act. It follows, in my view, that any acknowledgement of liability which would have served to interrupt the prescription at common law will serve to interrupt it in terms of s 14 (1)."

The court continued as follows:

"Firstly I do not think the acknowledgment of liability need amount to a fresh undertaking to discharge the debt. 'I admit I owe R100.00' is manifestly an acknowledgment of liability to pay a R100.00 but it is not a fresh or new undertaking to pay it. In *Consolidated Textile Mills Ltd v Wininger* 1961 (3) SA 335 (O) at 339 it was held that it was not necessary to go as far as the English law once did and require a promise to pay the balance on the debt to be implied in an acknowledgment of liability arising from a part payment."

The letter is addressed by the Plaintiff to the Defendant. There is no dispute about the authority of the signatories. The heading is

"Indebtedness to Land Bank: Impande Property Investments (Pty) Ltd." The body of the letter reads:

"We refer to the recent interaction between the Land Bank and Impande Property Investment (Pty) Ltd (hereinafter referred to as 'the company') and confirm as follows.

The company has undertaken to repay Land Bank' debt and is currently looking for an alternative financier to replace the Land Bank loan or find third party investor/s interested to (sic) purchase the development outright.

Land Bank has informed the company that the loan advanced to the company fell outside the Land Bank' mandate and that in terms of the provisions of Section 33 of the Land Bank Act as well as Section 66 and 68, Land Bank could not make any further advancements (sic) to the company under the loan, hence the need for the company to find alternative finance.

The company's outstanding loan balances comprises of capital of R6 951 973.86 --- as set out in the attached schedule, plus interest thereon currently charged at the rate of 18% (NACM) to be capitalized on the last day of each month until settled in full.

We draw your attention that our auditors will during April 2009 directly request an updated confirmation from the company of the balance as at 31 March 2009.

We appreciate the efforts made by the company in finding alternative finance, but it is imperative that the outstanding balance of the loan be repaid in full by the end of April 2009. An

extension of this deadline may be granted at the Bank's sole discretion.

This letter is issued without prejudice to any rights that the Bank may have on this matter which rights it may choose to exercise at its sole discretion at any time while the company remains indebted to the Land Bank."

The signature is dated 13 February 2009.

The concluding part of the letter then proceeds:

"Kindly acknowledge receipt of this letter, and the attached schedule, for an on behalf of Impande Property Investments (Pty) Ltd as confirmation of the information contained here-in. 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."

Thereafter follows a signature for and on behalf of Impande Property Investments (Pty) Ltd dated in script 8/03/09.

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.

The first point raised, in addressing the court on behalf of the Defendant was that A4 "was not drafted as a legal document it was a recordal of what was discussed."

No form is required. To the contrary a tacit acknowledgment is sufficient. The same applies to the criticism for the Defendant

that A4 does not "contain words such as 'undertake' and 'acknowledgement'."

The document is also criticised as being one sided.

The document in fact records an undertaking to repay and it is not contradicted.

Further criticism is raised at the reference to the outstanding balance on the loan. That does not detract from the recordal of the indebtedness and the undertaking.

Likewise the letter is criticised because it does not set out the indebtedness "in terms of an unjust enrichment claim." This again raised a formalism that is as irrelevant as is the contention that "A4 is not drafted in a contractual format and objectively speaking simply represents a letter that has a place for signature at the end thereof."

It is contended for the Defendant also that the Defendant's signature is merely that it has received the letter and does not accept the correctness. That is gainsaid in the confirmation of the information and also the invitation in the context of the silence ensuing.

The absence of the schedule is raised and "this lends further credence to the fact that the inscription could never have been intended for a confirmation of the correctness thereof." It is not clear from the agreed facts whether the schedule was in fact annexed or not. This again runs counter to the wording and silence.

A point is made that a signature postdates 28 February 2009. That does not displace the acknowledgement nor does the contention that:

"10.9 The document, for the mere fact (sic) that it requests a response, means in fact that it could never have been intended to be an acknowledgement of debt or indebtedness for that matter."

There is no merit in the following arguments that:

"10.10 For the document to be an acknowledgment of debt it would have had to contain certain definite and certain terms." It was submitted that the document contains no such definite and certain terms whatsoever and is a mere recordal of the events that the Plaintiff saw fit to reduce to writing:

10.11 As stated, there are no certain and definite terms in the said letter, same being vague and uncertain in respect of the alleged debt with reference in paragraph 3 of the said *ultra vires* conclusion of the Loan Agreement by the Land Bank, and then once again to a capital amount in terms of the Loan Agreement. This cannot be definite and certain in respect of the alleged indebtedness.

10.12 It is submitted further that the acknowledgment of debt requires an underlying *causa* if properly constituted and it is submitted the underlying *causa* cannot be deduced with certainty from the said letter."

Likewise there is no merit in the contention that the auditor's update renders the documents uncertain.

A4 does constitute an acknowledgment of debt liability and/or debt by the Plaintiff in the advanced sum.

Issue 5

Whether on the Loan Agreement read with claim B the Defendant's defence defeats claim B,

Issue 5 appears to be framed as a claim based upon the enforceability of the Loan Agreement. That agreement is void and does not sustain the cause of action. The plea does not appear relevant on this premise.

Issue 6

Assuming the Loan Agreement as void whether the Plaintiff is entitled to relief on enrichment absent tender of de-registration of the bond.

See issue 1 above as to the Loan Agreement being void. See further issue 2 above as to the mortgage bond consequently being void on the principle of being accessory to the Loan Agreement.

For the Defendant it is argued "that the defence is taken that the Plaintiff has failed to tender the return and deregistration of the mortgage bond." The Defendant refers to Amler's Precedents of Pleadings 7th Edition page 101 (f), reliance was also placed upon Amler op cit page 319 for a contention that the contract being prohibited by statute is illegal. It was also

argued that enrichment could only be determined *vis-à-vis* the value of the land because the enrichment received would be the benefit i.e. the land.

In reply to a question by the court it was submitted for the Defendant that it was not the money advanced but the value of the land that would have to be determined as at the institution of the claim and on that construction enrichment could not be shown on the stated case. That is self evidently not correct. The purchase of agricultural holdings was merely the stated purpose of the loan of the monies advanced.

Deregistration of the mortgage bond is at the highest merely a formality. The lack of a tender thereof is, like the bond itself, without content once void and it is in any event not about the claim on enrichment.

The lack of tender of de-registration is not a bar in the relief on enrichment.

Issue 7

If the Loan Agreement is void whether the Plaintiff was in *par delictum* as a bar to claim A.

The principle enshrined in the maxims *in pari delicto potier est conditio defendatis* or *nemo auditur turpitudinem allegans* is to be found in various authoritative Roman Dutch texts see Southern Cross: Civil Law and Common Law in South Africa, Zimmerman and Visser page 543, footnote 105. For the Defendant it is alleged that "the Plaintiff did act with moral

turpitude and dishonourably in respect of the conclusion of the said transaction in that it in fact contractually confirmed to the Defendant that it would advance a capital amount of R11 244 504.00 for the purposes set out in clause 3 and in fact endorsed in clause 3.4 that the purpose for which the funds were to be used by the Defendant were authorised when in fact they were not."

Reference in this regard is made to Jajbhay *v Cassim* 1939 (AD) 537 and it is contended for the Defendant that the Plaintiff must establish facts necessary for the court to come to its assistance. In the more recent decision referred to above by the Supreme Court of Appeal, per Cachalia, AJA in *Klokow v Sullivan* 2006 (1) SA 259 at 268B-E the court held:

"(25) The bare facts relevant to the determination of this appeal are the following. The parties entered into a written agreement for the purchase of a business, which contemplated a contravention of the Act. *Prima facie* therefore they were *in pari delicto*. The Plaintiff paid to the Defendant an amount of R250 000.00 towards the purchase price. Six weeks later the business was returned to the Defendant. The Defendant, however, refused to refund the purchase price. The result was that the Defendant retained both the business and the money.

(26) Faced with these facts it is difficult to understand what "further facts" the Plaintiff was required to plead to persuade the full court that the par *delictum rule* should be relaxed. The

Defendant was left with both the business and R250 000.00. The equities clearly support a return to the *status quo*. There was no need in these circumstances for the Plaintiff specifically to plead the relaxation of the *par delictum rule* on the grounds of public policy or that the Defendant had been unjustly enriched. Once it had been alleged that the Defendant was in possession of the business as well as the money (which at inception stage must be accepted as true) it was he not the Plaintiff who needed to show that he had not been enriched."

These observations are apposite to the present matter. The Plaintiff's claim A is not barred as contended for as being *in par delictum.*

Issue 8

If the Loan Agreement is void whether the Defendant has been enriched.

The Defendant does not deny on the pleadings that it was enriched. I reiterate what is set out in respect of the third issue supra.

Prior to the void Agreement of Loan no monies were advanced as a purported loan to the Defendant. On conclusion of the void agreement of the loan monies were advanced, pursuant to that void agreement. The monies have not been returned. The patrimony of the Defendant has been enriched to that extent leaving aside any question of interest.

In *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 at 203 paragraph 21 the following is stated by Navsa, JA and Heher, AJA delivering the judgment of the full court;

"(21) A presumption of enrichment arises when money is paid or goods are delivered. A Defendant then bears the onus to prove that he has not been enriched: *De Vos (supra* 2nd Edition at 183), quoted with approval in *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) at 713G-H. In the present case the Defendant attempted to discharge that onus by reliance on the fact that its loan account in Ruenya had been debited with the full agreed value of the blocks delivered to its nominee."

See also *De Vos* Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg 3rd Edition page 183.

The Defendant has been enriched.

Issue 9

Whether IMP4 constitutes an interruption of the running of prescription.

The final ninth issue overlaps to a large extent with that considered under issue 4 above. Whether "IMP4" constitutes an interruption of the running of prescription.

IMP4 (or A4) is an acknowledgment of liability. No specific form is required. It may be express or tacit, written or oral. What it does do, having found it to be an acknowledgment of liability, is to interrupt prescription as pleaded in the replication.

See generally LAWSA Vol 21, 2nd Edition page 67 paragraph 1 to 9 regarding the intention of the debtor.

The test is an objective one see the observation of Marais, AJ in *Cape Town Municipality v Allie NO supra* at 7H and see too the court's statement as to silence at 8C of the same judgment.

In my view the recordal in A4 coupled with the signature for the Defendant constitutes an express acknowledgment of liability and undertaking to pay and further there is a tacit acknowledgment and undertaking centred on the silence in the context of the concluding postscript in A4.

IMP4 constitutes an interuption of the running prescription.

In the result as far as costs are concerned the Plaintiff has been substantially successful on the stated case and the Plaintiff is awarded costs on the stated case including the costs of two counsel.

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