Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE HIGH COURT, KIMBERLEY)

Case No: 1373/04
Heard on: 02-08-2010; 03-08-20; 09-09-2010; 22-11-2010
Heads filed: 26-08-2010; 02-09-2010; 08-09-2010; 18-11-2010; 22-11-2010;
Supplementary heads filed: 21-07-2011; 01-08-2011 and 30-09-2011
Delivered on: 25-11-2011

In the matter between:

LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA	**PLAINTIFF**

AND

JAN ANDRIES DU PREEZ	**FIRST DEFENDANT**
DANIËL CHRISTIAAN CRONJE	**SECOND DEFENDANT**
PETRUS JOHANNES JOUBERT	**THIRD DEFENDANT**
FREDERICK RADEMAN DE WET	**FOURTH DEFENDANT**

JUDGMENT

PHATSHOANE J:

PRELIMINARY ISSUES ON THE DELAY

1. This matter is characterized by a drawn out history and on occasion became stagnated. On 02 March 2009 the defendants sought leave to amend their plea which leave was granted by Lacock J on 03 March 2009 with costs. The trial took off before me on 02 August 2010. Pursuant to the hearing of the evidence the case was postponed to 09 September 2010 for argument. Following argument judgment was reserved. On 27 September 2010 the defendants again sought leave to amend their plea which the plaintiff opposed. This application was heard on 22 November 2010. Subsequent to hearing argument I granted the defendants leave to amend their plea. It follows from this amendment that the parties had to reconsider their respective positions and do what was necessary in terms of the Rules of Court. On 07 February 2011 I enquired from the parties why the matter had stagnated. As it turned out they were unaware of the order granting the defendants leave to amend their plea as my order was inadvertently not communicated to them.

2. Having been made aware of the order the defendants filed their amended plea on 17 February 2011 whereas the plaintiff filed its amended replication on 23 February 2011. The amended replication was only brought to my attention on 01 June 2011 upon my further enquiry to the parties on the progress of the matter. The parties further brought to my attention correspondence exchanged between them dated 29 March and 05 May 2011 evincing that they could not reach an agreement on whether the filing of further heads of argument following the amendments was necessary.

3. On 29 June 2011 having once more carefully considered the amended papers filed I issued a directive requesting the parties, in the light of amendments made to the pleadings to file supplementary heads as follows: 21 July 2011 (the plaintiff) and 01 August 2011 (the defendants) which they did. The defendants filed further supplementary heads on 30 September 2011. I had the benefit of hearing oral submissions following the trial and in respect of the

application for leave to amend.

4. It appears that Mr Wessels SC, for the plaintiff, was not keen to deliver his final heads of argument. Apparent from his heads of argument is his uninformed attack that the Court has "four months after the hopefully final amendments, called for heads of argument to be filed by the parties". His remarks are regrettable regard being had to the background sketched above.

<u>THE SHORT FACTUAL BACKGROUND</u>

5. On 02 December 2004 the plaintiff, the Land and Agricultural Development Bank of South Africa (Land Bank), instituted action against Jan Andries du Preez, Daniël Christiaan Cronje, Petrus Johannes Joubert, and Frederick Rademan de Wet, the first to the fourth defendants, respectively, in their capacities as sureties and co-principal debtors for the payment of arrears in the amounts of R948 558.89 and R2 569 083.51 together with interest thereon at the rate of 12.5% per annum computed monthly from 30 September 2004.

6. The aforesaid claims are in respect of the two loans Land Bank advanced to Grapex (Pty) Ltd in July 1999 in the amount of R500 000.00 (the first loan) and R1 300 000.00 (the second loan) for the establishment and cultivation of grapes on the Grapex vineyards in the area of Kakamas, South Settlement, Kenhardt Road, Northern Cape. On 13 July 1999 Land Bank agreed to lend and advance to Grapex the aforesaid sums. The terms and conditions of the loans are set out in annexures LB1 and LB2 to Land Bank's declaration. In respect of the first loan it is stipulated that the following documents were to be completed, signed and returned to the Bank: The acceptance of the loan, payment request, suretyship and the certificate of completion of the program for the establishment of the vineyards. In addition several conditions are set out. In clause 3(h) of LB1 the condition central to the issues in respect of the first loan is captured as follows:

"<u>U verstrek aan die Bank</u> 'n onherroeplike magtiging om die volle opbrengs van u sagtevrugte/druiwe en/of wyn en/of ander produkte van u druiwe/sagtevrugte van u

koöperasie of ander kopers te vorder, op sodanige basis as wat die bank van tyd tot tyd mag besluit."

7. At the end of the loan stipulation/offer there appears a nota bene with the following inscription:

"Die lening kan alleenlik uitbetaal word nadat aan al die voorwaardes (uitgesluit voorwaarde (k) en (p) hierbo) en vereistes daaraan verbonde, voldoen is."

8. In respect of the second loan the offer at LB2 likewise requires the completion, signing and returning to the Bank of the following documents: The acceptance of the loan, request for payment, suretyship and **the cession**. Similarly several conditions for the loan are also set out. One of these conditions also pertinent to issues appearing at clause 3(i) of the offer reads:

"<u>U verstrek aan die Bank</u> onherroeplike magtiging om die volle opbrengs van u sagtevrugte/druiwe en/of wyn en/of ander produkte van u druiwe/sagtevrugte van u koöperasie of van u koöperatiewe wynkelder of van die KWV of van ander kopers te vorder, op sodanige basis as wat die bank van tyd tot tyd mag besluit."

9. It is also stipulated in the above offer that the loan can only be paid out once all the conditions and requirements (save condition (o)) are fulfilled or met. These two clauses are very contentious.

10. The quantum of the plaintiff's claim was settled on the basis that as at 18 February 2009 the outstanding amount on the loans was R3 147 009.51.

11. Grapex initially purchased the farms in issue with a loan obtained from Standard Bank, in whose favour the first mortgage bond was registered over the properties. When Land Bank advanced the two loans to Grapex the defendants, shareholders in Grapex, bound themselves jointly and severally as sureties and co-principal debtors in favour of Land Bank for the repayment of the loans on 27 July 1999 and waived the exception *beneficia ordinis seu excussionis et divisionis*.

12. Grapex was provisionally liquidated in August 2003 and finally in September 2003. Land Bank did not prove any claim against the insolvent estate. There appeared to have been a danger of contribution by the creditors. On 29 August 2003 the liquidators of Grapex (in liquidation) forwarded a circular to all Grapex's creditors. Amongst others the following appears therein:

"Die totale eis van Landbank in die boedel beloop die som van R2 700 000.00. Die Landbank beskik egter oor hoegenaamd geen sekuriteit van watter aard nie. Indien daar 'n oes op die land was, kon daar moontlik sprake gewees het van 'n statutêre pand ten gunste van Landbank wat betref die opbrengs van die oes onder artikel 30 van die Landbankwet 15 van 2002. Aangesien daar geen oes op die land is nie is daar geen sprake van enige voordeel vir die Landbank nie....

Die likwidateurs sal dus op hierdie stadium konkurrente skuldeisers aanraai om nie hul eise te bewys nie. Sou die likwidateurs egter in die toekoms vir welke rede ookal van siening verander dat daar wel 'n moontlike oorskot mag ontstaan, sal krediteure dienooreenkomstig in kennis gestel word.

Die likwidateurs is dus van voorneme om alle bates so spoedig moontlik te gelde te maak en wel op een van die ondergenoemde wyses, naamlik:

(a) die verkoping van alle bates per publieke veiling of privaat tender;

(b) die verkoping van bates uit die hand in welke geval geen verkoping sal plaasvind teen 'n bedrag van minder as geswore waardasie nie tensy die betrokke versekerde skuldeiser daartoe toestem.

Indien u enige beswaar het teen die tegeldemaking van bates op enige van bogemelde voorgestelde wyses, wens ons u te versoek om sodanige beswaar binne tien(10) dae vanaf datum van hierdie skrywe skriftelik by ons kantore in te dien by gebreke waarvan aanvaar sal word dat u goedkeuring verleen tot die voorgestelde wyse van verkoping......

Dit mag onder bepaalde omstandighede vir die likwidateurs nodig wees om die boederybedrywighede voort te sit tot en met sodanige datum as wat die oes afgehaal kan word en produkte daarvan van die hand gesit en/of uitgevoer kan word. Die geskatte koste om laasgenoemde tot stand te bring sal ongeveer R1 miljoen - R 1 200 000.00

beloop. 'n Geskatte suksesvolle oes opbrengs behoort R2,5 miljoen – R3 miljoen te beloop."

13. In the aforesaid circular creditors were also invited to lodge objections if so advised, against the cultivation of the crop. In the event they did not object the cultivation would be proceeded with. The liquidators contracted Du Preez, the first defendant, to cultivate the crop with a view to selling the produce. Following the auction arranged at the behest of the liquidators the Grapex vineyards and the movable assets on them were sold to a certain Mr Van Rensburg on 28 October 2003 for R3 700 000.00.

14. On 29 October 2003 Land Bank forwarded to the liquidators a document headed "authorization to sell in terms of s 30(1)(b) of the Land and Agricultural Development Bank Act, 15 of 2002". Therein Land Bank authorized the liquidators to sell the assets in accordance with the conditions of sale on an auction. Further, the Bank relinquished any rights whatsoever to the proceeds in respect of the grape harvest. The purchaser would have unqualified ownership in the event of the successful sale on the said auction. This authorization, according to the defendants, amounted to a waiver by the Land Bank which they strongly took issue with as will become apparent.

15. The defendants bore the onus and the duty to begin. They called no less than six witnesses in support of their case. The plaintiff did not lead any evidence in rebuttal. Issues flowing from the pleading and evidence are by and large questions of law and most facts are common course.

16. Mr Jacobus Andries van Lill, a commercial manager in fresh produce since 1995, visited the Grapex farms twice before the auction to assess the harvest. He testified that the net value of the crop was R2 952 433.33 for the 2003/2004 season. His evidence was supported by Mr Barend Johannes Hendrick Jacobs, a farmer in grapes for the past 10 years. Mr Johannes Gerhard Terblanche, a candidate valuator, determined the value of the farms as at 28 October 2003 to be R3 800.000.00 excluding the value of the crop thereon. His valuation report was co-signed by Mr George JD Du plessis, a

professional valuator since 1985.

THE APPLICATION FOR FURTHER LEAVE TO AMEND AND REASONS FOR THE ORDER GRANTING THE DEFENDANTS FURTHER LEAVE TO AMEND THEIR PLEA ON 22 NOVEMBER 2010

17. At the commencement of the trial on 02 August 2010 the defendants abandoned paragraphs 7.4 - 7.6 of their plea. As already alluded to, following argument on the merits and before judgment could be delivered the defendants brought an application in terms of Rule 28(10) seeking further leave to amend the plea by introducing a further defence (the second alternative defence) couched as follows:

"8.In die alternatief tot paragraaf 7 hierbo, pleit verweerders soos volg:

8.1 Verweerders het die borgaktes, synde bylae A en B tot die davaarding op 27 Julie 1999 onderteken:

8.1.1Terwyl eiser se vorderingsreg teen die maatskappy vir terugbetaling van die lenings vermeld in paragrawe 5 en 16 van die deklarasie, versekureer was ingevolge Artikels 34(3)(b) tot (7), (9) en (10), sowel as 55(2)(b) tot (d) van die Landbank Wet, 13 van 1944; en

8.1.2Terwyl eiser verplig was of sou wees om sy vorderings (of aksies) sowel as sekuriteite aan verweerders (as borge vir die maatskappy se verskuldigdheid), te sedeer teen betaling deur verweerders aan eiser van die maatskappy se verskuldigheid voortspruitend uit die leningsooreenkomste;

8.2 Artikels 34(3)(b) tot (7), (9) en (10), sowel as 55 (2)(b) tot (d) van die Landbank Wet, 13 van 1944 is op of ongeveer 16 Mei 2000, alternatiewelik 30 Junie 2000 deur die Konstitusionele Hof nietig verklaar, welke nietigverklaring opgeskort is vir 2 jaar tot 16 Mei 2002, alternatiewelik 30 Junie 2002, toe eiser se versekureerde vorderingsreg, alternatiewelik sekuriteit, teen die maatskappy, verval het;

8.3 Die maatskappy is gelikwideer op 21 Augustus 2003;

8.4 Eiser was, as gevolg van die nietigverklaring van Artikels 34(3)(b) tot (7), (9) en (10), *sowel as 55(2)(b) tot (d), slegs 'n konkurrente skuldeiser van die maatskappy (in likwidasie) en het , weens die feit dat daar 'n tekort in die insovente boedel was nadat voorsiening gemaak is vir betaling van versekerde skuldeisers, geen eis teen die insolvente boedel bewys nie;*

8.5 Eiser was gevolglik nie in staat om sy vorderings (of aksies) sowel as sekuriteit teen die maatskappy (in likwidasie) teen betaling daarvan aan eiser, aan verweerders te sedeer nie, alternatiewelik sou so 'n sessie vrugteloos wees;

8.6 Gevolglik het prestasie deur eiser, synde sessie aan verweerders van eiser se vorderings (of aksies) en sekuriteit teen die maatskappy (in likwidasie), teen betaling deur die borge, onmoontlik geword en was verweerders nie geregtig om deel te neem of ingereken te word as skuldeisers ten opsigte van die likwidasie en distribusierekening van die maatskappy (in likwidasie) nie;

8.7 In die vooropstelling is verweerders se nie-betaling van eiser se vorderings teen hulle geregverdig, en is die borgaktes as kontrakte ontbind, alternatiewelik is die verweerders bevry van aanspreeklikheid ingevolge die borgaktes."

18. The plaintiff, the respondent in the interlocutory application, opposed the application. Fourteen days after the filing of the answering affidavit the defendants (applicants) filed their replying affidavit. Mr Wessels contended that the defendants ought to have filed their replying affidavit within ten Court days and had failed to bring an application for condonation of the late filing of the replying affidavit. The following passage appears in Erasmus *et al* **Superior Court Practice** at B1-55:

"The provisions of the Rules relating to time for filing answering and replying affidavits do not apply to interlocutory applications. Further affidavits in interlocutory applications must be filed within a reasonable time; prima facie in the absence of special circumstances, this would not be longer than the times prescribed in terms of Rule 6(5)."

19. I am of the view that the filing of the replying affidavit was made within a reasonable time. The four days beyond the prescribed ten days is quite negligible and condonable. This is a case of the Rules for the Court and not the Court for the Rules.

20. Mr Arnoldi SC, for the defendants, argued that the nub of the amendment is

that at the time the defendants signed the suretyships Land Bank was a preferent creditor of the principal debtor, Grapex, in terms of Land Bank Act, 13 of 1944, and was entitled to attach the debtor's assets and sell them in reduction of the principal debt. He contended that it was an implied term of the suretyship agreements that the defendants as sureties would have enjoyed the benefit of cession of actions had they effected payment of the principal debt. This is so, the argument went, because they would have been entitled to obtain cession of Land Bank's claim against Grapex (in liquidation) together with the Banks' security in terms of s 34 of Act 13 of 1944. In his view the fact that the Land Bank's rights in terms of s 34 and 55 were declared invalid prior to the liquidation of Grapex following the decision of the Constitutional Court in ***First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and Others; Sheard v Land and Agricultural Bank of South Africa and Another*** **2000 (3) SA 626 (CC) (2000 (8) BCLR 876)**, meant that the Bank's contractual obligation to effect the cession to the sureties became impossible. The corollary of this, counsel argued, makes the suretyship agreements unenforceable and the sureties should naturally be discharged.

21. Mr Wessels argued that the defence which the defendants are seeking belatedly to introduce should have been raised as a special plea. Had such a defence been sustainable, little or no evidence would have been required and it would have stopped the plaintiff's claim in its tracks and avoided concomitant costs. He contended further that the plaintiff would have been able to place evidence before Court to the effect that the defendants had not been prejudiced because no securities existed or same were worthless. In any event, he went on, the proposed amendments do not constitute a triable issue in that only Land Bank and no one else could exercise the rights conferred on it in terms of s 34 and 55 of Act 13 of 1944.

22. In ***Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another 1990 (3) SA 547 (A)*** at 565G-J Corbett CJ, for the Court, made the following pronouncement:

"Although the decision whether to grant or refuse an application to amend a pleading rests in the discretion of the Court, this discretion must be exercised with due regard to certain basic principles. These principles are well summed up in the judgment of Caney J in Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another 1967 (3) SA 632 (D) at 640H - 641C. In the portion of the passage referred to, Caney J states (at 641A):

'Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable.'

With this should be read the remarks of De Villiers JP in Krogman v Van Reenen 1926 OPD 191 at 195:

'... (H)e must show, for instance, that the matter involved in the amendment is of sufficient importance to justify him in putting the Court and the other party to the manifold inconveniences of a postponement....'

It should further be noted that in the Trans-Drakensberg Bank case supra it was held that mere delay in bringing forward an amendment is no ground for refusing it (see at 642H)."

23. In ***Moolman v Estate Moolman 1927 CPD 27*** at 29, Watermeyer J held:

". . . The practical rule adopted seems to be that the amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by cost. In other words, unless the parties cannot be put back for the purpose of justice in the same position as they were when the pleadings which it is sought to amend were filed.'

24. The proposed amendment to the plea is a purely legal issue. By the plaintiff's own admission the facts and circumstances upon which the defendants seek to rely on in its belatedly introduced defence have since the inception of the action been present.

25. The consequential defence introduced by this amendment, in my view, raised a serious issue to be tried. I was of a view that any likely prejudice to be caused to the plaintiff could be mitigated with an appropriate costs order.

Consequently I granted an order affording the defendants leave to amend their plea.

<u>THE DEFENDANTS' SECOND ALTERNATIVE DEFENCE</u>

26. The substance of this defence is captured in the preceding paragraphs. To recapitulate, Mr Arnoldi contended that the suretyship agreements are void and therefore the sureties should be released from their obligations. In amplifying his argument he contended that it is an implied term of the suretyship agreement that if the sureties effected payment of the principal debt the Bank would cede its rights and security which it held against Grapex to them. In ***First National Bank v Lynn No 1996 (2) SA 339 (SCA)*** at 350 Van Heerden JA states:

"The subject-matter of cession is a right, often referred to as a claim and less felicitously as the cession of a debt. The expression "cession of a right of action" is also used but there is little advantage in doing so since the right of action (to enforce performance) is a power which is inherent in the right (to performance) and cannot be detached from it as a separate cedable entity.

(Per P M Nienaber, dealing with 'Cession' in Joubert (ed) The Law of South Africa (First Re-issue) vol 2 para 241.) See, too, the discussion of the judgment in Trust Bank of Africa Ltd v Muller NO and Another 1979 (2) SA 368 (D) by Scott in 1982 De Jure 183 at 186.)"

27. When Land Bank advanced the two loans to Grapex in 1999, it had remedies set out in s 34 and 55 of the Land Bank Act 13 of 1944 against its defaulting debtors. The Bank could attach and sell movable and immovable property in execution on its own, without judicial recourse. It could in cases of winding up of a debtor require the sheriff to attach and sell by public auction so much of the movable property to liquidate the amount owing to it (s34(3)(b)). If the amount was still owing it could

attached the immovable property and cause it to be sold by public action(s 34(3)(c). The proceeds of the sale would after the payment of the amount owing in terms of any bond or other real right over the property be utilized towards reduction of the debt. Section 34 applied in this case as the loan to Grapex was in respect of the cultivation of the vine crop. Section 34(5) grants the Land Bank a preferent claim to the proceeds drawn out of the attachments and sales executed in terms of s 34(3)(b).

28. The Constitutional Court held that the provisions of ss 34(3)(b) - (7), (9) and (10), together with s 55(2)(b) - (d) of the Land Bank Act 13 of 1944 were unconstitutional and ordered that their invalidity be suspended for a period of two years, provided that, as on the date of the order (09 June 2000), no attachment and sale in execution in terms of s 34(3)(b) of the Land Bank Act 13 of 1944, not yet completed, was to take place without recourse to a Court of law. Se***e First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and Others; Sheard v Land and Agricultural Bank of South Africa and Another*** supra at 633D-634B paras 17 – 18.

29. It is common cause that Land Bank waived its rights to the proceeds of the sale of the grapes in terms of s 30(1)(b) of The Land and Agricultural Development Bank Act, 15 of 2002, which provides:

"Statutory pledges

1) While any person owes the Bank any money by virtue of an advance in terms of this Act-

(a) ....

(b) any agricultural produce purchased by that person with money so advanced to him or her,

which is in the possession of or in transit to that person or an agent of that person, is deemed to have been pledged to the Bank as effectually as if it had been expressly pledged and delivered to the Bank, and any disposal thereof by or on behalf of that person, without the consent in writing of the Bank, is void."

30. In my view Land Bank could not have held the statutory rights it purportedly

waived because Grapex's indebtedness arose in terms of an advance made prior to the commencement of The Land and Agricultural Development Bank Act, 15 of 2002. In the unreported decision of the SCA ***Land & Agricultural Development Bank of SA t/a LANDBANK v The Master and others Case No: 352/05 delivered on 30 May 2006*** at para 67 the Court held:

"The thrust of s 30 is, as it states unequivocally, directed to protecting debts arising from advances made 'in terms of the Act' not to advances made under any repealed legislation. In addition, of course, the pledge provided a new form of security for the Bank. The effect of applying it to advances made prior to the Act would be to impose ex post facto a burden on the recipient of the advance after the contractual terms have been negotiated. I find no indication in the Act to suggest that the legislature intended such a consequence."

31. It is also axiomatic that Land Bank did not prove its claim against Grapex (in liquidation). Mr Arnoldi argued that this meant that it had lost its claim against Grapex. Therefore its inability to cede its lost claim against Grapex rendered performance in terms of the suretyship agreement impossible. Likewise the declaration of invalidity of s 34 of the Land Bank Act 13 of 1944 rendered Land Bank, through no fault on its part, unable to cede its claim and security to the sureties. Therefore Land Bank's contractual obligation towards the sureties became impossible thus the suretyship agreements became void and this released them from their suretyship obligations.

32. Mr Wessels contended that the rights which the defendants suggest should have been ceded are statutory rights, personal to or vested in the Bank and could not have been ceded to the defendants. However, Mr Arnoldi submits that the rights provided for in s 34 and 55 are not so personal as to render them incapable of cession. In any event he submitted that it is not necessary to decide the issue. What should be decided is whether a claim which Land Bank may have proved against Grapex could have been ceded, he argued. The question whether the rights conferred on the Bank in terms of s 34 and 55 are capable of being ceded is important to the determination of the sureties' liability and cannot be left open. The dictum set out in ***Unicorn Lines (Pty) Ltd v Commissioner of Customs and Excise And Another*** **1997 (1) SA**

369 (D) at 374D-H is apposite:

"The general rule in regard to the transmission of rights by way of cession is stated in Joubert (ed) The Law of South Africa vol 2 (1st re-issue) para 253 as follows:
'As a general rule rights which are capable of transmission by mere agreement may be disposed of freely and without restraint. . . . It is incumbent on the party who challenges the cedent's autonomy to cede, to show that an exception applies and not the rule.'
(See cases quoted in support of the aforesaid passage and Scott Law of Cession 2nd ed at 167 et seq.)
One of the exceptions to this rule is where a cession of rights is prohibited by statute. Certain statutes expressly prohibit cession*. See s 2(1) and (2) of the Statutory Pensions Protection Act 21 of 1962; s 3(2) of the Matrimonial Properties Act 88 of 1984 and s 27 of the Public Service Act 111 of 1984.* ***In others the wording indicates that the Legislature intended that there be no transmission of rights by way of cession or otherwise. In the case*** *of South African Board of Executors and Trust Co Ltd (In Liquidation) v Gluckman 1967 (1) SA 534 (A)* ***it was held that the rights afforded a trustee or a creditor suing qua creditor in the name of the trustee to set aside a disposition of property not for value in terms of the*** *Companies Act 46 of 1926* ***read with*** *s 32 of the Insolvency Act 24 of 1936* ***could not be ceded. In*** *Clifford Harris (Pty) Ltd v SGB Building Equipment (Pty) Ltd 1980 (2) SA 141 (T)* ***at 150 and 151 it was held that the right to bring an infringement action in terms of ss 53 and 54 of the Patents Act 37 of 1952 were not capable of being ceded.***
To determine whether a right is capable of cession the Court must look at the provisions of the statute and in particular the section conferring the right and determine whether on a proper interpretation it was the intention of the Legislature to prohibit transmissibility.
(*See Clifford Harris (supra at 150A and 151H****)."***

33. The sureties did not renounce the benefit in respect of cession of actions. Even if they did this would not disqualify them from having a cession of actions on or after payment of the debt as renunciation operates only to prevent the surety from delaying payment to the creditor. See CF Forsyth & JT Pretorius, **Caney's The Law of Suretyship**, fifth edition, at 156. As cessionary the surety may acquire rights and benefits (which it does not possess by being a surety) such as securities held by the creditor, claims against third parties who are liable to the creditor for payment of the principal debt, or the preference which the creditor's claim may enjoy in the case of the principal debtor's insolvency. This accord with the dictum in ***African Guarantee & Indemnity Co Ltd v Thorpe 1933 AD 330*** at 338:

"(I)t seems difficult to see why a surety should not be in a better position and be entitled, when paying the full amount to the creditor, to get from him a cession of all the rights which flowed to the creditor from the transaction in respect of which the surety became obliged.

The only obstacle in the way is the principle that when a debt has once been paid the creditor has no longer any rights to cede. This obstacle, however, does not exist in the case of suretyship, as has been pointed out above, for if it did exist the surety could have no recourse against co-sureties and third parties."

See also **Law of South Africa (First reissue) 26** at 213 para 210) and **Caney's The Law of Suretyship**, supra at 150.

34. In ***Gerber v Wolson*** **1955 (1) SA 158 (A)** at 167 Van Den Heever JA, dissenting made the following valid remarks:

"If a surety pays in order to discharge the principal debtor's debt, the debt is extinguished; if however he pays in order to discharge his own accessory debt, he may demand cession of action from the creditor even if he does so after payment."

See also the article by EM Burchell: **South African Law Journal 1957, Vol 74** at 17'; **The Law of South Africa(first reissue) 26** at 209 para 205.

35. When suspending the order of invalidity in ***First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and Others; Sheard v Land and Agricultural Bank of South Africa and Another*** supra at 631-2 the Constitutional Court notes that s 34(3)(b) and (5) of Act 13 of 1944, comprise an important form of security in the absence of contractual security between the Land Bank and its debtor clients and that the instant removal of such security would prejudice the Bank. It is reasonable to believe that, if the statutory security were removed without any interim remedial measures, the Land Bank would incur monetary loss. The Bank may then be forced either to raise interest rates or decline future s 34 advances. Even if it is only a perceived risk the Land Bank may be compelled to protect itself from

projected losses and transfer the burden onto its clients. This would undermine the intended role of the Land Bank to provide commercially viable financial services. Because there exists the potential to impede the work of the Land Bank and the advantages it provides to struggling farmers and the national agricultural sector, it is not unreasonable in the interests of sound public policy to preserve its current form of security under s 34 by suspending the order of invalidity, the CC held.

36. There is no express provision in the Land Bank Act, 13 of 1944 prohibiting cession of rights or security held by the Bank in terms of s 34 and 55 of the said Act. Nevertheless regard being had to the language in the sections conferring the right and the structure of the relevant sections I am not swayed that the legislature intended the rights and security held by the Land Bank in terms of these sections to be transmissible. In my view the reference to the "Bank" in the section was designed to exclude any other person or entity from exercising the rights.

The effect of placing a construction to the contrary would be untenable. This finding, however, cannot put this matter to rest.

37. **Caney's The Law of Suretyship** supra at 154-5 states that the situation in relation to the creditor's inability to give fully effective cession of action because of the release or abandonment of securities for the payment of the debt, or their loss by reason of his acts or another person is by no means clearly defined. The learned authors proceeds at 155:

"If the security is lost by operation of the law, for example, if it is set aside under the provisions of the insolvency law, the surety has no relief."

38. Mr Arnoldi contended that if it was impossible to cede the claim from the inception, the contract of suretyship would be a nullity as a result of impossibility of performance. Solomon ACJ enunciated the following principle in ***Peters, Flamman and Co v Kokstad Municipality 1919 AD 427*** at 434 –

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"By the Civil Law a contract is void if at the time of its inception its performance is impossible: impossibilium nulla obligatio (D. 50.17.185). So also where a contract has become impossible of performance after it had been entered into the general rule was that the position is then the same as if it had been impossible from the beginning.....

For the authorities are clear that if a person is prevented from performing his contract by vis major or casus fortuitus, under which would be included such an Act of State as we are concerned with in this appeal, he is discharged from liability."

39. It should be implied or folded in the suretyship agreement as a *naturalia* thereof that Land Bank would be able to cede its rights or security or claim upon payment of the debt. If cession of action cannot follow as a matter of course it stand to reason that the performance in terms of the suretyship agreement would be impossible thus rendering the agreement void *ab origine* and thereby releasing the sureties.

The second alternative defence by the defendants is accordingly upheld.

40. In view of the conclusion reached it is unnecessary to deal with further issues raised in the pleadings.

41. What therefore remains is the question of costs. Insofar as the amendment to the plea is concerned, Mr Arnoldi argued that in the event that the Court grants the defendant leave to amend, they would tender the costs incurred up to the filing of the replying affidavit. I am of the view that the defendants brought the application for the amendment late and they should bear the costs consequent upon the amendment. In relation to other costs, needless to say, they should follow the result.

42. In the premises I make the following order.

Order:

The plaintiff's claim is dismissed with costs save the costs in respect of the application for the amendment which the defendants should bear jointly and severally.

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MV PHATSHOANE

JUDGE

NORTHERN CAPE HIGH COURT

On behalf of the plaintiff	Adv MH Wessels SC
Instructed by	Duncan & Rothman
On behalf of the Defendants	Adv AF Arnoldi SC
Instructed by	Engelsman Magabane Inc