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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 11674/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 27/11/25

SIGNATURE: G.C MULLER

POLOKWANE HIGH COURT

In the matter between:

THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA	**APPLICANT**
And	
PAUL JOHANNES ROOS (Identity No: 6[...])	**FIRST RESPONDENT**
PATRICIA LOUISE ROOS (Identity No: 7[...])	**SECOND RESPONDENT**
FIRST NATIONAL BANK OF SOUTH AFRICA LTD	**THIRD RESPONDENT**

(Registration No:1929/001225/06)

STANDARD BANK OF SOUTH AFRICA LTD (Registration No: 1962/000738/06)	**FOURTH RESPONDENT**
REGISTRAR OF DEEDS, CAPE TOWN	**FIFTH RESPONDENT**
REGISTRAR OF DEEDS, LIMPOPO	**SIXTH RESPONDENT**
REGISTRAR OF DEEDS, GAUTENG	**SEVENTH RESPONDENT**

Delivered :

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be **27 November 2025.**

Date heard : **20 July 2025**

Coram : **Muller J**

JUDGMENT

MULLER J:

[1] The Land and Agricultural Bank[1] obtained an interim interdict against the first and second respondent[2] in an *ex parte* application in terms whereof the respondents are prohibited from alienating or encumbering three immovable properties of which they are

[1] Hereinafter called "the bank".
[2] Hereinafter called "the respondents".

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the owners.[3] The order was granted pending the finalization of an application for a monetary judgment in the amount of R106 880 521.87 plus interest and ancillary relief against the respondents and, in addition, an order to dispose of the properties in terms section 33 of the Land and Agricultural Development Bank Act.[4]

[2] The respondents anticipated the return date in terms of rule 6(8) in the urgent court and filed answering affidavits.[5] The "notice of anticipation" was struck from the urgent court roll.[6] The application now serves before this court on the return date in the opposed motion court for the procurement of the monetary judgment against the respondents, as outlined above.

[3] The parties were requested to file supplementary heads of argument in respect of the following issue:

> "Should Obaro Finansiële Dienste and Obaro Handel (Edms) Bpk not be joined as applicants to the proceedings if reliance is placed on the acknowledgment of debt."

I am grateful to counsel of both parties for their assistance in this regard.

BACKGROUND FACTS

[4] Pro Plum Orchards (Pty) Ltd[7], is a company who conducted fruit farming. On 25 March 2021 Pro Plum acknowledged its indebtedness to the bank by making a written offer to settle its indebtedness.[8] It also admitted in a business rescue application that it is

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[3] The first and second respondents are married to each other in community of property.
[4] Act 15 of 2002. Hereinafter called "the Land Bank Act".
[5] The rule allows a person against whom an order was granted in his absence in an urgent application to have the order reconsidered.
[6] Per Tshidada J on 2 May 2024. The return date was extended to the opposed motion court.
[7] Hereinafter called "Pro Plum".
[8] Annexure "FA 3".

indebted to the bank in the amount of R96 862 322.00. Pro Plum was placed under final winding up by order of this court on 10 February 2022 at the instance of the bank.[9]

[5] The indebtedness of Pro-Plum originated from a variety of loans in terms whereof various amounts were lent and advanced to the company by Obaro Financial Services (Pty) Ltd.[10]

Obaro[11] in terms a written sale agreement concluded with the bank on 11 April 2014 sold its rights in and to its existing and future book debts which included the debts owed to Obaro by Pro Plum arising from the loan agreements to the bank. Obaro was appointed in terms of a service level agreement to manage the debts on behalf of the bank.[12]

[6] The respondents executed a deed of suretyship on 31 August 2018 in terms whereof they bound themselves jointly and severally *in solidum* as sureties and co-principal debtors to Obaro, its successors or assigns for the proper and punctual payment of present or future indebtedness of Pro Plum, whether alone or jointly with others.[13]

[7] On 2 September 2020, Pro Plum, Henque 3198 CC and Zelphy 2604 (Pty) Ltd (jointly called "die skuldenaar")[14] executed a written instrument in terms of which they acknowledged their indebtedness to Obaro and Obaro Handel (Pty) Ltd as well as the bank (jointly called "die agent")[15] This instrument embodies an unequivocal

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[9] Case no 1335/2022.
[10] Hereinafter called "Obaro".
[11] Obaro Financial Services (Pty) Ltd was previously known as Statusfin Financial Services (Pty) Ltd. It changed its name on 2 November 2015.
[12] The bank as well as Obaro are registered credit providers.
[13] A copy of the deed of suretyship is attached to the papers as annexure "F5". The document filed is incomplete. The original document was called to be produced. The original consists of a page not included in annexure filed which reflects both the names of the creditor and the principal debtor.
[14] Hereinafter called "the debtor".
[15] Hereinafter called "the agent".

acknowledgment of indebtedness by “the debtor” with an express undertaking to pay “the agent.” [16]

[8] The applicant in the replying affidavit placed reliance upon the acknowledgment of debt. The purpose of the acknowledgment of debt was to create a new obligation in terms whereof “the debtor” is indebted to “the agent” in an aggregate amount coupled with the express undertaking to pay the amount, plus interest. Such an undertaking was held to be enforceable in *Adams v SA Motor Industry Employers Association*:[17]

> “There is ample authority to the effect that an acknowledgement of debt, provided it is coupled with an express or implied undertaking to pay that debt, gives rise to an obligation in terms of that undertaking when it is accepted by the creditor; and it does not matter whether the acknowledgment is by way of an admission of the correctness of an account or otherwise.”[18]

[9] The entitlement of the “agent,” to institute proceedings for the recovery of the debt is contained in the following clause in the preamble and clause 12:

> “**EN AANGESIEN** die agent geregtig is om regsaksie in te stel teen die skuldenaar ter verhaling van die bedrae wat aan die agent verskuldig is tesame met ‘n uitwinbaarheidsverklaring van die eiendomme, maar bereid is om regsaksies oor te hou onderhewig aan die terme en voorwaardes hiervan, saamgelees met die termes en voorwaardes van die uitstel aansoek en onderhewig daaraan dat hierdie ooreenkoms onderteken word en geldig tussen alle partye tot stand kom.”[19]

Clause 12 of the document is linked to the statement above states:

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[16] On16 August 2022 under case No 2538/2022 judgment was granted in favour of the bank against Henque 3198 (Pty) Ltd and Zelphy 2604 Pty) Ltd. for the amount of R106 880 521.87, together with further compound interest at the various rates as provided for in terms of the various agreements such interest to be calculated daily and capitalised monthly from 31 January 2022 to date of payment.
[17] 1981 (3) A 1189 (A).
[18] At 1198B-C.
[19] Annexure FA 2 to the founding affidavit.

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> "Hierdie volmag en ooreenkoms sal geen novasie skep ten opsigte van die skuldoorsake uit hoofde waarvan die skuldenaar gelde aan die agent verskuldig is nie en sal die agent in sy uitsluitlike diskresie geregtig wees om te enige tyd stappe te neem om einge verskuldige bedrae te verhaal."

[10] It is contended that the acknowledgment of debt constitutes a novation of the underlying indebtedness. This proposition cannot be accepted. Novation is not presumed.[20] The proposition also flies directly in the face of clause 12 of the acknowledgement of debt.

[11] It was also held in *Adams supra* that the original obligation is reinforced by a new obligation arising from the acknowledgment of debt. When the creditor elected to enforce the right arising from the acknowledgment of debt, the original obligation is suspended as a result of their inter-dependency for when a creditor claims payment of the original obligation it must account for the acknowledgement of debt.[21]

[12] It is necessary to refer to the nature of the legal relationship between "the agent" and the sureties. The "agent" as the creditor entered into a written acknowledgement of debt with "the debtor" They were the parties to the principal contract which gave rise to the principal obligation to pay the debt acknowledged to be due and payable in terms of the acknowledgement of debt.

[13] Only Obaro (who is one of the creditors that constitutes "the agent") had concluded the unlimited suretyship agreement on 31 August 2018 with the sureties in terms whereof they bound themselves jointly and severally *in solidum* and as co-principal debtors to Obaro for the proper and punctual payment by Pro Plum (who is, one of the debtors

[20] *Smit v Rondalia Versekeringskorporasie van Suid-Arika Bpk* 1964 (3) SA 338 (A) 346H.
[21] 1199G-1200D.

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constituting the "the debtor" of each and every amount owed or may in future owed to Obaro by Pro Plum, whether alone or jointly with others.

[14] The surety contract that has arisen between the sureties and Obaro is accessory to the acknowledgment of debt (principal contract). The sureties did not become parties to the acknowledgement of debt (principal contract) concluded between the "the agent" and the "the debtor."[22] These contracts are different, separate and distinct contracts, existing side by side in respect of the same debt arising from the acknowledgement of debt. The only parties common to both contracts are Obaro and Pro Plum.

[15] The existence of a plurality of creditors ("the agent") in terms of the acknowledgement of debt has no influence the obligations of the respondents in terms of the deed of suretyship towards Obaro in respect of the debts of Pro Plum. The sureties, being co-principal debtors, were not transformed into "the debtor" in terms of the acknowledgement of debt.

[16] It was held in Tucker and Another v Carruthers [23] that:

> "…in Roman-Dutch law co-obligators are liable only jointly unless an intention to impose a joint and several liability is plainly expressed or can be clearly inferred. This contention may be accepted as correct."

In terms of the common law the creditors, constituting "the agent," are, obliged to acted jointly, as joint creditors, to enforce the acknowledgement of debt, unless the instrument expressly or by necessary implication indicated the intention that "the debtor" are jointly

[22] *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) 471C-472E.
[23] 1941 AD 251, 254.

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and severally liable.[24] It was explained in *Henri Viljoen (Pty) Ltd v Awerbach Brothers*[25]that:

> "For, where there is a joint obligation, an individual promise is entitled only to a rateable or aliquot share of the performance of the single obligation. Again, where the obligation is joint and several, a promisee is entitled to a single performance and a promisor who performs the act promised, absolves the other co-promisors from the whole obligation. In other words, an obligee can claim the entire performance of the solitary obligation from any of the obligators, but performance by any one of the obligators of the act promised *ipso facto* discharges the whole obligation and, therefore, also the other joint and several obligators."[26]

[17] Where a debt is owned to a number of creditors jointly and severally, or *in solidum,* it is regarded as a single obligation owed to a multiplicity of obligees. Any one of the co-creditors may demand and receive payment of the whole of the debt as much as a debtor to may choose to pay one of the creditors and thereby extinguish the obligation.[27]

[18] In *Moon & Co Ltd v Eureka Stores (Pty) Ltd* it was held that:[28]

> "Ordinarily contractual liability undertaken by two or more persons is joint and not several, unless the contrary appears from the contract; but it was laid down as long ago as 1840 that in Roman-Dutch law joint acceptors, drawers and endorsers of bills of exchange are liable *singuli et in solidum* unless the contrary is expressed in the bill (Kidson v Cambell and Jooste (2 M 279)). The Cape Supreme Court was asked in 1890 to overrule this decision, but declined to do so (Jacobson v Nitch (7 SC 174). It has been followed ever since."

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[24] *Roelou Barry (Edms) Bpk v Bosch en 'n Ander* 1967 (1) SA 54 (C).
[25] 1953 (2) SA 151 (O).
[26] 158G-H.
[27] *Kotsopoulos v Bilardi* 1970 (2) SA 391 (C) 397C-F.
[28] 1949 (4) SA 40 (T); *Kidson v Cambell and Jooste* (1840) 2 Menzies 293, 294; *Jacobson v Nitch* (1890) 7 SC 174.

[19] On acceptance that the debt in terms of the acknowledgement of debt is owned to "the agent" jointly and severally, in solidum, the question arises whether the bank may, as a co-creditor in terms of the principal contract, who is not a party to the surety contract, enforce the claim arising from the principal contract against the surety, based on the surety contract. Put differently; may any one of the co-creditors in terms of the principal contract, who is not a party to the surety contract, demand and receive payment of the whole of the debt arising from the surety contract and thereby extinguish the obligation where the principal debt is owned to a number of creditors jointly and severally, or *in solidum.*

[20] The answer must, in my view, be in the negative. The right enforceable against the respondents that arises exclusively from the contract of suretyship is confined to Obaro only. Each one of the joint sureties is jointly and severally liable with Pro Plum for the whole of the debt owed to Obaro.

[21] The respondents are not co-principal debtors in terms of the acknowledgement of debt but, as sureties, have tacitly renounced the ordinary benefits available to a surety such as those of excussion and division, *vis a vis* the Obaro (the creditor in terms of the surety contract.[29] It follows from the aforesaid that the obligation will be extinguished if one of the sureties performed in full.[30] Similarly, if one of the creditors constituting "the agent," in terms of the acknowledgment of debt receives full performance from the respondents, the obligation will be extinguished. A creditor, who is not party to the surety contract cannot enforce an obligation in terms of an agreement of which the creditor is not a party. It is not

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[29] *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) 472B-D; *Liberty Group Ltd v Illman* 2020 (5) SA 397 (SCA) par 20; *Wolmarans NO and Others v Standard Bank of South Africa* [2025] ZASCA 150 (14 October 2025) par 35.
[30] *Shillings v Cronje en Andere* 1986 (3) SA 423 (T) 428B.

similar to the situation where a co-creditor enforces payment of a debt owed to several creditors against a debtor on the basis that the debtors are jointly and severally liable.

[22] Obaro should, as co-creditor in terms of the acknowledgement of debt, have enforced the obligation created by the principal contract against the respondents, as sureties, on the basis of them being parties to the surety contract, which is an accessory obligation. In *Morgan and Another v Salisbury Municipality,*[31] it has been held that:

> "Now the feature which is common to the cases of joint owners, joint contractors and partners, is that in all of them there is a joint financial or proprietary interest. It has been stated that the interest is indivisible as well as joint, but that point need not be discussed here. The feature to which I draw attention is the joint financial or proprietary interest. The position may therefore broadly stated to be that by South African practice the only cases in which a defendant has been allowed to demand a joinder as of right are the cases of joint owners, joint contractors and partners, in all of which cases there exists a joint financial or proprietary interest, but in other cases a defendant, as a general rule, has not been allowed to demand to demand such joinder."[32]

[23] Obaro, has a substantial and a direct legal as well as a financial interest in the subject-matter as the party who entered into the surety contract with the respondents and as a co-creditor - "the agent,"- together with the other co-creditors of the ("the agent") in terms of the principal contract. Obaro is a necessary party to enforce the debt of "the debtor" in terms of the deed of suretyship, against the sureties.

In the result the following order is made.

ORDER

[31] 1935 AD 167.
[32] 171. See also *Kock & Schmidt v Alma Modehuis (Edms) Bpk* 1959 (3) SA 308 (A) 318 E-G.

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1. **The proceedings are stayed pending the joinder of Obaro Finansiële Dienste (Edms) Bpk and Obaro Handel (Edms) Bpk as co-creditors to the proceedings.**

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G.C MULLER

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

FOR THE APPLICANT	**:**	**P.G Cilliers SC**
		A Van Der Merwe
INSRTUCTED BY	**:**	**Leahy Attorneys**
FOR THE 1st and 2nd RESPONDENT	**:**	**FG Janse Van Rensburg**
INSTRUCTED BY	**:**	**Geyser Attorneys**
DATE HEARD	**:**	**20 July 2025**

DATE DELIVERED : 27 November 2025

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