

**IN THE HIGH COURT OF SOUTH AFRICA  
(TRANSCAAL PROVINCIAL DIVISION)**

**CASE NO: 12506/07**

**In the matter between:**

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

**Plaintiff**

**and**

**A. BOEKE**

**Defendant**

**BELLEVUE AUCTIONEERS (PTY)LTD**

**Applicant/Stakeholder**

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**JUDGEMENT**

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**Coram: RABIE J**

1. The crisp question that arises for decision in this matter is what the period of prescription is in respect of a debt secured by a special notarial bond contemplated in section 1 of the Securities by Means of Movable Property Act, Act 57 of 1993.
2. The plaintiff and the defendant entered into two loan agreements, the first for R134 000,00 on 2 July 1997 which debt became due and payable on 2 July 1998, and the second for R375 000,00 on 25 March 1999 which debt became

due and payable on 16 February 2004. The defendant failed to honour his indebtedness in terms of the agreements and plaintiff issued summons against him during April 2007.

3. The first debt was secured by a special notarial bond over defendant's Nissan motor vehicle. The bond was registered in the Deeds Office on 13 August 1997. The second debt was secured by a special notarial bond over a number of specified Simbra cows owned by the defendant. The bond was registered in the Deeds Office on 16 February 2004.
4. The only defence tendered by the defendant in respect of both claims related to the issue of prescription. The defendant contended that in respect of both debts the three year period as contemplated in section 11(d) of the Prescription Act, Act 68 of 1969 ("the Act"), is applicable and that both debts have consequently become prescribed.
5. The plaintiff contended, however, firstly, that both debts were secured by mortgage bonds and that the prescriptive period is thus 30 years as provided for in section 11(a)(i) of the Act. The plaintiff contended in the alternative that the debts arose from a notarial contract and that the prescriptive period is thus 6 years as provided for in section 11(c) of the Act. In that event the debt in respect of the first loan would have become prescribed but not the debt in respect of the second loan.
6. Section 10 and 11 of the Act, *sv* "Prescription of Debts" provide as follows:

“10       Extinction of debts by prescription

(1) Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.

(2) By the prescription of a principal debt a subsidiary debt which arose from such principal debt shall also be extinguished by prescription.

(3) Notwithstanding the provisions of subsections (1) and (2), payment by the debtor of a debt after it has been extinguished by prescription in terms of either of the said subsections, shall be regarded as payment of a debt.

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)      any judgment debt;
  - (iii)     any debt in respect of any taxation imposed or levied by or under any law;
  - (iv)     any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;
- (b)     fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a 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.”

7.     The parties were *ad idem* that the 15 year period in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of

land by the State is not applicable as the plaintiff is not “the State” as intended by section 11(b) of the Act. *Cf Holeni v The Land and Agricultural Bank of South Africa* 2009(4) SA 437 (SCA).

8. The first question to be answered is thus whether the words “mortgage bond” referred to in section 11(a)(i) of the Act also includes a reference to a notarial mortgage bond. If that were the case, the debts upon which the plaintiff’s claims were based would be subject to a period of a prescription of 30 years and the plaintiff would then be successful in respect of both its claims against the defendant.
9. If not, the second question arises, namely, whether the defendant’s debt to the plaintiff can be said to be “arising ... from a notarial contract” as envisaged in section 11(c) of the Act. In such event of the period of prescription would be 6 years with the result that the plaintiff’s claim of R137 000,00 in respect of the first loan would have become prescribed but the claim of R R375 000,00 in respect of the second loan would be due and payable to the plaintiff.
10. The parties were *ad idem* that the present claims of the plaintiff do not fall within any of the other provisions of section 11 of the Act. I agree with this submission and consequently it is not necessary to refer to those provisions.
11. To get back to the meaning of “mortgage bond” (“Verband” in Afrikaans) as used in the Act. The Act does not define the term “mortgage bond” and counsel for the plaintiff and the defendant could not refer me to any court

decision which refers to the import and meaning of this term as used in the Act.  
I could also not find any.

12. In Claasen, Dictionary of Legal Words and Phrases, second edition, volume 3, "mortgage" is defined as follows: "Is a right given by a debtor, over his property, to his creditor in order to secure an obligation". Reference is made to Wille's Principles of South African Law, 6<sup>th</sup> edition p234 and Kahn, Contract and Mercantile Law Through the Cases p988. "Mortgage bond" is defined as follows: "a mortgage bond may be defined as an instrument hypothecating landed property to secure an existing debt or a future debt or both existing and future debts". The reference is made to section 50(2) of the Deeds Registries Act 47 of 1937 and Lief v Dettmann 1964(3) SA 252 (A). "Notarial bond" is defined as "a mortgage bond duly executed in the presence of a notary public".
13. Although it cannot be denied that in general parlance and amongst practitioners the phrase "mortgage bond" is more often than not referred to when immovable property is hypothecated and the phrase "notarial bond" when movables are hypothecated, I could find no authority for the proposition that these phrases should be so restricted in their interpretation. In fact, the term mortgage bond is often used to describe a notarial bond. The definition above in Claasen's work of notarial bond is an example. Another is the statement by Van den Heever J.A in Olief v Minnie, 1953 (1) SA 1 (AD), where it was stated on p. 3 that,  
  
"a mortgage bond as we know it is an acknowledgment of debt and at the same time an instrument hypothecating landed property *or other goods*". (my emphasys).

Other authority on the subject, of which Cooper NO en andere v Die Meester en 'n ander 1992 (3) SA 60 (A) is a good example, supports this notion.

14. Authors commenting specifically on the question whether the 30 year prescription period of the Act applies to notarial mortgage bonds are prof M. Loubser in his work Extinctive Prescription and Prof J.C. de Wet in Kontraktereg en Handelsreg, de Wet en Yeats. Prof Loubser put it thus on p 37 of his work:

"A debt is secured by a mortgage bond upon the registration of the bond. The Act does not distinguish between different kinds of mortgage bond and the thirty year period therefore applies to a debt secured by any kind of mortgage bond, including a special bond, a general bond, a general covering bond, a collateral bond *and a notarial bond*." (my emphasys).

Prof de Wet stated the following in his aforesaid work, 4<sup>th</sup> edition, page 260 footnote 27:

"'n Verband is natuurlik nie net 'n spesiale verband nie, maar ook 'n notariële verband."

Unfortunately none of these authors discussed these statements and it would seem that they regarded it as trite that the phrases "verband" and "mortgage bond" are not restricted to any particular kind of mortgage bond ("verband") and relate to the hypothecation of both immovables and movables.

15. A research of present as well as earlier legislation referring to mortgage bonds does not, in my view, detract from these views. What it does show is that each Act must be interpreted with its particular objectives in mind and not in order to establish any hard and fast meaning of particular phrases used. So, for example, the Deeds Registries Act, Act 47 of 1937 deals, *inter alia*, specifically

with the execution and registration, where applicable, of different types of bonds. For that reason a distinction in the Act between a mortgage bond hypothecating immovable property and one hypothecating movable property Act was called for. The fact that the phrase “mortgage bond” was then used in respect of immovable property and “notarial bond” in respect of movable property can thus not be an indication that all other statutes should be interpreted in this manner.

16. So, for example, section 1 of the Insolvency Act, Act 24 of 1936, 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 Movable Property Act, 1993 (Act 57 of 1993), or such a *notarial mortgage bond* registered before 7 May 1993 in terms of section 1 of the Notarial Bonds (Natal) Act, 1932 (Act 18 of 1932), but excludes any other *mortgage bond* hypothecating movable property” (my emphasis).

The Insolvency Act thus specifically uses the phrase “mortgage bond” with reference to movable property in its definition clause. Also section 88, dealing with certain mortgages which are invalid, refers to a mortgage bond, “whether special or general”. Similarly, section 102 deals with a “general mortgage bond”. See also section 33 of the Land and Agricultural Development Bank Act 15 of 2002.

17. The references to a “general” mortgage bond in these statutes obviously refer to a mortgage bond relating to movables. See *Cooper NO en andere v Die Meester en 'n ander* (*supra*) op p85A-E.

18. I was referred by counsel to the Common Law and previous legislation in this country. It is not necessary to refer thereto in this judgment save to say that I could find nothing in any of the writings and documents which detracts from the aforesaid.
19. On behalf of the defendant it was submitted that it is improbable that the legislature would have provided for a prescription period of 30 years in respect of movables since movables would, by its very nature, in all probability not exist for such a long period in order to act as security for a debt. Having regard to the history and development of the relevant legal principles, and the different periods of prescription over the years, this is a rather compelling argument. However, not all movables would be destroyed in a period of 30 years. Furthermore, a general notarial mortgage bond would not necessarily be subject to this risk.
20. Lastly, the submission was that if the legislature wanted to include notarial mortgage bonds in the 30 year period of prescription, it would have done so specifically. In my view, and having regard to the wording of other statutes where the legislature did exactly that when it was required to differentiate between mortgage bonds relating to immovable property and movable property respectively, the correct inference is that the legislature intended to include notarial mortgage bonds in the reference to "mortgage bond" in section 11 of the Act.
21. In this regard the Afrikaans text of the Act supports this interpretation. The reference is to "verbande", which word is clearly equally applicable to mortgage

bonds relating to immovable property and notarial mortgage bonds relating to movable property.

22. In view of the aforesaid it is unnecessary to consider the submissions on behalf of the parties in respect of the interpretation to be given to section 11(c) of the Act.
23. Since the period of prescription in respect of the loans made to the defendant is 30 years, the plaintiff should succeed with both its claims and is entitled to the proceeds of the auction held in trust and the interest that has accrued. The defendant is also liable for the costs of the stakeholder. The parties are in agreement regarding the amounts to be paid and the interest thereon. Should the parties require any further orders from this court, this court should be approached within one month of date of this order.
24. In the result the following order is made:
  1. The period of prescription relevant to the debts arising from the two loan agreements between the parties is 30 years.
  2. The defendant is ordered to pay the costs of the plaintiff and the stakeholder which costs shall include the costs of senior counsel.

A handwritten signature in black ink, appearing to read 'C.P. Rabie', is written above the printed name and title.

**C.P. RABIE**  
**JUDGE OF THE HIGH COURT**

CASE NO: 12506/07

FOR THE PLAINTIFF: ADV A.J. LOUW SC

INSTRUCTED BY: ROTH WESSELS MOTLA CONRADIE

REF.: MR N. MADISA

FOR THE DEFENDANT: ADV BC STOOP

INSTRUCTED BY: FRIEDLAND HART SOLOMON AND NICHOLSON

REF.: MR G. STOLP

DATE OF JUDGEMENT: 17 FEBRUARY 2011