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# *The validity of a deed of suretyship in instances where the principal loan agreement is invalid*


by

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# Summary

Suretyship agreements have been used in informal transactions since before the Justinian era where members of the Roman civil society relied on moral values as assurance that a debtor would repay his debt. Over the years, the principle of suretyships has become immersed into the South African legal system through Roman-Dutch law and these agreements have evolved into instruments utilised in commercial industries in which a moral compass is not a sufficient covenant for one's debt to be paid. This mini-dissertation seeks to analyse the accessory nature of the suretyship agreement particularly in instances where the principal agreement to which it attaches is invalid. The Constitutional Court in *Shabangu v Land and Agricultural Development Bank of South Africa and Others*[1] found that on the facts brought before it, the deed of suretyship concluded between the creditor and the surety was invalid as a result of the principal agreement also being invalid. This judgment will be critically considered and compared to *Panamo Properties 103 (Pty) Ltd v Land and Agricultural Development Bank of South Africa*,[2] wherein the Supreme Court of Appeal held that a mortgage bond was not be invalid on the basis of the principal agreement being invalid. Although the suretyship agreement and the mortgage bond are two different agreements, their accessory nature and the effects thereof are similar. It is this similarity that has sparked the curiosity of the rights of the creditor who finds himself in a dilemma where the principal agreement is found to be invalid.

[1] (CCT215/18) [2019] ZACC 42.
[2] [2015] ZASCA 70.

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To my Heavenly Father, for staying true to Your promise in Jeremiah 29:11, I am eternally in awe of your wonderful works and my worship and praise will ring evermore.

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# Chapter 1
# Introduction

## 1.1 Research problem and background to the study

It is understood in the South African law that the concept of suretyship, as inherited from the Roman law and Roman-Dutch law, is that one party can be held liable for the debts of another party, subject to the existence of a principal agreement. The principal agreement would ordinarily be concluded between a debtor and a creditor, with a separate but accessory agreement being concluded between a third party (the surety) and the creditor who would agree to place himself in the shoes of the debtor in the event of the latter's default.

A question then arises whether or not the agreement between the creditor and the surety would remain valid in instances wherein the principal agreement between the creditor and the debtor is invalid for whatever reason. Such question is appraised in light of a similar uncertainty which exists when adjudicating mortgage bonds which share the characteristics of accessoriness as with suretyships.

The Constitutional Court ("CC") in the matter of *Shabangu v Land and Agricultural Development Bank of South Africa and Others*[1] ("*Shabangu*") was faced with the issue and found that on the facts brought before it, which featured an acknowledgement of debt, the deed of suretyship concluded by the creditor and the surety was invalid as a result of the principal agreement being void.

Although the decision of the apex court comes as no surprise, it sparks some curiosity on whether the CC properly considered the facts in *Shabangu* in light of the court's prerogative to decide on constitutional issues in general, as well as its duty to develop the common law as contemplated in section 39 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). One is also tempted to wonder, in the event of a different set of facts coming before a court where a creditor seeks to enforce its claim against the surety, whether the court would come to a different conclusion without diluting the positive law applicable to suretyships. Further, and should it be found that the principal agreement is invalid, the creditor would have to evaluate its position on the possible recourse it would have.

[1] (CCT215/18) [2019] ZACC 42.

## 1.3 Research questions

The objective of this dissertation is to answer the first question being whether or not an invalid principal agreement between parties automatically means that the suretyship agreement is also invalid.

Although the CC in *Shabangu* answered the question in the affirmative, the court's findings relied on the peculiar facts of that case as it was heard and strictly applied the laws of suretyship as generally applied. This dissertation seeks to analyse the court's reasoning in reaching its conclusion, when compared to the reasoning followed by the Supreme Court of Appeal ("SCA") in a case involving a mortgage bond as the accessory to the agreement.

The second question which arises is whether or not the reason behind the invalidity of the principal agreement is material enough to affect the suretyship agreement, especially if the creditor is an entity of the State as was the case in *Shabangu*.

In *Panamo Properties 103 (Pty) Ltd v Land and Agricultural Development Bank of South Africa*,[2] ("*Panamo*") the SCA had held that it cannot follow that a mortgage bond is invalid solely because the principal agreement was invalid and the actual terms of the mortgage bond and the actual facts of the case where heavily relied upon.

The third question relates to whether or not a creditor can possibly argue that a suretyship agreement can be treated in a similar fashion as a mortgage bond which can render it valid, despite the underlying principal agreement being invalid. The overarching question in this regard really is the *status quo* regarding a creditor's right of recourse in a situation wherein the suretyship agreement is invalid as a result of an invalid principal agreement.

## 1.4 Overview of the chapters

The current chapter provides a brief background introduction of the questions to be answered in the chapters to follow. In Chapter 2, the history and current legal principles of the South African law of suretyship are discussed by tracing the path and evolution of the law of suretyship from the time of its conception in Roman law, to its influence by the concept of equity in terms of the Roman-Dutch law, up to its immigration into the South African legal system. Chapter 3 contains an analysis of the adjudication of

[2] 2016 (1) SA 202 (SCA).

suretyship agreements vis-à-vis mortgage bonds with specific reference to the cases of *Shabangu* and *Panamo*. Having considered the status *quo* of the current applicable laws in relation to suretyship agreements which are found to be invalid, Chapter 4 explores the recourse that a creditor has in the event of a suretyship being found to be invalid due to the underlying agreement being invalid. Chapter 5 is a general conclusion and remarks on all the issues as discussed in the dissertation.

# Chapter 2
# The history and current legal principles of the South African law of suretyship

## 2.1 Introduction

The Roman society had a value system that placed a great emphasis on friendship.[1] *Amicita* was a relationship between citizens which was considered to be permanent in nature and based on fidelity, which ultimately gave rise to a number of strict extra-legal duties.[2] Due to the amount of weight and faith that Roman citizens placed on *amicitia*, personal security was considered a viable and popular institution in society.[3] Suretyship, a form of personal security, was the most popular and preferred form of security in Rome.[4]

The roots of the South African law of suretyship lies in Roman law.[5] Although the South African law is mostly based on Roman-Dutch law principles, the ancestry of suretyship is heavily influenced by Roman law.[6] Upon maturity of this branch of the law by Justinian at a particular point in history, the Roman law had developed principles which are the foundation of the modern South African law of suretyship.[7] All Roman-Dutch writers drew their expositions of the law of suretyship directly from the *Corpus Iuris Civilis*,[8] which they, together with the commentators, begotten to other legal systems whilst maintaining the essence of the Roman principles.[9]

The purpose of this chapter, therefore, is to provide an overview of the historical development of suretyship as well as of the current legal principles in South African in this regard.

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[1] R Zimmermann *The law of obligations: Roman foundations of the Civilian Tradition* (1996) 115.
[2] *Ibid*, referring to F Schulz *Principles of Roman law* (1936) 237 at n 6.
[3] *Ibid.*
[4] G Van Niekerk 'Instances of security in ancient African law with Roman equivalents' (2006) *Fundamina* 152.
[5] CF Forsyth *Caney's The law of suretyship* (2002) 1.
[6] *Ibid* at 4.
[7] *Ibid.*
[8] *Ibid.* See also Grotius *Introduction to Dutch jurisprudence* bk 3, ch 3.
[9] *Ibid.*

## 2.2 Suretyship in Roman law

In ancient or classical Rome, as fully set out in the *legis actio* procedure, there existed three forms of suretyship, namely the *vindex*, *vades* and *praedes*.[10] Later the concept of *stipulatio* was born.[11] Through *stipulatio*, two forms of stipulatory suretyship came into existence: the *sponsio* and the *fidepromissio*.[12] The third form of stipulatory suretyship, known as the *fideiussio*, was later developed with the aim of making the regulation of suretyships less burdensome on the surety.[13]

Although little is known of the law during the time of the Twelve Tables, the closest concept to suretyship that is known to legal writers involves occasions when the *vindex* would release a defendant from his or her obligations to attend to an opponent when summoned to appear before a praetor, simply by standing before the praetor as a guarantor for the defendant's appearance.[14] Legal writers also note the role played by the *vades* who "went bail" for a defendant who was required to re-appear when proceedings were adjourned after *litis contestatio*.[15]

According to Gaius,[16] there were two kinds of sureties in ancient times – the *praedes sacramenti causa* and the *praedes litis et vindiciarum*.[17] When a party wished to utilise the *legis actio sacramenti in rem* (where there was a thing or symbol in dispute) the praetor would instruct parties to the matter to make a *sacramentum* (a religious oath) declaring that the subject of the thing belonged to either of the respective parties.[18] As security in the event of an adverse judgment, the *sacramentum* would be accompanied by the payment of an amount to the public treasurer.[19] The matter would then be referred to the *iudex* in order to determine which of the oaths made before him were justified.[20] The person in whose favour the praetor would have found, would be granted interim possession of the thing pending the decision of the case being finally made by the praetor.[21] In instances where a dispute

[10] CF Forsyth *Caney's The law of suretyship* (2002) 2.
[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*
[15] *Ibid* at 3.
[16] G 4.13 and 16.dw.
[17] *Ibid.*
[18] CF Forsyth *Caney's The law of suretyship* (2002) 3.
[19] *Ibid.*
[20] *Ibid.*
[21] *Ibid.*

was not *in rem* but rather *in personam*, the *legis actio* to be utilised would be the *legis actio per sacramentum in personam*.[22]

The common discovery made by legal writers in respect of the history of suretyships is that self-help was its genesis.[23] During the era of the Twelve Tables, an aggrieved party would gather his relatives and head to the home of the wrongdoer with the purpose of capturing him for as long as the "wrong" committed had not been addressed.[24] In the event that the wrongdoer could not provide sufficient compensation or redress at the time, a "hostage" who would be a relative of the wrongdoer, would be taken captive as security for the wrongdoer's composition.[25] The "hostage" would then be the surety and the undertaking to ensure that the debt is repaid would be the *stipulation*.[26]

As mentioned above, in ancient Rome, there were three forms of stipulatory suretyships, namely *sponsio*, *fidepromissio* and *fideiussio*.[27] Of the three types of suretyships, the earliest form of *stipulatio* was *sponsio*.[28] *Sponsio* would be concluded where the stipulator would ask the promisor "do you undertake…?" and the promisor would respond "I do undertake …".[29] Arguably, the term "sponsor" possibly meant "surety".[30] *Sponsio* was reserved for Roman citizens, and was accessory to a principal agreement reserved for Roman citizens, wherein the surety undertook his obligation by entering into a *stipulatio* with the creditor.[31]

The second type of a stipulatory suretyship, which was not limited to Roman citizens, was the *fidepromissio*, which involved a *stipulatio* between a surety and the creditor.[32] In respect of both the *sponsio* and the *fidepromissio*, the sponsor who had an obligation to pay the creditor was given redress against the principal debtor using the remedy *actio depensi* under the *lex publilia*.[33] Where the principal debtor denied liability, he would be condemned and later had to pay interest up to but not exceeding

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[22] *Ibid.*
[23] CF Forsyth *Caney's The law of suretyship* (2002) 4.
[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid*.
[27] CF Forsyth *Caney's The law of suretyship* (2002) 5.
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*
[32] *Ibid.*
[33] *Ibid,* referring to Gaius at G 3.127.

the capital amount due subject to the *in duplum* rule.[34] The redress available to the *fidepromissio* is unclear, but there is suspicion that the redress would be on the basis of an action founded on mandate (the *actio mandati*).[35]

The *fideiussio* was initially intended to lighten the yolk cast upon sureties.[36] While the *sponsio* and the *fidepromissio* could only be used to secure stipulatory obligations, the *fideiussio* was recognised to secure any form of obligation, which included not only civil obligations but also natural obligations.[37] Classical jurists accepted *fideiussio* as the "novel" form of suretyship at the time but on condition that the suretyship was concluded before or after the conclusion of the principal obligation, in respect of the very same obligation undertaken by the same principal debtor.[38] Later in South African law, the requirement of the correct identity of the debtor, creditor and surety, became an important aspect as highlighted by the Appellate Division in *Sapirstein v Anglo African Shipping Co (SA) Ltd*,[39] as discussed in later chapters of this dissertation.

The jurists had accepted that suretyship was accessory in nature and thus concluded that the obligation of the surety could not embrace more than the principal obligation but could embrace less in terms of performance.[40] The surety's obligation also could be conditional or *ex die* whilst the principal obligation was *pura* and had to be satisfied without relaxation or condition.[41] The strict principle then applied to the effect that the surety's obligation could not be more onerous than the principal obligation as a result of its strictly accepted accessory nature.[42]

Ulpian's conclusion therefore,[43] was that due to the surety being intended to be accessory and not principal in nature, in the event that it became more onerous, it was invalid.[44] The challenge posed by the accessoriness of the surety's obligation was in a situation whereby the principal obligation was extinguished, which then followed that the surety's obligation also had to be extinguished.[45] This is a problem that still exists

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[34] *Ibid.*
[35] *Ibid.*
[36] CF Forsyth *Caney's The law of suretyship* (2002) 8.
[37] *Ibid* at 9.
[38] *Ibid* at 10.
[39] 1978 (4) SA 1 (A).
[40] CF Forsyth *Caney's The law of suretyship* (2002) 10, referring to Gaius at G 3.126; D 46.1.8.7.
[41] *Ibid.*
[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*
[45] CF Forsyth *Caney's The law of suretyship* (2002) 10.

for the creditor in modern law with regard to prescription of principal obligations and the consequent validity of the suretyship obligations.[46]

Where a creditor had to elect whether to recover a debt from the principal debtor or the surety first, Gaius implied that the creditor ought to first sue the principal debtor and if he is unable to do so, sue the surety.[47] The rationale behind this was that a surety could institute an *iniuria* in a case where the debtor would have been readily amenable to satisfy the debt.[48] When the creditor instituted an action for recovery of the debt, *litis contestatio* would extinguish the principal obligation and replace it with the new obligation set out as the cause of action.[49] In turn, an action brought against the principal debtor would release the surety.[50] To curb this unintended result, Celsus[51] suggested that perhaps a creditor ought to include a stipulation to the effect that the amount which he is unable to recover from the principal debtor would be for the surety to make good.[52]

In the times of Justinian, the *fideiussio* was codified to improve the manner in which suretyships were regulated, especially the effects of the accessoriness thereof.[53] Firstly, in Justinian's code, where there were multiple sureties, it was provided that recovery of the debt from one surety did not *ipso facto* release the others.[54] As time went on, in the Novels,[55] the benefit of excussion (*beneficium ordinis vel excussionis*) provided that where a principal debtor was sued first, unless in absentia, the sureties would be given an opportunity to produce him prior to being held liable themselves.[56]

In classical Roman law, two further types of suretyships had developed in addition to the *fideiussio*, namely mandate and *constitutum*.[57] Where a person stood as surety for a principal debtor as requested by the principal debtor and the debt due

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[46] *Ibid.*
[47] *Ibid* at 11.
[48] *Ibid.*
[49] *Ibid,* referring to Gaius at G 3.180.
[50] *Ibid.*
[51] CF Forsyth *Caney's The law of suretyship* (2002) 11, referring to P Stein *W Buckland Textbook of Roman law* (1931) 450.
[52] *Ibid.*
[53] CF Forsyth *Caney's The law of suretyship* (2002) 14.
[54] *Ibid.* Referring to Justinian's Code at C 8.40(41).28.
[55] CF Forsyth *Caney's The law of suretyship* (2002) 14, referring to Nov 4.1.
[56] *Ibid.*
[57] *Ibid,* referring to R Zimmermann *The law of obligations: Roman foundations of the Civilian Tradition* (1996) 138-9.

was not paid, the creditor would be able to recover from the principal debtor.[58] The surety could then institute an action against the principal debtor to recover the debt paid to the creditor using the *actio mandati*.[59]

The one advantage that mandate had over the *fideiussio* was that it was consensual and did not require conclusion by *stipulatio*.[60] Furthermore, *fideiussio* by way of *stipulatio* required that both parties be present at conclusion whilst mandate did not require that both parties be present.[61] The disadvantage of mandate however was that it had to be concluded prior to the principal agreement being concluded between the creditor and the principal debtor.[62]

*Constitutum* was developed by the praetor and was considered to be more equitable by nature.[63] The *constitutum* was based on an informal agreement in terms of which an absent party could be made surety after conclusion of the principal debt.[64] Unlike the classic suretyship, which is accessory to the principal agreement in nature, this particular type of suretyship was not considered as a strictly accessory obligation due to it being informal.[65] It was considered to be more advantageous than *fideiussio* because the action on the pact did not render the principal obligation as extinguished and a pact where the surety pays more than the principal amount due or payment on condition was considered valid, unlike with *fideiussio*.[66]

## 2.3 Development of suretyship in Roman-Dutch law

The *Corpus Iuris Justinianus* contains a developed and coherent law of suretyship.[67] Within this legal text, it became clear that commentators accepted that there is no difference between informal pacts (*constitutum*) and formal agreements (*fideiussio*).[68] In constructing the Roman-Dutch principles, Roman-Dutch writers relied on Roman law principles of *fideiussio*, with certain influences such as equity being infused from the *constitutum*.[69] The three classical types of suretyships as devised in Roman law

[58] CF Forsyth *Caney's The law of suretyship* (2002) 15.
[59] *Ibid.*
[60] *Ibid* at 16.
[61] *Ibid.*
[62] *Ibid.*
[63] *Ibid.*
[64] *Ibid.*
[65] *Ibid.*
[66] *Ibid* at 18.
[67] *Ibid* at 19.
[68] *Ibid*, referring to Voet at V 46.1.1.
[69] CF Forsyth *Caney's The law of suretyship* (2002) 19.

(*sponsio*, *fidepromissio* and *fideiussio*) were so refined and elaborate in structure that generally, the rules which governed suretyships in Roman-Dutch law essentially remained Roman.[70]

Voet introduced an element of equitable development within the Roman-Dutch law in terms of which sureties could pursue their co-sureties without having first ceded the action.[71] Thereafter, Roman-Dutch law gradually infused equitable principles similar to those of mandate and *constitutum* with those of *stricti iuris* as contained in the Roman *fideiussio.*[72] Forsyth accordingly holds the view that although Roman-Dutch suretyships are largely and genetically Roman, the former is far more advanced in that it "took three stands and wove them into one".[73]

## 2.4 Suretyship in South African law: basic principles

In the South African law, although there is no legislative definition of suretyship, there are principles which remain constant, namely the accessory nature of suretyship, existing obligations of parties who participate in a contract of suretyship and recourse of the surety against the principal debtor.[74] Forsyth describes suretyship as "only one form of intercession, that is, a transaction in which one person undertakes liability for another's debt".[75] He further explains that for a suretyship to be a valid contract of suretyship, it will have to comply with formalities for a valid contract of suretyship.[76]

The accessory nature of the contract of suretyship remains a defining characteristic in that there has to be a valid obligation and that no contract of suretyship can exist independently.[77] Notwithstanding this fact, it should be noted that the contract of suretyship is a contract between a creditor and surety, to the exclusion of the principal debtor who need not even be aware of the existence of such agreement.[78] Zimmerman argues that the modern idea of "accessoriness" of the contract of suretyship indicates dependency of the surety's obligations to that of the principal

[70] R Zimmermann *The law of obligations: Roman foundations of the Civilian Tradition* (1996) 114.
[71] CF Forsyth *Caney's The law of suretyship* (2002) 22. Reference made to V 46.1.30.
[72] *Ibid.*
[73] *Ibid* at 23.
[74] CF Forsyth *Caney's The law of suretyship* (2002) 24.
[75] *Ibid.*
[76] *ibid*, referring to Section 6 of the General Law Amendment Act 50 of 1956 which requires that a "contract of suretyship" has to be embodied in a written document.
[77] *Ibid* at 25.
[78] *African Life Property Holdings (Pty) Ltd v Score Food Holdings Ltd* 1995 2 SA 230 (A).

debtor.[79] He further opines that Roman lawyers were more flexible on the nature of suretyship and did not allow themselves to "be hemmed in by rigid dogmatic categories such as 'accessoriness'."[80]

The universally accepted truth about suretyship is that, by its nature, it is a burdensome contract.[81] Insofar as the burden was somewhat honourable as a result of the underling friendship or *amicita* in the Roman society, that is not the case in the modern South African society. This is evinced by the enactment of section 6 of the General Law Amendment Act 50 of 1956 ("GLAA"), which requires that all suretyship agreements be reduced to writing. In this regard, Miller AJ in *Fourlamel (Pty) Ltd v Maddison*[82] stated the following:

> "The Legislature may also have been influenced by other considerations, for example, that suretyship being an onerous obligation, involving as it does the payment of another's debts, would-be sureties should be protected against themselves to the extent that they should not be bound by any precipitate verbal undertakings to go surety for another but would be bound only after their undertaking had been recorded in a written document and signed by them or on their behalf."[83]

The fundamental characteristic of a suretyship contract is the presence of a valid principal obligation.[84] It is accepted that a suretyship is accessory in nature and can only continue to exist whilst the principal debt also exists. Therefore, should a principal obligation come to an end, the suretyship should also lapse.[85] The principal debt need not necessarily exist at the time of conclusion of the contract of suretyship. However, the principal obligation envisaged at the time of conclusion of the suretyship agreement must come into being in order to found the liability of the surety.[86]

Although the subject of suretyships in South African law has remained largely untouched by legislation from the times of Justinian, the small changes that have been effected have generally been cautious and incremental.[87]

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[79] R Zimmermann *The law of obligations: Roman foundations of the Civilian Tradition* (1996) 121.
[80] *Ibid*. Reference also made to E Levy *"The principal and surety in classical Roman law"* (1951) 14/15 BIDR 217.
[81] *Jans v Nedcor Bank Ltd* 2003 (6) SA 646 (SCA) para 30.
[82] 1977 1 SA 333 (A).
[83] 342h - 343B.
[84] CJ Nagel *Commercial Law* (2011) 391.
[85] *Ibid.*
[86] *Ibid.* Reference made to *United Dominions Corporation (South Africa) Ltd v Rokebrand* 1963 (4) SA 411 (T) and *Trust Bank of Africa Ltd v Frysch* 1977 (3) SA 562 (A).
[87] CF Forsyth & JF Pretorius "Recent Developments in the Law of Suretyship" (1993) 5 *SA Merc LJ*181.

## 2.5 Formation of a contract of suretyship and consequences thereof

The earliest judicial pronouncement on the definition of suretyship in South Africa is found in the judgment penned by Connor J in *Murray and Burril v Buck and Buck*,[88] in which he remarked that "any person is, I apprehend, a surety within the meaning of the term in law who engages his own liability in respect of another's debt".[89] In the later judgment of *Fitzgerald v Angus Printing and Publishing Co Ltd*,[90] De Villiers CJ stated that "the essential requisites of the contract of suretyship are that the surety should incur only an accessory obligation whilst the principal obligation of the debtor remains in full force…".[91] The definition of suretyship was considered to be too wide and in *Corans & Another v Transvaal Government and Coull's Trustee*,[92] the court narrowed the concept of suretyship by stating that "the undertaking of the surety is accessory to the main contract, the liability under which he does not disturb, but it is an undertaking that the obligation of the principal debtor will be discharged, and, if not, that the creditor will be indemnified."[93]

Suretyship was largely governed by the common law and it was not until the year 1956 that the South African legislature set out formalities for the conclusion of a valid contract of suretyship.[94] As mentioned above also, suretyship comes into being by a contract of suretyship that ought to comply with the requirements of section 6 of the GLAA. The exact wording of section 6 of the GLAA is as follows:

> "No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety: Provided that nothing in this section contained shall affect the liability of the signer of an aval under the laws relating to negotiable instruments."[95]

In the case of *Fourlamel (Pty) Ltd v Maddison*,[96] Millar JA considered the possible objects of section 6 of GLAA and remarked:

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[88] 1870 NLR 155 at 156 as referred to in Forsyth (n 7 above) 25 at n 4.
[89] *Ibid.*
[90] (1907) 3 Buch AC 152 at 59 as referred to in Forsyth (n 7 above) 25 at n 4.
[91] *Ibid.*
[92] 1909 TS 605 at 612 as referred to in Forsyth (n 7 above) 25 at n 5.
[93] *Ibid.*
[94] CJ Nagel *Commercial Law* (2011) 393.
[95] Section 6 of GLAA.
[96] 1977 (1) SA 333 (A).

> "The plain, grammatical meaning of the words used in sec 6 appears to me to be clear. The section presupposes that an agreement of suretyship has been reached – 'contract of suretyship entered into' - and it provides thereafter that such agreement shall not be valid 'unless the terms thereof are embodied in a written document signed by or on behalf of the surety.' What is it that requires to be signed by the surety? It is surely the written document containing the terms of the agreement".[97]

The Judge of Appeal went further to state that the objective of the legislature in respect of section 6 is to ensure legal certainty and to minimise the possibility of perjury or fraud where the validity of a suretyship agreement would be concerned.[98] Considering the onerous nature of suretyships, the legislature had possibly also intended to protect sureties against themselves and to prevent them from binding themselves to agreements unless the terms of such agreement are reduced to writing and signed by themselves or their representatives.[99]

In addition to the general legislative requirements for a valid contract of suretyship, the essence of *fides* from Roman law still features, as a suretyship that is *contra bonos mores* may be rendered illegal, as was held in *Botha v Finanscredit (Pty) Ltd*.[100] Notably, public policy does evolve over time as Roman law prohibited women from standing surety in their own capacities.[101] The two provisions of *Senatusconsultum Velleianum* and *Authentica si qua mulier*, which prevented women from standing surety and particularly prohibiting married women for standing surety for their husbands, were repealed by the Suretyship Amendment Act 57 of 1971.[102] Notwithstanding this development in the common law, parties married in community of property still require their spouse's written consent to sign as surety unless such undertaking is in the spouse's normal course of career, trade or business.[103]

A surety who concludes a contract of suretyship will be liable the moment the principal debtor fails to meet his obligations in terms of the principal agreement, unless there is an agreement to the contrary or the surety is entitled to rely on the defence of excussion.[104] As per the accessory nature of suretyship, a surety is in principle entitled

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[97] At 341 G-H.
[98] *Ibid.*
[99] *Ibid.*
[100] 1989 (3) SA 773 (A).
[101] CJ Nagel *Commercial Law* (2011) 393.
[102] Section 1.
[103] Section 15(2)(h) and (6) of the Matrimonial Property Act 88 of 1984.
[104] CJ Nagel Commercial Law (2011) 393 and *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 563 (A).

to rely on any defences available to him unless such defences attach to the principal debtor's person, for example minority, insolvency or protection in terms of a moratorium.[105] Defences *in rem* are defences that relate to the enforceability of the principal obligation, such as duress, misrepresentation, set off and *res judicata*.[106]

Certain defences are unique to suretyships and are considered "benefits" of the surety.[107] The first is the benefit of excussion (*beneficium excussionis*) in terms of which the surety can insist that the creditor seek recovery of the debt from the principal debtor first before claiming performance from him.[108] The second is the benefit of division (*beneficium divisionis*), which applies in instances where there is a plurality of sureties and the surety demands that the debt be divided amongst all co-sureties.[109] The third is the benefit of cession of actions (*beneficium cedendarum actionum*) for the surety who has performed his obligations and seeks that the creditor's claim against the principal debtor or co-sureties be ceded to him.[110] The surety may seek performance from his co-sureties where there is more than one surety and the latter has solely performed and wants to recover from his co-sureties.[111]

Of course, the surety may also opt to recover from the principal debtor where the former has performed for the latter, provided that during legal proceedings against him, the former raises defences which are applicable to him at the time.[112]

## 2.5 Termination of suretyship

The termination of a suretyship may occur by payment of the principal debt by the surety or the debtor,[113] effluxion of time, prejudice whether through a material alteration to the principal debt,[114] extension of time or an agreement not to enforce the original obligation,[115] or where there is a breach of a duty by the creditor.[116]

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[105] *Ibid* at 394.
[106] *Ibid.*
[107] *Ibid.*
[108] *Ibid.*
[109] *Ibid.*
[110] *Ibid* at 395.
[111] *Ibid.*
[112] *Ibid.*
[113] CF Forsyth *Caney's law of suretyship* (2010) 204.
[114] *Ibid* at 206 – 208.
[115] *Ibid* at 209.
[116] *Ibid.*

Due to the accessory nature of suretyship to the principal obligation, it follows that upon extinction of the principal obligation, the suretyship lapses.[117] Payment or reimbursement of the amount tendered by the surety from the principal debtor also terminates a suretyship.[118]

## 2.6 Concluding remark

Suretyship was popular in Roman societies, which attributed great value to friendship as well as to the concept of *fides* and close human relationships (*amicitia*).[119] It was believed in Roman society that friends are compelled to assist each other in times of difficulties, which included financial obligations or debts as a form of personal sacrifice.[120] On the basis of *fides*, the Roman creditor could accept that merely on the surety's word, the risk to be assumed by a creditor in his dealings with a debtor would be minimised.[121]

In the modern economy, especially in the South African context, the subject of suretyship has maintained its purity for the most part with minimal interventions which have been done cautiously and incrementally.[122] Deeds of suretyship are mostly dictated by large financial institutions and favour the creditor for the most part.[123] It would seem however, that our courts are moving towards more of a constitutionally-focused dispensation which considers the rights of all parties who may have an interest in a suretyship agreement.

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[117] CJ Nagel *Commercial Law* (2011) 396.
[118] *Ibid.*
[119] G Van Niekerk 'Instances of security in ancient African law with Roman equivalents' (2006) *Fundamina* 152.
[120] *Ibid.*
[121] *Ibid.* Reference is also made to F Schulz *Principles of Roman law* (1936) 233 at n 21.
[122] CF Forsyth & JF Pretorius 'Recent Developments in the Law of Suretyship' (1993) 5 *South African Mercantile Law Journal* 181.
[123] *Ibid.*

# Chapter 3

# The adjudication of suretyship agreements vis-à-vis mortgage bonds: Analysis of the *Shabangu* and *Panamo* cases

## 3.1 Introduction

In order for a contract of suretyship to qualify as such, and for a surety to be entitled to the benefits that flow from a contract of suretyship, the envisaged agreement has to meet the requirements for a valid contract of suretyship.[1] The requirements for a valid agreement of suretyship are contained in section 6 of the General Law Amendment Act 50 of 1956. Although the old authorities did not define a contract of suretyship, it is common cause between them that the crucial element of a contract of suretyship is the accessory nature of the agreement.[2] The accessory nature of a contract of suretyship means that a valid obligation is essential, as the suretyship cannot exist independently.[3] It is trite in our law that the principal obligation in respect of a suretyship has to be valid. If it is void, the suretyship is also void.[4]

The performance of a principal obligation to which a suretyship agreement attaches may be due only in the future,[5] or may be described in comprehensive terms such as “any debt whatsoever”.[6]

The CC in *Shabangu* and the SCA in *Panamo* had to deal with two different deeds before them and although the two cases were dealing with loan agreements entered into between the Land Bank (a state-owned entity) and private entities, the securities at issue were different. It has already been established that a suretyship agreement is defined as:

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[1] CF Forsyth *Caney’s law of suretyship* (2010) 26.
[2] *Ibid.*
[3] *Ibid.*
[4] D Hutchison (ed) *Wille’s Principles of South African law* (1991) 616. Reference is also made at n 5 to D 50.17.178; Voet 46.1.6.10 and *Imperial Cold Storage and Supply Co Ltd v Julius Weil & Co* 1912 (A) at 747.
[5] *Trust Bank of Africa Ltd v Frysch* 1977 (3) SA 562 (A) at 584 as referred to in D Hutchison (ed) *Wille’s Principles of South African law* (1991) 616 at n 10.
[6] *Bank of Lisbon and South Africa v De Ornelas* 1988 (3) SA 580 (A) at 608-9 as referred to in D Hutchison (ed) *Wille’s Principles of South African law* (1991) at n 11.

> "…an accessory contract by which a person (the surety) undertakes to the creditor of another (the principal debtor), that the principal debtor, who remains bound, will perform his obligation to the creditor and that if, and so far as the principal debtor fails to do so, the surety will perform it or, failing that, indemnify the creditor."[7]

A "mortgage" is defined, in the narrow sense of the word, as "a real right of security in an immovable asset or immovable assets of another, which is created by registration in the deeds registry pursuant to an agreement between the parties."[8] As Lubbe explains, "The term "mortgage bond", strictly speaking, refers to the deed or instrument, the registration of which brings about the right of mortgage."[9] Another definition of a mortgage is where:

> "The mortgagee (creditor) generally obtains a limited real right over immovable property of the mortgagor, or the property of a third person, in order to secure payment of a debt owed by the mortgagor (debtor) to the mortgagee".[10]

A mortgage bond has a dual nature.[11] Firstly, it constitutes a form of real security which affords the bondholder the right to realise the mortgaged property in order to satisfy the debt due and basically restricts the owner of the property in dealing with the property.[12] Secondly, it amounts to an acknowledgement of debt and a record of the terms of repayment and it serves as a debt instrument which is recognised by law.[13] A mortgage bond caters for debts which exist at the time of registration of the bond, as well as future debts through a covering bond.[14] A contract of suretyship on the other hand is accessory to the principal debt (which can be from contract, delict, or any other cause such as enrichment or a natural obligation) and can only exist whilst such debt exists.[15] The principal debt need not exist at the time of conclusion of the suretyship

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[7] CF Forsyth Caney's law of suretyship (2010) 28–29, citing *Corrans & another v Transvaal Government and Coul's Trustee* 1909 TS 605.
[8] GF Lubbe 'Mortgage and pledge' (revised by T J Scott) in WA Joubert & JA Faris (eds) *The Law of South Africa* vol 17 part 2 2 ed (2008) para 327, citing Grotius *Inleidinge* 2 48 1; *Roodepoort United Main Reef Gold Mining Co Ltd* (*in liquidation*) *v Du Toit* 1928 AD 66-71.
[9] GF Lubbe 'Mortgage and pledge' (revised by TJ Scott) in WA Joubert & JA Faris (eds) *The law of South Africa* vol 17 part 2 2 ed (2008) para 327, citing *Reinhardt v Ricker & David* 1905 TS 179-187.
[10] CJ Nagel *Commercial Law* (2011) 405.
[11] RC Lourens *Mortgage bond: real security* (1984) 202 *De Rebus* 480-481.
[12] *Ibid.*
[13] *Ibid.*
[14] *Kursan v Eastern Province Building Society and Another* 1996 (3) SA 17 (A).
[15] CJ Nagel *Commercial Law* (2011) 391.

agreement but the principal debt must come into existence in order for the surety's liability to be "activated".[16]

Both the suretyship and the mortgage bond are tools that a creditor may utilise as a form of security to protect himself against the possibility of a debtor not being able to pay his debt when it becomes due.[17] With a suretyship, such creditor requires that a third party binds himself contractually for performance of an obligation and such agreement would be a type of personal security.[18] Whereas with a mortgage bond, the creditor may require that the debtor bind his assets as security for the debt, which is real security.[19] In most instances, real security is preferred over personal security as the latter is more advantageous for the creditor.[20] Both personal security and real security require the existence of a principal debt or obligation which can only exist so long as the principal debt exists.[21]

The similarity between a suretyship and a mortgage bond is that they both require a valid principal obligation in order for them to be enforceable as accessory agreements.[22] Therefore, where a question of the validity of a principal obligation arises in a case relating to mortgage, cases reported on suretyship can be a useful guide,[23] and *vice versa.*

## 3.2 Analysis of *Shabangu*

### 3.2.1 In the High Court

The dispute in this matter concerned a suretyship and the facts thereof are summarised in the High Court judgment.[24] The Land and Agricultural Development Bank ("the Land Bank"), an organ of state governed by the Land and Agricultural Development Bank Act 15 of 2002, had concluded an agreement with a company known as Westlake Trading 570 (Pty) Ltd ("Westlake") which, at the time of the

[16] *United Dominions Corporation (South Africa) Ltd v Rokebrand* 1963 (4) SA 411 (T) as referred to in CJ Nagel *Commercial Law* (2011) 391.
[17] CJ Nagel *Commercial Law* (2011). See also D Hutchison (ed) *Wille's Principles of South African law* (1991) 616.
[18] CJ Nagel *Commercial Law* (2011) 390.
[19] *Ibid.*
[20] *Ibid.*
[21] *Ibid.*
[22] H Silberberg & J Schoeman *The law of property* (1983) 428.
[23] *Ibid* at n 6.
[24] *Land and Agricultural Development of South Africa v Meisel N.O and Others* (Unreported Case No.: 23733/12, 06 October 2017) (GNP) ("the High Court judgment").

proceedings, had been wound up.[25] The liquidators of Westlake had acknowledged the Land Bank's right to claim against the estate of Westlake.[26] On 06 July 2016, the Land Bank and Westlake concluded a loan agreement in terms of which the Land Bank agreed to advance an amount of R100 million to Westlake for the purpose of acquiring and developing properties on the farm Hartebeesfontein in the North West Province.[27] The advancement of the loan occurred in two separate payments, being an amount of R 51 million for the purpose of acquisition of the identified properties and a further R49 million to finance the township establishment and engineering service fees.[28]

The loan agreement had required that Westlake provide security to the Land Bank to secure its indebtedness under the loan agreement in the form of, amongst others, a mortgage bond and a written deed of suretyship which was concluded with the shareholders acting on behalf of Westlake at the time.[29] The deed of suretyship was concluded sometime between 06 and 20 July 2006.[30] In terms of the suretyship agreement, the shareholders of Westlake would be jointly and severally liable to pay the Land Bank an amount of R 82 million in the event of the company being in default of payments as contemplated in the loan agreement.[31]

On 03 August 2006, the Land Bank caused a covering bond to be executed in respect of all amounts that Westlake owed or will owe to the Land Bank.[32] At the time when the Land Bank stopped advancing payments in terms of the loan agreement it had advanced an amount of R62 617 214,54 to Westlake.[33] It later transpired that the agreement and the amount advanced was not authorised and Westlake acknowledged in writing that it was indeed indebted to the Land Bank.[34]

The illegality of the underlying loan agreement was raised in the action brought by the Land Bank against the shareholders of Westlake and the shareholders for recovery of the amounts already advanced, in accordance with the written

[25] Para 2 of the High Court judgment.
[26] *Ibid*.
[27] Para 5 of the High Court judgment
[28] *Ibid.*
[29] *Ibid.*
[30] Para 7 of the High Court judgment.
[31] *Ibid.*
[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.*

acknowledgment of debt.[35] In their plea, four of the shareholders pleaded that the suretyship agreement and the mortgage bond were invalid, illegal, void or unenforceable as a result of the principal loan agreement being concluded contrary to the Act.[36]

At the time when the Land Bank had realised that it could not legally conclude the agreement that it already had with Westlake, the former had already concluded approximately sixteen similar loan agreements with other entities.[37]The accessory suretyship agreement was concluded between 06 and 20 July 2006 by the shareholders of Westlake.[38] Notably, the Ninth Defendant in the High Court proceedings ("Shabangu") disputed the conclusion of the suretyship agreement and later appealed the High Court judgment at the CC.[39] The suretyship agreement was concluded subject to numerous terms, one of which was material and required that the sureties individually and collectively bind themselves as sureties and co-principal debtors *in solidum* to the Land Bank for the punctual payment of the indebtedness by Westlake.[40]

The other salient terms of the suretyship agreement were summarised in the High Court judgement in which Basson J pointed out that "the fact that the loan agreement is invalid does not necessarily mean that it follows that the deed of suretyship, as an ancillary agreement is likewise invalid".[41] To support this finding, the High Court made reference to the *Panamo* decision,[42] which is discussed in detail later on in this Chapter.

Having realised that it was not entitled to lend money for the intended purpose, the Land Bank engaged Westlake and negotiated for a repayment of the moneys advanced.[43] The Land Bank and Westlake accordingly concluded an agreement in terms of which Westlake would pay an amount of R82 million to the Land Bank by the end of April 2009, notwithstanding the fact that the amount due as at 31 January 2009 was R92 million.[44] The conclusion of the acknowledgement of debt, albeit contentious,

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[35] Para 8 of the High Court judgment.
[36] *Ibid.*
[37] Para 11 of the High Court judgment.
[38] Para 18 of the High Court judgment.
[39] *Ibid.*
[40] Para 20 of the High Court judgment.
[41] Para 22 of the High Court judgment.
[42] *Ibid.*
[43] *Ibid.*
[44] Para 24 of the High Court judgment.

was central to the dispute between the parties as it forms the basis upon which the Land Bank instituted an action against the shareholders of Westlake who had signed a surety.[45]

The High Court found that the Land Bank and Westlake had concluded a loan agreement and that, contentious as it was, and having considered the evidence before it, the shareholders had validly concluded the suretyship agreement.[46] In addition to this, the High Court held that the acknowledgment of debt is one which falls within the ambit of the deed of suretyship, thus the terms of the suretyship agreement had a direct impact on the acknowledgement of debt.[47] The shareholders of Westlake were accordingly ordered, jointly and severally, the one paying the other to be absolved, to pay an amount of R82 million to the Land Bank with interest plus the costs of the action.[48]

### 3.2.2 In the Supreme Court of Appeal

Mr Shabalala, one of the shareholders of the liquidated Westlake, brought an application for leave to appeal before the SCA. Such application was dismissed with costs as reflected in a court order dated 03 August 2018. In the order, the SCA had noted that the appeal was dismissed on the grounds that there were no reasonable prospects of success on appeal and there was no other compelling reason why the appeal should be heard.[49]

### 3.2.3 In the Constitutional Court

Mr Shabangu then brought an application for leave to appeal before the CC, where he was given audience and a judgment, penned by Froneman J, was subsequently delivered. Being the apex Court and the ultimate decision maker in respect of this matter, it is important to consider the judgment of the CC very critically.

At the outset, the CC sought to analyse the judgment of Basson J and noted that Basson J had "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

[45] Para 27 of the High Court judgment.
[46] Para 58 of the High Court judgment.
[47] Para 59 of the High Court judgment.
[48] Para 74 of the High Court judgment.
[49] See court order delivered by the Supreme Court of Appeal dated 03 August 2018 under Case Number 521/18.

suretyship was also invalid."[50] The CC then summarised the manner of disposal of the matter by making reference to paragraph 22 of the High Court judgment in which Basson J expressed her satisfaction that, on the evidence presented before her and on an interpretation of the relevant documentation, she reached the conclusion that she did and accordingly granted her order.[51]

#### 3.2.3.1 The participating shareholders in the proceedings

In the CC, four of the shareholders sought to apply to intervene in the application for leave to appeal brought by Shabangu. Their application was dismissed due to their applications only being brought after the CC had expressed its intentions to consider the matter. The CC expressed the view that such applications to intervene were "opportunistic" and "brought little … value to the issues already raised".[52]

Besides the question of the jurisdiction of the CC to entertain the application before it and the admission of the parties therein, the CC also noted that, of the issues it had to consider before it, the court had to make a determination on the validity of the acknowledgment of debt and in turn, the liability of the sureties under the suretyship agreement in respect of the acknowledgment of debt.[53]

#### 3.2.3.2 The acknowledgement of debt

The acknowledgment of debt was once again contentious on appeal. It was submitted by the sureties that the only debt which was acknowledged in the acknowledgment of debt was the alleged liability of Westlake towards the Land Bank as underpinned in the loan agreement which was later found to be invalid.[54] It had already been decided by Basson J that the acknowledgment of debt is central to the dispute and forms the basis of the action as instituted against the sureties.[55] The judgment penned by Basson J went into detail about the content of the acknowledgment of debt, highlighting that it was basically a two-page letter dated 13 February 2009 addressed to the Chief Financial Officer of Westlake and signed off by the Chief Executive Officer

[50] *Shabangu v Land and Development Bank of South Africa and Others* [2019] ZACC 42 ("the CC judgment") at para 5.
[51] Para 6 of the CC judgment.
[52] Para 12 of the CC judgment.
[53] Para 13 of the CC judgment.
[54] Para 8 of the CC judgment.
[55] Para 27 of the High Court judgment.

of the Land Bank.[56] In the letter, it is recorded that the settlement amount would be paid “on conclusion of the transaction” with a potential buyer of the properties already purchased with whom a Deed of Sale had been concluded.[57] It is recorded in the High Court judgment that the letter confirms that the Land Bank had no mandate to conclude the agreement and accordingly would not be in a position to make any further advances to Westlake.[58]

A new submission noted in the CC judgment but not in the High Court judgment was the proposition that not only did the acknowledgement of debt suffer the same fate of the loan agreement but also that the acknowledgment of debt was even more tainted especially because the Land Bank is an organ of state.[59] The domino effect was therefore triggered by the first tile being the invalid loan agreement and acknowledgement of debt. It was argued by the sureties that there cannot be an ancillary obligation under the suretyship, being the last piece of the board. Counsel for the sureties further argued that this matter was distinguishable from *Panamo* because that case concerned the question whether the mortgage bond was capable of covering a valid enrichment claim which did not apply *in casu*.[60] The decision in *Panamo* is discussed below in further detail.

Another new argument also raised by the sureties in the CC was around the prejudice allegedly suffered by the sureties at the hands of the Land Bank, which they argued had released them from their obligations as sureties.[61] It was proposed that the Land Bank had failed to perform its obligations in accordance with the terms of the loan agreement and that they suffered prejudice as a result of such non-performance and were thus released from the suretyship as they had not been prepared to risk their rights in accordance with the agreements.[62] The CC judgment does not make a clear finding on this submission. It is difficult to find merit in such a submission because the judgment makes no mention of an application being brought in accordance with Rule 30 and 31 of the CC Rules for admission of further evidence on appeal before the CC.

[56] Para 28 of the High Court judgment.
[57] *Ibid.*
[58] *Ibid.*
[59] Para 8 of the High Court judgment.
[60] *Ibid.*
[61] Para 9 of the CC judgment.
[62] *Ibid.*

#### 3.2.3.3 Did the conclusion of the acknowledgment of debt result in a compromise or a novation?

The Land Bank argued that the effect of the acknowledgement of debt in the matter was that a compromise came into being and not a novation.[63] Whether the CC accepted the acknowledgement of debt as a compromise or a novation,[64] would have tipped the scale on the matter because if it was accepted as a compromise, it could survive being tainted by the invalid loan agreement. The Land Bank also submitted that due to the acknowledgment of debt being a compromise, the facts of this case could would be on the same standing as those in *Panamo* in that a deed of suretyship, similar to the mortgage bond in *Panamo*, covered the debt as set out in the acknowledgement of debt and it then follows that the sureties ought to be liable.[65] In the High Court judgment, it was found that having considered the terms of the acknowledgement of debt, Westlake had compromised its liability towards the Land Bank by signing the acknowledgement of debt.[66]

In criticising the judgment of the High Court, Froneman J opined that the lower court had missed a crucial step, which was the question whether or not the acknowledgement of debt was tainted by the invalid loan agreement.[67] It was noted that the acknowledgement of debt was signed after the Land Bank had been advised that the loan agreement was invalid as it was concluded *ultra vires* and that such invalidity was common cause between the parties. This notwithstanding, the CC reached the conclusion that there is little doubt that the debt referred to in the acknowledgement of debt related to the invalid loan agreement and that the "full and final settlement" as referred to in the written acknowledgment of debt was in respect of the "indebtedness with the Land Bank".[68]

The conclusion reached by Froneman J that one cannot be sure whether the acknowledgment of debt related to the indebtedness which arose from the loan agreement has to be considered critically and contextually in light of the judgment of

[63] See para 60 of High Court judgment and para 10 of the CC judgment.
[64] Para 10 of the CC judgment.
[65] *Ibid.*
[66] See para 60 of High Court judgment.
[67] Para 16 of the CC judgment.
[68] Para 20 of the CC judgment.

Basson J[69] in which she referred to *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[70] especially where the SCA held that:

> "Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the *context* in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production."[71] [Own emphasis]

Froneman J further interpreted the purpose of the acknowledgment of debt and mentioned that "at best, [the acknowledgment of debt] was about payment of a reduced amount still owing under the invalid loan agreement".[72] The Justice went further by expressing the view that the Land Bank was claiming an amount actually advanced together with interest, which was evidence that the Land Bank was attempting to derive some form of benefit from a contract that was invalid.[73]

An attempt was made in argument by counsel for the Land Bank that there is a distinction between the Land Bank as an organ of state and private entities in assessing the validity of an acknowledgment of debt concluded after the fact. This submission did not find favour with the CC as it held that by virtue of the Lank Bank not having the powers to conclude the loan agreement, it could not have the power to compromise a claim for any debt which would subsequently arise from the invalid loan agreement.[74] The CC went further to conclude that the distinction between an organ of state and a public entity finding itself in a similar predicament does not change the outcome.[75]

The CC also quoted a passage from a judgment delivered in *Gibson v Van der Walt*:

> "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

[69] Para 67 of the High Court judgment.
[70] 2012 (4) SA 593 (SCA).
[71] *Ibid* at para 18.
[72] Para 20 of the CC judgment.
[73] *Ibid*.
[74] Para 21 of the High Court judgment.
[75] Para 22 of the CC judgment. The CC makes reference to *Quinot* in the *State of Commercial Activity: A legal framework (2009)* at 223 where it is stated that "When the state acts it always does so with public power and its actions are always a public action. The principle of legality thus always applies to the state".

> 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."[76]

It has already been established that the Land Bank submitted that the agreement reached with Westlake, upon the realisation that the loan agreement was invalid, was in effect a compromise. To confirm the rebuttal of this submission, the CC held that even as a compromise, the acknowledgment of debt was invalid because it related to the same indebtedness which flowed from the invalid agreement.[77] To support this finding, the CC referred to the judgment of *Weltmans Custom Office Furniture (Pty) Ltd (In Liquidation) v Whistlers CC*.[78] In *Weltmans*, the SCA held that a compromise was invalid as it had differed from the original agreement with regard to the amount payable and the method of payment. The compromise in the aforementioned matter had not altered the essence of the creditor's claim or the obligations of the debtor.[79]

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[76] 1952 (1) SA 262 (A) at 270A-B. Before reaching the conclusion that the Appellate Division reached in respect this matter, Fagan JA explored the Roman Dutch authorities on this point and in the paragraph preceding 270A-B made the following notes:

> "This question has been settled in the case of *Jajbhay v Cassim,* 1939 AD 537, where it was held (I quote from the head-note) that:
>
> > 'The Court will not enforce rigidly the general rule in *pari delicto potior est conditio defendentis*, but will come to the relief of one of the parties where such a course is necessary in order to prevent injustice or to satisfy the requirements of public policy. Whether or not the plaintiff requires any aid from the illegal transaction to establish his case is not a test for determining whether a party to an illegal contract can recover what he has parted with under it.'
>
> This decision frees our courts from the rigidity of some of the rules previously propounded and allows scope for the consideration of broad principles of equity and public policy in cases in which a taint of illegality is alleged to attach to transactions in respect of which the Court's assistance is invoked. When one has to consider whether connected acts are all tainted by a reprobation attaching to one of them, the nature and degree of that reprobation cannot but play an important part. While, for instance, a taint of criminality or immorality may attach to a compromise on a dispute arising out of a criminal or immoral transaction, a similar compromise on a merely unenforceable but otherwise not reprehensible claim obviously carries no such taint, and the question of its enforceability will have to be decided by some other test."

[77] Para 23 of the CC judgment.
[78] 1999 (3) SA 1116 (SCA) at para 16.
[79] *Weltmans* at para 16.

The CC made a point that although the subject of the original loan agreement was not valid, there was no scope for arguing that the acknowledgment of a lesser sum of money by Westlake transformed the original invalid loan agreement into a new valid transaction.[80] The CC suggested that in order to deal with the illegality of the loan agreement, the Land Bank would first have to address the illegality attached to the agreement. Unfortunately for the Land Bank, such illegality is entrenched in its empowering legislation, which of course does not allow it to fund township development but rather to assist in land and agricultural developments.[81] In this case, the best way to grapple with the illegality would be to bring the action on the basis of enrichment or the "no-profit principle" coined in *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency*,[82] as discussed further in Chapter 4.

The CC judgment also contained a discussion regarding the probability of the acknowledgment of debt possibly embracing a valid principal obligation, for which the sureties could have possibly been liable, in the event that it expressly provided for a claim for unjust enrichment alternatively another form of legal indebtedness.[83] It was held in fact that in the circumstances, the suretyship agreement did not contain such alternative legal indebtedness thus this particular case was distinguishable from *Panamo.*[84]

According to the CC, the acknowledgment of debt in this case could have been resuscitated had it recognised the invalidity of the debt as underpinned by the loan agreement. On consideration of the terms of the acknowledgement of debt as they are, however, it did not cover any enrichment claim.[85] It would seem that the CC would have been convinced that the acknowledgment of debt was intended to provide for an enrichment claim only in the event that the actual written agreement made express reference to such. The CC went further to refer to *Panamo* where the reason why the SCA could hold Panamo liable for an enrichment claim is because there was an absence of a relationship of indebtedness. What is unclear from the judgment of the CC in *Shabangu* is whether the court considered the possibility of the parties accepting

[80] Para 24 of the CC judgment.
[81] Para 25 of the CC judgment.
[82] 2014 (4) SA 179 (CC).
[83] Para 29 of the CC judgment.
[84] *Ibid.*
[85] *Ibid.*

the invalidity of the loan agreement as a tacit term to their suretyship agreement in light of the issue being common cause and also having regard to the contents of the letter accepted as the acknowledgment of debt.

It is an accepted principle in our law that the validity of a subsequent agreement in a series of agreements entered into between the same parties who had initially concluded an agreement, which was later found to be invalid, depends on the question whether the latter amounts to a novation.[86]

In the CC judgment and on the point of compromise where the underlying agreement is illegal, the court referred to *Benefeld v West*.[87] In that case, a man and a woman were having an affair while the man was married. During the affair, the man made a promise to marry the woman upon conclusion of his divorce. When he had failed to honour his promise, the woman sued him for damages as a result of breach of promise. The two concluded a settlement agreement in terms of which the man undertook to pay her R 1,5 million as a settlement for her claim. The man failed to pay the settlement amount and the woman issued summons. The man pleaded that the settlement agreement was not enforceable as it was contrary to public morals. The court held that a compromise is a self-standing contract which is independent of the cause that gave rise to it.[88]

The court further held that a compromise cannot be illegal simply because the cause that gave rise to it was illegal or against public morals.[89] The enquiry therefore, ought to be whether the compromise, by virtue of its terms, is against public morals, void or unenforceable.[90] The court acknowledged that the defendant would not have been liable for damages but for the compromise and that by concluding the compromise, he had assumed liability to pay the settlement amount.[91] Public policy could not be against a party's freedom to contract, especially as set out in *Transvaal Alloys (Pty) Ltd v Polysius (Pty) Ltd*, where the court stated:

> "'If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of

[86] Para 30 of the CC judgment.
[87] 2011 (2) SA 379 (GSJ) at para 14.
[88] *Ibid* at para 16.
[89] *Ibid* at para 17.
[90] *Ibid* at para 18.
[91] *Ibid* at para 24.

> contracting, and that their contracts when entered into freely and voluntarily shall be sacred and enforced by courts of justice."[92]

Having considered the views of the High Court in *Benefeld*,[93] the CC in *Shabangu* nonetheless held that the terms of the acknowledgement of debt had "perpetuated the original invalidity and must therefore be invalidated".[94] Thus, the court accepted that the acknowledgment of debt was in fact a novation and was accordingly tainted.[95]

As a point of clarity, Froneman J then stated that an agreement may be concluded in terms of which it is common cause that the latter is based on a previous invalid agreement and on that basis, an enrichment claim may arise.[96] He cautioned, however, that such subsequent agreement cannot be valid if it seeks to enforce the indebtedness of the original invalid agreement.[97] The Justice concluded this point by stipulating that if the terms of the accessory suretyship agreement are wide enough to cover an enrichment claim, the sureties may also be liable.[98]

The conclusion reached by Froneman J on the terms of the suretyship agreement and whether or not they are wide enough to cover an enrichment claim makes one wonder whether the CC actually considered the terms of the suretyship agreement in *Shabangu*. As quoted above, the following terms of the suretyship were emphasised:

> "(iii) the sureties accept that all admissions and acknowledgments by Westlake in respect of the indebtedness shall be binding on the sureties, irrespective of whether they have been made expressly, tacitly or by implication; (iv) the sureties accept that the plaintiff shall in its sole discretion be entitled to enter into any accord, arrangement or compromise with Westlake in respect of the indebtedness; (v) in the event of the insolvency or liquidation of Westlake, no payment made by Westlake under the indebtedness to the plaintiff shall prejudice the plaintiffs rights to recover from the sureties any liability which is due by Westlake in terms of the deed…".[99]

On consideration of the above and the fact that such terms of the agreement would have been exhaustively tested in the High Court, the CC may have had to reconsider

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[92] *Transvaal Alloys (Pty) Ltd v Polysius (Pty) Ltd* 1983 (2) SA 630 (W) at 639E.
[93] 2011 (2) SA 379 (GSJ).
[94] Para 31 of the CC judgment.
[95] *Ibid.*
[96] Para 32 of the CC judgment.
[97] *Ibid.*
[98] *Ibid.*
[99] As summarized in the High Court judgment at para 67 thereof.

the conclusion that the effect of the acknowledgement of debt was in fact a novation and not a compromise as argued by the Land Bank. On whether or not the suretyship covered the indebtedness acknowledged in the acknowledgment of debt, the CC found that it is not necessary to make that finding because it followed that as there is no claim that lies against Westlake, the sureties were released.[100]

An acknowledgment of debt is defined as a contract entered into by a debtor and a creditor in terms of which the debtor undertakes to unconditionally pay an existing debt to the creditor in the terms set out in the acknowledgement of debt.[101] The CC was of the view that an agreement which succeeds an invalid agreement, which seeks to resuscitate the invalid agreement itself, remains tainted with invalidity even if the invalidity does not stem from illegality or immorality.[102] A novation was defined in *Acacia Mines Ltd v Boshoff*[103] as an agreement entered into with the intention of substituting a new valid obligation for an old valid obligation and is essentially established by questioning what the intention of the parties were and whether such parties intended to replace a valid contract with another valid contract.[104]

The nature of a compromise is that it is concluded where the parties are uncertain of their rights and the parties seek to resolve such uncertainty,[105] which seems to have been the issue in *Shabangu* on consideration of the common cause facts. Furthermore, a compromise is a self-standing substantive contract which is not affected by the invalidity of the original agreement.[106] By virtue of its independence, a compromise materially alters the obligations of the parties thereto.[107]

It is difficult to agree with the CC on this view especially if one accepts that the acknowledgment of debt was a compromise and not a novation. The acknowledgement of debt was entered into following a dispute which arose once the Land Bank halted advancing moneys to Westlake and considering the contents of the terms of the acknowledgment of debt as scrutinised by Basson J,[108] the reasonable conclusion to reach would be that a compromise was entered into. On reaching this

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[100] Para 34 of the CC judgment.
[101] *Adams v SA Motor Industry Employers* 1981 (3) SA 1189 (A).
[102] See para 22 of the CC judgment where the CC also made reference to *Gibson.*
[103] 1958 (4) SA 330 (A) at 337 C-D.
[104] *Ibid.*
[105] *Wilson Bayley Holmes (Pty) Ltd v Maeyane and Others* 1995 (4) SA 340 (T) at 345 E-F.
[106] *Dennis Peters Investments v Ollerenshaw and Others 1977* (1) SA 197 (W) at 203A; *Benefeld v West 2011* (2) SA 379 (GSJ), at [14].
[107] *Cachalia v Harberer and Co* 1905 TS 457 at 464.
[108] Para 24 up to 30 of the High Court judgment.

conclusion and considering the terms of the suretyship agreement, the deduction would favour that the compromise qualified as “indebtedness” as set out in the suretyship agreement and thus fell squarely within the terms of the suretyship agreement.

When it comes to the interpretation of contracts of suretyship, the ordinary principles of interpretation of contracts in general apply.[109] Although these general principles are applied, there are certain aspects which are peculiar to contracts of suretyship, thus the interpretation varies slightly to that of contracts in general.[110] Firstly, the intentions of the parties have to be ascertained from the language used in the contract by giving effect to the ordinary meaning of the words and to the grammatical sense with which they express themselves.[111] If the two methods as aforesaid are not appropriate, it was held in *Jonnes v Anglo-African Shipping Co (1936) Ltd* that an ambiguity in a suretyship agreement may be resolved by restrictive interpretation in favour of the surety who would not have intended to charge himself with duties that are more onerous than he intended.[112]

Similar to suretyships, the interpretation of mortgage bonds depends on the wording of the bond as well as the underlying agreement.[113] In instances where words cannot be given their ordinary meaning whilst interpreting contracts in general (not only suretyship agreements), the court can look at other factors besides the language, which includes looking at the “surrounding circumstances”.[114] Besides the aforesaid possibilities, a court may also resolve the ambiguity of a suretyship agreement through the assumption that the parties negotiated in good faith.[115]

In *South African Forestry Co Ltd v York Timbers*,[116] the court held that:

> “While a court is not entitled to superimpose on the clearly expressed intention of the parties its notion of fairness, the position is different where a contract is

[109] CF Forsyth *Caney’s law of suretyship* (2010) 88.
[110] *Ibid.*
[111] CF Forsyth *Caney’s law of suretyship* (2010) 89.
[112] 1972 (2) SA 827 (A) at 835B –G.
[113] *Lipschitz NO v Saambou Nasionale Bouvereeniging* 1979 (1) SA 527 (T) as referred to in R Brits *Real security law* (2016) 18.
[114] CF Forsyth *Caney’s law of suretyship* (2010) 89. Also see n 11 where *Delmas Milling Co Ltd v Du Plessis 1955* (3) SA 447 (A) at 454 is discussed and surrounding circumstances is said to be described by Schreiner JA as ‘matters that were probably present to the minds of the parties when they contracted (but not actual negotiations or similar statements)'. Where the contract itself recites the circumstances in which the contract was entered into, it seems clear that they form part of the contract 'as a whole'.
[115] CF Forsyth *Caney’s law of suretyship* (2010) 89.
[116] 2005 (3) SA 323 (SCA) at para. 30-32.

> ambiguous. In such a case the principle that all contracts are governed by good faith is applied and the intention of the parties is determined on the basis that they negotiated with each other in good faith."[117]

Having considered the facts of *Shabangu* and the terms of the acknowledgement of debt and the suretyship agreement, the CC ought to have considered that the parties were negotiating to settle the matter in good faith and perhaps apply the principles from *South African Forestry Co Ltd* in addition to those of *Natal Joint Municipal Pension Fund*.[118]

Gratefully, the CC clarified that the state is not prohibited from entering into compromise agreements when there are "uncertain associated claims that may be founded on unjust enrichment or the no-profit principle".[119] These alternatives are discussed in detail in Chapter 4 of this dissertation.

On considering *Panamo* in comparison to *Shabangu*, the CC held that the suretyship agreement made reference to "indebtedness" in paragraph 2 thereof which "flowed from the invalid agreement".[120] As a result of this clause, together with clause 10 which provided that the release of the sureties would be upon payment of the amount of "indebtedness", the CC held that the sureties had only intended to be bound arising out of the invalid agreement. Thus, the matter was distinguishable from *Panamo*, where the mortgage bond stipulated that the bond would be passed to cover the debt in general as it was a covering bond.*[121]*

A deed of suretyship and a mortgage bond are two different deeds which are executed differently and serve different purposes. In order to consider whether indeed *Shabangu* was distinguishable from *Panamo*, one has to consider *Panamo* in detail as well.

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[117] CF Forsyth *Caney's law of suretyship* (2010) 91.
[118] 2012 (4) SA 593 (SCA).
[119] Para 33 of the CC judgment.
[120] Para 35 of the CC judgment. Further reference is made to clause 2 of the suretyship agreement which reads 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."

[121] Para 35 of the CC judgment.

## 3.3 Analysis of *Panamo*

### 3.3.1 In the High Court[122]

On or about 05 April 2007, the Land Bank and Panamo concluded a written agreement in terms of which the Land Bank agreed to advance an amount of R 52 919 645 to Panamo for the purpose of purchasing properties in Krugersdorp ("the loan agreement").[123] The Land Bank advanced the amounts in tranches as set out in a draw down statement which was attached to the client statement of Panamo, attached to the particulars of claim which accompanied the summons issued from the High Court.[124] The matter was determined on a stated case which came before court for the determination of the question whether or not the Land and Agricultural Development Bank Act 15 of 2002 (referred to as "LADA" in the High Court judgment) empowered the Land Bank to finance the agreement for the purchasing of agricultural properties with the aim of developing a township and executing engineering services thereon.[125]

The matter was brought before Claassen J on a stated case. As part of the stated case, the court had to consider the continuous covering bond which was registered over the properties purchased by Panamo in favour of the Land Bank which secured "any existing or future debt" which Panamo might owe the Land Bank.[126]

In determining the validity of the loan agreement, Claassen J referred to an unreported decision of *Land and Agricultural Development Bank of South Africa v Impande Property Investments (Pty) Ltd* ("*Impande*") and was *ad idem* with the finding therein.[127] In *Impande*, the court held that the loan agreement entered into between the Land Bank and Impande did not fall within the ambit of section 3 of LADA and thus the agreements were found to be void.[128]

Next, the court had to make a finding on the enforceability of the mortgage bond. Panamo had argued that it follows that the mortgage bond would be invalid and unenforceable in the event of the principal loan agreement being found to be void *ab initio*.[129] Claassen J did not agree with this proposition. He accordingly expressed that

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[122] *Land and Agricultural Development Bank of South Africa v Panamo Properties* 103 (Pty) Ltd 2014 (2) SA 545 (GJ) ("the High Court judgment").
[123] Para 3 of the High Court judgment.
[124] *Ibid.*
[125] Para 2 of the High Court judgment.
[126] Para 4 of the High Court judgment.
[127] (Unreported judgment at the Gauteng Local Division of the High Court with Case No.: 2010/35355 delivered on 9 April 2013).
[128] *Panamo* High Court judgment at para 14.
[129] Para 15 of the High Court judgment.

due to the mortgage bond still being registered at the time and not being cancelled, the Land Bank still enjoyed security for all debts which were existing and also those which would arise in future between the parties.[130] An enrichment claim would have been ideal in the circumstances because the Land Bank would have advanced moneys in accordance with an agreement which was subsequently declared invalid.[131] The court mentioned that in the event that enrichment was established at trial, the Land Bank would be successful with its claim and would consequently be entitled to recover such a debt in terms of the covering bond which was registered against the property which would ultimately entitle the Land Bank to execute against the property.[132]

The bond by its nature was said to be a separate agreement of hypothecation and its validity would not depend upon the validity of the anterior agreement.[133] The accepted general rule is that a mortgage is accessory to an obligation and there can be no mortgage "*cum unum sine altero intelligi non posset*".[134] The exception to the rule is that a creditor is entitled, whilst the mortgage is still enforce, to obtain payment of a different debt from the same debtor even though that debt is unrelated to the principal obligation.[135] Having the understanding of the exception and its existence from our common law,[136] one must distinguish between:

> "cases where the obligation, the performance of which is secured by the mortgage, is invalid, and those in which the obligation itself is not illegal, although it may have had its origin in, and been connected with, a transaction which was invalid."[137]

Claassen J held the view that this case was the latter and that although the original obligation was invalid, the debt to repay advances made *sine causa* was not illegal.[138]

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[130] Para 17 of the High Court judgment.
[131] Para 17 of the High Court judgment.
[132] Para 17 of the High Court judgment.
[133] Para 18 of the High Court judgment.
[134] Para 18 of the High Court judgment.
[135] Para 20 of the High Court judgment.
[136] Voet *Commentarius* 20.6.16; Van der Keessel *Thesis Selectae* 435, 450; *Brink's Trustees v SA Bank* (1848) 2 Menz 381; *Haarhoff v Cape of Good Hope Bank* (1887) 4 HCG 304; *Smith v Farrelly's Trustee* 1904 TS 949; *Hirschberg v Jackson* 1933 CPD 238; *Van den Heever v Cloete* (1904) 21 SC 113 as referred to at para 20 of the High Court judgment at n 7.
[137] Para 20 of the High Court judgment.
[138] Scott TJ & Susan S "Wille's *Mortgage and Pledge"* (1987) as referred to in the High Court judgment at n 8.

In *Thienhaus NO v Metje & Ziegler Ltd and Another*[139] the Appellate Division found that it is not essential that the details of the origin or nature of the obligation to be secured be described in a mortgage bond over immovable property where the mortgage is considered as an instrument of hypothecation.[140]

Claassen J accordingly found that:

> "A mortgage can secure any obligation, whether it be present or future, whether 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.[141] At the time the mortgage is created, however, the amount which may ultimately become due need not be determined in advance and, in particular, the obligation to be secured may be conditional, or even an obligation which has not yet been incurred."[142]

Having made the above conclusions, the High Court ordered that the agreement is void *ab initio* and that the mortgage bond is valid and enforceable.[143]

### 3.3.2 In the Supreme Court of Appeal

Unsatisfied with the High Court's pronouncements, Panamo took the matter on appeal before the SCA.[144] The SCA confirmed that the loan agreement was indeed invalid and unenforceable.[145]

The SCA agreed that a mortgage bond is accessory to an obligation regardless of its origin,[146] and that where the obligation is unenforceable, the security tied to it is also unenforceable as confirmed in *Albert v Papenfus*.[147] Lewis JA however cautioned that an obligation need not necessarily exist prior to the mortgage being entered into as it may be concluded in respect of a future debt or as a covering bond.[148] Such

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[139] 1965 (3) SA 25 (A).
[140] *Ibid.*
[141] See *Kilburn v Estate Kilburn* 1931 AD 501 at 506. Referred to in n 10 in the *Panamo* High Court judgment.
[142] Para of the High Court judgment.
[143] Para 37 of the High Court judgment.
[144] *Panamo Properties v Land and Development and Agricultural Development Bank* (29951/2014) [2015] ZASCA 70 (22 May 2015) ("the SCA judgment").
[145] Para 22 of the SCA judgment.
[146] Para 24 of the SCA judgment.
[147] 1964 (2) SA 713 (E) at 717H. Referred to in para 24.
[148] Para 25 of the SCA judgment.

present or future obligation has to be valid and to determine whether or not the bond is secured, one must examine the terms thereof.[149]

The foundation having been laid, Gorven AJA referred to *Kilburn v Estate Kilburn*[150] where the Appellate Division held that in our law, there has to be a legal or natural obligation to which the hypothecation of a mortgage bond is accessory.[151] It follows that where there is no obligation whatsoever, the hypothecation cannot ensue.[152] Where the bond was initially passed as an accessory to the principal loan which is subsequently found to be invalid, then the bond will suffer the same fate unless it covers another obligation which is different from the initial loan.[153] Such "other obligation" may well be an enrichment claim.[154] In this case, the bond was a covering bond which provided security for more than one specified debt.[155]

Gorven AJA analysed the clauses in the bond and confirmed that they provided for an enrichment claim.[156] Having considered the clauses of the mortgage bond, although not completely clear,[157] the SCA considered the bond as a whole including the language used therein and concluded that the bond in this case could not suffer the same fate as the underlying loan agreement as the bond afforded security for a claim under one of the *condictiones*.[158] The SCA accordingly agreed with the court *a quo* and dismissed the appeal with costs.[159]

The effect of this judgment is twofold:[160] the first is that a covering bond will not necessarily be void as a result of the underlying principal loan agreement being void.[161] Secondly, *Panamo* had unjustly benefited from the moneys advanced to it by the Land Bank thus the latter had a claim for unjustified enrichment which it could still pursue as secured under the covering bond, which was wide enough to include some

[149] *Ibid*.
[150] 1931 AD 501 at 505-6.
[151] Para 28 of the SCA judgment at n 1.
[152] *Ibid.*
[153] Para 29 of the SCA judgment.
[154] Para 30 of the SCA judgment.
[155] Para 31 of the SCA judgment.
[156] At para 37 of the SCA judgment he states that: "The three clauses dealt with above pertinently afford 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."
[157] Para 46 of the SCA judgment.
[158] Para 46 of the SCA judgment.
[159] Para 47 and 48 of the SCA judgment.
[160] R Brits *Real security law* (2016) 24.
[161] *Ibid.*

claim as a "future debt".[162] The debts which therefore can be secured by the covering bond will depend on the wording of the bond.[163]

The High Court judgment in *Panamo* was heavily criticised by Sonnekus and Schlemmer.[164] According to the authors, the finding made by the court *a quo* in *Panamo*, to the extent that the court had accepted that the payment of money by the Land Bank to Panamo was made *sine causa*, is *prima facie* ingenuous.[165] It is argued that the court *a quo* did not explain what condictio would be used "as a vehicle for [the] eventual claim".[166] It is argued that this would raise numerous problems for the "holder" of the limited real right because the said limited real right can only result from a real agreement with defined content.[167] In considering the existence of the real right, a court would have to consider the intention of the parties that the covering bond was intended to secure "unidentified future dates which may result from uncertain sources".[168]

The authors then make the following statement:

> "It will be necessary to show the existence of a real agreement, independent of the void loan agreement, that is accessory to a valid claim founded in the delict or unjustified enrichment. In essence because of the void loan agreement, there exists no legal relationship between the bank and Panamo and it would be far-fetched for two legally unrelated independent parties to conclude a covering bond (with the necessary intention to create a right of real security) with the aim of securing a potential enrichment or delictual claim that may or may not arise in future. In none of these circumstances is one dealing with obligations based on consensus and to deduce an intention on the side of both parties to create a right of real security in these circumstances seems to be totally unrealistic. It is fairly certain that not many legal subjects will intend a future enrichment or delictual liability to arise that needs to be secured by a covering bond."[169]

The above statement by Sonnekus and Schlemmer sparks a curiosity on whether, in the context of a suretyship being similar to a covering bond, a suretyship would be valid where there is a valid acknowledgment of debt which is independent of the invalid

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[162] *Ibid.*
[163] *Ibid.*
[164] JC Sonnekus & EC Schlemmer "Covering bonds, the accessorial principle and the remedies founded in equity – not self-evident bedfellows" (2015) 132 *SALJ* 340-371.
[165] *Ibid* at page 361.
[166] *Ibid* at page 362.
[167] *Ibid.*
[168] *Ibid.*
[169] *Ibid* at n 77.

loan agreement - especially where such acknowledgement of debt, or compromise, creates a legal relationship between the parties which creates an obligation (in future, if one considers that the acknowledgment of debt was concluded post the concession by Westlake that the underlying loan agreement was void *ab* initio) as it was argued by the Land Bank in the CC.

Referring to *Rooth & Wessels v Benjamin's Trustee and Natal Bank Ltd*,[170] the authors opine that at the time of execution of the notarial bond in that matter, the parties had not intended that the notarial bond concluded would cover liability which arose from unjustified enrichment but only intended that the liability of the debtor be secured.[171] Applying the converse situation as it may have been accepted by the CC in *Shabangu*, the acknowledgment of debt had been an unconditional acknowledgment of Westlake being enriched at the expense of the Land Bank absent any agreement.

In conclusion, the authors state that:

> "there are no sound reasons why the inherently conservative system of norms known as the common law has developed certain well defined requirements for certain constructions. There is also a tendency to interpret any exceptions or deviations restrictively."[172]

It is indeed correct that the deviations from the accessoriness principle have been restrictively interpreted. For purposes of mortgage bonds, it is argued that section 51 of the Deeds Registries Act[173] is an exception to the principle.[174] Perhaps the courts ought to consider circumstances such as those which arose in *Shabangu* as an exception to the accessoriness principle insofar as suretyships are concerned, that is where parties have entered into a compromise and the suretyship agreement is wide enough to include such future debts.

[170] 1905 TS 624 at 629-630, as referred to *Ibid* at page 363.
[171] *Ibid* at page 363.
[172] *Ibid* at page 371.
[173] Act 47 of 1937.
[174] JC Sonnekus & EC Schlemmer "Covering bonds, the accessorial principle and the remedies founded in equity – not self-evident bedfellows" (2015) 132 *SALJ* 371.

## 3.4 Concluding remark

The applicant in *Shabangu* had argued that although the SCA in *Panamo* found that the mortgage bond was not invalid despite the principal loan agreement being found to be invalid, the *Shabangu* facts made the case distinguishable from *Panamo* and the CC agreed with those submissions.[175] Similar to suretyships, mortgage bonds which give rise to real security rights must relate to valid indebtedness or liability, which is known as the "accessoriness" principle.[176] It is accepted that the effectiveness of a mortgage, as an accessory to the principal obligation, depends on a valid, underlying agreement.[177] The principle of accessoriness can be applied in the context of suretyships as well.[178]

In *Panamo*, the SCA held that the bond was passed in order to secure the performance of the debtor under the loan.[179] The SCA went further in *Panamo* to state that by virtue of the invalidity of the principal agreement, the accessory mortgage (covering) bond ought to suffer the same fate unless the mortgage bond is also accessory to an obligation which is different to the original loan.[180] The SCA further held that the question of whether or not such obligation existed had to be considered in light of the terms of the bond and in the facts before it, the mortgage bond held by the Land Bank did not exclude an enrichment claim.[181]

Although a mortgage bond and a suretyship agreement are two different deeds which give rise to different rights of different force and effect, they are nonetheless substantial agreements albeit accessory in their nature. Having considered that the acknowledgment of debt in *Shabangu* was a valid, separate agreement which gave rise to a compromise, the CC ought to have considered such agreement as an agreement which qualifies as "indebtedness" as contemplated in the suretyship agreement. This would have had the result of the shareholders of Westlake being held liable for the debt due to the Land Bank and qualified the claim of the Land Bank as payable in terms of the suretyship agreement. As the highest court which has exclusive jurisdiction on constitutional matters,[182] and as a court which can make

[175] Para 35 of the CC judgment.
[176] R Brits *Real security law* (2016) 20.
[177] *Ibid.*
[178] *Ibid* at 52.
[179] Para 21 of the SCA judgment.
[180] Para 22 of the SCA judgment.
[181] Para 31 of the SCA judgment.
[182] Section 167(4)(e) of the Constitution of the Republic of South Africa, 1996.

orders which are just and equitable and which seek to "ameliorate or redress the consequences of the invalidity through the re-transfer of unjustified gains",[183] the CC ought to have considered following the *Panamo* approach in *Shabangu*.

[183] Para 28 of the CC judgment.

# Chapter 4
# A creditor's recourse in the event of a suretyship agreement being invalid due to the underlying agreement being invalid

## 3.1 Introduction

Due to the principle of accessoriness, a valid suretyship can only exist where there is a valid principal obligation between the debtor and the creditor.[1] Suretyship is therefore conditional upon the existence of a principal obligation.[2] A surety therefore only takes upon himself the risk of a breach of contract by the principal debtor and he is not liable for non-performance based on an invalid obligation or one that has been extinguished.[3] This supports the idea that a surety merely promises that the principal debtor will perform and not that he will indemnify a creditor for losses caused by the debtor's non-performance.[4] Thus, the surety will not be bound to a person to whom the principal debtor is not liable.[5] As intimated in *African Life Property Holdings v Score Food Holding*,[6] by Nienaber JA, guaranteeing a non-existent debt "is as pointless as multiplying by nought".[7]

Myburgh highlights the fact that South African law only provides for relief sought under an action for unjustified enrichment where the agreement is found to be void and not if it is voidable or unenforceable.[8] She further contends that the issue of legality of an agreement determines the availability of an enrichment remedy as well as whether or not such enrichment remedy may be granted at all.[9]

In *Shabangu*, the Constitutional Court ("CC") highlighted that the problem of the invalidity of the original agreement to which a suretyship is accessory can be addressed either by means of an enrichment claim or by applying the "no-profit

[1] CF Forsyth *Caney's law of suretyship* (2010) 29.
[2] *Ibid* at 30.
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*
[6] 1995 (2) SA 230 (A).
[7] *Ibid* at 238F.
[8] FE Myburgh *Statutory formalities in South African law* (2013) LLD thesis Stellenbosch University 229. Reference made to *Crispette & Candy Co Ltd v Michaelis NO and Michaelis* NO 1948 1 SA 404 (W) 408-409 and *Bisset v Boland Bank* Ltd 1991 4 SA 603 (D) 611J-612B.
[9] FE Myburgh *Statutory formalities in South African law* (2013) LLD thesis Stellenbosch University 248.

principle".[10] As *Shabangu* currently stands as good law and authority, the alternative remedies for the surety as suggested by the CC are discussed below.

## 3.2 Unjustified enrichment

The concept of unjustified or unfounded enrichment refers to the situation where one party is held liable for "restitution of an unfounded patrimonial transfer resulting from an obligation created by created by the increase of one party's estate at the expense of the estate of another without such cause as the law may regards as conclusive for the transfer to the estate of the first party".[11] As put by Serfontein, unjustified enrichment is the "stepchild of the law of obligations in South Africa".[12]

A patrimonial increase of a party's estate which is not founded by a legal cause is considered to be an obligation on its own which provides a party that is impoverished with a claim against the former.[13] Once it is established that there cannot be a legal ground for sustaining the transfer of a patrimonial benefit from one party to another, the norms of the law of enrichment can be invoked.[14] The legal principles attached to enrichment are thus a part of the self-correction and equity.[15]

The notion of enrichment whereby one benefits unjustifiably to the detriment of another person has its roots in Roman law.[16] The Roman legal system, similarly to the South African legal system, did not observe a general enrichment action as it developed the concept in numerous specific actions.[17] In dealing with cases of unjustified enrichment, and where the circumstances are deemed to be appropriate, the South African courts expand the scope of specific enrichment actions casuistically.[18]

The older authorities conceived obligations as deriving from either contract or delict.[19] Where a case involved an issue that fell neither into the contract nor the delict

[10] Para 26 of the CC judgment.
[11] JC Sonnekus *Unjustified enrichment in South African law* (2008) 1.
[12] J Serfontein 'What is wrong with modern unjustified enrichment law in South Africa?' 2015 *De Jure* 389.
[13] JC Sonnekus *Unjustified enrichment in South African law* (2008) 3.
[14] *Ibid.*
[15] *Ibid* at 8.
[16] D Hutchison (ed) *Wille's Principles of South African law* (1991) 630. Reference made to D 12.6.14: *"Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem"*; D 50.17.206 *"Jure naturae aequum est, neminem cum alterius detrimento, et injuria fieri locupletiorem".*
[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*

compartment, such cause of action would be classified as “quasi-contract” or “quasi-delict” depending on which of the two sources such case would be closely related.[20] Obligations that arose from unjustified enrichment were said to arise “as if by contract” and were classified as “*obligations quasi ex contractu*” or “*quasi*-contracts”.[21] This development in the law has given rise to the modern understanding that actions arising from unjustified enrichment are not generally treated as though they arose from a substantive source of obligations.[22] Grotius accordingly proposed a separate source of obligations, called “*baet-trecking*” (unjustified enrichment), which proposal found its way into the current South African law.[23]

### 3.2.1 The nature of the enrichment claim

Sonnekus expresses the view that the law of enrichment embodies a final element or last resort in the law of obligations.[24] Unjustified enrichment is, by virtue of its classification as compared to contract and delict, intended to restore a legal imbalance harmoniously with the principle of equity.[25] Thus, where the unjustifiably enriched party complies with his performance and in the process restores the previous imbalance, the emphasis of restitution is placed on performance of the obligation that flows from enrichment, rather than the restoration of the thing itself.[26] The Appellate Division in *Nortje v Pool NO and Another*[27] found against the development of a general action for unjustified enrichment.[28] It was in the subsequent *obiter dictum* of *McCarthy Retail Ltd v Shortdistance Carries CC*,[29] that the SCA expressed that in the event that a general enrichment action is developed in the South African law, such action would have to be subsidiary to the existing Roman-Dutch law actions.[30]

[20] *Ibid.*
[21] *Ibid.*
[22] *Ibid* at 631.
[23] *Ibid.* Reference also made to Grotius 3.30.1-2.
[24] JC Sonnekus *Unjustified enrichment in South African law* (2008) 11.
[25] *Ibid.*
[26] *Ibid* at 13.
[27] 1966 (3) SA 96 (A).
[28] *Ibid.*
[29] 2001 (3) SA 482 (SCA).
[30] *Ibid* at para 9.

### 3.2.2 Generic requirements for an enrichment claim

Roman law and Roman-Dutch law did not develop a general claim in enrichment.[31] However, the three generic requirements for a claim in enrichment are that the defendant must be enriched and the plaintiff must be impoverished, the defendant's enrichment must occur at the expense of the plaintiff's impoverishment and the enrichment must be unfounded.[32] Each of the three requirements is discussed below.

#### 3.2.2.1 The defendant must be enriched and the plaintiff must be impoverished

Enrichment means that a patrimonial transfer occurred from the one party into the other's estate, which results in a factual increase in or a non-reduction in the assets of the enriched party.[33] Such patrimonial increase or decrease has to be calculable by considering the total assets in the estate of the party whose situation is being assessed at the time.[34] The use or mere benefit of possession that is enjoyed by an enriched party may qualify as an enrichment benefit considering what the market price of the benefit was at the time.[35] Enrichment can also take place in different forms.[36] Common examples of enrichment are where there has been an increase in the defendant's assets, or where his assets have not decreased or where his liabilities have not increased.[37] On the other side of the coin, the plaintiff has to show that he has been impoverished whether by decrease in assets, non-increase in assets or an increase in liabilities or a non-increase thereof.[38]

The quantum of the plaintiff's claim is governed by the general principle that the plaintiff can either claim for the amount in which the defendant was enriched or the amount of his impoverishment, whichever is lesser.[39] The aforesaid general principle is however subject to certain qualifications, including the instance where property was transferred to the defendant where the plaintiff would have to claim for return of the thing itself or its equivalent and only in the event of it being impossible to deliver the

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[31] JC Sonnekus *Unjustified enrichment in South African law* (2008) 16.
[32] *Ibid* at 42.
[33] *Ibid* at page 43.
[34] JC Sonnekus *Unjustified enrichment in South African law* (2008) 43.
[35] *Ibid.*
[36] D Hutchison (ed) *Wille's Principles of South African law* (1991) 631.
[37] *Ibid.*
[38] *Ibid.*
[39] *Ibid.*

thing will the plaintiff be entitled to its value.[40] In the case of the defendant being enriched with a thing that bears fruit, the plaintiff will also be entitled to such fruit less any operational expenses that it may have cost the defendant to achieve such fruitfulness.[41]

Calculation of enrichment or impoverishment is done by using the net-asset position or sum formula approach.[42] This involves a comparison of the real value of the defendant's estate with the hypothetical value that it would have been but for the alleged enriching fact.[43] Where it is found that there has not been a change in the net asset situation of a party, there cannot be a legally relevant enrichment claim.[44]

When calculating the liability of a surety who stood surety for the debts of a principal debtor, the calculation is done by determining the actual extent of the outstanding obligation of the principal debtor.[45] The liability of the surety would thus be for the total extent of the unjustified enrichment despite the fact that the principal debtor would in the meantime possibly have been sequestrated.[46]

In an instance where the plaintiff has inflicted the impoverishment himself, such would not qualify as legally relevant impoverishment.[47] Thus, if a plaintiff were to waive a claim to an asset, he will not be able to recover in terms of an enrichment claim and the subsequent "impoverishment" as a result of the waiver of his right to performance cannot be blamed on the defendant.[48] The foundation of equity upon which unjustified enrichment is based, demands that regard be had when a court decides whether or not such claim will be successful.[49]

The rule that a defendant can plead non-enrichment as a defence to an enrichment claim is subject to the qualifications that where a defendant knew or ought to have known that he had been unjustifiably enriched, he has a duty to preserve the enrichment. Thus he can only plead non-enrichment in the event that the loss of the enrichment, if any, was not culpable.[50]

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[40] *Ibid* at page 632.
[41] *Ibid.*
[42] JC Sonnekus *Unjustified enrichment in South African law* (2008) 51.
[43] *Ibid.*
[44] *Ibid* at page 53. Reference also made to *King v Cohen Benjamin and Co* 1953 (4) SA 641 (W) 650A-B.
[45] JC Sonnekus *Unjustified enrichment in South African law* (2008) 55.
[46] *Ibid.*
[47] *Ibid* at page 57.
[48] *Ibid.*
[49] *Ibid.*
[50] D Hutchison (ed) *Wille's Principles of South African law* (1991) 633.

All the facts to be established to found liability must be determined before the obligation for enrichment arises and such facts are for the plaintiff to prove.[51]

#### 3.2.2.2 The defendant's enrichment must occur at the expense of the plaintiff's impoverishment (causal link)[52]

This particular requirement is rather contentious amongst authors.[53] It is accepted that a legally relevant causal connection has to exist between the plaintiff's impoverishment and the defendant's enrichment in order for an enrichment to occur "at the expense of" the plaintiff.[54] Visser makes the observation,[55] supported by Sonnekus, that such a requirement exists not to introduce causality in the delictual sense in unjustified enrichments, but rather to restrict liability in enrichment claims.[56] When a direct connection between the defendant's patrimonial increase and the plaintiff's patrimonial decrease is shown, then there is compliance with this requirement.[57] It would appear that the courts are reluctant to adopt a "strictly dogmatic approach" to the presence of this requirement and that policy considerations play a role in influencing the decision whether or not the causal link is present.[58]

#### 3.2.2.3 The enrichment must be unfounded or a cause for the retention of the enrichment must be absent[59]

As a general point of departure, the patrimonial transfer must be "unfounded, unjustified, unauthorised or sine causa".[60] *Causa* is not expressly defined in Roman law within the context of unjustified enrichment.[61] It is only when there is no *causa retendi* (no cause for the retention of the enrichment by the defendant) that a plaintiff can succeed with a claim for enrichment.[62] As there is no defined general enrichment

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[51] JC Sonnekus *Unjustified enrichment in South African law* (2008) 64.
[52] See D Hutchison (ed) *Wille's Principles of South African law* (1991) 634 and JC Sonnekus *Unjustified enrichment in South African law* (2008) 69.
[53] JC Sonnekus *Unjustified enrichment in South African law* (2008) 69.
[54] *Ibid.*
[55] DP Visser "Searches for silver bullets: enrichment in three-party situations" in D Johnston & R Zimmermann (eds) *Unjustified enrichment: key issues in comparative perspective* (2002) 526.
[56] JC Sonnekus *Unjustified enrichment in South African law* (2008) 69.
[57] *Ibid* at 70.
[58] D Hutchison (ed) *Wille's Principles of South African law* (1991) 634. See also *Gouws v Jester Pools (Pty) Ltd* (1968 SA 563 (T), *Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons* 1970 (3) SA 264 (A) and *Standard Kredietkoporasie Bpk v JOT Motors (Edms) Bpk h/a Vaal Motors* 1986 (1) 223 (A).
[59] See Hutchison (1991) 634 and JC Sonnekus *Unjustified enrichment in South African law* (2008) 76.
[60] JC Sonnekus *Unjustified enrichment in South African law* (2008) 76.
[61] *Ibid.*
[62] D Hutchison (ed) *Wille's Principles of South African law* (1991) 634.

action in South Africa law, there is no settled criterion to determine the justifiability of enrichment, which then means such adjudication has to be done on a case by case basis by considering all the requirements together.[63]

South African judges do not sit in courts of equity and thus the test for the juridically relevant basis for patrimonial transfer is the most important objective when determining liability in unjustified enrichment cases.[64] The first question in determining liability therefore ought to be whether the enrichment of the defendant and the impoverishment of the plaintiff has occurred and only once that is established can the court proceed to the element of *sine causa*.[65]

Van der Walt holds the view that there is enrichment *sine causa* where an obligatory relationship does not exist between the parties in terms of which the impoverished party can accordingly claim for a patrimonial transfer.[66]

#### 3.2.2.4 The specific enrichment actions

In early Roman law, the *condictio* was a general remedy that could be used in various actions, including "unfounded retention".[67] A number of enrichment actions that have since been adopted in South African law are founded upon the *conditiones* from Roman law.[68] However only the four *condictiones* are discussed hereunder.

The first specific enrichment action is the *condictio causa data causa non secuta*, which is an action limited to the recovery of money or property that was transferred to another person on either an assumption that did not materialise or subject to a modus that subsequently became disregarded or frustrated.[69] An example of where this action could be used is where A concludes an agreement with B and the agreement is subsequently found to be void but A performs regardless, on the assumption that B will do the same and B does not.[70]

The second action is the *condictio ob turpen vel iniustam causam*.[71] A plaintiff can rely on this *condictio* where he has paid or delivered in pursuance of an illegal

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[63] *Ibid.*
[64] JC Sonnekus *Unjustified enrichment in South African law* (2008) 77.
[65] *Ibid.* See also *B&H Engineering v First National Bank of SA Ltd* 1995 (2) SA 279 (A).
[66] JC Van der Walt *"Die condictio indebiti as verykingsakke"* (1966) *THRHR* 220 as referred to in Sonnekus *Unjustified enrichment in South African law* (2008) 82.
[67] D Hutchison (ed) *Wille's Principles of South African law* (1991) 635.
[68] *Ibid.*
[69] *Ibid.*
[70] *Ibid.*
[71] *Ibid* at 636.

agreement,[72] which could be concluded, performed or whose object is prohibited by law or contrary to public policy,[73] provided that the plaintiff himself did not act dishonourably or with "turpitude".[74] This principle is known as the "*par delictum* rule", which is based on the notion that courts will not assist a party who seeks to pursue claims that are contrary to public policy.[75] It has been accepted by our courts that the *par delictum* rule is not strictly enforced by our courts, which are amenable to relaxing the dictations of public policy in order to do "dimple justice between man and man".[76]

The third possible enrichment action is the *condictio indebiti*.[77] In terms of this enrichment action, a person who has paid a sum of money or delivered a property to another person, under the mistaken belief that such payment or delivery was due to the recipient, may claim in accordance with this *condictio*.[78] The same *condictio* may be utilised where a debtor overpays a creditor.[79] If a payment of money has been made, which payment was not legally claimable but paid nonetheless under a natural obligation, then it cannot be reclaimed.[80] Similarly, where a payment is made under a compromise, such money cannot be reclaimed if it is subsequently found that it was actually not due.[81]

The fourth *condictio*, which comes in two forms, is the *condictio sine causa*.[82] The first form is the *condictio sine causa generalis*, which corresponds with the above three *conditiones*.[83] Its second form is the *condictio sine causa specialis*, which is an alternative denomination of the other condictiones and is only appropriate where money or property was transferred to another in terms of a *causa* that subsequently falls away,[84] or when the plaintiff's money or property was alienated or consumed by a person in possession thereof,[85] or where money or property has been transferred to

[72] *Ibid.*
[73] JG Lotz & FDJ Brand "Enrichment" in *The law of South Africa* vol 9 (1996) para 215.
[74] D Hutchison (ed) *Wille's Principles of South African law* (1991) 636.
[75] *Ibid.*
[76] *Ibid.* Reference made to *Jajbhay v Cassim* 1939 AD 537.
[77] D Hutchison (ed) *Wille's Principles of South African law* (1991) 636.
[78] *Ibid.*
[79] *Ibid.*
[80] D Hutchison (ed) *Wille's Principles of South African law* (1991) 637.
[81] *Ibid.*
[82] D Hutchison (ed) *Wille's Principles of South African law* (1991) 638.
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.*

another, but South African law is not determined on the exact parameters of the debtor's liability.[86]

The question then becomes: under which of the above *condictiones* can a creditor bring an enrichment claim as a result of a suretyship agreement that is declared void? Myburgh distinguishes between the appropriate enrichment remedy where a formal requirement is not met resulting in a "formal defectiveness" in the agreement as opposed to agreements where the result of the non-compliance is illegality.[87] In respect of the former, the contention is that where an agreement is void because it does not comply with statutory formalities, it does not qualify as one which is illegal or immoral.[88]

Relying on the sentiments expressed by De Vos,[89] the proposition per Myburgh is that the *condictio ob turpem vel iniustam causam* is not the best suited *condictio* because the jurisdictional requirement thereof is the illegality of the agreement.[90] However, where the content or the goal of the agreement is prohibited by legislation or public policy, then the *condictio ob turpem vel iniustam causam* could be applied.[91] The challenge expressed is: "in determining whether a particular statutory provision amounts to the prescription of a formal requirement or whether it is prescribing a requirement for the legality of the agreement."[92] Such challenge in the context of *Impande*, *Panamo* and *Shabangu* appears to be addressed as the principal loan agreements entered into by those parties with the Land Bank were invalid due to the loan agreement being contrary to section 3 of the Land and Agricultural Development Bank Act 15 of 2002 ("LADA") and consequently found to be void *ab initio*. Consequently, in such instances, the "content and goal" of such agreements are prohibited by statute and thus the *condictio ob turpem vel iniustam causam* could be applied.

In a different context, that is where LADA does not apply or the statute does not express the illegality of the agreement outright in the provisions and no

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[86] *Ibid* at 639.
[87] FE Myburgh *Statutory formalities in South African law* (2013) LLD thesis Stellenbosch University 248.
[88] *Ibid* at 249. Reference made to *Pottie v Kotze* 1954 3 SA 719 (A) 725A and *Tuckers Land and Development Corporation (Pty) Ltd v Wasserman* 1984 2 SA 157 (T) 161A-G.
[89] W De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 3 ed (1987) 153, as quoted *ibid.*
[90] FE Myburgh *Statutory formalities in South African law* (2013) LLD thesis Stellenbosch University 249. Reference also made to *Afrisure CC v Watson NO* 2009 2 SA 127 (SCA) and Sonnekus (2008) 262.
[91] *Ibid* at 249. Reference also made to D Visser *Unjustified enrichment* (2008) 425 and W De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 3 ed (1987) 164.
[92] FE Myburgh *Statutory formalities in South African law* (2013) LLD thesis Stellenbosch University 249.

pronouncements have been made in case law, the line of whether or not the agreement is void because of a formal requirement of overall legality of the agreement is still blurred and the hurdle highlighted by Myburgh stands. To address this phenomenon, there are two possible actions that have been suggested.[93] The first is the *condictio indebiti* for instances where a party performed under the mistaken belief that the formalities were complied with whereas they were as a matter of fact not, and the second is the *condictio causa data causa non secuta* where a party performs knowing that the formalities are not complied with but performs nonetheless on the assumption or expectation that the other party will also perform.[94]

Myburgh maintains that a surety who mistakenly makes a payment on the basis of a suretyship that is formally defective, as a result of non-compliance with General Law Amendment Act 50 of 1956, would be able to reclaim such payment using the *condictio indebiti*.[95] This proposition is supported by the fact that the surety's intention would be to discharge his own debt, which will be non-existent due to the formal invalidity of the suretyship agreement.[96] The current discussion does not consider the surety's right to recover but the creditor's. Thus, the sensible deduction would be that the *condictio ob turpem vel iniustam causam* would be the most viable action.

Sonnekus and Schlemmer critically analyse the *Panamo* High Court decision,[97] to which they express their disagreement,[98] which decision was subsequently upheld by the SCA.[99] In what they head as an "ingenious construction to circumvent the non-compliance with the accessorial principle",[100] the authors discuss enrichment in the context of mortgage covering bonds, which are of course similar to suretyships on the characteristic of accessoriness.[101] It is accepted that an enrichment claim is a remedy of last resort for a claimant in terms of the law of obligations.[102] The authors also

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[93] *Ibid* at 256. Reference made to W De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (1987) 183; D Visser "Unjustified Enrichment" in F du Bois (ed) *Wille's Principles of South African law* (2007) Du Bois (2007) 1041 and D Visser *Unjustified enrichment* (2008) 459-460.
[94] *Ibid.*
[95] FE Myburgh *Statutory formalities in South African law* (2013) LLD thesis Stellenbosch University University 258.
[96] *Ibid* at 259.
[97] JC Sonnekus & EC Schlemmer "Covering bonds, the accessorial principle and the remedies founded in equity – not self-evident bedfellows" (2015) 132 *SALJ* 340-371.
[98] *Ibid* at 368.
[99] 2016 (1) SA 202 (SCA).
[100] JC Sonnekus & EC Schlemmer "Covering bonds, the accessorial principle and the remedies founded in equity – not self-evident bedfellows" (2015) 132 *SALJ* 361.
[101] As discussed in Chapter 3 hereof.
[102] JC Sonnekus & EC Schlemmer "Covering bonds, the accessorial principle and the remedies founded in equity – not self-evident bedfellows" (2015) 132 *SALJ* 364.

suggest that the *condictio ob turpem vel iniustam causam* and the *condictio indebiti* would be the most probable *condictiones* to rely on for the creditor who seeks to sue on the basis of the underlying agreement being void.[103] They conclude, however, that in addition to the generic requirements, the additional requirements germane to the respective condictiones would not be met.[104]

On the *condictio ob turpem vel iniustam causam*, Sonnekus and Schlemmer accept that because the lending of money by the Land Bank to Panamo was contrary to the objects of the LADA and thus in contravention of legislation and public policy, the contract was unenforceable and the contractual remedies, which would have been available, therefore fell way.[105] The issue, they opine, is in satisfying the requirement that the plaintiff ought to have been honourable in its dealings.[106] It is opined that the Land Bank, which they assume delegated the function of concluding such agreements to competent senior staff members, did not approach the court with clean hands as they ought to have known the provisions of the LADA that prohibit the agreement entered into with *Panamo*.[107] Making reference to the Dutch Civil Code, the authors accept that there is no express requirement that in the circumstances, a plaintiff would have to approach the court with clean hands.[108] However, it is argued that the over-arching principles of "*redelijkheid en billijkheid*"[109] would disqualify a plaintiff in an enrichment claim who approaches the court with tainted hands.[110]

In analysing the possible reliance on the *condictio indebiti* as possibly applicable to *Panamo*, it is conceded that South African law does not apply the requirements of the old *condictiones* strictly and that they have been developed overtime.[111] However, the *condictio indebiti* requires that the plaintiff not be negligent or blameworthy in the conduct that resulted in its impoverishment.[112] Of course, one can accept that on a

[103] *Ibid* at 364.
[104] *Ibid.*
[105] *Ibid* at 365.
[106] *Ibid.*
[107] *Ibid.*
[108] *Ibid.*
[109] *Ibid.* Translated as "reasonableness and equity" at n 89.
[110] *Ibid.* Reference made to s6: 203 ff, s 6:248.2 and s6:2.2 BW. W Snijders "Ongeregvaardigde Verrijking en het Betaalingsverkeer" (2001) 14ff.
[111] JC Sonnekus & EC Schlemmer "Covering bonds, the accessorial principle and the remedies founded in equity – not self-evident bedfellows" (2015) 132 SALJ 366. Reference also made *to McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) at 489A-B.
[112] *Ibid* at page 367. Reference made to *Capricorn Beach Home Owners Association v Potgieter t/a Nilands 2014* (1) SA46 (SCA) at 51F-I.

different set of facts, or even *Panamo* had it been argued along the confines of unjustified enrichment, a different outcome could be reached.

The fatal issue with non-compliance with the requirements for an enrichment claim in the context of the principle of accessoriness is that in the event that there is no enrichment claim, there are no real security rights that can attach to the accessory agreement for mortgages,[113] and possibly no personal rights that can attach to the suretyship agreement. In *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd*,[114] the Appellate Division held that a subcontractor did not have an enrichment claim against a landowner for improvements made on the property, as the former did not have a contractual relationship with the latter but rather with the occupant of the land at the time who had contracted him to perform the works. It is thus clear that in the absence of an underlying existing claim, the limited real right or personal right cannot secure a debt for unjustified enrichment because the accessory element would be defeated.[115]

## 3.3 The "no-profit principle"

The Constitutional Court in *Shabangu* confirmed that a possible alternative to an unjustified enrichment claim by a creditor where the suretyship agreement is invalid is the application of the "no-profit principle" as established in *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency*[116] ("*AllPay*"). Section 172(1)(b) of the Constitution empowers the CC to make an order that is just and equitable after it has declared a law constitutional invalid. An order that is just and equitable includes an order to limit the retrospective effect of the invalidity so declared and to suspend the invalidity for a defined period in order to allow a competent authority to address the defect or invalidity as declared.[117]

The CC in *Electoral Commission v Mhlope and Others*[118] held that section 172(1)(b) of the Constitution allowed the courts to exercise remedial powers that are extensive to allow courts "to craft an appropriate or just remedy, even for exceptional,

[113] *Ibid* at 367.
[114] 1996 (4) SA 19 (A) at para 26A.
[115] JC Sonnekus & EC Schlemmer "Covering bonds, the accessorial principle and the remedies founded in equity – not self-evident bedfellows" (2015) 132 *SALJ* 367.
[116] 2014 (4) SA 179 (CC).
[117] Section 172(1)(b) of the Constitution.
[118] 2016 (5) SA 1 (CC).

complex or apparently irresoluble situations".[119] The CC proclaimed that the words "any order" means that the court needs to consider considerations of justice and equity in order to find solutions to legal issues that the courts may find themselves faced with.[120]

In the *AllPay* decision, Froneman J referred to the judgment of *Steenkamp NO v Provincial Tender Board, Eastern Cape*,[121] wherein Moseneke DCJ stated that where an administrative functionary as acted in an improper manner, the Constitution would be implicated and the party that is aggrieved would accordingly be entitled to the appropriate relief.[122] Such remedy would have to be commensurate to the injury suffered and by being fair to the wrongdoer but also justiciable to the victim.[123] Such remedy, bestowed from a public law perspective, is to afford administrative justice to a party that is prejudiced and to "advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law" .[124] *AllPay* raised legal issues in procurement and review applications to set aside the award of a tender under the Promotion of Administrative Justice Act.[125]

In *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*[126] ("*AllPay II*"), the CC handed down a further judgment in which it indicated that a tenderer such as the respondent would not have a right to benefit from an unlawful contract.[127] To address such possible benefit, the CC requested that Cash Paymaster, the tenderer, should provide its financial information in order for the CC to see where the company arrived at a break-even point and from which point the company would start or had started making a profit.[128] Having concluded that the tenderer had had no right to benefit from an unlawful contract, the CC ordered that Cash Paymaster must file its audited financial statements with the Court.[129]

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[119] *Ibid* at para 132.
[120] *Ibid.*
[121] 2007 (3) SA 121 (CC).
[122] *Ibid* at para 29.
[123] *Ibid.*
[124] *Ibid.*
[125] 3 of 2000.
[126] 2014 (4) SA 179 (CC).
[127] *Ibid* at para 67. See also *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law Intervening)* 2017 (3) SA 335 (CC) for a discussion on the repercussions of the non-compliance with the court orders handed down in *AllPay I* and *II.*
[128] *Ibid.*
[129] *Ibid.* At para 4.2 and 4.3 of the court order.

Considering *Schoeman*, *Electoral Commission and AllPay*, it appears that the "no-profit principle" is especially effective in disputes where a public functionary is involved. In matters involving the state and its organs, such organ of state could possibly bring a collateral challenge in terms of which it seeks to challenge its own public power in appropriate circumstances by having the administrative action set aside and seek a prayer for a just and equitable remedy in the event that the agreement entered into is found to be unlawful and unenforceable.[130] Properly construed in a case post-*Shabangu*, it would be interesting to note how the courts apply the "no-profit principle" to the vertical contractual relationship between two private persons.

## 3.4 Estoppel

It occurs frequently that when a plaintiff sues a defendant on the basis of a contract, the defendant may plead illegality of the contract and the plaintiff then replicates that the defendant is estopped from relying on such illegality because he would have, by his words or actions, induced the plaintiff into believing that the contract is valid, thus causing the plaintiff to act contrary thereto.[131] For present purposes, the creditor would be the plaintiff who sues the principal debtor and/or surety for performance or damages in accordance with the suretyship agreement.

Typically, the plaintiff would not be allowed to rely on estoppel because such reliance would result in the unenforceable contract being enforceable.[132] When applying the doctrine of estoppel, the principles of public policy, which ultimately would have led to a statute being promulgated as a reflection thereof, prevail over the former.[133] The defendant therefore cannot be prevented from relying on the illegality of an agreement as a defence regardless of the impact of such denial on the plaintiff or its case.[134]

Where suretyship is concerned, a surety may be denied reliance on the illegality of the principal debt or his knowledge of the voidness or illegality by estoppel.[135] Thus,

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[130] *Department of Transport and others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC).
[131] RH Christie *The law of contract in South Africa* (2006) 393.
[132] *Ibid.*
[133] *Ibid* at 364-365. Reference made to *Trust Bank van Suid Afrika Bpk v Eksteen* 1964 3 SA 402 (A) 425F.
[134] *Ibid.*
[135] CF Forsyth *Caney's law of suretyship* (2010) 42.

where a surety knows that the agreement entered into between the creditor and the principal debtor is void, it is accepted that such surety contracts as the principal debtor and therefore he is bound to make payment to the creditor when the principal debtor is unable to honour his obligations to make such a payment.[136]

Hoexter JA in his minority judgment in *Trust Bank van Afrika Bpk v Eksteen*[137] encouraged a more flexible approach to the application of estoppel in actions involving a surety.[138] In *Credit Corporation of SA Ltd v Botha*,[139] the court was faced with a principal debtor who had attempted to allege that the agreement was invalid as it was incomplete. Sheerer J held that the statute was not designed to assist purchasers against innocent persons of the illegality and accordingly concluded that in the case before the court, public policy weighed more than the doctrine of estoppel.[140]

As a general rule, where one party successfully relies on estoppel, such victory will not result in the enforcement of an agreement that is legally prohibited.[141] In terms of this rule, an agreement that is illegal because it is *ultra vires* cannot be revived by a defence for estoppel.[142]

Sonnekus and Schlemmer explore the possibility of estoppel where the debtor relies on estoppel as a defence to preclude the creditor from pleading the invalidity of the loan agreement and concluded that the defence could not be of assistance in *Panamo*.[143] The conclusion is that this defence, may not bring joy to the creditor who would rather rely on the other remedies discussed here. It was held in *Trust Bank van Afrika Bpk v Eksteen*,[144] that although there are numerous obstacles that an estoppel assertor has to overcome in order to successfully invoke the defence and though he may indeed succeed, the law is settled that where a state of affairs is prohibited by law and public interest, the courts will not find in favour of a party who seeks to perpetuate an illegality.[145]

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[136] *Ibid.* Reference made to B6, 10, approved in *Van Eeden v Sasol Pensioenfonds* 1975 (2) SA 167 (O) at 180A-F
[137] 1964 (3) SA 402 (A).
[138] *Ibid* at 415H-416A.
[139] 1968 (4) SA 837 (N).
[140] *Ibid* at 852-B.
[141] *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd 2008 3 SA 1 (SCA) para 13; Nyandeni Local Municipality v Hlazo* 2010 4 SA 261 (SCA) para 49.
[142] *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 2 SA 15 (A).
[143] JC Sonnekus & EC Schlemmer "Covering bonds, the accessorial principle and the remedies founded in equity – not self-evident bedfellows" (2015) 132 SALJ 369.
[144] 1964 (3) SA 402 (A).
[145] *Ibid* at 411H – 412B.

## 3.5 Concluding remarks

Serfontein expresses the view that the reform of enrichment jurisprudence ought to begin at the relaxation of the principle of reciprocity (*pacta sunt servanda est*).[146] The execution of the "no-profit principle" may prove to be a challenge where the parties are private persons or entities who enjoy the principles of sanctity and reciprocity. Serfontein further expresses the view that the current state of the South African law of unjustified enrichment results from the courts sometimes meddling in agreements between parties and often misinterpreting the common law principles.[147]

Leckey opine that the "no-profit principle" highlighted the role of a "remedial discretion" in the link between the supremacy of the Constitution and a theory of nullity.[148] At this stage, it would seem that the terms of the suretyship agreement would have to be crafted in enough detail to provide for numerous possible outcomes, including the possibility of the underlying agreement being found to be void after the creditor has performed in accordance with such "agreement".

[146] J Serfontein "What is wrong with modern unjustified enrichment law in South Africa?" 2015 *De Jure* 390.
[147] *Ibid* at 389.
[148] See R Leckey "The Harms of Remedial Discretion" (2016) 14 *IJCL* 584, 597.

# Chapter 5
# Conclusion

## 5.1 General remarks

This dissertation sought to explore a few live issues around the validity of a deed of suretyship in instances where the principal loan agreement is found to be invalid. It has been accepted as early the Justinian era, through the times of the twelve tables up to date that the suretyship agreement is one that is accessorial and whose lifespan is dependent on the validity of the principal loan agreement.

In Roman societies, due to the value ascribed to friendships and the *fides* and *amicitia,* it was believed that a Roman surety would keep his word at all costs and honour his friend who is the debtor as well as the creditor.[1] In African societies where more emphasis was placed on the family group rather than individual relations, it would be the members of the group who stood surety, as opposed to an individual, without the need to formalise such a relationship with the creditor.[2]

The South African legal system has come a long way to bring its laws of suretyship to where they are and accordingly align them to transformative constitutional dispensation which we currently enjoy.

## 5.2 Summary of analysis

One cannot discuss suretyship agreements without acknowledging their conception from Roman law. Roman-Dutch writers had the privilege of inheriting a branch of law which was developed on mere principles of friendship and managed to mature to regulating complex commercial transactions on which our economies strive. As the position of a surety is a rather precarious one, there is a trend of attempts being made to burden the yolk of the surety as early as the conception of the *fideiussio* in Roman law.[3] Gaius, by implying that a creditor ought to sue the debtor first and then only sue the surety if he is unable to do so,[4] suggests that such inability to sue the debtor on

[1] *Ibid* at 152.
[2] *Ibid.*
[3] CF Forsyth *Caney's law of suretyship* (2002) 8.
[4] *Ibid* at 11.

the basis of some kind of “illegality” would hinder the creditor from proceeding to the surety.

Roman-Dutch law sought to infuse mandate and *constitutum* with the principles of *stricti iuris* contained in the Roman *fideiussio.*[5] The product of such infusion the consideration of equity into the contract of suretyship in order to ease the burden of the surety. The resultant notion of suretyship ultimately found its way into the South African law, which by codifying it into legislation and regulating the requirements of a valid suretyship agreement, achieved the purpose of legal certainty somewhat.

Nevertheless, throughout its development, suretyship has maintained its nature as an accessory agreement which accedes to the principal loan agreement.[6] Such accessoriness of the contract of suretyship, as Zimmerman aptly proposed, indicates the dependency of the surety’s obligations to that of the principal debtor.[7] Such dependency logically dictates that if the agreement in which the principal debt is conceived is found to be unlawful and unenforceable, then the suretyship ought to suffer the same fate.

Suretyship, being a form of personal security, can be compared to a mortgage bond which is real security because, among others, both contracts share the similarity in accessoriness as a characteristic. It therefore comes as no surprise that the principles applied in determining whether or not a mortgage bond concluded to secure a debt contained in an agreement which is subsequently found to be void, can be used in adjudicating the same problem in the context of suretyships.

In *Panamo,* the court had found that the mortgage covering bond had survived regardless of the fact that the agreement was void. On analysing the clauses of the mortgage bond, the SCA interpreted such terms as being intended to include future debts which include an enrichment claim which the Land Bank (the creditor) could institute for the performance of its obligations in an agreement which was ultimately found to be void.

Following the same formula as that of the SCA in *Panamo,* the High Court in *Shabangu* sought to reach the same conclusion. The spanner in the works as far as *Shabangu* is concerned, has to be the acknowledgement of debt concluded by the parties as a compromise to their legal dispute. In *Shabangu,* the loan agreement was

[5] CF Forsyth *Caney’s law of suretyship* (2010) 22. Reference made to V 46.1.30.
[6] *Ibid* at 24.
[7] R Zimmermann *The law of obligations: Roman foundations of the Civilian Tradition* (1996) 121.

also found to be void as it was in contravention of the legislative prescripts on which the Land Bank is founded. With the funds already being advanced as provided for in the loan agreement, the Land Bank had duly performed. In light of the principal agreement being found to be void for the same reasons as those advanced in *Impande* and *Panamo,* it followed that the Land Bank would want to recover the monies advanced against *Shabangu* and the shareholders of the subsequently liquidated Westlake (the original principal debtor). The High Court applied the principles laid down in *Panamo* and held *Shabangu* and his co-sureties, the shareholders of Westlake, liable. Considering the SCA's refusal to entertain the application for leave to appeal brought by the shareholders, one is tempted to conclude that the SCA agreed with the outcome as pronounced in the High Court.

The CC however curbed such enthusiasm by upholding the application for leave to appeal brought by *Shabangu.* Surprisingly, the CC followed a strict approach to the interpretation of suretyships and in presumably balancing the rights of the parties, found in favour of the surety. The CC held that the Land Bank ought to have brought an enrichment claim, alternatively a claim framed along the lines of the "no-profit rule" as coined in *AllPay.* The Land Bank's status as a public entity, the actions of which may possibly be subject to PAJA, entered the fray alas to its own detriment. The state, as a result of the decision by the CC possibly lost R82 million worth of a compromise merely on the basis of the apparently incorrect cause of action relied upon. This is assuming that by the time the judgment was delivered by the apex court, a fresh claim of enrichment or action for a just and equitable remedy in accordance with the "no-profit rule" would have prescribed.

What then for the creditor whose principal loan agreement is found to be invalid? It would seem that such creditor, when entering into the suretyship agreement, ought to make provision for a possibly invalid principal agreement which may give rise to an enrichment claim. Thereafter, and in the event that the principal debtor defaults and an action is brought and the agreement is found to be void, the creditor can institute an action for enrichment in the alternative and sue the surety in the event that the debtor is unable to honour the judgment obtained from the enrichment claim. Alternatively, and especially where organs of state are concerned, an action to recover in accordance with the "no-profit rule" would have to be instituted. During exchange of pleadings, the creditor may be faced with a plea attacking the validity of the agreement.

Whether the creditor replicates with estoppel may ultimately be of no consequence as the court will not give effect to the void agreement in any event.

## 5.3 The role of the Constitution in suretyships

Chapter 2 of the Constitution contains the Bill of Rights which includes, in section 22, the right of every citizen to "choose their trade, occupation or profession freely".[8] Such right of "occupational freedom" includes the rights of an individual to participate in commercial activities as one would wish.[9] For one to participate in economic activity, there has to be monetary means to allow such participation to take place, which may sometimes involve the use of credit.[10] A creditor who is prepared to advance a loan may require some type of personal or real security in order to have assurance that the debtor will repay the monies advanced to him in the terms as agreed upon.[11] As mentioned by Scott JA in *Jans v Nedcor Bank Ltd*, the very nature of suretyship is burdensome and irrational as it seems, the general convention is that one who signs surety is well aware of the risks and possibilities involved in taking up such cross.[12]

The South African law of suretyships does not differentiate between different types of suretyships however "continuing suretyships or guarantees" have previously been recognised as being the state of affairs for certain transactions.[13] A suretyship agreement can therefore be entered into for a single credit transaction or for a series thereof.[14] Such continuing suretyship would cover debts to be incurred in future by the debtor,[15] similar to what a covering bond would do.

The courts which adjudicated matters relating to suretyships in the pre-constitutional era strictly held to the principle of *pacta sunt servanda* and had observed the sanctity of contract as a universal truth.[16] The recognition of a legal obligation in law presupposes that when individuals opt into being parties to contracts, they do so

[8] Section 22 of the Constitution.
[9] E Reid & D Visser (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2013) 437.
[10] *Ibid.*
[11] *Ibid* at 440.
[12] 2003 (6) SA 646 (SCA) para 30.
[13] E Reid & D Visser (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2013) 445.
[14] *Ibid.* Reference also made to *SA General Electric Co (Pty) Ltd v Sharfman* 1981 (1) SA 592 (W) at 595; JT Pretorius "Continuing Suretyships" (1988) 10 *Modern Business Law* 85 and J W Wessels (1951) vol II para 4218.
[15] *Ibid.*
[16] *Roffey v Catterall, Edwards and Goudré (Pty)* Ltd 1977 (4) SA 494 (N).

subject to the values of the society at the time.[17] In *Barkhuizen v Napier,*[18] the CC had to determine the place of the doctrine of *pacta sunt servanda* in the constitutional dispensation. Ngcobo J confirmed that the Constitution applies to contracts in view of the fact that such contracts have to be underpinned by the public policy which had been inculcated into the Constitution and the values which underlie it.[19]

Where a banker had decided to close the account of a client in *Bredenkamp & others v Standard Bank of South Africa Ltd*,[20] the client had argued that the bank's actions had been substantively and procedurally unfair.[21] Although it was conceded that the contract terms were not contrary to public policy, the client contended that the exercise of such contractual rights were not 'fair' thus in contravention with the core value of fairness as contained in the Bill of Rights.[22] Harms DP addressed this argument by advancing that in determining whether or not an agreement is contrary to public policy, one has to balance competing values which includes the value of honouring contractual promises.[23]

The *exceptio doli generalis* was rejected as a defence of last resort for a surety who is overburdened by the suretyship as held in *Bank of Lisbon and South Africa Ltd v De Ornelas & Another* after the Appellate Division had accepted that it did not form part of Roman-Dutch law thus has no place in South African law.*[24]* The surety's risks have accordingly become more imminent and the potential inequities that come with being a surety have increased which has resulted in attempts being made to lighten the yolk of a surety.[25]

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[17] E Reid & D Visser (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2013) 447. Reference also made to SWJ Van der Merwe *et al Contract: General Principles* (2007) 11.
[18] 2007 (5) SA 323 (CC).
[19] *Ibid* at para 28.
[20] 2010 (4) SA 468 (SCA).
[21] *Ibid* at para 61.
[22] *Ibid* at para 64.
[23] *Ibid* at para 38.
[24] 1988 (3) SA 580 (A).
[25] E Reid & D Visser (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2013) 455. Reference made to the various benefits and exceptions available to the surety which stemmed from Roman law including the benefit of excussion, the benefit of division among co-sureties, the benefit of cession of actions, etc as mentioned in n66.

## 5.4 Conclusion

Our courts thus have a duty to maintain a balance between the rights of the creditor and the surety by not simplifying an escape of a surety from his contractual obligations and inadvertently discouraging creditors from granting credit facilities, whilst also not favouring creditors who may be financial institutions armed with sophisticated contract drafters which may retard a surety's rights in a suretyship.[26]

It can therefore be concluded that in interpreting contracts of suretyship, our courts ought to ascertain the intention of the parties and consider the terms of the contract in light of the surrounding circumstances to determine what such intention was at conclusion of such contract.[27]

[26] *Ibid* at 460.
[27] *Novartis South Africa (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA).

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