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## REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO:64702/2010

(1)	REPORTABLE: YES/ <del>NO</del>
(2)	OF INTEREST TO THE JUDGES: YES/ <del>NO</del>
(3)	REVISED. ✓
10-9-2015	
DATE	SIGNATURE

In the matter between:

LAND AND AGRICULTURAL DEVELOPMENT

PLAINTIFF

BANK OF SOUTH AGRICA t/a THE LAND BANK

And

FACTAPROPS 1052 CC

1<sup>ST</sup> DEFENDANT

ISMAIL EBRAHIM DARSOT

2<sup>ND</sup> DEFENDANT

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JUDGMENT

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MSIMEKI J:

### INTRODUCTION

- [1] The matter concerns an action which Land and Agricultural Development Bank of South Africa as the Land Bank (Land Bank), the plaintiff, brought against Factaprops 1052 CC and Ismail Ebrahim Darsot, the first and second defendants respectively, claiming from them payment of an amount of R491 203.05 with interest and costs, jointly and severally, the one paying the other to be absolved. The plaintiff's claim against the first defendant is based on a loan agreement secured by a special Notarial Bond while the claim against the second defendant is based on a Deed of suretyship which the second defendant signed.
- [2] The matter serves before me as a stated case in terms of Rules 6(5) (d) (iii) and 33 (1) of the Uniform Rules of Court.
- [3] The defendants brought an application for leave to amend their plea by introducing a special plea of prescription. The plaintiff opposed the application on the basis that the application had involved a question of law raised in terms of Rule 6 (5) (d) (iii). The question of law raised was that the special plea of prescription would not disclose any defence to the plaintiff's claim as the cause of action was for payment of a debt which was secured by a mortgage bond and that the applicable prescription period in terms of section 11 (a) (i) of the Prescription Act, 68 of 1969 ("the Prescription Act") was 30 (thirty) years. The court granted the defendants leave to amend their plea. The amendment was effected on 28 May 2014.

- [4] The parties, consequent to the amendment, agreed to approach the court by way of a stated case. The clear indication is that if the applicable prescription period is found to be 30 (thirty) years, the relief claimed by plaintiff as set out in the declaration should be granted. The plaintiff's claim should be dismissed with costs should the court find that the prescription period is not 30 (thirty) years.
- [5] The parties prepared a "written Statement of agreed facts and formulation of legal issues in terms of Uniform Rule 33 (1)" ("the written statement"). The written statement covers the contents of the declaration, the special plea and the replication. I, as a result, have deemed it necessary to repeat its contents. The written Statement reads:
- "1. *The plaintiff is the **LAND AND AGRICULTURAL DEVELOPMENT BANK OS SOUTH AFRICA** trading as the **LAND BANK** duly registered and incorporated as a legal person under section 3 of the Land Bank Act 18 of 1912 and which continued to exist in terms of section 3 of the Land Bank Act 13 of 1944 and which, despite the repeal of the aforesaid statutes, continues to exist under the name of the Land and Agricultural Development Bank of South Africa in terms of section 2 (1) of the Land and Agricultural Development Bank Act 15 of 2002, and having its main place of business at Echo Glades no. 2, Block D, Witch-Hazel Avenue, Echo Park, Centurion, Pretoria, Gauteng.*

2. The first defendant is **FACTAPROPS 1052 CC**, a close corporation duly registered in terms of the laws of the Republic of South Africa, with registration number 1996/057442/23 and having its registered address at Fourth Floor, Aloe Grove, no. 196, Louis Botha Avenue, Houghton Estate, Johannesburg, Gauteng.
3. The second defendant is **ISMAIL EBRAHIM DARSOT**, an adult man residing at no. 49 Houghton Drive, Johannesburg, Gauteng.
4. In terms of a written offer dated 25 May 1999 from the plaintiff to the first defendant and accepted in writing by a duly authorized representative of the first defendant on 31 May 1999, an amount of R250 000.00 (two hundred and fifty thousand rand) was lent and advanced by the plaintiff to the first defendant and received by the first defendant. A copy of the plaintiff's summons and particulars of claim is annexed hereto marked "A". Copies of the offer and acceptance are annexed hereto marked "B1" and "B2" respectively.
5. In the circumstances, the plaintiff and the first defendant entered into a written loan agreement ("the loan agreement") during or about May 1999 on the basis of what is contained in annexes "B1" and "B2" hereto.
6. In terms of the loan agreement:

- 6.1 *the indebtedness of the first defendant had to be discharged by way of five installments;*
- 6.2 *payment of the amounts due and owing to the plaintiff under the loan agreement in respect of each of the five instalments became due on the following dates:*
- 6.2.1 *15 June 2000: due date for payment of the first annual instalment;*
- 6.2.2 *15 June 2001: due date for the payment of the second annual instalment;*
- 6.2.3 *15 June 2002: due date for the payment of the third annual instalment;*
- 6.2.4 *15 June 2003: due date for the payment of the fourth annual instalment;*
- 6.2.5 *15 June 2004: due date for the payment of the fifth annual instalment.*
- 6.3 *should the first defendant fail to make payments of the amount due and owing on the various payment dates, the full amount due and owing under the loan agreement would immediately become due and payable.*

7. *The amount lent and advanced by the plaintiff to the first defendant taking into consideration interest levied and payments received amounted to R491 203.05 (four hundred and ninety-one thousand two hundred and three rand and five cents) which amount is subject to interest at the rate of 14% per annum calculated from 31 August 2010 to date of payment, with the said interest to be calculated and capitalized monthly. A copy of the balance certificate confirming the above is annexed hereto marked "C".*
8. *In terms of a special notarial bond registered on 18 April 2000, the first defendant hypothecated certain moveable property described more fully in prayer 3 of the plaintiff's summons in favour of the plaintiff as continuing covering security for the benefit of the plaintiff in respect of the first defendant's indebtedness to the plaintiff from time to time for whatever cause arising. A copy of the special notarial bond is annexed hereto marked "D".*
9. *In terms of a written deed of suretyship ("**the suretyship agreement**") the second defendant bound himself as surety and co-principal debtor in solidum in favour of the plaintiff for the repayment on demand of all amounts due by the first defendant to the plaintiff. A copy of the suretyship agreement is annexed hereto marked "E".*

10. *The loan agreement is valid and of full force and effect in terms of section 52 (1) of Land Bank Act 15 of 2002 despite the repeal of the Land Bank Act 33 of 1944.*
11. *The National Credit Act 34 of 2005 does not apply to the loan agreement between the parties.*
12. *The first defendant did not make payment of the loan agreement as when required with the result that the plaintiff claims payment against the first and second defendants jointly and severally the one paying the other to be absolved in the amount of R491 203.05 together with interest at 14% per annum from 31 October 2010 to date of payment with the said interest to be calculated and capitalized monthly. The defendants dispute the aforesaid liability for the reasons set out below.*
13. *As appears from the amended plea filed on behalf of the defendants, a copy of which is annexed hereto marked "F", the defendants allege the following by way of a special plea:*
  - 13.1 *the plaintiff claims payment from the defendants in the sum of R491 203.05 together with interest at the rate of 14% per annum from 31 August 2010 to date of payment with the interest to be calculated and capitalized monthly.*
  - 13.2 *the claim against the first defendant arose ex contractu following the first defendant's alleged failure to make payment of each of*

*the five installments that became due and owing to the plaintiff under the loan agreement concluded during or about May 1999.*

*13.3 payment of the amounts owing to the plaintiff under the loan agreement in respect of each of the five installments became due on the dates listed in paragraph 6.2.1 to 6.2.5 above;*

*13.4 the plaintiff's summons was served on the defendants on 3 November 2010, being more than three years from the dates on which the alleged debt(s) arose as described in paragraph 6.2.1 to 6.2.5 above;*

*13.5 in the premises, the plaintiff's claim is prescribed in terms of section 11 (d) of the Prescription Act 68 of 1969 ("**the Prescription Act**");*

*13.6 in the alternative, and to the extent that it is alleged that the claim against the first defendant arose from the special notarial bond (which is denied), the plaintiff's summons was served on 3 November 2010, being a date more than six years from the dates on which the alleged debt(s) arose as described in paragraph 6.2.1 to 6.2.5 above and in any event more than three years following the lapsing of those dates;*



13.7 *in the premises, the plaintiff's claim is prescribed in terms of section 11 (c) of the Prescribed Act, alternatively section 11 (d) of the Prescription Act;*

13.8 *as a result of the plaintiff's claim against the first defendant having prescribed in the manner set out above, the indebtedness of the second defendant under the deed of suretyship has likewise prescribed.*

14. *As appears from the replication filed on behalf of the plaintiff, a copy of which is annexed hereto marked "G", the plaintiff alleges the following:*

14.1 *due to the registration of the special notarial bond and in view of the terms of the loan agreement and the special notarial bond, plaintiff's claim is for a debt secured by mortgage bond as provided for in section 11 (a) of the Prescription Act;*

14.2 *it is admitted that plaintiff's summons was served on or about 3 November 2010, being a date more than six years from the dates on which the debt arose;*

14.3 *the plaintiff's claim is one for a debt secured by a mortgage bond, and consequently the prescription period is thirty years in terms of section 11 (a) of the Prescription Act and consequently the prescription period has not yet lapsed.*

15. *Accordingly, and in light of the foregoing, the question upon which the Court is requested to adjudicate can be succinctly formulated as follows:*
- Is the applicable period of prescription in the instant proceedings thirty years in terms of section 11 (a) of the Prescription Act (i.e. on the basis that the debt is secured by a mortgage bond) as contended by the plaintiff, or as contended by the defendants, six years as provided for in section 11 (c) (i.e. on the basis that the indebtedness is secured by a notarial contract) or three years as provided for in section 11 (d) on the basis that the debt is one that arose from the loan agreement?*
16. *In the event that the aforesaid question is answered in favour of the plaintiff, the effect thereof will be that the plaintiff's claim has not prescribed and the service of the summons on 3 November 2010 had the effect of interrupting the running of prescription whereafter judgment shall be entered in the name of the plaintiff as claimed in the particulars of claim.*
17. *In the event that the question is answered in favour of the defendants on the basis that the period of prescription is six years as provided for in section 11 (c) (i.e. on the basis that the indebtedness is secured by a notarial contract) or three years as provided for in section 11(d) (on the basis that the debt is one that arose from the loan agreement), the*

*defendants' special plea of prescription will be upheld and action will be dismissed with costs in favour of the defendants.*

18. *The terms of the agreement reached in paragraphs 16 and 17 above is subject to the right of either party to seek leave to appeal and prosecute any appeal to the extent that leave to appeal is granted by the above Honourable Court".*

- [6] Paragraph 15 of the written statement contains the issue which the court has to determine.
- [7] It was contended on behalf of the plaintiff, that the plaintiff's claim is one for a debt secured by a mortgage bond, and consequently the prescription period is thirty (30) years in terms of section 11 (a) (i) of the Prescription Act and that the plaintiff's claim has not prescribed.
- [8] The contention, on behalf of the defendants, is that the prescription period in terms of section 11 (c) of the Prescription Act is 6 years, alternatively 3 years in terms of section 11 (d) of the Prescription Act. Lastly the further contention is that the plaintiff's claim has become prescribed either in terms of section 11 (c) or 11 (d) of the Prescription Act.
- [9] The determination of the burning and vexed issue lies in a proper interpretation of statutes relevant to the issue. The views and opinions of

academics and authors will not be disregarded in the determination of the issue.

[10] The statutes, most relevant to the issue, are:

1. The Deeds Registries Act, No 47 of 1937 ("the Deeds Registries Act");
2. The Insolvency Act, No. 24 of 1936 ("the Insolvency Act");
3. The Security by means of Movable Property Act No 57 of 1993. ("the Security Act"), and
4. The Prescription Act, No.68 of 1969. ("the Prescription Act")

[11] Before I deal with the issue I have been called upon to determine, it is paramount to first understand the meanings of:

1. **Mortgage**
2. **mortgage bond**
3. **General notarial bond, and**
4. **Special notarial bond**

[12] **Francois du Bois, and others ("Du Bois and others"): Wille's Principles of South African Law, 9<sup>th</sup> Edition, define a "mortgage" as:**

"a real right in respect of the immovable property of another, securing a principal obligation between a creditor and a debtor. This real right is created by registration in the Deeds Registry pursuant to an agreement between the parties".

According to them a mortgage is always accessory to a principal obligation as its existence and continued existence depends upon the existence of the

principal obligation which it secures. A mortgage, they further say, is indivisible as it exists up until the entire obligation is extinguished. A reduction of the debt by payment does not mean a reduction in the security for the debt. The burden on the mortgaged property remains the same (see also **Roodepoort United Main Reef G M Co Ltd (in liquidation) v Du Toit NO 1928 AD 66 at 71** and **Nasionale Behuisingskommissie v Swaziland Trustees and Executors Ltd 1962 (3) SA 816 (T) at 819**).

- [13] In **LAWSA volume 17 (2) paragraph 327 JG Lubbe and TJ Scott** define "mortgage" in a narrow sense as "a real right of security in an immovable asset or immovable assets of another, which is created by registration in the deeds registry pursuant to an agreement between the parties".
  
- [14] Section 102 of the Deeds Registries Act 47 of 1937 ("the Deeds Registries Act") defines "mortgage bond" as "a bond attested by the registrar specially hypothecating immovable property". It must, in terms of section 50 (1) of the Deeds Registries Act, be executed in the presence of the registrar by the owner of the immovable property therein described or by a conveyancer duly authorized by such owner by power of attorney, and must be attested by the registrar.
  
- [15] **Van Wyk JA in Lief NO v Dettmann 1964 (2) SA 252 (A) at 259** defined a "mortgage bond" as "an instrument hypothecating landed property to secure an existing debt or a future debt or both existing and future debts". This is in line with the provisions of section 50 (2) of the Deeds Registries Act.

- [16] The term “**mortgage bond**” refers to a deed or instrument the registration of which brings about the “mortgage”. “Mortgage bond” is an instrument of title to a real right in the property (e.g land) hypothecated thereby. (See **Lief NO v Dettmann (supra)** at 266; **Thienhaus NO v Metje Ziegler Ltd 1965 (3) SA 25 (A)** at 32 and **Du Bois and Others (supra)** footnote 6 at 631.)
- [17] It is important to note that a consensual right to claim hypothecation of immovable property is, prior to registration of the personal right, available only against the debtor. A real right is only constituted in favor of the mortgagee once the debtor causes a mortgage bond to be registered in the Deeds Registry. This gives effect to the reciprocal obligation. Personal rights known as *jura in personam ad rem acquirendum*, with few exceptions, give rise only to personal rights which are converted into real rights by registration. (**Registrar of Deeds (Transvaal) v The Ferreira Deep Ltd 1930 AD 169 at 180** and **Oliff v Minnie 1953 (1) SA 1 (AD)** ).
- [18] **Van Den Heever JA at 3E in Oliff v Minnie (supra)** defined “mortgage bond” as:
- “an acknowledgment of debt and at the same time an instrument hypothecating landed property or other goods”. (my emphasis)

It is clear from the case that the object of a mortgage bond is to hypothecate and settle the terms of a loan. The mortgagee lends the money while the mortgagor furnishes security stipulated for and complies with the conditions

relating to the repayment of the amount of the loan. These flow from the parties' common consent to undertake the transaction.

[19] **In Lief NO v Dettman (supra) at 276E** the court said:

"The bond itself (i.e. the document) is a corporeal movable. It embodies an incorporeal right of action and real right in immovable property which is accessory to and secures the principal obligation".

[20] **Lubbe and Scott (supra) at paragraph 328** say that:

"An agreement will constitute a mortgage agreement resulting in a real right of security upon registration, only if it reveals upon analysis, an intention to grant real security for the performance of a principal obligation by the creation of a real right in an immovable asset of the mortgagor".

[21] **A "notarial bond"** in section 102 of the Deeds Registries Act is defined as "a bond attested by a notary public hypothecating movable property generally or specially". (my emphasis)

The movables hypothecated in a special notarial bond are specifically identified and described while the hypothecated movables are not specifically identified and described in a general bond. The holder of a general or special notarial bond registered before the Security by means of Movable Property Act came into operation does not enjoy a real security right. The result is that such notarial bond is not enforceable against a *bona fide* acquirer or pledgee of the mortgaged property or against a creditor who has attached the property in execution in good faith. **(Du Bois and Others (supra) at 652 and 653;**

**Atmore NO v Tobacco Sales Warehouse (Pvt) Ltd 1978 (3) SA 215 (T)  
and the other cases mentioned in footnote 202- Du Bois and others).**

[22] The anomaly or the problem that was faced by the notarial bondholders whose bonds were registered before the Security by means of Movable Property Act 57 of 1993 ("the Security Act") came into operation has been removed by the enactment of this piece of legislation. The Act now regulates the legal consequences of the registration of a notarial bond over specified movable property. It excludes the operation of the landlord's tacit hypothec in respect of certain movable property. The act repeals the Notarial Bonds (Natal) Act, 1932 and adjusts another law in consequence of such repeal.

[23] Section 1 of the Security Act provides:

"1(1) if a notarial bond hypothecating corporeal movable property specified and described in the bond in a manner which renders it readily recognizable is registered after the commencement of this Act in accordance with the Deeds Registries Act, 1937 (Act NO.47 of 1937), such property shall –

(a) Subject to any encumbrance resting upon it on the date of registration of the bond, and

(b) Notwithstanding the fact that it has not been delivered to the mortgagee, be deemed to have been pledged to the mortgagee as if it had expressly been pledged and delivered to the mortgagee"(my emphasis)

This bond, upon the discharge of the debt secured by the bond, mentioned in subsection 1, in terms of section 1 (2) must be cancelled.



- [24] Section 1(1) of the Security Act, as a deeming section confers a real right of security on the bondholder.
- [25] General notarial bonds confer no real rights of security on the bondholders over the property. They deserve no further attention as the issue to be resolved relates to a special notarial bond. A notarial bond which fails to specify and describe the movable property that is hypothecated does not satisfy the requirements of section 1 (1) of the Security Act. In that event, the bond does not create a deemed pledge of the property. Such bond does not confer a real right of security over the property (**Ikea Trading and Design A G v BOE Bank Ltd 2005 (2) SA 7 (SCA)**).
- [26] The enactment of the Security Act resulted in the amendment of section 2 of the Insolvency Act. The amendment relates to the definition of "special mortgage". Section 4 of the Security Act amended section 2 of the Insolvency Act by substituting the definition of "special mortgage".
- [27] Section 2 of the Insolvency Act defines "Special Mortgage" as:  
"A mortgage bond hypothecating any immovable property or a notarial mortgage bond hypothecating specially described movable property in terms of section 1 of the Security by means of Immovable Property Act". (my emphasis)
- A proper reading of the definition reveals that a general notarial bond has been excluded from the definition. There must be a specific and special reason for such exclusion. In terms of the definition a special notarial bond

forms part of a "special mortgage". The legislature, in my view, at the time of the amendment of Section 2 of the Insolvency Act, was well aware of the existence of Section 11 (a) (i) of the Prescription Act. It was also aware of the consequences of the amendment.

- [28] As alluded to above, it was submitted, on behalf of the plaintiff, that a special notarial bond should be included in the definition of "mortgage bond" in the Prescription Act. This must have been the intention of the Legislature as I have shown above.

Section 11 of the Prescription Act provides:

**"11 periods of prescription of debts.-**

The periods of prescription of debts shall be the following:

(a) thirty years in respect of –

- (i) any debt secured by mortgage bond;
- (ii) .....
- (iii) .....
- (iv) .....

(b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);

(c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt". (my emphasis).

[29] On behalf of the plaintiff, the submission is that the prescription period applicable in this case is 30 years. The reasons advanced therefor are the following:

1. The bond involved in this matter is a special notarial bond and not a general notarial bond.
2. The general effect, after registration of a mortgage bond and a notarial bond, is basically the same for both bonds.
3. Both mortgage bonds and notarial bonds have similar provisions in terms of the Deeds Registries Act and that the inference must therefore be drawn that a reference to "mortgage bond" in the Prescription Act includes both mortgage bonds in respect of immovable property and bonds in respect of movable property.
4. In terms of the Insolvency Act, a special notarial bond is also a "special mortgage".
5. The correct definition of "mortgage bond" must be in line with the intention of the legislature.
6. The substituted definition of "special mortgage in the Insolvency Act was brought about by section 4 of the Security Act which amended

section 2 of the Insolvency Act. The legislature at the time of the amendment was well aware of the provisions of Section 11 (a) (i) of the Prescription Act.

7. The incorporation of a notarial bond into the definition of "mortgage bond" in the Security Act and the Insolvency Act, in 1993, is a clear indication that the legislature always intended a notarial bond to be incorporated in the definition of mortgage bond.

[30] **Molopa-Sethosa J**, at paragraph [69] of her judgment, in **Land and Agricultural Development Bank of South Africa v Thato Farms (Pty) Ltd (formerly known as Mount Carmel Farms No 2 (Pty) Ltd and 3 Others**, case number 58018/10, dealing with special and general notarial bonds, said:

"[69] A special notarial bond registered over movables could be considered to be a mortgage bond as envisaged in section 11 (a) (i) of the Prescription Act, as it confers a real right of security on the bondholder". The same, according to her, could not be said of a general notarial bond.

[31] The court in **Standard Bank of South Africa Ltd v Saunderson 2006 (2) SA 264 (SCA)**, at paragraphs [2] and [3], said:

"A mortgage bond is an agreement between borrower and lender, binding upon third parties once it is registered against the title of the property, that upon default the lender will be entitled to have the property sold in satisfaction of the outstanding debt. Its effect, is that the borrower by his or her own volition, either on acquiring a house or later when wishing to raise further

capital, compromises his or her rights of ownership until the debt is paid. The right to continued ownership and hence occupation, depends upon repayment. The mortgage bond does curtail the right of property at its root, and penetrates the rights of ownership for the bondholder's rights are fused into the title itself. The value of a mortgage bond as an instrument of security lies in confidence that the law will give effect to its terms".

[32] **Rabie J** in the matter of **Land and Development Bank of South Africa v Boeke & Another**, case number 12506/07 had an occasion to deal with an issue similar to the issue I am called upon to determine. After examining, analyzing and considering the law against the facts of the case, he concluded that the period of prescription in respect of a debt secured by a special notarial bond contemplated in section 1 of the Security Act, was 30 (thirty) years.

[33] The defendants, *in casu*, pleaded specially that the plaintiff's claim had prescribed in terms of section 11 (d) of the Prescription Act.

In the alternative the defendants further pleaded specially that the plaintiff's claim, in terms of section 11(c), had prescribed. This was, in the event that the plaintiff's claim against the first defendant was alleged to have arisen from the special notarial bond. On behalf of the defendants, the submission was that the six year period in terms of section 11 (c) had come and gone. Either way, i.e. whether one looked at the issue from the point of view of section 11 (c) or 11 (d), the plaintiff's claim, according to the defendants, had become prescribed. The prescription of the main claim, according to the defendants

meant that the indebtedness of the second defendant under the deed of suretyship also had become prescribed. This will be correct if the construction of section 11 (a) (i) of the Prescription Act is proper, in which event, that would be in line with the law. It is correct that the extinction of the principal debt discharges the surety from liability. A mortgage is extinguished by discharge of the principal debt and termination of the principal obligation by release, novation, compromise, set off or agreement. **(Du Bois and Others (supra) at 1026-1027; Cronnin v Meerholt 1920 TPD 403 at 407, Prescription Act ss 10 (1), (2); Leipsig v Bankorp Ltd 1994 (2) SA 128 (A) at 132; Absa Bank Bpk v De Villiers 2001 (1) SA 481 (SCA); Jans v Nedcor Bank Ltd 2003 (6) SA 646 (SCA)**

[34] On behalf of the defendants, the submission is that “mortgage bond” and “notarial bond” are not synonymous. They may not be synonymous but a law may cause them to apply the same way or have the same effect.

[35] On behalf of the defendants, it was further submitted, that the use of the term “mortgage bond” is two-fold. First, it covers every form of hypothecation of the property and this includes every real right which one person has in and over another’s property for the purpose of securing payment of a debt or generally the performance of an obligation. The further submission is that “mortgage” is also used in a more restricted sense. This is also correct.

While it is, indeed, so that the Prescription Act does not define the terms “mortgage bond” and “notarial contract, and while it is further correct that section 102 (1) of the Deeds Registries Act defines a “mortgage bond” as a

bond attested by the registrar specially hypothecating "immovable property" and a "notarial bond" as a bond attested by a notary public hypothecating movable property generally or specially", it is not necessarily so that a notarial bond has not been elevated to a point where it now could have the same effect as a mortgage bond in its restricted sense. This depends on the proper construction of the term "mortgage bond" used in section 11 (a) (i) of the Prescription Act. There is, indeed, a distinction in the registration of immovable and movable property. The most important aspect which should never be lost sight of is the effect both have after registration, which, in my view, appears to be the same. Section 53 (1) of the Deeds Registries Act, provides:

"Save as provided in any other law the registrar shall not attest any mortgage bond which purports to bind movable property or which contains the clause, commonly known as the general clause, purporting to bind generally all the immovable or movable property of the debtor or both and shall not register any notarial bond which purports to bind immovable property".

The section, in my view, deals with the registration of a notarial bond which binds movable property and a bond which hypothecates immovable property. Real rights of security are created by registration but the effect of such registration, in my view, is something else. Understanding the difference, in my view, will help us determine whether the period of prescription in respect of a debt secured by a special notarial bond and a debt secured by a bond which binds specially immovable property is the same.

[36] A submission, on behalf of the defendants, is that section 1 of the Security Act is in line with section 53 (1) of the Deeds Registries Act in that it does not make provision for the registration of notarial bonds over immovable property. I have already pointed out that while it may well be so that there is no room for the registration of notarial bonds over immovable property the registration in both cases, however, creates real rights of security. This is what section 2 of the Insolvency Act and section 1 of the Security Act specifically deal with. They deal with "special mortgage" which is "a mortgage bond" hypothecating any immovable property or "a notarial mortgage bond" hypothecating specially described movable property in terms of section 1 of the Security Act. The definition of "special mortgage" in section 2 of the Insolvency Act excludes "any other mortgage bond hypothecating movable property". A general notarial bond falls under "any other mortgage bond hypothecating movable property".

[37] Indeed, it is correct that the interpretation of section 11 (a) (i) of the Prescription Act has not been the subject of reported case law. It is also correct that this division has no less than four unreported judgments in which the interpretation of the section has come under consideration. These are:

1. The judgment of my brother **Rabie J** in **Land and Agricultural Development Bank of South Africa v Boeke Bellevue Auctioneers (Pty) Ltd** (TPD case no 12506/07: 17 February 2011. The case dealt with the period of prescription in respect of a debt secured by a special notarial bond, the subject matter of the determination that I am called upon to make in this matter,



2. The judgment of my brother **Mabuse J** in the matter of **ABSA Bank Limited v Hammerie Group (Pty) Limited (7457/12) [2013] ZAGPPHC 403 (20 December 2013)**.
3. The judgment of my brother **Phatudi AJ** in the matter of **Land and Agricultural Development Bank of South Africa v Factaprops 1052 CC Darsot (64702/2010 [2014] ZAGPPHC 293 (19 May 2014)**, and
4. The judgment of my sister **Molopa-Sethosa** in the matter of **Land and Agricultural Development Bank of South Africa v Phato Farms (Pty) Ltd and Others 9580/10 [2014] ZAGPPHC 616 (11 August 2014)**.

This matter concerned a special plea of prescription in the context of a general notarial bond and the court after analysing the relevant authorities concluded that a general notarial bond cannot be said to constitute a mortgage bond as envisaged in section 11 (1) (a) of the Prescription Act. I agree.

- [38] In ABSA Bank Limited case, **Mabuse J**, was called upon to determine the period of prescription where the respondent had bound certain of its movable assets specially and generally as security for its obligations to the applicant under a loan agreement. The respondent contended that the debt arising from a loan agreement had become prescribed. The application concerned the liquidation of the respondent on the grounds that it was commercially insolvent; that it was unable to pay its debts and that it would be unable to pay its future debts. The applicant contended that the loan agreement was secured by a special and

general notarial bond and that, as a consequence, the applicable period of prescription, in terms of section 11 (a) (i) of the Prescription Act was 30 years. After analysing the relevant law, Mabuse J came to the conclusion that "the prescription period that applied to it was, therefore, three (3) years.

[39] In **Land and Agricultural Development Bank of South Africa v Factaprops 1052 CC & Darsot** (supra) the applicants sought leave to amend their plea which would include a special plea of prescription. After analysing the earlier decisions I have referred to above as well as the relevant statutes, Phatudi AJ concluded that a special notarial bond could not be construed as a mortgage bond within the meaning of section 11 (a) (i) of the Prescription Act. On that basis, he found that the proposed amendment was not bad in law, and that same would not be excipiable as disclosing no valid defence. The defendants (applicants) were granted leave to amend their plea by introducing a special plea formulated in their notice in terms of Rule 28 (1) of the Uniform Rules of Court. Effectively, Phatudi AJ endorsed the approach that Mabuse J followed when he concluded that the period of prescription was 3 years and not 30 years.

[40] In **Land and Agricultural Development Bank of South Africa v Phato Farms (Pty) Ltd** (supra), my sister **Molopa-Sethosa J**, also had to *inter alia*, decide whether a general notarial covering bond was a mortgage bond. After having had regard to Rabie J's judgment ,as

well as the other authorities, she concluded that a special notarial bond, registered over movables could well be considered to be a mortgage bond as envisaged in section 11 (a) (i) of the Prescription Act. She further concluded that a general notarial bond cannot be said to be a mortgage bond as envisaged in section 11 (a) (i) of the Prescription Act. The general notarial bond in question, according to her, was a notarial contract as envisaged in section 11 (c) of the Prescription Act, and that the prescription period in such a case was 6 years which meant that the plaintiff's claim had become prescribed.

[41] It appears, Molopa-Sethosa J, did not have the benefit of perusing and considering the other two judgments.

[42] In paragraph [27] of his judgment, Mabuse J, said:

"[27] It is clear that a mortgage bond is not a notarial bond. The main attribute of a mortgage bond, and which is lacking in a notarial bond, is the immovable property. Simply put, in a mortgage bond the property hypothecated is an immovable property whereas in so far as it concerns the notarial bond the property involved is a movable property. Accordingly the period of 30 years does not apply to the notarial bond because it is not a mortgage bond. I accept though that in terms of section 11 (b), if it be proved that the debt arises from a notarial contract the applicable period of prescription is six (6) years".

[43] The submission, on behalf of the plaintiff, is that the foundation for Mabuse J's finding is incorrect. The reason advanced is that the reference in the Security Act and the Insolvency Act to "special notarial bonds" as "mortgage bonds" negates the notion that a mortgage bond must in all instances apply to immovable property. I agree.

Mabuse J in paragraph [27] of his judgment, seems to be saying that a notarial bond is not a mortgage bond. A mortgage bond, according to him, only relates to immovable property. Having regard to the definition of "special mortgage" in section 2 of the Insolvency Act, Mabuse's view regarding the aspect cannot be correct. It is a mistake. In **Oliff v Minnie (supra)**, **Van Den Heever JA** described a "mortgage bond": as an acknowledgement of debt and at the same time an instrument hypothecating landed property or other goods". (my emphasis)

The instrument that the judge refers to creates real rights of security upon registration thereof at the Deeds office. Section 1 of the Security Act also creates real rights of security upon registration of the bond.

A special notarial bond in terms of section 1 of the Security Act and Section 2 of the Insolvency Act is a mortgage bond just as the bond hypothecating immovable property (i.e. in its restricted sense) is. Section 2 of the Insolvency Act clearly refers to both as "mortgage bond". The failure to see the mistake by Mabuse J led to him concluding that "the period of thirty years does not apply to the notarial bond".

- [44] “Mabuse’s judgment, on the issue, was endorsed by Phatudi AJ who also made another mistake when he said:

“I am firm in my view, therefore that the differentiation of the legal nature between a notarial bond and ‘a mortgage bond’ with reference to prescription of debts should always be appraised. This approach, I thought accords with the provisions of the Deeds Registries Act, 1937, read in conjunction with the Securities Act, 1993. These are two crucial statutory instruments ever passed by the lawmaker in the last century on the subject”

- [45] It seems to me that Phatudi AJ, too, failed to see that a notarial bond especially a “special notarial bond” is “a mortgage bond”. As correctly submitted, on behalf of the plaintiff, the inference that Phatudi AJ drew from the stipulations of the Deeds Registries Act and the Security Act are incorrect. The Deeds Registries Act deals with the modes of delivery which apply in respect of real rights and which do not reflect upon the prescription periods applicable to real rights created or transferred by the registration process. The registration of the real rights in respect of immovable and movable property is not the same but the legal consequences or effect of both bonds registered over the property is the same.

The conclusion that Phatudi AJ reached when he said that the plaintiff could only exercise its right of security over the encumbered movables once it perfected its claim under the bond, in my view, also appears to be incorrect. As correctly submitted, on behalf of the plaintiff, section 1

of the Security Act provides that the encumbered movable which is specified and described (readily recognizable) "shall be deemed to have been pledged to the mortgagee as effectually as if it had expressly been pledged and delivered to the mortgagee". Perfection, in my view, is therefore unnecessary. This shows Phatudi's conclusion to be clearly incorrect.

[46] On behalf of the defendants, it was submitted that Rabie J's judgment was "wrongly decided and ought not to be followed". As one of the reasons why it ought not to be followed, the submission proceeded, Van Heerden JA's statement in **Ollif v Minnie (supra)**, 'was made obiter and the court was not tasked with determining the proper scope of a mortgage bond'. I do not think that the submission is correct. A court is not precluded from making a correct statement of law simply because that does not fall within the terms of reference. What I have alluded to above clearly demonstrates the incorrectness of the submission and the notion.

[47] It is correct that in "interpreting legislation it is always assumed that the legislature did not intend to repeal or modify the earlier statutes". (**Kent v S A Railways and Harbours 1946 AD 405** and **Wendwood Development (Pty) Ltd v Reiger 1971 (3) SA 28 (A)**). However, the presumption does not preclude a court from coming with an interpretation which is clearly sound and correct.

[48] Coming back to the submissions, on behalf of the plaintiff, the following is evident:

1. Indeed, this case involves" a special notarial bond".
2. A proper consideration of the Deeds Registries Act reveals that notarial bonds and mortgage bonds share provisions of the Act. (Section 50 (2); 50 (3); 50 (4) and (5); 51; 52 54 and 55)

The Deeds Registries Act in these sections, in my view, has used "mortgage bond" and notarial bond simply to differentiate between the bond over immovable and movable property. The Security Act as well as the insolvency Act clearly show the significance of a special notarial bond. This is where the legal effect thereof, after registration, surfaces. They both are instruments acknowledging indebtedness and hypothecating property and they are, indeed, real rights of security.

3. In terms of the Insolvency Act "special mortgage" means a mortgage bond hypothecating any immovable or a notarial mortgage bond hypothecating specially described movable property in terms of section 1 of the Security Act.

It is noteworthy that section 4 of the Security Act is the one which amended section 2 of the Insolvency Act by substituting the definition of "special mortgage". The significance of the amendment cannot be denied. The legislature, at the time of the amendment, was well aware of the existence of the Prescription Act, in particular section 11 (a) (i) thereof as well as its provisions and implications. The amendment is unambiguous. It

tells us more about the mortgage bond I have dealt with above. It appears to have been the Legislature's intention to make the period of prescription in respect of debts secured by a mortgage bond and special notarial bond 30 (thirty) years. "Special mortgage" excludes a general notarial bond. This explains why section 1 of the Security Act is key in the determination of the issue before the court. A general notarial bond accords no special protection which is given by the special notarial bond. No wonder why the period of prescription of a debt secured by a special notarial bond has to be thirty years (30). A special notarial bond creates a real right of security. It seem to me that "a general mortgage bond" in section 11 (c) of the Prescription Act and section 102 of the Deeds Registries Act refers to a general notarial contract. **(Cooper No and Others v The Master and Another 1992 (3) SA 60 at 85 D and the judgment of Rabie J at paragraph [17].**

- [49] Having regard to what I say above, it is clear that the correct interpretation of section 11 (a) (i) in the Prescription Act seems to be that the legislature intended to include special notarial bonds in the reference to "mortgage bond". The reading of section 11 (a) (i) together with section 2 of the Insolvency Act, and section 1 of the Security Act, makes it even clearer. Having said this, in my view, it also becomes clear that Rabie J, in his judgment was correct when he found that reference to a "general" mortgage bond in the statutes referred to



herein “obviously refer to a mortgage bond relating to movables”. (Paragraph [17] of his judgment). He was also correct in finding that the period of prescription in respect of a debt secured by a special notarial bond contemplated in section 1 of the Security Act is 30 years. There is therefore no reason why his judgment ought not to be followed.

[50] Section 11 (a) (i) of the Prescription Act specifically stipulates that the period of prescription of “any debt secured by a mortgage bond” shall be 30 years. What is clear is that any debt can be secured by a mortgage bond. The meaning and description of “mortgage bond” has been dealt with above.

[51] The further submission, on behalf of the plaintiff, was that a proper consideration of the Prescription Act, evinces that there is a distinction between prescription periods in respect of real rights and personal rights. According to the submission, real rights of ownership and servitudes are only affected by prescription after a period of 30 (thirty) years (sections 1, 6 and 7 of the Prescription Act). It was lastly submitted that, bearing in mind the consistency relating to similar provisions made by the legislature, the term “mortgage bond” being an instrument creating a real right to a creditor, has to be notarial bond by which a real right of security is created. This I discussed above. The submission has merit.

[52] Rabie J's judgment, in light of what I say above, ought to be followed. The period of prescription of any debt secured by a "mortgage bond" is 30 (thirty) years. Having so found, it becomes unnecessary to deal with section 11 (c) of the Prescription Act. Plaintiff's claim has not prescribed. The service of the summons on 3 November 2010 interrupted the running of prescription.

[53] Paragraph 16 of the written statement of agreed facts and formulation of legal issues in terms of Uniform Rule 33 (1) dated 20 October 2014 (the written statement) reads:

"16. In the event that the aforesaid question (the issue to be determined referred to in paragraph 15 of the written statement) is answered in favour of the plaintiff, the effect thereof will be that the plaintiff's claim has not prescribed and the service of the summons on 3 November 2010 had the effect of interrupting the running of prescription whereafter judgment shall be entered in the name of the plaintiff as claimed in the particulars of claim".

[54] Having found in favour of the plaintiff, paragraph 16 of the written statement, has become applicable and must be adhered to.

[55] **In the result I make the following order:**

1. **Judgment is entered in favour of the plaintiff against the defendants, jointly and severally, the one paying the other to be absolved, for:**

**1.1. Payment of R491 203.05**

**1.2. Interest on the amount of R491 203.05 at the rate of 14% per annum from 31 August 2010 to date of payment, the said interest to be calculated and capitalized monthly;**

**1.3. Costs of suit taxed on the scale as between attorney and client;**

**AS AGAINST THE FIRST DEFENDANT:**

**1.4. An order is granted authorizing the plaintiff and/or the sheriff for the district where the following movable property or any replacements or components thereof may be found, namely 8 X Nordisk air/cooking systems, serial numbers:**

**Room 3 – 8889 – 0461 – 008**

**Room 4 – 8889 – 0461 – 007**

**Room 5 – 8889 – 0124 - 004**

**Room 6 – 8889 – 0461 - 005**

**Room 7 – 8409 – 1466 - 006**

**Room 8 – 8409 – 1466 – 002**

**Room 9 – 8309 – 0428 – 003**

**Room 10 – 8409 – 1466 – 001**

to enter onto the said premises and to attach the property and to deal therewith in accordance with the terms of the special notarial bond number BN24464/2000.

  
M.W. MSIMEKI  
JUDGE OF THE GAUTENG  
DIVISION, PRETORIA

COUNSEL FOR THE PLAINTIFF:  
INSTRUCTED BY:

ADV B BERGENTHUIJN SC  
VAN ZYL LE ROUX ATTORNEYS

COUNSEL FOR THE 1<sup>ST</sup> & 2<sup>ND</sup> DEFENDANTS :  
INSTRUCTED BY:

ADV C.C BESTER  
ISMAIL AYOB & PARTNERS

DATE OF HEARING:  
DATE OF JUDGMENT:

28 OCTOBER 2014  
10 SEPTEMBER 2015