THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 352/05

In the matter between:

LAND & AGRICULTURAL DEVELOPMENT BANK OF SA t/a LANDBANK	Appellant
and	
THE MASTER OF THE HIGH COURT	First Respondent
DAVID JOSEPHUS STRAUSS NO	Second Respondent
SAREL ALBERTUS COETZEE NO	Third Respondent
THE 33 CONCURRENT CREDITORS IN THE INSOLVENT ESTATE OF THOROLD ROY DOUBELL	Fourth and Further Respondents

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Coram:	**SCOTT, ZULMAN, NAVSA, NUGENT et HEHER JJA**
Date of hearing:	**4 MAY 2006**
Date of delivery:	**30 MAY 2006**
Summary:	**The remedies afforded to the Land Bank in terms of s 33 and 34 of Act 15 of 2002 are not applicable to advances made by the Land Bank under the repealed Act 13 of 1944.**
Neutral citation:	**This judgment may be referred to as *Land Bank v The Master and others* [2006] SCA 68 RSA**

JUDGMENT

SCOTT JA/…

SCOTT JA:

[1] The appellant, to which I shall refer as the Bank, was established under s 3 of the Land Bank Act 18 of 1912. The 1912 Act was repealed by the Land Bank Act 13 of 1944 ('the 1944 Act') which in turn was repealed by the Land and Agricultural Development Bank Act 15 of 2002 ('the 2002 Act'). Despite the repeal of the earlier Acts the Bank established in 1912 continues to exist.

[2] The first respondent is the Master of the High Court. The second and third respondents are the joint trustees of the insolvent estate of Mr Thorold Doubell. The remaining respondents are the concurrent creditors of the insolvent estate. Only the second and third respondents participated in the appeal and I shall refer to them as the respondents.

[3] Prior to his sequestration Doubell carried on business as a farmer. The Bank lent and advanced money to him in terms of four loan agreements; two were secured loans in terms of s 25 of the 1944 Act and two were unsecured loans in terms of s 34 of that Act. He was provisionally sequestrated on 26 July 2000 and finally sequestrated on 31 August 2000. It appears that the Bank purchased the immovable property that had been mortgaged to it and deducted the purchase price from the outstanding amount of the loan. A further amount was received from the insolvent estate in September 2002. It is common cause that the amount still owing to the Bank is well over R2 million in respect of the four loans.

[4] The 1944 Act afforded the Bank extraordinary powers for the recovery of loans. In terms of s 34 the Bank was authorised in prescribed circumstances, including in the event of any payment due in respect of an unsecured advance falling into arrears or the insolvency of the debtor, and without recourse to a court of law, to attach and sell so much of the debtor's property as may be necessary

to liquidate the amount owing to the Bank. The section further conferred a preference in favour of the Bank in respect of such proceeds. Section 55 afforded the Bank similar powers in relation to secured loans. However, the material provisions of both sections were declared unconstitutional in *First National Bank of SA Ltd v Land and Agricultural Bank of SA and others* 2000 (3) SA 626 (CC). In terms of the court's order, which was made on 9 June 2000, the invalidity of the offending provisions of s 34 of the 1944 Act were suspended for a period of two years:

'provided that as from the date of this order no attachments and sales in execution in terms of s 34(3)(b) of [the 1944 Act] not yet completed shall take place without recourse to a court of law.'

There was no similar suspension of the unconstitutional provisions of s 55.

[5] As previously mentioned, Doubell's estate was finally sequestrated some three months later on 31 August 2000. Nonetheless, no attempt was made by the Bank during the period of suspension to recover the amount outstanding in terms of the unsecured loans by exercising the Bank's powers under s 34, subject to the limitation imposed in the Constitutional Court's order. Instead, the Bank subsequently 'notified' the respondents of its claim and in fact received a dividend in terms of the first liquidation and distribution account. A possible reason for the Bank not pursuing its rights under s 34 is that it was no longer possible to rely on s 55 for the recovery of the amounts due under the secured loans.

[6] The 2002 Act came into operation on 10 June 2002, ie two years after the Constitutional Court's order. Unlike the 1944 Act, no distinction was made between secured and unsecured loans in relation to the remedy available to the Bank in the case of default. As in the case of the earlier Act, the 2002 Act affords the Bank far-reaching remedies. The provisions in the Act dealing with the new remedies are contained in s 33.

[7] On 26 March 2004 the Bank launched the application giving rise to the present appeal. By this time all the assets of the insolvent estate had been sold and all amounts owing to it recovered. In terms of the second and final liquidation account there was a free residue of R319 327,50 which was allocated to concurrent creditors. The Bank objected to the account and it has not been confirmed by the Master. The application was based on s 33(4)(c) and s 34(1) of the 2002 Act. The order sought was for the attachment of the liquidated amount standing to the credit of the free residue of Doubell's insolvent estate and for a declaration that the Bank was entitled as a preferent creditor to the money so attached, together with certain ancillary relief, which included the rectification of the second and final liquidation and distribution account so as to reflect the Bank's full claim.

[8] The matter came before Davis J in the Cape High Court. It was opposed on various grounds. One was that the institution of the proceedings was not properly authorised. In this Court the respondents abandoned the point, in my view rightly so, and nothing further need be said about it. The ground upon which the learned judge found in favour of the respondents was that, properly construed, ss 33(3)(b) and ss 33(4) were not applicable to advances made in terms of the 1944 Act. The judgment is reported *sub nom Land and Agricultural Development Bank of SA t/a Land Bank v The Master and others* 2005 (4) SA 81 (C). The conclusion of the court *a quo* differed from that arrived at by Wright J in *Land and Agricultural Development Bank of SA t/a The Land Bank v Venter NO and others* [2004] 2 All SA 314 (O) who held that the subsections were applicable to advances made under the 1944 Act. The present appeal is with the leave of this Court.

[9] Section 33 has 14 subsections. It is necessary to quote the first four.

'(1) Despite anything to the contrary in any other law or any agreement and without prejudice to any other remedies the Bank may have, the Bank may in respect of advances that it

has made take any action envisaged in subsection (3) if any of the circumstances envisaged in subsection (2) exist.

(2) The circumstances contemplated in subsection (1) are if—

(a) payment of any sum of money, due in respect of any advance made in terms of this Act, is in arrear, whether it is the capital sum or interest thereon;

(b) any such advance has been applied for a purpose other than the purpose for which it was made;

(c) the advance has not within a reasonable time been applied for the purpose for which it was made;

(d) any other condition to which the advance is subject has not been complied with substantially;

(e) (i) the debtor becomes insolvent, commits any act of insolvency in terms of section 8 of the Insolvency Act, 1936 (Act 24 of 1936), or is sequestrated by virtue of an order of court in terms of that Act;

(ii) the debtor is sentenced to imprisonment without the option of a fine;

(iii) judgment is obtained against the debtor for the payment of any sum of money;

(iv) any asset of the debtor is by order of a competent court declared executable or is attached in pursuance of an order of any such court;

(f) the debtor is deceased, and his or her estate is about to be dealt with in terms of section 34 of the Administration of Estates Act, 1965 (Act 66 of 1965), or has been sequestrated;

(g) the debtor is a company or close corporation which has been placed under judicial management or is being wound up or is being deregistered, as the case may be; or

(h) the debtor is a private company or close corporation and any director, shareholder or member thereof is sentenced to imprisonment without the option of a fine.

(3) As contemplated in subsection (1) the Bank may—

(a) refuse to pay any portion of an advance which has been approved, but which has not yet been paid;

(b) after the expiry of seven days after the Bank has in writing—

(i) made a demand for the repayment of the advance, addressed to the address of the debtor stated in the form of application for the advance; and

(ii) given notice to the holder of a preferent or similar security in respect of the property of the debtor and, if appropriate, to the Registrar of Deeds,

apply to a court of law for an order contemplated in subsection (4).

(4) *(a)* If the Bank makes an application in terms of subsection (3) *(b)*, and if there is evidence supported by affidavit that—

(i) a liquidated amount in money is due and payable to the Bank;

(ii) the Bank intends without undue delay to institute an action in that court against the debtor for recovery of the debt;

(iii) the debtor has no *bona fide* defence to the intended action;

(iv) if such action were instituted, the court would have jurisdiction in respect of the debtor and the cause of action;

(v) the debtor has property at his or her disposal from which the debt or part thereof could be satisfied if the property were available for execution after judgment;

(vi) a substantial danger exists that if an action for the recovery of the debt is instituted against the debtor, he or she will dispose of such property or will remove it from the area of jurisdiction of the court in order to evade satisfaction of the debt, or that the delay likely to be caused by the institution of an action for recovery of the debt would result in the property having no value due to its perishable nature;

(vii) arrangements including the giving of security have been or will be made by the Bank in order to protect the interests of the debtor or any other person whose interests might be affected by the granting of the order mentioned herein,

a court of law may authorise the Bank to attach and sell by public auction or public tender, so much of the property and rights of the debtor as may be necessary to liquidate the amount owing in respect of the advance made by the Bank, together with interest and costs in respect thereof.

(b) In making such an order the court may impose conditions with regard to the institution of the action and the giving of security by the Bank for any damages which the debtor or any persons might suffer or costs which might be incurred as a consequence of the attachment of any of his or her property.

(c) If it is reasonable or just in the circumstances or if compelling considerations exist and the Bank has provided necessary guarantees or other safeguards, the court may authorise the Bank to attach and sell the debtor's property and rights without recourse to ordinary court processes.

(d) Any person affected by an order referred to in paragraphs (a) to (c) may apply to a competent court to have the order set aside.'

Section 34 deals with the ranking of claims to the proceeds of the realisation of property attached and sold in terms of s 33 and creates a preference in favour of the Bank. It is unnecessary to quote it.

[10] It will be observed that, broadly stated, in terms of ss 33(1) the Bank may 'without prejudice to any other remedies [it] may have' take the action envisaged in ss 33(3) if any of the circumstances envisaged in ss 33(2) exist. In terms of ss

33(3)(b) the Bank may, subject to the fulfilment of certain requirements, ie demanding payment and giving notice to the holder of a security in respect of the property in question, apply to 'a court of law' for an order contemplated in ss 33(4). Subsection 33(4)(a), in turn, provides that the court may authorise the Bank to attach and sell by public auction or public tender so much of the debtor's property as is necessary to liquidate the amount owing to the Bank, provided there is evidence on affidavit of certain facts. These are listed in ss 33(4)(a)(i) to (vii). It is apparent from what is required that the order contemplated is an order *pendente lite*, in other words an order pending the adjudication of the Bank's claim against the debtor. In terms of ss 33(4)(c) the court may authorise the Bank to attach and sell the debtor's property 'without recourse to ordinary court processes' if it is 'reasonable or just in the circumstances' to do so or if 'compelling considerations exist' and the Bank 'has provided necessary guarantees or other safeguards'. I interpose that the Bank's case is that it is entitled to an order in terms of ss 33(4)(c) as the circumstances are such that the indebtedness is common cause and no adjudication of its claim is necessary; also that no guarantee is required as it is common cause that there are no creditors whose claims would outrank the Bank's claim to the free residue in terms of s 34. A subsection which I have not quoted above but which has some relevance is ss 33(10). It provides that the sequestration or liquidation of the debtor's estate does not limit the Bank's right to apply to court for an order in terms of ss 33(4).

[11] But fundamental to s 33 is that the Bank's right to apply for an order in terms of ss 33(4) and the Court's power to grant such an order is dependent on the existence of 'any of the circumstances' listed in ss 33(2). The meaning to be attributed to this subsection and its effect was the main subject of the debate before us.

[12] The first circumstance mentioned (in para (a)) is the payment of any sum of money 'due in respect of any advance *made in terms of this Act'* falling into

arrears (my emphasis). Davis J, in his judgment in the court *a quo*, considered the paragraph to be incapable of being construed as including a reference to an advance made under the 1944 Act. He regarded the words 'such advance' in para (b) and the words 'the advance' in paras (c) and (d) as referring quite clearly to an advance contemplated in para (a), ie an 'advance made in terms of this Act'. Similarly he considered the words 'the debtor' in paras (e), (f), (g) and (h) to refer to a debtor in relation to an advance contemplated in paras (a), (b), (c) and (d). He accordingly held that s 33 had no application where, as in the instant case, the advances were made pursuant to the 1944 Act.

[13] Counsel for the appellant stressed the importance of construing the relevant provisions against what he termed the clear policy and object of the Act which, he said, included the giving of assistance to small scale farmers and the beneficiaries of land reform programmes who required financial assistance but who were unable to acquire such assistance from other lending institutions by reason of their lack of creditworthiness. The object of s 33 and s 34 of the 2002 Act, and of s 34 and s 55 of the 1944 Act, was, he said, to afford the Bank a special remedy and a preference so as to enable it to advance money without adequate or any security to farmers who would otherwise be unable to obtain financial assistance. In support of this proposition, he referred in particular to paras 9, 10 and 11 of the Constitutional Court's judgment in the *First National Bank* case, *supra*. He argued that in these circumstances it would be anomalous for the Bank to be unable to utilise the remedies provided for in s 33 of the 2002 Act in respect of an existing loan just because the advance had been made under the 1944 Act. Against this background he argued, first, that it was essential to construe para (a) of ss 33(2) as including advances made under the 1944 Act, presumably on the basis that the ordinary meaning of the words used was inconsistent with the intention of the legislature and that in accordance with the principles enunciated in *Venter v Rex* 1907 (TS) 910 at 914, a departure from the ordinary meaning was justified. In the alternative, he argued that if para (a) of ss 33(2) is to be construed as referring to advances under the 2002 Act only, then

the reference to ‘such advance’ in para (b) and ‘the advance’ in paras (c) and (d) should be construed as a reference to the words ‘advances it has made’ in ss 33(1) which, he contended, were wide enough to include advances made under the 1944 Act as well as under the 2002 Act. Similarly, the words ‘the debtor’ in paras (e) to (h) he said, had to be construed as a debtor in relation to the ‘advances’ referred to in ss 33(1), not the ‘advance’ referred to in para (a) of ss 33(2).

[14] It is well to remember that in the quest to ascertain the purpose or object of a statute its language must always be the primary source. The purposive approach is no justification for simply ignoring the clear and unambiguous language of the statute itself. The remarks of Judge Learned Hand in *Borella et al v Borden Co* 145 F 2d 63 at 65, (quoted with approval in *Standard Bank Investment Corporation Ltd v Competition Commission and others* 2000 (2) SA 797 (SCA) at 812E) are particularly apposite:

‘We do not indeed mean that here, or in any other interpretation of language, the words used are not far and away the most reliable source for learning the purpose of a document; the notion that the “policy of a statute” does not inhere as much in its limitations as in its affirmations, is untenable.’

Turning to the present case, I can see no ambiguity in the phrase ‘advance made in terms of this Act; in ss 33(2)(a); nor could counsel suggest one. Indeed the legislature could hardly have expressed itself in clearer terms. It is true that the consequence of attributing to the phrase its ordinary meaning is that the remedy provided for in s 33 will not be available in the case of a payment due in respect of and advance under the 1944 Act falling into arrears. It is also so that in such an event the Bank would be limited to its ordinary common law remedies. But there is nothing in the Act to suggest that this could not have been what was intended by the legislature. The remedies provided for in s 34 and s 55 of the 1944 Act had been found to be unconstitutional. The remedy contemplated in s 33 of the 2002 Act was new. It is by no means inconceivable that the legislature should deliberately have refrained from affording to one party to a completed loan agreement a remedy which would not have been in existence when the

agreement was concluded. The remedy in such circumstances would have interfered with the existing rights of the parties to the loan and for Parliament to have decided that the remedy was not to apply in the case of advances under the 1944 Act is not unreasonable. But, in any event, the legislature could hardly have been unaware of the consequence of limiting the arrear payments contemplated in ss 33(2)(a) of the 2002 Act to payments due in respect of advances made in terms of that Act. In my view, therefore, there can be no justification for departing from the ordinary grammatical meaning of the language employed in ss 33(2)(a).

[15] I turn to the appellant's alternative argument. The first question is whether the words 'such advance' in para (b) and 'the advance' in paras (c) and (d) of ss 33(2) can be construed as a reference to 'advances' in ss 33(1) as contended for by the appellant or whether they must be construed as a reference to 'any advance' in para (a) of ss 33(2). In my view there can be no doubt that they are to be read as referring to 'advance' in para (a). Any other construction would be contrived. There would also be no sense in the distinction between para (a) on the one hand and paras (b), (c) and (d) on the other which the appellant says must be made, in other words, for the event contemplated in (a) to apply only to advances under the 2002 Act and the events contemplated in paras (b), (c) and (d) to apply to advances under both the 1944 and the 2002 Acts.

[16] The next question relates to the proper interpretation of para (e). It is clear that the words 'the debtor' in paras (e), (f), (g) and (h) can only mean the debtor in relation to an advance. The question is this: is the advance to be construed as one made 'in terms of this Act', ie an advance of the kind contemplated in paras (a), (b), (c) and (d), or is the advance to be construed as the advance referred to in ss 33(1), which the appellant contends includes an advance under both Acts? (I mention in passing that para (e) reads 'the debtor becomes insolvent, commits an act of insolvency . . . or is sequestrated . . . .' The Act would appear to be concerned with future and not past insolvencies. But this was not the basis on

which Davis J dismissed the application and I shall not consider the point further.)

[17] It will be observed that ss 33(2) consists of a single sentence. The advance contemplated in the reference to 'the debtor' would therefore more naturally and logically be to the advance referred to in the same sentence, ie the advance referred to in paras (a), (b), (c) and (d). Significantly, a number of anomalous situations would arise were paras (d) to (h) to be construed otherwise. The most frequent event giving rise for the need for the Bank to invoke the remedy in s 33 would be the debtor falling into arrears. In that event, as we have seen, the remedy would be available only if the advance were made 'in terms of this Act'. It would make no sense, for example, for the remedy to apply also to advances under the 1944 Act because the debtor, instead of being in arrear with his or her payments, happened to be sentenced to say short term imprisonment without the option of a fine for an offence such as one involving the driving of a motor vehicle, or for that matter any offence (subpara (e)(ii)). Even more anomalous would be the situation where the debtor is a private company and one of its shareholders was sent to prison in similar circumstances (sub para (h)). Another example would be the case of the debtor against whom judgment is obtained in respect of some other debt (para d (iii). It could never have been intended that in such an event the remedy in s33 would apply to advances under both Acts, but if the debtor were in arrears with payments in respect of an advance made by the Bank, the remedy would be applicable only if the advance had been made under the 2002 Act. It follows that in my view, properly construed, paras (d), (e), (f), (g) and (h) are applicable only in the case of advances made in terms of the 2002 Act and the appellant's alternative argument must likewise fail.

[18] In the further alternative counsel for the appellant sought to rely on two provisions in the 2002 Act dealing with transitional matters. The first was ss 52(1). It reads:

'(1) Anything validly done in terms of the Land Bank Act, 1944 (Act 13 of 1944), continues to be valid and of full force and effect despite the repeal of that Act by section 53 and any regulations made in terms of that Act remain in force until repealed in terms of section 49 of this Act.'

In my view the subsection does not assist the appellant. It renders valid anything validly done in terms of the 1944 Act despite its repeal; it does not deem anything done under the previous Act and which could have been done under the 2002 Act to have been done under the latter Act. (An example of such a deeming provision is to be found in s 42 of the Environment Conservation Act 73 of 1989.) Moreover, as observed by Davis J, in his judgment refusing leave to appeal, the meaning sought to be read into the subsection would be contrary to the express wording of s 33.

[19] The other provision relied upon is 52(7). It reads:

'(7) Any reference in any legislation to the Land and Agricultural Bank of South Africa or the Land Bank Act, 1944, must be interpreted as a reference to the Bank or to this Act, as the case may be.'

The appellant's contention is that by reason of this provision the words 'any advance made in terms of this Act' in ss 33(2)(a) must be construed as including a reference to an advance made in terms of the 1944 Act. There is no merit in this contention. The subsection says the very opposite. In addition, the phrase 'in any legislation' logically and contextually can only mean in any legislation other than the 2002 Act.

[20] It follows that the appeal must fail. It follows, too, that *Land and Agricultural Development Bank v Venter NO, supra,* was wrongly decided.

[21] The appeal is dismissed with costs.

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D G SCOTT
JUDGE OF APPEAL

Concur:
ZULMAN JA
NAVSA JA
HEHER JA

NUGENT JA:

[22] I agree with the order that is proposed by my colleague but cannot agree with his reasons for doing so. Because the meaning he gives to the Act has profound consequences for the future application of the Act I have found it necessary to set out fully my reasons for disagreeing.

[23] The conclusion reached by my colleague is that the draftsman of the Act intended in s 33(2)(a) to distinguish advances made after the Act took effect from advances that were made before then. The consequence of making that distinction is that when the Act took effect the Land Bank's only protection in respect of its unsecured advances immediately fell away, with nothing to replace it, and the Land Bank was reduced to a concurrent creditor in respect of those debts. If the distinction contended for by my colleague was indeed intended by the draftsman, it must have been calculated by him to bring about that result, for there is no other reason to make the distinction. My colleague is of the view, based on the words that were used in s 33(2)(a), that the draftsman indeed wished to bring about that result. That is where we differ. I think it is clear from the context within which the section was enacted, and from other indications in

the Act itself, that the draftsman did not wish to bring about that result and thus he could not intended the words to have the meaning that is now contended for. In my view the draftsman must have intended the remedies of s 33 to apply to all the Bank's advances, whether they existed at the time the Act took effect, or were made subsequently. The reason that the Land Bank cannot succeed in the present case is only that the debtor was sequestrated before the Act took effect.

[24] Construing a statute, Innes CJ observed in *R v Detody,*[1] 'is all a question of intention.' And intention is established by a process of inferential reasoning. Generally it can be inferred that the legislative intention is expressed by the ordinary meaning of the words that were used. It can also usually be inferred that words were used with a consistent meaning, that they were not used superfluously, and so on. But those are not rules of law. They are no more than logical inferences. And as with all inferential reasoning the inference will not be correct if the premise from which the reasoning proceeds is unsound. That premise in the cases I have mentioned is that the draftsman understood and intended to use words in their ordinary meaning, that he was indeed anxious to maintain consistency, and that he used words carefully and sparingly.

[25] There are also other facts from which inferences might be drawn when construing legislative intention. As pointed out by Schreiner JA in *Jaga v Dönges; Bhana v Dönges,* [2] what is 'no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context'. He went on to add that

'"the context", as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background.'[3]

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[1] 1926 AD 198 202.
[2] 1950 (4) SA 653 (AD) 662C
[3] Cited with approval in *S v Makwanyane* 1995 (3) SA 391 (CC) para 13.

[26] For one ought also, as pointed out by Innes CJ in *Detody,*[4]

'take account of…circumstances which are matters of well-known history and of common knowledge, to note the mischief which the pass laws were intended to remedy, and in the light of that enquiry to ascertain the meaning of the legislature as expressed in the [statute].'

In the same case Kotze JA said:[5]

'It is a well-settled canon of construction that the intention of a statutory provision is to be ascertained from the words used, which are to be understood in their ordinary sense, unless there exists some satisfactory reason to the contrary. Now the reason for modifying or restricting the ordinary meaning of general words may vary with the particular instance before the Court. Thus general language occurring in a statute may be modified by some provision in it, showing the true intent of the legislator; or the nature of the case may require a restrictive meaning; or the surrounding circumstances may necessitate a departure from the ordinary meaning, or an adherence to the literal and ordinary meaning of the general language may lead to manifest absurdity.'

He went on to refer with approval to the following extract from the speech of Lord Blackburn in *River Wear Commissioners v Adamson:*[6]

'In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without enquiring farther and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from the circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used'.

[27] In similar vein Chaskalson CJ said in *Minister of Health v New Clicks (SA)(Pty) Ltd:* [7]

'In *S v Makwanyane and Another*[8] I had occasion to consider whether background material is admissible for the purpose of interpreting the Constitution. I concluded that

'where the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution.'

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[4] 203.
[5] 228.
[6] 2 AC 743 763.
[7] 2006 (2) SA 311 (CC) paras 200 and 201.
[8] 1995 (3) SA 392 (CC) para 19.

Although it is not entirely clear whether the majority of the Court concurred in this finding, none dissented from it. I have no reason to depart from that finding and, in my view, it is applicable to ascertaining 'the mischief' that a statute is aimed at where that would be relevant to its interpretation.'

[28] In *Dönges* Schreiner JA elaborated on the relationship between the language of the statute and its context by pointing out that the approach to interpretation may take either of two courses:[9]

'Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together.'

After illustrating the two approaches he went on to say the following:[10]

'No doubt the result should always be the same, whichever of the two lines of approach is adopted since, in the end, the object to be attained is unquestionably the ascertainment of the meaning of the language in its context. But each has its own peculiar dangers. While along the [latter] line there is the risk that the context may in a particular case receive an exaggerated importance so as to strain the language used, along the other line there is the risk of verbalism and consequent failure to discover the intention of the law-giver. The difference in approach is probably mainly a difference of emphasis, for even the interpreter who concentrates primarily on the language to be interpreted cannot wholly exclude the context, even temporarily; and even the interpreter who from the outset tries to look at the setting as well as the language to be interpreted cannot avoid the often decisive first impression created by what he understands to be the ordinary meaning of that language. Seldom indeed is language so clear that the possibility of differences of meaning is wholly excluded, but some language is much clearer than other language; the clearer the language the more it dominates over the context and *vice versa*, the less clear it is the greater the part that is likely to be played by the context.'

But the learned judge went on to caution that [11]

'[u]ltimately when the meaning of the language in the context is ascertained, it must be applied regardless of the consequences and even despite the interpreter's firm belief, not supportable by factors within the limits of interpretation, that the legislator had some other intention. So, too, if, when interpretation is complete, it is clear that the legislator has failed to deal with a class of case

[9] 662H-663A.
[10] 664B-F.
[11] 664F-H.

that in all probability would have been dealt with if it had not been overlooked, there is a *casus omissus* which the courts cannot fill. But the legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene.

It is important not to mistake what that means. It does not mean that the language of the statute must be applied irrespective of the consequences. It means only that the true intent, once established, must be given effect to, no matter that it has consequences that were not foreseen. As pointed out by Kotze JA in the passage that I have referred to, once the true intent is established, the language may need to be departed from, or given a restricted meaning, in order to reconcile it with the true intent. For words are a tool for establishing intent, and not an instrument to frustrate it once it is established.

[29] The Land and Agricultural Development Bank of South Africa (which I will refer to for convenience as the Bank) has been in existence for almost a century. It was established by the Land Bank Act 1912 for the purpose of advancing loans to farmers and agricultural co-operatives to promote agriculture in the national interest.

[30] From the outset the legislature has given the Bank a privileged status relative to other creditors to ensure that the Bank's risk is kept to the minimum. By keeping its risk to the minimum the Bank is able to lend money on terms that are not available commercially. The Act permitted loans to be advanced to farmers only against the security of a first mortgage bond,[12] and it gave the Bank special rights in relation to moneys that were advanced to co-operatives.[13] In addition it gave the Bank a speedy remedy for realising its security whenever there was the prospect that the moneys might not be recovered. If the borrower, amongst other things, failed to pay any amount that fell due, or did not apply the advance for the purpose for which it was made, or became insolvent, or breached a condition upon which the advance was made, the Bank, after

[12] Section 21(1).
[13] Sections 28(3) and 32(1).

complying with certain formalities, was entitled 'without recourse to a court of law to enter upon and take possession of and sell by public auction the whole or any part of the security for the advance' in order to satisfy the outstanding debt. The rights of the Bank were also insulated from the ordinary consequences of the debtor's insolvency.[14]

[31] The permitted activities of the Bank, and its protection against risk, were extended over time. In 1940, for example, a provision was added that created a pledge over agricultural produce and products of a co-operative company when it ceded its debts to the Bank as security for an advance.[15]

[32] In 1944 the 1912 Act was replaced by the Land Bank Act, 1944. Its purpose was to consolidate the 1912 Act and its numerous amending and related statutes. The 1944 Act retained the principal features of the earlier legislation. Amongst other things, s 25 permitted the Bank to advance money only against the security of real rights in land, except where the Act provided otherwise, s 55 retained the special remedy for recovering debts, and the Bank's rights continued to be insulated from the ordinary consequences of the debtor's insolvency.[16]

[33] But by then it was felt that the Bank should also be permitted to advance working capital in certain circumstances even if the borrower could not provide real security. Section 34 thus authorized the Bank to advance money to farmers, notwithstanding the provisions of s 25,[17] for the purposes of meeting costs incidental to the production, cultivation, gathering or marketing of crops. When such an advance was made, and after compliance with certain formalities, the crops were deemed to have been pledged and delivered to the Bank as security

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[14] By s 78 of the Insolvency Act 1916 (at least from 1916) and thereafter by s 90 of the Insolvency Act 1936.
[15] Section 26(6)(c) of the Land Banks Acts Further Amendment Act 1922 as amended by s 17 of Act 32 of 1924 and s 7 of Act 12 of 1940.
[16] By s 90 of the Insolvency Act 1936.
[17] See the analysis of the two sections in *Land and Agricultural Bank of SA v Janse van Rensburg NO* [2004] 4 All SA 596 (SCA).

for repayment of the advance,[18] and were thus liable to be attached and sold by the Bank in accordance with its special remedy.

[34] In 1975 s 34 was replaced. The new section permitted the Bank to advance money for the purpose of purchasing livestock and farming machinery and equipment as well as for establishing and harvesting crops. It also did away with security in the form of a statutory pledge. Instead a remedy for the recovery of money that had been advanced, comparable to the remedy in s 55, was introduced, which permitted the Bank, in defined circumstances, and without recourse to a court of law, to attach and sell any property of the debtor in satisfaction of the debt. (The Bank was required first to act against movables, and only then against immovable property. If immovable property was mortgaged the Bank was entitled to the balance after the mortgagee had been paid.)

[35] What stands out from the history of the legislation is that for close on a hundred years the legislature has consistently afforded the Bank the greatest protection against the risk of loss from defaulting debtors. Advances were permitted only against substantial security. Where ordinary security might be lacking it was statutorily created. The Bank was permitted to realise property in satisfaction of its debts by an extraordinary procedure that avoids delay. And on insolvency of the debtor the Bank stood first in line for payment subject only to the rights of earlier mortgagees.

[36] In about 2000 the Bank's special procedures for recovering debts – created by s 34 in relation to unsecured debts and by s 55 in relation to secured debts – came under scrutiny and were declared to be constitutionally invalid by the Constitutional Court.[19] What concerned the court was not the existence of those special procedures but only that they excluded oversight by the courts. The objection, as it was expressed by Makgoro J, was that the procedures 'allow

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[18] Section 34(1)-(4).

[19] *First National Bank of SA Ltd Land and Agricultural Bank of South Africa Ltd and Others; Sheard v Land and Agricultural Bank of South Africa and Another* 2000 (3) SA 626 (CC).

the Land Bank to take the law into its own hands and serve as judge in its own cause' and to '[decide] its own claims and relief'.[20] So narrow was the objection that the Constitutional Court even considered merely severing the phrase 'without recourse to a court of law' as an alternative to invalidating the procedures as a whole but ultimately it preferred the latter course.[21]

[37] In the Constitutional Court the Land Bank accepted that the procedures were invalid. Because it held other security for advances that were subject to the s 55 procedure, and was thus not reliant on that procedure alone to secure the debts, it did not oppose the s 55 procedure being declared invalid with immediate effect. But in relation to the comparable s 34 procedure the position was different. Most of the advances that were subject to that procedure were unsecured and the Bank's protection against loss lay only in its ability to realise the debtor's property in accordance with that procedure. If the procedure became invalid before alternative legislative protection was substituted the Bank would be reduced to a concurrent creditor in relation to all the advances it had made without security. It goes without saying that it would also have been reluctant to continue making such advances until its position was safeguarded.

[38] For that reason the Bank urged the Constitutional Court to suspend the declaration of invalidity in relation to s 34, to enable Parliament to remedy the matter before the relevant provisions fell away. The Bank's dilemma was summarised by Makgoro J as follows:[22]

'The Land Bank accepted the immediate effect of the High Court order of invalidity as it pertains to s 55 but argued that in respect of s 34 the order should be suspended. Specifically, it urged this Court to suspend the order of invalidity as to s 34(3)(b) and (5) so as to preserve the statutory security it enjoys over the proceeds of a sale in execution. For this submission, the Land Bank relied on the fact that, unlike s 55 advances…s 34 loans are generally not secured by contract. … Section 34 is exceptional in that it enables the Land Bank to make short- and medium-term advances to farmers without pledges or collateral security. The Land Bank affirmed

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[20] Para 5.
[21] Para 15.
[22] Para 7.

that the bulk of its s 34 loans are unsecured by formal contract, and that these advances were made on the strength of its statutory security. It asserted that, should the order be confirmed with immediate effect, it would lose its only form of security and be placed at high risk. This would, in turn, likely impair its capacity to offer s 34 loans to the detriment of existing and potential clients.'

[39] The Constitutional Court acceded to the Bank's request and suspended the declaration of invalidity in relation to the s 34 procedure for two years. The reasons for acceding to the Bank's request were expressed as follows:[23]

'It is reasonable to believe that, if the statutory security were removed without any interim remedial measures, the Land Bank would incur monetary losses. The Bank may then be forced either to raise interest rates, as the applicant suggested in argument before this Court, 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 unviable financial services. Because there exists a 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.'

[40] The effect of the suspension was that unsecured advances that had been made until then, and advances that were made thereafter (until the suspension expired) would continue to be protected by the s 34 procedure. But when the suspension expired those advances would be unprotected unless and until they were protected by alternative legislation.

[41] As it turned out the 1944 Act was repealed entirely and replaced by the Land and Agricultural Development Bank Act 2002. The 2002 Act was assented to on the day before the suspension expired, and it was brought into operation to coincide with the expiry of the suspension at midnight on 9 June 2002. The effect of the expiration of the suspension was that the s 34 procedure became invalid with effect from the time the Constitution came into effect on 4 February

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[23] Para 11.

1997.[24] (That is why the Court intended its declaration of invalidity not to affect 'attachments and sales in execution already completed',[25] though that intention seems not to have been expressed in its order.)

[42] It is clear from that history that one of the purposes of the 2002 Act was to continue to protect unsecured advances that existed at midnight on 9 June 2002 (when the suspension expired) and to protect future advances. Indeed, there was no reason for the new Act to have been introduced so as to coincide with the expiry of the suspension other than to protect unsecured advances that existed at that time. But for that the 2002 Act could have been introduced at any time without material consequences. There can be no doubt, then, that the 'mischief' that the 2002 Act was aimed at was, amongst other things, to protect the Bank's past and future advances. It is against that background that I turn to the provisions of the 2002 Act.

[43] Far from retreating from its long-standing practice of giving the greatest protection to the Bank the legislature increased that protection. The protection that it afforded no longer distinguished between secured and unsecured advances, as it had done under the 1944 Act. In respect of both it placed a statutory pledge on agricultural produce and products of debtors, whether or not the debts were secured, for so long as the debtor 'owes the Bank any money by virtue of an advance in terms of this Act' (s 30(1)). (No such pledge existed immediately before the 2002 Act took effect.) It also created remedies to protect the Bank if one of a number of specified events occurred in respect of 'advances that [the Bank] has made,' whether or not the advances were secured (s 33(1)). In that respect, too, it increased the protection of secured advances, because the new remedies entitled the Bank to recover the debt from all property of the debtor and not merely from the security that it held.

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[24] *Minister of Health v New Clicks South Africa (Pty) Ltd* (2), unreported judgment of the Constitutional Court in Case number CCT 59/04 decided on 30 September 2005, para 17.
[25] Para 18.

[44] The remedies that were created by s 33 were twofold, depending upon whether moneys had been advanced and were outstanding, or whether the Bank had approved the advance of moneys but the moneys had not yet been advanced. Where the Bank had approved the advance of moneys, but they had not yet been advanced, it was entitled to refuse to advance the moneys (s 33(3)(a)). Where moneys had been advanced and were outstanding, various procedures were created for their speedy recovery, including summary execution against all property of the debtor under the supervision of a court (s 33(3)(b) and following). Those remedies were to accrue to the Bank upon the occurrence of one or other specified event. One of the events that would trigger these remedies was the failure of the debtor to pay any sum of money 'due in respect of any advance made in terms of this Act'(s 32(a)). The Act also provided for the continued validity of advances that had been made before it took effect (s 52(1)).

[45] It would be anomalous if the Act created a pledge in respect of a particular advance, but simultaneously precluded the Bank from realising the pledge in accordance with the newly created procedure. It would also be anomalous if the Act created remedies to protect a particular advance, but simultaneously precluded the triggering-events from occurring in relation to that advance. Those anomalies are avoided only if the advances that are subject to the pledge, the advances that are subject to the new remedies, and the advances that are subject to the triggering-events, coincide. Yet in each case the draftsman used different language to describe the advances concerned. The pledge was created in respect of 'advances in terms of this Act'. The remedies were created in respect of 'advances that [the Bank] has made'. And the triggering-event is related to 'advances made in terms of this Act'.

[46] If those anomalies were not intended (and there is no reason to think that they were intended) the draftsman must have used all three phrases with the same intended meaning. It is thus clear that the draftsman was neither careful in his manner of expression nor consistent in his use of language. I see no reason

in the circumstances to assume that he used the words 'made in terms of this Act' with any precision.

[47] The three phrases that I have referred to, which must all have been used with the same meaning, are textually distinguishable primarily by the use of the phrase 'in terms of' in two of them. That phrase originated with a precise meaning in mathematics, but from that technical use, according to Fowler's Modern English Usage,[26] 'came at first a trickle and, after the 1940s, a flood of imitative uses by non-mathematicians'. By 1985 it was described as 'a vague all-purpose connective'. It is vague because it conveys no meaning by itself: the meaning emerges only from the elements that it connects. It is 'all purpose' because it is used, as is evident from everyday experience, to connect any manner of things, even where there is little discernable connection. Because it is so lacking in definition, and merely encourages lazy expression, it is understandable why the phrase has been said to represent 'the lowest point so far in the present degradation of the English language'.[27]

[48] The court below, and my colleague, construe the phrase as having been used in the present context to connect, on the one hand, the Bank's act in making an advance and, on the other hand, the authority conferred by the 2002 Act to do so. On that basis they construe the term to refer to advances made after the Act took effect, and not to advances that were made under preceding legislation, and that were preserved by s 52(1). That is a common use of the phrase in legislation. Indeed, the draftsman of the 2002 Act used the phrase as a tool to convey that meaning in various parts of the Act.[28] But the draftsman also uses the phrase 'in terms of' as a tool for conveying other meanings. He

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[26] 3rd ed by RW Burchfield 406

[27] Fowler, page cited.

[28] See, for example the definition of 'Chief Executive Officer' in s 1, which refers to the person 'appointed in terms of s 17(1)'. By that he means that the person has been 'appointed in the exercise of the authority conferred by s 17(1)'. The meaning emerges from the nature of the two elements that are connected, in this case the empowering section, on the one hand, and the act that has followed from the exercise of that power, on the other. Other examples appear from s 2(1), s 15(1)(b), s 31(2)(a).

uses it to convey the effect of a section,[29] or of a regulation,[30] and also to convey that one thing conforms with another.[31] On one occasion he uses it merely to identify something by reference to its description elsewhere.[32] I would be most hesitant to infer of a draftsman who uses the phrase to achieve various effects that he must necessarily have used it in s 33(2)(a) with the clear and definite purpose contended for by my colleague.

[49] I pointed out earlier that if the draftsman meant s 33(2)(a) to have the meaning that the court below and my colleague contend for he it must have been calculated by him to forego the Bank's security in relation all advances that existed at the time the Act took effect. For there could be no reason to distinguish advances that existed at that time from advances that were made subsequently other than to preclude the former from the remedies of s 33. Indeed, my colleague acknowledges that in paragraph 14 of his judgment, in which he points out that the legislature could hardly have been unaware of the consequences of limiting the arrear payments contemplated in s 33(2)(a) to advances made under the authority conferred by the Act. If that was indeed the true intention with which the words – and in particular the word 'made – were used in s 33(2)(a) then effect must be given to that intention. But if the draftsman did not intend them to have that meaning, and consequently that effect, but instead used the words without appreciating that they would be construed in that way, then it is his true intention that must prevail and not his inadvertence.

[50] I have already pointed out that throughout its history the Bank has had the greatest legislative protection against loss. Moreover, the order of invalidity was suspended precisely to avoid the Bank losing its protection, and was clearly

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[29] See s 4(1), which refers to a person who is not 'disqualified in terms of s 10', by which is meant a person who s 10 does not disqualify'. Similarly s 9(2)(b).

[30] See s 49 (1)(c), which refers to anything that is 'prohibited in terms of any regulation', by which is meant anything 'that a regulation prohibits'.

[31] See s 30 (2), which refers to 'produce held…in terms of a silo certificate', by which is meant that his holding conforms with a silo certificate.

[32] See s 31(7), which refers to 'liability which attaches…in terms of that certificate', by which is meant only that the extent of his liability is referred to in the certificate.

brought into effect to avoid that occurring. What is more, the 2002 Act increased the protection afforded to the Bank, by creating a pledge when none had existed before, and by allowing for execution against all property of even a secured debtor. Against that background I find it startling that the draftsman might have intended to bring about the result that the Bank should be reduced to a concurrent creditor in respect of all unsecured advances that existed when the Act took effect. My colleague finds it conceivable that the legislature intended that result. I cannot agree. I can conceive of no reason at all why it should want that result. But I must nonetheless examine the language to establish whether it shows that that was indeed the result that was intended.

[51] I have already pointed to two anomalies that would arise if that was the correct construction of s 33(2)(a) but they bear repeating.

[52] The first is that without the same construction being placed on s 30(1) (where the phrase 'advances in terms of this Act' is used, without express reference to the 'making' of the advance) it would mean that the draftsman created a pledge in relation to advances that were made before the Act took effect. Had the draftsman wanted to forego all the Bank's protection in relation to advances that were made before the Act took effect he would surely not have created a pledge in relation to the self-same advances. Least of all would he create such a pledge and simultaneously exempt the debtor from the remedies of s 33. I see no reason to reconcile the two phrases by extending the construction that has been given to s 33(2)(a) to the advances referred to in s 30(1). That would mean adding the word 'made' in s 30(1) or, possibly, implying it. If the draftsman had indeed been intent on protecting debtors with reference to when the advance was made, and used the words in s 33(2)(a) with that purpose in mind, he would surely have been astute also to expressly relate the Act to the 'making' of the advance in s 30(1), and not have left that to implication. In my view he used the phrase 'in terms of' in s 30(1) merely to convey that he was referring to advances that conformed with the provisions of the Act, as Nicholas

AJA construed the phrase in *Oosthuizen v Standard Credit Corporation Ltd,*[33] (where the phrase 'in terms of' was said by Nicholas JA merely to connote conformity) and Hathorn J construed it in *C Ltd v Commissioner of Taxes,*[34] (where it was said to be merely descriptive) and not to distinguish between advances depending upon when they were made.

[53] The second is that unless that construction of s 33(2)(a) is also extended to s 33(1) it will mean that the draftsman proclaimed his intention in s 33(1) to afford a remedy to the Bank in respect of all advances while simultaneously intending to deny that remedy in relation to some advances in the following subsection. I do not think that could have been his intention. Had his mind been directed to bringing about the result that advances existing when the Act took effect were precluded from the remedies of s 33 he would undoubtedly have expressed that clearly in s 33(1). Again I see no reason to reconcile s 33(1) and s 33(2)(a) by incorporating in the former the words used in the subsequent subsection, which is subsidiary to s 33(1). If they are to be reconciled there is no reason why the primary provision should not prevail.

[54] But there are other anomalies that arise from construing s 33(2)(a) (and the subsections that follow) as applying only to advances made after the Act took effect. I have pointed out that s 33 creates two remedies upon the occurrence of a triggering-event, depending upon whether moneys have been advanced, or whether they have simply been approved but not yet advanced. In the latter case s 33(3) entitles the Bank to 'refuse to pay any portion of an advance which has been approved, but which has not yet been paid.' It is apparent that the word 'advance' is used in that subsection with two simultaneous meanings. It is used to describe undertakings that have been given by the Bank to advance moneys (an 'advance which has been approved') as well as to describe moneys that have been advanced in consequence of such an undertaking (an

[33] 1993 (3) SA 891 (AD).
[34] 1962 (1) SA 42 (SR) 45C-D

'advance…which has not yet been paid'). (In subsections 30(1) and 33(1) the word 'advances' also has both those meanings.) From its context it is clear, however, that in s 33(2)(a) the word 'advances' is used to refer only to moneys that have been advanced. It is important to appreciate in what form unsecured advances are made.

[55] The authority to make unsecured advances was first conferred on the Bank by s 34 of the 1944 Act. That section authorised the Bank to advance moneys on what were referred to as 'cash credit accounts'.[35] A 'cash credit account' was 'an account through which moneys may, from time to time, during its currency…be drawn from or repaid to the Bank so that the total amount owing to the Bank under such account shall not at any time exceed a maximum amount to be fixed by the board'. In effect, it was an overdraft facility, that could be drawn upon from time to time to meet the costs of planting and harvesting crops, and the outstanding balance could be reduced when funds were available to do so. Section 34 was substituted in 1975. The substituted section was in wider terms. It no longer referred expressly to 'cash credit accounts' but authorised the Bank to make 'advances' to farmers for planting and additional purposes. There is no reason to think that the Bank did not continue making those advances in accordance with its earlier practice, bearing in mind the seasonal nature of the expenditure for which the moneys were advanced. Indeed, the remedy in s 33(3)(a), which was not altered in 1975, contemplates that it would continue to do so.

[56] Thus it can be expected that at midnight on 9 June 2002 overdraft facilities had been granted to farmers running to many millions of rand, but not all had been drawn on to the full limit. If s 33(2)(a) is confined to moneys that were advanced after the Act took effect the following would occur in respect of all facilities that existed at the time the Act took effect: Where the farmer had drawn on the facility before midnight on 9 June 2002, and defaulted thereafter, the

[35] Section 34 of the 1944 Act.

remedies of s 33 would not accrue to the Bank. Notwithstanding that the Bank was then at its highest risk it would also not be entitled to refuse to allow further drawings on the facility. But if a withdrawal was made on the self-same account after midnight on 9 June 2002 the Bank would be entitled to invoke the s 33 remedies, but only in respect of that withdrawal, and only if the farmer defaulted on repayment of that withdrawal, and not on default in respect of a withdrawal made before the Act took effect. How the Bank is to determine whether the default relates to one withdrawal rather than another, and why it should wish to recover one withdrawal but not another, even though they are made from the same account, is difficult to explain. Indeed, it would not be possible to distinguish between withdrawals for the purpose of bringing the remedies into effect. The problem is compounded in relation to the other triggering-events. That the draftsman intended to grant or deny the Bank the remedies of s 33 in relation to a particular debtor depending upon whether moneys were drawn before or after midnight on 9 June 2002 is in my view absurd. He must have intended the triggering-events in s 33(2) to apply to all advances, whether in the form of mere approvals or in the form of moneys actually advanced, that existed at the time the Act took effect, and those that were made subsequently. (Similar anomalies arise in relation to the pledge that is created by s 30(1), bearing in mind that the 'advance' that is referred to in that subsection encompasses an undertaking to advance moneys that might have been given before the Act took effect and that is utilised to produce agricultural produce far into the future.)

[57] All those anomalies are resolved – and no other anomalies arise – if s 33(2)(a) was intended to apply to all advances that existed when the 2002 Act took effect and to subsequent advances.

[58] I pointed out earlier that where the true intention, once established, conflicts with the language of the statute, the language of the statute must give way. As it was expressed by Steyn CJ in *Capnoziras v Webber Road Mansions*

(Pty) Ltd,[36] in relation to construing a contract, in which the principles are the same:

'While it is of course true that in construing a contract the Court must give effect to the grammatical and ordinary meaning of the words, and that cogent reasons would be required for doing violence to plain words, it is likewise settled law that a departure from such a meaning is justified where it clearly appears from the contract that the parties intended a different meaning.'

Similarly in *S v Tieties*,[37] Smalberger JA said the following:

'It follows from the above principles that, whereas a Court may in appropriate cases depart from the ordinary meaning of the words used in a statute, or even modify or alter such words, it may only do so where this is necessary to give effect to what can with certainty be said to be the true intention of the Legislature. Once such intention has been established the Court should not hesitate to give effect thereto. The correct approach in this regard is, in my view, that set out in Steyn *Die Uitleg van Wette* 5th ed at 68 as follows:

> "Binne die beperkte gebied waarin die afwykende wetgewende wil wel met sekerheid vasgestel kan word bestaan daar egter geen genoegsame rede om terug te deins vir 'n woordverandering wat daardie wil sal uitvoer nie. Die beswaar dat dit nie die taak van die Regbank is om wette te maak nie, vloei voort uit 'n foutiewe opvatting aangaande die werklike aard van 'n Wet. Die mening van *Donellus* dat die wil, en nie die word nie, die Wet maak, lyk gesond. Vir wie daardie mening onderskryf, tree 'n Hof nie wetgewend op as hy woordwysigende uitleg toepas nie, maar wel wanneer hy 'n word wat nie die bedoeling weergee nie en daarom geen Wet is nie, tot Wet verhef."

The principles enunciated above have ben consistently followed and applied in our Courts. Instances thereof are to be found in the cases conveniently collected and referred to in *Steyn* (*op cit* at 58-61 including footnote 33). It is clear from these principles, and the cases that the Legislature intended something different from the ordinary meaning conveyed by the words used in a statutory enactment, a departure from such meaning is justified, even if it involves an

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[36] 1967 (2) SA 425 (AD) 434A-B.
[37] 1990 (2) SA 461 (AD) 464A-F.

alteration or substitution of the words used. The key requirement is that the Legislature's contrary intention must be clearly established with regard to such circumstances as the Court may properly take into account.'

[59] From whichever point one commences construing the phrase the result is the same: The draftsman could not have intended to leave the Bank exposed as a concurrent creditor in respect of all unsecured advances that were in existence at the time the Act took effect, and to have used the words 'made in terms of this Act' in s 33(2)(a) to achieve that purpose. Yet that could have been the only reason to use the words with the meaning contended for by my colleague. To set about achieving that result would have been in conflict with consistent practice over nearly a hundred years, inconsistent with the purpose for which the invalidity of the s 34 procedure was suspended, inconsistent with the additional protection that he introduced into the Act, commercially insupportable, produces anomalies, and would leave the Bank with irresoluble difficulties when it came to applying s 33. In my view he must have used the word 'made' inadvertently and not with that meaning in mind. That he used the word inadvertently is not unlikely, bearing in mind the lack of precision with which he used language generally in the Act as a whole. That he did so on this occasion is abundantly clear when it is viewed in the context of the Act as a whole and the clear purpose it was aimed at achieving. And in law, as Lord Steyn observed in *R v Secretary of State for the Home Department, ex parte Daly,*[38] – 'context is everything.'

[60] But that does not end the enquiry in the present case. All the provisions of the Act indicate that it was intended to apply prospectively in relation to advances that existed at the time it took effect and subsequent advances. Nothing in the language of s 33(2) suggests that it was to apply retrospectively to triggering-events that had occurred before the Act took effect. Some of those events are of a continuing nature (in particular those referred to in subsections (a), (b), (c), (d),

[38] [2001] 3 All ER 433 (HL) at 447a

and (g)). If they had commenced before the Act took effect they would inevitably continue to occur thereafter, thereby triggering the remedies of s 33. But other triggering-events are the occurrence of a particular event. The event that is material for present purposes is if 'the debtor…is sequestrated'. The clear language of that subsection contemplates a sequestration after the Act took effect and there is nothing in the context to suggest that it was intended to interfere with rights that had accrued to creditors consequent upon the *concursus* of an earlier sequestration. If the failure of the Bank to use the remedies of the earlier Act when the sequestration occurred has left it exposed as a concurrent creditor once the 2002 Act took effect and those remedies fell away, as in my view it has, that is no more than an unintended consequence of the clear intention of the Act. It is for that reason alone that I would dismiss the appeal.

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R. NUGENT
JUDGE OF APPEAL

HEHER JA:

[61] I agree with the judgment of Scott JA but wish to add my own observations concerning the interpretation of s 33.

[62] First, as to context. Some two years passed between the declaration of unconstitutionality in *First National Bank v Land and Agricultural Bank of South Africa Ltd and others* and the operative date of Act 15 of 2002 ('the new Act'). The Bank had ample time to investigate the consequences of the declaration

upon the future conduct of its business and, particularly, the extent of its existing commitments and the sufficiency of security held by it and the protections provided for in relation to advances made, deriving, one assumes, from contracts (since such advances did not fall ripe and ready from the statute into the hands of borrowers). Contractual obligations were not invalidated by the declaration and, in so far as the terms were valid, were preserved with full force and effect by s 52(1) of the new Act. Such contracts would, of course, continue to govern advances paid after the operative date of that Act. I have no doubt that it duly investigated the matter. If, the Bank regarded itself as seriously in need of protection or security in respect of its commitments under such contracts (as distinct from arrangements subject to the new Act) it is inconceivable that it would not have ensured that such protection or security was provided in unequivocal terms in the pending legislation. However, the Bank placed no facts before the court *a quo* which justify any inference that it had ground to fear such prejudice. The court was not told, as one might have expected, of the extent of the Bank's exposure at the date of operation of the new Act. In the circumstances it seems to me that reliance simply upon the historical protections which have over the years been included in legislation affecting the Bank is a tenuous and, perhaps, unreliable, means of establishing the context of s 33(1) and (2). This is an especially significant matter when, as Nugent JA demonstrates, the context defines the intention to an extent where the words of the statute must be strained to serve its ends.

[63] Second, as to interpretation of the text of the new Act. What is certain is that if the real intention of the legislature was to apply s 33 to advances made under the 1944 Act there is no reason why it should not have said so in the simplest and clearest terms. What it did however was in my respectful judgment to disclose the contrary intention with great clarity. However unsatisfactory the phrase 'in terms of' may on occasions be, in the combination 'advances made in terms of this Act' the meaning seems to me to be crystal clear: such advances

are those approved and paid under the authority and in accordance with the prescriptions of the Act in which the words appear.

[64] It seems to me, moreover, that the legislative draftsman has been consistent in his use of language. The use of the perfect tense in the phrase 'in respect of advances it has made' in s 33(1) is simply an indication of the historical fact that the Bank has made an advance. It does not refer to the time of the advance whether before or after the commencement of the Act but it leaves the matter to be regulated by the existence of the circumstances envisaged in ss (2) ('the triggering event' as Nugent JA calls it). One must therefore look to ss (2) in order to decide whether the circumstances do or do not include an advance made before the Act came into operation. It is, with respect, not accurate to talk of a 'denial' of the remedy in ss (1) by what appears in ss (2)(a). Nor is s 33(2) 'subsidiary' to ss 33(1). On the contrary, if one is to give proper weight to the words 'if any of the circumstances envisaged in subsection (2) exist' then it is clear that the apparently unlimited breadth of the phrase 'in respect of advances that it has made' must be subordinated to such limitations as the legislature has placed on the circumstances in s 33(2) which trigger the Bank's right to take action.

[65] Nugent JA assumes that the draftsman used the expression 'any advance made in terms of this Act' in a sense meaning 'in conformity with this Act', or at worst, without a real appreciation of its consequences. (I do not know what sort of advance conforms to the provisions of the Act. To which provisions and in what manner is there to be conformity?) But that seems to secondguess the intention. The phrase must surely bear the same connotation (*mutatis mutandis*) as other substantially similar phrases in other parts of the statute such as 'made in terms of this section' (s 27(2); s 31(2)(a)) and 'an advance in terms of this Act' (s 30(1) and (2); s 33(6)).

[66] Examination of the context shows that all such uses are prospective in the sense that they can relate only to acts which may be done after the commencement of the Act. Why then must it be inferred that the draftsman became confused when he arrived at s 33(2)? It should be pointed out that none of the sections in which comparable language is used (including s 30) benefits from the influence of the allegedly unlimited words of s 33(1) from which Nugent JA draws support for his interpretation.

[67] Nugent JA attaches significance to the effects of the pledge which is created by s 30. He finds that unless one reads into the words 'an advance in terms of this Act' a meaning that includes advances made before the Act the efficacy of the protection will be substantially eroded. I do not agree. The new pledge is designed to create security in produce and products manufactured with money advanced by the Bank and in produce purchased with money advanced by the Bank (s 30(1)) as well as in agricultural produce held under a silo certificate. Such produce or products are by their nature constantly being disposed of and replaced. The duration of an indebtedness of such a nature arising from advances made before the Act came into effect must be very limited. 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.

[68] In summary, not only is the assumption of the legislative intention on which Nugent JA grounds his interpretation unproved but, in order to satisfy the unprovable, one is required to give s 33(2) an artificial construction which the language cannot bear.

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J A HEHER
JUDGE OF APPEAL

SCOTT JA) Concur
ZULMAN JA)
NAVSA JA)