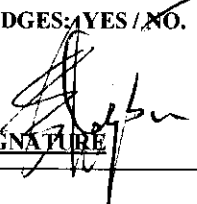




IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO .	
(2) OF INTEREST TO OTHER JUDGES: YES / NO .	
(3) REVISED.	
DATE 19/5/2014	SIGNATURE 

Case No. 64702/2010

20/5/2014

In the matter between:

**Land and Agricultural Development Bank
of South Africa**

Plaintiff

and

**Factaprops 1052 cc
Ismail Ebrahim Darsot**

**First Defendant
Second Defendant**

FLY NOTE:

Practice - pleadings-Amendment of Plea-when granted.

Whether if granted would render pleading excipiable-whether respondent prejudiced due to amendment

Commercial - whether the word "mortgage bond" in Section 11(a)(i) of the 1969 Prescription act wide enough to include reference to a Notarial Mortgage Bond - what the prescription period is in respect of any other debt not covered by rest of Section 11(a); 11(b) and 11(c) of Prescription Act 1969 - and any other Act of parliament - a mortgage bond not a notarial bond - a distinction to be maintained to define characteristics of each- The 30-year period of prescription not applicable to notarial bond it not being a mortgage bond under Section 11(a)(i) of the 1969 Prescription Act - If proved that the source of debt is a notarial contract - 6-year prescription period applies under Section 11(c) of the Act - where cause of debt is the loan agreement - prescription period applicable is 3 years.

JUDGMENT

PHATUDI AJ:

INTRODUCTION:

- [1.] The dispute in this matter presents not only a vexed question whether a special Notarial Bond("notarial bond") could be construed as a mortgage bond within the meaning of Section 11(a)(i) of the Prescription Act¹, but also poses some difficulties as to the correct or proper interpretation thereof which constitutes *res nova* in our law.
- [2] The factual matrix that gave rise to the present application are briefly the following:
- [3] The applicants (the defendants in the main action) seek leave to amend their plea in terms of the provisions of Rule 28(4) of the Uniform Rules of Court ("the Rules"). The plea sought to be amended incorporates in it a Special Plea of prescription as set out in the notice in terms of Rule 28(1) dated 02.09.2013.
- [4] Upon delivery of the relevant notice in terms of Rule 28(1) referred to, the respondent(plaintiff in the main action) served a Notice of Objection to the proposed amendment, contending that its cause of action is for payment of a debt secured by a notarial bond, and that the applicable

¹ Act 68 of 1969

prescription period in terms of section 11(a)(i) of the Prescription Act of 1969, ("the Act") is, therefore, thirty(30) years. Consequently, the Special Plea sought to be inserted by the proposed amendment was not only bad in law, but also did not disclose any defence, and would accordingly be excipiable if allowed to stand.

[5] It was on the basis of the objection aforementioned that the applicants now approached this Court for leave to amend their plea by introducing the Special Plea of prescription of the claims against them.

[6] The crisp question that calls for consideration is two-fold:

(a) whether a registered Notarial Mortgage Bond, for a debt, falls

within the ambit "mortgage bond" in terms of the provisions of Section 11(a)(i) or a debt arising from a "notarial contract" in terms of section 11(c) or a written loan contract in terms of section 11(d) of the Prescription Act, 1969, or , put differently,

(b) what the period of prescription is in respect of a debt secured by a notarial bond envisaged in section 1 of the Securities by Means of Movable Property Act, 1993²("the Securities Act").

² Act 57 of 1993

[7] In an attempt to formulate a proper and acceptable interpretation, and the effect of extinction of debts by prescription, I venture to enter this treacherous terrain by first analysing and reviewing the old authorities on the subject, and where necessary, to evaluate the legal framework applicable.

THE APPLICABLE LEGAL FRAMEWORK

[8] The legal position that obtains with regard to the extinction of debts by prescription is regulated by Chapter 111, in particular, Sections 10-16 of the 1969 Prescription Act.

Section 10(1) provides:-

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

Section 10(2) provides that:-

“By the prescription of a principal debt a subsidiary debt from such principal debt, shall also be extinguished by prescription”.

- [9] In the premises, it is of cardinal importance to always bear in mind that a debt shall be extinguished by prescription after a lapse of the period which in terms of the "relevant law applies in respect of the prescription of such debt" (my own underlining).
- [10] For the purposes of this judgment, I am called upon to determine the lapse of the period in terms of a debt, which in the present instance, has been secured by a special notarial bond within the purview of Section 1 of the Securities Act, 1993, and also to establish whether such a debt has been consumed by prescription under the relevant provisions of the Prescription Act, 1969. The conclusion arrived at will accordingly pave way whether or not to permit the amendment sought.
- [11] Counsel for the applicants contended, on the one hand, that firstly, and on the formulation of the respondent's declaration, the summons was served more than three(3) years from the dates on which the alleged debts arose, with the result that the respondents' claim is prescribed in terms of section 11(d) of the Act. (Three-year extinction period).
- [12] It was furthermore contended on behalf of the applicants in the

alternative to reliance on Section 11(d) thereof, that the respondents' claim is prescribed in terms of the provisions of Section 11(c) of the Act. It was further submitted that by virtue of the fact that the indebtedness was secured by a "notarial contract" with more than six(6) years having passed from the dates on which the alleged debt had arisen, and the period of service of the summons, the debt was extinguished by operation of prescription(the six-year period of extinction).

[13] Counsel for the respondents, on the other hand, opposes the application. The respondents' opposition is predicated on the question of law raised in its notice in terms of Rule 6(5)(d)(iii) of the Rules of this Court. In its notice of objection to the proposed amendment, the respondents' contention was that the proposed amendment, if allowed, would not disclose a defence in law, and would, therefore, technically be excepiable. The submission on behalf of the respondent, is simply that because its cause of action is premised on payment of a debt secured by a mortgage bond in respect of which a thirty-year period of prescription applies, the claim has not prescribed.

[14] It is against this construction that the applicants take issue, and

have now approached this court for intervention and to provide guidance on the proper interpretation on the two opposed contentions.

- [15] As already shown, the period of prescription of debts is governed by the provisions of Section 11 of the 1969 Prescription Act which stipulates as follows:

Section 11:

“The periods of prescription of debts shall be the following:

Section 11(a):

“thirty years in respect of:

- (i) any debt secured by **mortgage bond**,

- (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**.

[16] Having restated the periods of prescription of various debts, the next logical question is when does prescription begin to run for each debt? The position is regulated by the provisions of Section 12(1) of the Act which recites:

Section 12(1):

“Subject to the provisions of subsections(2), (3), and (4), prescription shall commence to run as soon as the debt is due”.

I may however remark although, orbiter that in modern commercial parlance, for prescription to begin to run, the debt must have been due and payable.

[17] Turning to the contentious issues in the present application one needs to examine closely, the nature of and the type of the secured debt the respondent seeks to enforce in its claim in the main action.

[18] The respondent's particulars of claim were formulated and attached to its summons which was issued on 27th October 2010. The respondent's declaration dated 18th March

2011, was delivered on the applicant's attorneys on 22nd March 2011. I shall, for the sake of convenience and brevity, refer only to the relevant portion thereof to demonstrate the cause of debt, its source, and how it has been circumscribed in the declaration.

[19] In Paragraph 3 of the declaration, the respondent alleged that

the parties had entered into a written loan agreement dated 25.05.1999 which agreement ought to be read in conjunction with Section 34 of Act No. 13 of 1944³. The said Act has currently been replaced by Act No. 15 of 2002⁴, its successor-in-title. It appears from the Acceptance letter signed on behalf of the applicants that the effective date was 31st May 1999, when the applicants accepted its terms and conditions.

[20] The respondent had, in terms of the said loan agreement, lent

and advanced to the first applicant an amount of R250 000,00 for the purposes of acquiring equipment for a humidity cold room. The loan was repayable in five equal annual instalments of capital, together with interest, the first instalment payable on the first due date succeeding the date of the first payment under the loan.

³ The Land Bank Act, 1944(now repealed)

⁴ The Land and Agricultural Development Bank Act, 2002

[21] As security for the loan, a Notarial Bond had to be registered over the equipment to be purchased out of the proceeds of the loan, and the second applicant, as the sole member of the first applicant, was required to sign surety for the loan, presumably also as a co-principal debtor in the event the first applicant defaulted in its contractual obligations.

[22] A "Special Notarial Bond" as envisaged in the loan agreement,

was subsequently registered during 2000 by the Registrar of Deeds under Protocol No. 828. I must, however, remark that there appears conflicting registration dates *ex facie* the registered notarial bond itself. The one date appears as 20th July 2000 while the other was captured as 18.04.2000. The discrepancy, in my view, does not, however, alter the position, which at any rate is not in dispute.

[23] The Special Notarial Bond, was registered under the provisions

of the Security by Means of Movable Property Act, 1993(captioned in this judgment "the Securities Act 1993"). The purpose of the said Notarial Bond, in short, was for the mortgagor to pass the bond in question over the movable property specified namely, the 8x Nordis K air cooling systems, as security for the due and proper repayment of

the loan capital advanced with interest thereon, and furthermore, for the due and proper fulfilment of all the terms and conditions under which the advance was made to the mortgagor.

[24] In consequence, the mortgagor would, upon the passing of the

said Special Notarial Bond, become indebted to the respondent, its successor or assigns in the amount lent and advanced to it. The bonded movables would then serve as security for the capital and on prescribed interest thereon.

It was also a further term and condition that the Notarial Bond would serve as a continuing covering security for all and any sum or sums of money which are now or may in future be owing to or claimable by the respondent from the applicants, including future debts generally, under the Notarial Bond now under consideration.

[25] In the event of default, for instance, failure by the mortgagor(s)(applicants in this case) to pay any amount due and payable under the Notarial Bond so passed, or that the mortgagor(s) having committed a breach of any term or condition thereof, then in such event, the respondent(mortgagee) would have the following recourse available to it, namely:

- (a) To claim and recover from the applicants, the full capital amount of indebtedness to the respondents,
- (b) To enter in and upon any of the premises in which the applicants carries on business, and to take and retain possession as pledge all or any of the movable assets so secured or attached,
- (c) To take and retain possession of the movable assets and to sell and alienate any of such secured movables either in terms of Section 34 of Act 13 of 1944 or any other legal proceeding.

[26] On careful consideration of the foregoing prerequisites, it seems clear that the mortgagee, would not be in a perfect position to exercise its right of retention and/or security over the encumbered movables, not until it has "perfected" its claim under the bond.

I propose to revert to the notion of "perfection" later in the course of this Judgment. This notion, without a doubt, is peculiar in this context. Having said that, it then becomes necessary to trace and find the origin and the meaning, if any, of the concept "mortgage bond" from our statute books and old authorities. There are in our law, only four legislative enactments in place in so far as my memory can stretch, which makes reference to the concepts of "mortgage

bond", "notarial contract", and "notarial bond". None of these measures, in my view, define quiet adequately the pure juridical meaning to be assigned to each for purposes of interpreting prescription of debts. I shall briefly refer to them seriatim as follows:

26.1 The Insolvency Act⁵, which is even a much older piece of legislation, refers in Section 102, to the consequences of preference of secured claims proved against an insolvent estate, which constitute a balance of the free residue, where such claims were secured by a general mortgage bond. Again, this section does not offer any intelligible definition of the concept "mortgage bond", for the purposes of interpreting extinctive prescription on debts of this nature.

26.2 The Deeds Registries Act⁶("the Deeds Act") which is also the pre-Republican era legislation, refers in Section 102 thereof to a "mortgage bond" as a "bond attested by a notary public hypothecating movable property generally or specially".(my own underlining)

The same Act in Section 50(1), in relation to execution of bonds, refers to a "mortgage bond" which shall be executed in the presence of the Registrar(of Deeds) by

⁵ Act No. 24 of 1936

⁶ Act 47 of 1937

the owner of the immovable property therein described, or by a conveyancer duly authorised and shall be attested by the Registrar.

Section 50(2), refers to a “mortgage bond” or “notarial bond” which may be registered to secure an existing debt or a future debt, or both existing and future debts. Section 50(1) and 50(2), of the Deeds Act, thus briefly refer to the manner of execution of both the immovable and movable assets, respectively, by either mortgage bond or notarial bond, as the case may be. This Act too does not provide definition of what a “mortgage bond” in this context.

- 26.3 The Prescription Act, 1969, which is the cornerstone of the law governing prescription of various kinds of debts, is relevant for the purposes of determining the dispute in the present instance. This law, just like the two of its predecessors mentioned herein, makes reference in Section 11(a)(i) to prescription of debts to be 30 years in respect of “any debt secured by “mortgage bond”. The Act in its present form is, in that regard as silent as a stone, offering no precise definition of the notion “mortgage bond” for the purposes of how to compute the period of prescription of debts of that nature.

26.4 The legislature in 1993 introduced the Security by Means of Movable Property Act, which came into effect on 07th May 1993. Its preamble provides for the regulation of the legal consequences of the registration of a "notarial bond" over specified movable property, and to exclude the operation of the landlord's tacit hypothec in respect of certain movable property. Once again, this Act does not provide guidance in terms of the definition of "notarial bond", and the effect of prescription on the hypothecated corporeal movable property specified in the bond.

[27] The correct interpretation of the concept "special notarial bond" within the confines of the Securities Act 1993, is of cardinal importance for the purposes of determining the issues in contestation in the present application, and to locate the source of liability or the debt as the case may be.

[28] Before I approach the issues in dispute, I thought it apposite if

not necessary, to first review the divergent views expressed by the modern commentators, and relevant case law authorities on this topical subject-matter.

[29] In Elliot, "The South African Notary"⁷, the learned author observed the notion as follows:

"(a) The true mortgage bond, in the narrow sense of the word referring to a real right of security in an immovable asset of another which is created by registration in the deeds registry by means of a bond which must be prepared and executed before the registrar of deeds by a duly qualified conveyancer".

As already seen, such a mortgage bond, in order to be valid and effective, shall be executed in the presence of the Registrar(of Deeds) by the owner of the immovable property therein described, or by a conveyancer duly authorised by such owner by power of attorney, and shall be attested by the registrar. These ritual formulae are found in Section 50(1) of the Deeds Act 1937, and are pre-emptive in character as they appear to be.

[30] I again, in deference to the learned authors of "The South

African Notary" wish to refer to their characterisation of real security wherein they particularly define a notarial bond in the following language as:

⁷ 06th Edition, at p.146 et seq.

"The notarial bond being a general or special bond hypothecating a specific movable asset, or all the movable assets of a debtor and registered in a deeds registry by the registry of deeds". This characterisation of the hypothecated specified movable property accords, in my opinion, with the definition in Section 1 of the Securities Act, 1993. The provisions thereof sound as follows:

Section 1:

"If a notarial bond hypothecating corporeal movable property specified and described in the bond in a manner which renders it that it will be recognisable, is registered, after the commencement of this Act in accordance with the Deeds Registries Act, 1937(Act 47 of 1937), such property shall:

(a)-----

(b) Notwithstanding the fact that it has not been delivered to

the mortgagee, be deemed to have been pledged to the mortgagee as effectually as if it had expressly been pledged and delivered to the mortgagee".

[31] From the language employed in both the Deeds Act, 1937 and

the Securities Act, 1993, it seems plain that a notarial bond which in its nature, when executed or registered, hypothecates corporeal movable property specified and described in the bond, cannot in my view, constitute a mortgage bond, and accordingly, prescription of the debts secured by such divergent bonds, ought to differ both in effect and interpretation. I venture, to return to this proposition later as I consider the distinctive characteristic features thereof.

[32] Contrary to this view, other such writers as Prof. M.M Loubser

in the work "Extinctive Prescriptions, 1996⁸", the learned author, after analysing the general principles of extinctive prescriptions in our law, observed that the Prescription Act, 1969 does not distinguish between the different kinds of mortgage bonds and submitted that the thirty-year period, therefore, applies to a debt secured by "any kind of mortgage bond", including a special bond, a general covering bond, a collateral bond, and a notarial bond.

[33] I am unable to subscribe to the broad interpretation offered by the learned writer for the following reasons:

⁸ Paragraph 3.1 at p.35-37, See also para 3.2 at p.37

33.1 The prescription periods in terms of which debts become prescribed within the meaning of the 1969 Prescription Act are, by and large, set out in Section 11, which must be read in conjunction with Section 10 of the said Act. I have already referred extensively to the relevant sections of the Act in paragraphs 8 and 9, supra, and I shall, therefore, refrain from quoting, once again, verbatim from them.

33.2 In view of the fact that extinctive prescription begins to run as and when the debt becomes due under Section 12 of the Act, where a mortgage bond is registered in respect of a debt, a period of prescription applies to the debt concerned and not the mortgage bond itself.

My opinion in this regard is fortified by the imperative language expressed in the Section. The words "shall" in the Section imports a pre-emptive or restrictive method of interpretation and excludes, therefore, any measure of discretion to justify deviation. In consequence, where a mortgage bond is registered after the due date of the debt, the usual prescriptive period applicable to that debt will apply (Section 11(d), until the registration of the mortgage bond, when the 30-year period will find application. Accordingly, any period of prescription which has

already begun to run, for instance 2 years before registration of the bond, will be taken into account, and the prescriptive period, after registration of the mortgage bond, will be a further 28-years period.

33.3 Furthermore, and with utmost respect to the learned author,

no reasons were advanced as to the writer's authority for an all-inclusive approach in which he held the view that the 30-year period applies to a debt secured by **"any kind of mortgage bond"**.

[34] In his work "Notarial Practice"⁹ Professor F.E. Van der Merwe, gives a comprehensive analysis of the special notarial bond, its legal effect, and that of the general notarial bond. He also made brief reference to the adverse consequences of the legacy left by the decision of the Appellate Division in Cooper N.O. v Die Meester en Sentraalwes (koöp) Bpk¹⁰ in terms of which it was held that a special notarial bond gives no common law or statutory preference to a mortgage of a special notarial bond over concurrent creditors in respect of the free residue in the insolvent estate of the mortgagee. It was held further that, a mortgage of a general bond does indeed

⁹ Butterworths 2007, p.165-166

¹⁰ 1992(3) SA 60(A) and 1992(3) SA 868(A) respectively

enjoy preference over concurrent creditors in respect of the free residue in the insolvent estate of the mortgager.

In view of the "negative consequences" referred to by the learned author, in his "Notarial Practice"¹¹, parliament subsequently promulgated the Securities Act, 1993, referred to elsewhere herein.

[35] In the light of the legislative amendment brought about by the

introduction of the Securities Act, 1993, one may safely conclude that, in essence, the legal position that currently obtains is analogous to the position that obtained in Natal. (Now Kwa-Zulu Natal). The mortgagee now acquires real right over the movable property after registration as if the property has been pledged and delivered to it.

[36] The fact that the mortgagee is deemed to be in possession of the property accordingly places his/her legal position on an equal footing with that of a pledgee, and in the event of a dispute, the mortgagee will have recourse to the ordinary principles relating to a pledge.

[37] Having reviewed the writings of some of our eminent commentators on the subject, I am inclined to lean in favour

¹¹ At page 116 thereof

of the proposition that given the nature and character of a notarial bond, it can only be registered over movable assets of a debtor. A general notarial bond does not, therefore, in the absence of attachment of the property before insolvency, constitute the mortgagee as a secured creditor of the mortgagor. It, therefore, grants to him/her a limited statutory preference beyond the claims of concurrent creditors in the insolvent estate of the mortgagor.

Furthermore, a special notarial bond is a mortgage created over specifically enumerated corporeal (tangible) movable property of a debtor (mortgagor) in favour of a creditor (mortgagee), as security of a debt or other obligation which is compliant with the requisites set out in the Securities Act 1993, and registered under the Deed Registries Act.

- [38]. Fortifying the aforementioned formulation, yet another distinguished writer John Saner, in his work: "Prescription in South African Law"¹² submitted with reference to the three-year prescriptive period under Section 11(d) of the Act, that the prescriptive period of three years applies in respect of "any other debt" not covered by the rest of the provisions of Section 11 of the 1969 Prescription Act, and also not covered by "any other Act of Parliament". I respectfully agree with this submission. I may just as well state, in addition that Section 11(d) applies to a debt which

¹² Service Issue 20.09.2013. Pp3 - 43

is not covered by the provisions of Section 11(a); 11(b) and 11(c), respectively, of the Act.

[39]. I now proceed to examine briefly the legal position bequeathed by our Courts on the subject, and to establish whether any of them laid any sound legal basis for the correct or proper interpretation of extinctive prescription on "mortgage bond", "Special Notarial Bond", and a "notarial contract", as the concepts appear frequently in the statute books and our legal precedents.

[40]. The Appellate Division (as it then was) in LIEF N.O. v DETTMANN,¹³ per Wessels JA described a "mortgage bond" as an instrument hypothecating landed property to secure an existing debt or a future debt or both existing and future debts".

* See also Section 50(2) of Act 47 of 1937 in this context.

Where a bond is intended to secure an existing debt it is inevitable that the amount of such debt should be acknowledged in the bond, which must be registrable in the Deeds Office.

[41]. The only real rights in favour of the mortgagee created by the registration of the bond are rights in respect of the mortgaged property, for instance, the right to restrain its alienation, and the right to claim a preference in respect of its proceeds on insolvency of the mortgagor. These real rights, however, can only exist in

¹³ 1964(2) ALL SA 448 (A) (Parallel citation 1964 (2) SA 252(A))

respect of a debt, existing or future, and it follows that they cannot be divorced from the debt secured by them.

That having been said, it follows that the real rights under a bond are immovable, but a debt is a movable one. Put differently, Cession for instance of real rights in land requires registration, but cession of a debt under a bond, being an incorporeal movable, requires no more than an agreement to cede. The principles enunciated in the Dettman's case, *supra* had since laid down the legal nature and the effect of a mortgage bond hypothecating landed property to secure an existing or future debt.

- [42]. In **CONTRACT FORWARDING (PTY) LTD v CHESTERFIN (PTY) LTD & OTHERS**¹⁴, the Supreme Court of Appeal ("the SCA") expressed the principle that the holder of a general notarial bond hypothecating movable property, does not enjoy a real right of security in the assets subject to the bond. There is therefore, nothing to prevent the owner from dealing with and disposing of assets subject to the bond. The rights of the bondholder are of importance mainly upon insolvency. However, a perfection clause, if applicable, entitles the bondholder to take possession of the movables over which the bond has been registered. Such a clause amounts to an agreement to constitute a pledge enforceable at the instance of the holder of the bond.

¹⁴ 2003(2) SA 253 (SCA)

[43]. In one of the matters that was heard in this Division recently, my Brother Rabie J, had occasion to consider what the period of prescription is in respect of a debt secured by a Special Notarial Bond contemplated in Section 1 of the Securities Act, 1993¹⁵.

The facts at issue were two pronged namely,

43.1 Whether the words "Mortgage bond" contained in Section 11(a)(i) of the 1969 Prescription Act, also included a reference to a Notarial Mortgage Bond. If the Court were to answer in the affirmative, the debts upon which the Plaintiff's claims were founded, would be subject to a period of prescription of 30 years, and the Plaintiff would invariably then be successful in respect of both its claims against the Defendants.

43.2 If not, the second question arises, namely, whether the defendant's debt could be said to be arising from a Notarial bond within the meaning of Section 11(c) of the said Act. In such event, the period would be a 6-year prescription period, in consequence whereof the plaintiff's claim in respect of the first loan would have become prescribed, although the latter claim in respect of the subsidiary loan would only have been due and payable to the plaintiff.

¹⁵ Land & Agricultural Development Bank of South Africa v A Boeke & Another (Unreported Case NO. 12506/2007) delivered on 17.02.2011

[44]. It is common cause that the 1969 Prescription Act offers no definition of the concepts in question as the learned Judge has correctly pointed out. He however, observed in Paragraph 13 of his Judgment that:

"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" is 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".

[45]. I have, with the greatest of respect, an interpretation inimical to that of the learned Judge. The reasons for my dissenting view are that, firstly, the Deeds Registries Act 1937, in Section 102 defines a Notarial Bond as a bond attested by a notary public hypothecating movable property generally or specifically, while in the same breath, Section 50(1) thereof relates to the manner in which execution of a mortgage bond shall be performed by the owner of the immovable property. Such a mortgage cannot be equated to a notarial bond by virtue of the variant assets bonded in them. Furthermore, a "mortgage bond" which is also defined in Section 102 of the Deeds Registries Act, entails a

bond attested by the register specially hypothecating immovable property.

To my mind, therefore, the intention of the law-giver was always to maintain a distinction in respect of both character and the general purport of the two securities. The distinctive features of the two legal concepts will become apparent in the course of this judgment.

- [46]. The Court, as it appears from Paragraph 14 of the Judgment, seems to have found refuge and drawn comfort from the submission made by such writers as Prof. M.M. Loubser "Extinctive Prescription", at page 37 of his work quoted from the passage that:-

"A debt is secured by a mortgage bond upon 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" (own under lining).

- [47]. Although the Court remarked and correctly so, that none of the authors whose work he has placed considerable reliance on, had discussed the rationale behind their views on the attributes they have assigned to the legal concepts referred

to, the learned Judge, maintained at Paragraph 15 of his Judgment, that:-

“a research of present as well as earlier legislation referring to mortgage bonds does not, in my view, detract from these views”. No reasons were, however, given for the formulation, except for the discussion of the procedures set out in the Deeds Act, relating to the execution of different types of bonds.

[48]. Section I of the Insolvency Act, 1936, as amended, defines in relation to “**special mortgage**” as:

“special mortgage”:-

“a mortgage bond by hypothecating any immovable property or a notarial mortgage bond hypothecating specially described movables in terms of Section I of the Security by Means of Movable Property Act 1993 or such Notarial Mortgage Bond registered before 07 May 1993 in terms of Section I of the Notarial Bonds (Natal) Act, 1932 (Act 18 of 1932), but excludes any other mortgage bond hypothecating movable property” (my own underlining).

[49]. Turning to the present application, and the reasons sought for the proposed amendment, the crux of the application is simply predicated on grounds as follows:

49.1 The Respondent’s claim is one for payment of the amount of R491 203.05, together with interest

thereon at the rate of 14% per annum from 31.08.2010 to date of payment capitalized monthly.

49.2 The claim against the First Defendant arose ex contractu following its failure to make payment of each of the five instalments that became due and payable to the Plaintiff (respondent) under a loan agreement, ("the loan agreement") concluded during or about May 1999.

49.3 Payment of the amounts said to be owing, due and payable to the respondent under the loan agreement in respect of each of the five instalments that became due on the following dates:

- (a) 15 June 2000 due date in respect of the first annual instalment;
- (b) 15 June 2001 due date in respect of the second annual instalment;
- (c) 15 June 2002, due date in respect of payment of the third annual instalment;

- (d) 15 June 2003, due date in respect of payment of the fourth instalment;
- (e) 15 June 2004, due date in respect of payment of the fifth instalment.

4.9.4 The Respondent's Summons was served on the Applicants on or about 03 November 2010, being a period in excess of three years computed from the dates on which each of the debt(s) became due and payable.

4.9.5 It is on this basis that Applicants pleaded extinction of the debt(s) in terms of Section 11(d) of the 1969 Prescription Act.

4.9.6 The Applicants pleaded in the alternative, to the foregoing, and to the extent that it is alleged that the claim against the Applicants arose from the "special notarial bond" attached to the declaration, (which is denied) the Summons was served on or about 03 November 2010, being the date more than six years from the dates on which the alleged debt(s) arose.

It was submitted on behalf of the Applicants, therefore, that the Respondent's claim has prescribed

in terms of Section 11(c) alternatively, Section 11(d) of the Prescription Act, 1969.

4.9.7 The Respondent's claim against the First Defendant having prescribed, similarly, the subsidiary debt against the Second Defendant (Second Applicant) under the deed of suretyship, has prescribed.

[50]. Opposing the intended amendment, the Respondent contended that the claim has not yet become prescribed in terms of Section 11(a)(i) of the Prescription Act, 1969 due to the 30-year premium attached to it. In order to determine the validity of this argument, one has simply to examine the source of the Applicants' indebtedness to the Respondent, and trace its origin and character from the particulars of its claim.

[51]. Reading from the particulars of claim, Paragraph 1, thereof, clearly provides that:

"In terms of a written offer dated 25 May 1999 by 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 was lent and advanced by Plaintiff to First Defendant and received by First Defendant: Copies of the Offer and Acceptance are attached hereto and marked "A" and "B".

[52]. In Paragraph 2 thereof it is further stated:

"The amount thus lent and advanced by the Plaintiff to First Defendant, taking into consideration interest levied and payments received amounts to R491 203.05, which amount is to the offer referred to above subject to interest of the rate of 14% per annum calculated from 31 August 2010 to date of payment, the said interest to be calculated and capitalized monthly".

[53]. It is also apparent from the reading of the same Paragraph 2, that the Special Notarial Bond hypothecating the movable property, which served as continuing covering security, stipulated that:

"in the event of First Defendant failing to make regular payments to Plaintiff in terms of the agreement referred to in Paragraph 1 above, the plaintiff shall have the right to enter into the premises where the movable property referred to above, may be found, and to attach the said movable property and to deal therewith in accordance with the terms of Special Notarial Bond No. BN 24464/2000".

[54]. Furthermore Paragraph 5 recorded that:

"The agreement referred to in Paragraph 1 above *inter alia* stipulates that should the First Defendant fail to make regular payments in terms of the said agreement, the amounts due in terms of the said agreement, will immediately become due and payable".

[55]. From the stipulations aforementioned, which formed the genesis of the Plaintiff's claim, it is abundantly clear that the claim was one ex contractu intrinsically connected to the "loan agreement" concluded by the parties in or during May 1999.

Needless to say, the Special Notarial Bond was subsequently registered during the year 2000.

- [56]. This then raises another intriguing question. When did the loan agreement repayment/s become due and payable to the Plaintiff, if indeed the First Defendant had fallen in mora in terms of its obligations.
- [57]. Applying ordinary arithmetical exactitudes for the purposes of calculation of extinctive prescription, the debt/s became due and payable to the Plaintiff between the period 15 June 2000 to 15 June 2004, if one accepts the loan agreement and not the Special Notarial Bond as the source or origin of the Plaintiff's claim.
- [58]. In order to decide on the question properly, it is imperative, I propose, to first distinguish briefly the salient and distinctive attributes of "mortgage bond" and a "notarial bond" for the purposes of interpreting extinction of debts by prescription of the kind of debt which was intended by the parties to secure.
- In doing so, one need not begin to traverse outside the recently unreported judgment delivered in this Division by Mabuse J on 20 December 2013¹⁶. None of the parties had referred to this judgment during oral argument, until further written heads of argument were called.
- I pause to remark that I am greatly indebted to Counsel for this innovative finding.

¹⁶ Absa Bank Ltd v Hammerle Group (Pty) Ltd- Case No. 7457/2013 ZAGPPHC 402

- [60]. In this matter, Mabuse J was seized with an issue that conflated three applications, one on rectification of a Loan Agreement, the other for liquidation of the Respondent in the matter, and finally that of striking out of certain allegations in the founding affidavit. The material facts in that matter are analogous to the dispute in the present application. The Respondent in that case, in opposing the application for its liquidation invoked prescription of its debt as a defence. The Applicant in the matter disputed Respondent's contention that the debt arising from the loan agreement had prescribed, contending that the loan agreement was secured by a special and general notarial bond, and that as a result, the extinction period of prescription in terms of section 11(a)(i) of the prescription Act 1969, is 30 years. In the alternative, it relied on the provisions of Section 11(c) of the Act, contending that the 6 year prescription period applies in respect of bonds attested by a notary such as notarial contracts, but which were not passed over immovable property. It thus submitted that the debt had not become extinguished.
- (61) Having analysed the relevant provisions of Section 11 (a)(i) of the 1969 Prescription Act in respect of mortgage bonds, Section 50 (1) and 102 of the Deeds Registries Act 1937, Section 1 of the Securities Act, 1993, and writers on the subject, the learned judge held, and correctly so, that:¹⁷

¹⁷ At Paragraph 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."

I find merit in this formulation, which in my view, represents a positive development towards our jurisprudence on this aspect, which was for many decades, not well coagulated by the courts of the land.

[62] In the present instance, Counsel for respondent submitted that the Plaintiff's claim is founded upon a loan agreement secured by a "special bond".

Although the applicants admitted these allegations in their Plea, that admission *per se* does not negate the question from which source was the debt originating. Was it from the loan agreement or from the notarial bond which was registered only in 2000.

[63] Reading from the respondent's particulars of claim as amplified in its declaration, it follows that the nucleus of its claim is founded upon the money lent and advanced to the applicant by the

respondent in terms of the loan agreement. This view is fortified by what is contained even in the special notarial bond itself.

[64] To that extent, the submission advanced on behalf of the respondent that because the debt is sourced by mortgage bond and therefore, the relevant prescription period is thirty years is, with respect, based on wrong premise.

[65] Counsel for the respondent conceded in paragraph 2.4 of its heads of argument that:¹⁸

“Although the cause of action is a loan agreement, the special notarial bond serves as security for the debt. The debt is therefore, secured by mortgage bond”. This contention is not only misplaced, but is also untenable. The loan agreement, and not the notarial bond, is to my mind, the source of the debt.

[66] I have intimated elsewhere in the course of this judgment at paragraph 26, in particular, about the requirement of “perfection” of certain movable property secured by notarial bond. In case of a general notarial bond, the creditor does not obtain a real right of security when possession is taken of the movables over which the bond has been registered. Such bond do not generally fall within the purview of the Securities Act 1993. In *Cherstein Pty Ltd & other’s case, supra*, it was said that:

“A perfection clause entitles the holder of the bond to take possession of the movables over which the bond has been registered. Such a clause amounts to an agreement to constitute a

¹⁸ 17 Paragraph 2.2, Paragraph: 3.1 to 3.6 of Plaintiff’s Heads of argument in respect to leave to amend

pledge and will be enforced at the instance of the bondholder, whereupon the creditor obtains a real right of security”

[67] In the present instance, counsel for respondent did not argue in its heads, that the respondent had indeed entered in and upon all or any of the premises in which the applicant carries on business, and to take possession as a pledge or all or any of the movable assets, as it had set apart the right in the notarial bond, the so called perfection clause. In the absence of such an assertion Counsel can hardly be heard to argue, therefore, that the special notarial bond is an instrument that gives rise to a real right of security if no case for perfection had been made. There is no evidence to support the view that the notarial bond has ever been perfected.

[68] Be that as it may, it is necessary if not essential to trace the source of the debt in order to interpret properly the prescription period applicable. If find refuge in this regard from the passage extracted from the judgment of Rose-Innes J where he stated¹⁹:

“a general notarial bond comes into existence pursuant to an agreement between the creditor and a debtor to hypothecate movable property as security for a bond, as it is called, to create a jus ad rem with a right to a general preference for payment of the principal debt upon insolvency of the debtor occurring -----the cause of action is the failure to comply with the terms of the

¹⁹ Coloured development corporation Ltd v Sahabodien 1981 (1) SA 868 (CPD) at 870A-D

principle agreement recorded in the bond as to repayment of the capital and interest of the loan. That cause of action is upon the principal contract of loan to which the rights created by the bond are but accessory and *ad securitatem debiti*.

The Creditor cannot claim on a bond, unless there is a valid obligation and debt due to him *de hors* the bond. There can be no settlement or payment of the bond in isolation of and without settlement or payment of the principal obligation acknowledged in the bond. Here that obligation is a loan."

- [69] In order to trace the roots of the source of the debt upon which the respondent relies, it is incumbent for one to merely examine the *causa* for the recovery action instituted, and for what kind of debt respondent seeks to pursue.

In the present instance, Paragraphs 1 and 5 of the respondent's particulars of claim referred to , clearly make reference to the money lent and advanced in terms of an agreement of loan which if breached, the money "will immediately become due and payable".

- [70] This then raises another issue. When did payment or the debt become due and payable in terms of the loan agreement? In terms of paragraph 3 (3.2 to 3.6) of the declaration, it is plain that the loan agreement was concluded by the parties during or about May 1999.

Counsel for the applicants submitted that payment of the amounts owing to respondents under the loan agreement in respect of each of the five instalments became due and payable from 15th June

2000 to 15th June 2004. If one accepts this computation as correct, it is plain that the respondent's claim has prescribed in terms of Section 11(d) of the 1969 Prescription Act.

- [71] It was also submitted on behalf of the Applicants in the alternative, that to the extent that it is alleged that the claim against the first applicant arose from a special notarial bond attached to the declaration marked "D", the summons was only served on or about the 03rd November 2010, being a period in excess of six years from the dates on which the debts became due and payable. Accordingly, the debts were extinguished by prescription under Section 11 (c) of the relevant Act.
- [72] On account of the prescription of the principal debt in respect of the first applicant, the indebtedness of the Second Applicant under the deed of suretyship had similarly fallen away.
- [73] From the observation made, it follows logically that the debt on which the respondent relies, has its origin in the loan agreement. It is patently clear that the respondent's claim is the applicant's failure to perform positively in terms of the loan agreement which is the *vinculum iuris* giving rise to the obligation.
- [74] In view of the fact that the debt did not flow from the notarial bond, but from the loan contract, it became due and payable between 15th June 2000 to 15th June 2004. The prescription period that applies to it was, therefore, three years in terms of Section 11 (d) and six years in terms of Section 11c, as the case may be.

74.1 The Supreme Court of Appeal in RUSTENBURG PLATINUM MINES LTD V INDUSTRIAL MAINTENANCE PAINTING

SERVICES CC[CASE NO: 448/2007 delivered on 23.09.2008, neutral citation, [2008] ZA SCA 108] in dealing with prescription of debts(para:11) Mpati JA stated that the word “debt” does not refer to the “cause of action”, but more generally to “the claim”.

The “cause of action”, in my opinion, is ordinarily used to describe the factual basis, and the set of material facts that begets the plaintiff’s particulars of claim, and correspondently, the defendant’s “debt”, the word we find in the 1969 Prescription Act. The Court went on to state that it should, therefore, be fairly clear that when the Prescription Act, speaks of a “debt”, it refers more generally to a “claim”, and not the cause of action.

74.2 In the present application, it admits of no doubt, therefore, that the respondent’s “claim” against the applicants originated from the loan agreement, which invariably gave rise to the “debt” sought to be recovered. The time frame within which the claim should have been instituted, had clearly become prescribed in terms of Section 11(d) of the Prescription Act, 1969.

[75] It follows that once the debt has become prescribed, the respondent ceased to be a creditor of the applicants.

[76] Given the provisions of the special notarial bond registered later in 2000 to secure the loan , it is clear that the source applicants indebtedness to respondent was the loan agreement per se, and not the notarial bond. This assertion can even be inferred from

the language contained in paragraphs 8 and 9 of the declaration which states that:

76.1 Paragraph 8:

"On 31st August 2010, First Defendant was still indebted to the Plaintiff in respect of the loan agreement "..... and

Paragraph 9 states:

76.2 Paragraph 9:

"The loan agreement referred to above is in terms of Section 52 (1) of Act 15 of 2002, valid and enforceable, despite the repeal of the Land Bank Act 33 of 1944."

[77] The special notarial bond states in Part A to its preamble that:

"The appearer declared that the mortgager is indebted to the Bank, its successor or assigns in the amount of R250 000,00 arising from money lent and advanced by the Bank to the mortgager".

[78] From the reading of other clauses of the notarial bond, one cannot reasonably conclude that it professed to serve as the source of the applicant's indebtedness, the more so that it was preceded by the loan agreement by more than twelve months before its registration .

[79] Having had regard to the provisions of Sections 11 (a)(i) and 11 (c) of the Act it is important to note that the wording in the two sections is crucial. It is accordingly not necessary in terms of Section 11 (a) (i) that the mortgage bond should be the origin of the debt before the indebtedness of the mortgager to a mortgagee may arise. The mortgage bond on its own gives rise to an

autonomous origin of the debt, and consequently an independent cause of action or debt.

- [80] In view of the fact that no amount of money was lent and advanced to the applicants on the basis of a notarial bond, which at any rate was registered *ex post facto* the loan agreement, it can hardly be said that the notarial bond formed the source or origin of the debt. In other words, a notarial bond cannot be regarded as the origin of the debt where no money or loan was advanced on its basis, or if it evinces a totally independent source of liability.
- [81] 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 emphasised. 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.
- [82] The *dictum* of Rabie J in the unreported judgment of *Boeke's case* supra, (footnote 15 p.22) did not, with utmost respect, pay due attention differentiating the two Acts referred to for purposes of interpretation of section 11 of the Prescription Act, 1969.
- [83] In fact, the inference the learned Judge has drawn to the effect that the legislature intended to include notarial mortgage bonds in the reference to "mortgage bond" in section 11 of the Act, should with respect, not be followed. To do so would be to offend the presumption of the interpretation of statutes that in interpreting legislation, the assumption is that the lawgiver did

not intend to either repeal or modify the earlier statute²⁰. Accordingly, when interpreting Section 11 (a) (i) of the Prescription Act, 1969, the differentiation drawn by the earlier Deeds Registries Act 1937²¹ and the Insolvency Act, should at all times be borne in mind. An attempt should therefore, be made to interpret the earlier statute and the later one together, and reconcile the two measures²² where feasible.

[84] The approach adopted in *Absa bank Ltd V HAMMERLE Group (Pty) Ltd, supra*, (footnote 16,p.30) is the preferred one, and I am rather compelled to follow it for the purposes of the present application.

[85] I shall now, for the sake of convenience and brevity, recapture the broad principles governing the amendment of pleadings within the confines of Rule 28 (4) of the Uniform Rules of Court.

[86] It was submitted on behalf of the Respondent that the application brought by the applicants was for dilatory purposes and lacks *bona fides*. Relying on the principle that:

“ Save in exceptional cases where the balance of convenience or some such reason might render another course desirable, an amendment ought not to be allowed where its introduction into the pleading would render such excipiable²³”. I pass now to consider whether the amendment sought to be incorporated would render the amended Plea excipiable.

²⁰ Kent V SA Railways & harbours 1946 405 (AD)

²¹ Section 50(2) of the Act read with Section 1 of Insolvency

²² Wendywood Development (Pty) Ltd V Rieger 1971 (3) SA 28(A)

²³ Cross v Ferreira 1950(3) SA 443 C at 450

- [87] Having found that the notarial bond referred to was not a mortgage bond and vice versa, it follows in my view that the 30 year period of prescription does not apply to a debt of this nature. The money lent and advanced in the form of a loan, being the main source of the debt, and not the notarial bond, was extinguished by operation of prescription in terms of Section 11 (d) of the Prescription Act , 1969. That being the position, it follows that the amendment sought, would disclose a defence in law, and it cannot therefore be said if allowed to stand, it would render the plea excipiable.
- [88] The next enquiry is whether will the respondent be prejudiced if the amendment were allowed to stand, and whether was it not bad in law.²⁴ In the present instance, this court has already made a determination on the question of law raised in terms of Rule 6 (5) (d) (iii) of the Rules.
- [89] I am of the opinion that neither is the amendment sought bad in law nor would it occasion any prejudice on the part of the respondent. Both parties will at any rate still vent out their dispute before this court in due course.
- [90] It was submitted further on behalf of the respondent that applicants must show *prima facie* that they had something deserving of consideration, a triable issue. A triable issue is a dispute which if proved on the basis of the evidence foreshadowed by the applicant in the application, will not be

²⁴ Krische V RAF 2008 (4) SA 358 (WLD)

innocuous, albeit a dispute which will probably be established by the evidence thus foreshadowed.

- [91] In deciding whether to grant or refuse an application for an amendment, the court exercises a discretion, and in doing so, leans in favour of granting it in order to ensure that justice is served by deciding the real issues between the parties.
- [92] The special plea raised, in my view, is capable of raising a triable issue. The real issue in this case would be whether the respondent's claim has not prescribed, and if not whether the applicants are liable to repay the debt claimed.
- [93] Furthermore, the court has discretion to permit an amendment even at a late stage, if it leads to a proper ventilation of the dispute and if it does not occasion an injustice to the opposing party which cannot be remedied by an appropriate costs order²⁵.
- [94] In an application where an objection based on prescription is raised, it is useful to identify the debt or ascertain what the claim was in the broad sense of the meaning of that word. The test is one of substance, and not form, whether or not the "debt" is the same or different.
- [95] In the light of the foregoing considerations, and bearing in mind the issues raised, I come to the conclusion that there exists no real impediment why an amendment should not be permitted introducing the Special Plea of Prescription. Such an amendment,

²⁵ Kasper V Andre Kemp Boerdery CC 2012 (3) SA 20 (WCC)

would in my view not be excepiable as disclosing no valid defence. I accordingly, do not hesitate to grant the application sought, and it is hereby granted. I, therefore, make the following Order:

COURT ORDER:

1. The Applicants ("defendants in the main action") are hereby granted leave to amend the Plea dated 19th April 2011, through the introduction of the Special plea formulated in the Notice in terms of Rule 28 (1) of the Uniform Rules of Court.
2. The Applicants are ordered to deliver and file their amended pages within ten (10) days from the granting of this order.
3. The costs of application are costs in the cause.

M.G. Phatudi

M.G PHATUDI

ACTING JUDGE OF THE GAUTENG HIGH COURT

PRETORIA

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Dated Heard: 25th March 2014

Date of Judgment: 20th May 2014