**REPUBLIC OF SOUTH AFRICA**

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

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

11/08/2014
DATE

SIGNATURE

In the matter between: **CASE NO: 58018/10**

LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA — Plaintiff

13/8/2014

and

PHATO FARMS (PTY) LTD (formerly known as Mount Carmel Farms No 2 (Pty) Ltd — First Defendant

POPS TEMPLETON MAGEZA — Second Defendant

MOHAMMED SAEED RAFEE — Third Defendant

THULASISWE RICHARD NKABINDE — Fourth Defendant

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**JUDGEMENT**

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**MOLOPA-SETHOSA J**

[1] On 1 November 2013 I made the following order:

"(1) The Defendants' special pleas, both on prescription and premature claim are upheld.

(2) The Plaintiff is ordered to pay the Defendants' costs."

[2] I undertook to furnish reasons at a later stage for the order. The following are the reasons.

[3] The plaintiff in this matter instituted an action against the first defendant for payment of R3 372 119.82, based on a short-term loan agreement ("*the loan agreement*"), signed on September 2003, secured by a general notarial bond ("*the general notarial bond*"), registered over the movables of the first defendant on 13 October 2003; and against the Second to Fourth Defendants R2 460 000, as sureties

[4] The defendants raised two special pleas to the plaintiff's claim against them as follows, that:

- the plaintiff's claims have prescribed [prescription]; and

- the plaintiff has failed to comply with the provisions of a breach clause contained in the loan agreement [premature claim]. That accordingly, the plaintiff's claim, based on the principal debt and on the accessory obligations are premature.

[5] The parties agreed to separate the issues, and to first deal with the defendants' special pleas set out above, and these were by agreement referred to this court for decision.

**Background**

[6] During or about October or November 2010 the plaintiff served a simple summons on the defendants in terms of which the plaintiff sought:

- payment of the sum of R3 372 119.82 from the first defendant pursuant to the conclusion of a short-term loan agreement concluded between the plaintiff and the first defendant; and

- payment of the sum of R2 460 000.00 from the second to fourth defendants, pursuant to the conclusion of suretyship agreements by the second to fourth defendants in favour of the plaintiff.

[7] The plaintiff subsequently served a declaration which was later amended. In terms of the amended declaration the plaintiff relies on:

- the loan agreement concluded between itself and the first defendant;

- a general notarial covering bond, registered over the movables of the first defendant in favour of the plaintiff; and

- suretyship agreements executed by the second to fourth defendants in favour of the plaintiff.

[8] The defendants filed a plea and counterclaim to the plaintiff's claim, and have raised two special pleas, as set out above.

[9] On 12 April 2013 the plaintiff served the defendant with an adjusted replication in response to the defendants' special pleas, in terms of which the plaintiff alleges that:

- the general notarial covering bond is a "mortgage bond" for the purposes of section 11(a)(i) of the Prescription Act 68 of 1969 ("*the Prescription Act*"), and accordingly carries a prescription period of thirty years;

- in terms of clause 8 of the notarial bond the plaintiff is entitled to claim for monies allegedly owed on the principal debt by way of the bond, without having to comply with the notice periods contained in the loan agreement; alternatively

- the second to fourth defendants are not party to the loan agreement and no notice in terms of the suretyship is required; further alternatively

- the second to fourth defendants have waived their rights to notice in the execution of the suretyship agreements.

[10] the issues for determination were thus following:

[11] **Prescription:** Is a general notarial covering bond a "mortgage bond" for the purposes of section 11(a)(i) of the Prescription Act?

[12] **Premature claim:** Insofar as the plaintiff's relief based on the principal debt, i.e. the loan agreement, is not yet claimable against the first defendant, is the plaintiff entitled to seek relief against the first defendant on the accessory obligation, being the notarial bond?

[13] In the alternative to the above, if the relief sought against the first defendant on the principal agreement is not yet claimable, is the plaintiff entitled to seek relief against the second to fourth defendants based on the accessory obligations of suretyship, either by the argument that the second to fourth defendants are not parties to the loan agreement, or by the argument that they have waived the entitlement to notice?

[14] On **Prescription:** Section 11(a) (i) of the Prescription Act provides as follows:

"**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;*"

[15] Section 11(c) and (d) of the Prescription Act provide as follows:

"*(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] For purpose of prescription the following facts are common cause between the parties:

[17] Plaintiff has two causes of action against the Defendants based on:

- The loan agreement; and
- The general notarial bond.

[18] The full amount in terms of the loan agreement became due and payable on the 01 April 2004.

[19] Summons in this matter was issued on 11 October 2010, as appears from the registrar's stamp. According to both parties the summons was served on the defendants during or about October/November 2010, more than six (6) years after the cause of action arose. Unfortunately there are no returns of service in the papers filed before this court; however, it is not in dispute that the summons was served more than six (6) years after the cause of action arose.

[20] It is thus common cause between the parties that the plaintiff's claim against the first defendant, based on the loan agreement, arose more than 6 years prior to the service of summons on the defendants.

[21] The plaintiff, in replication to the special plea of prescription, as already stated above, pleads that the general notarial covering bond is a "mortgage bond" for the purposes of section 11(a)(i) of the Prescription Act, and accordingly carries a prescription period of thirty(30) years;

[22] The Defendants contend that the general notarial bond does not constitute a mortgage bond for purpose of Section 11(a)(i) of the Prescription Act, and consequently that the plaintiff's claim has prescribed.

[23] Further, that even if the claim had not prescribed as against the first defendant, it has prescribed against the sureties, [this latter contention was abandoned by the defendants during argument].

[24] It is not in dispute that the bond in question herein is a general notarial bond, and not a special notarial bond.

[25] The first question to be answered is whether the words "mortgage bond" referred to in section 11 (a) (i) of the Prescription Act also includes reference to a general notarial bond. If that were the case, the debts upon which the plaintiff's claim was based would be subject to a period of prescription of thirty (30) years and the plaintiff would then be successful in its claim against the defendants.

[26] If not, the second question arises, namely, whether the defendants' debt to the plaintiff can be said to be "arising ... from a notarial contract" as envisaged in section 11 (c) of the Prescription Act. In such event the period of prescription would be six (6) years, with the result that the plaintiff's claim against the defendants would have become prescribed.

[27 The defendants contend that a general notarial bond does not confer real rights on a creditor. That the conferring of a real right of security on a creditor is an inherent characteristic of the concept of "mortgage".

[28] I may just state that for their contentions, the parties, more especially the defendants, referred the court to several authorities dealt with below.

[29] The authors JG Lubbe and TJ Scott in LAWSA volume 17(2) par. 327 define the term "mortgage" as follows:

> *"The term "mortgage", in the narrow sense of the word, refers to 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."*

[30] The authors Du Bois et al in Wille's principles of South African Law, 9th edition page 631 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."*

[31] Lubbe and Scott *supra* refer to a tendency to use the term "*mortgage bond*" as a synonym for "*mortgage*". This usage, they assert, results from confusion between the right of security and the means employed to create it. The term "*mortgage bond*", strictly speaking, refers to the deed or instrument, the registration of which brings about the right of mortgage.

[32] Section 102 of the **Deeds Registries Act** 37 of 1947 ("*the Deeds Act*") defines a mortgage bond as:

> *"a bond attested by the registrar specially hypothecating immovable*

*property*"

[33] In **Goodricke & son (Pty) Ltd v Registrar of Deeds, Natal 1974(1) SA 404 at 408**, Muller J stated, with reference to the case of **National Bank v Cohen's Trustee 1910 TPD 1305** that:

"*A mortgage bond over immovable property is a real right in land.*"

[34] Du Bois et al *supra* state at 634 that:

"*[t]he agreement to mortgage must be valid and must reveal an intention to grant real security for performance of the principal obligation by creation of real security in a specified immovable asset.*" And that

"*The real right of mortgage is created on registration of the mortgage bond.*" (emphasis added)

[35] Wessels JA stated the following in the case of **Lief N.O. v Dettmann 1964(2) SA 252 (A) at 264-265**

"*It is convenient at this stage to set out what I conceive to be the true nature of a mortgage bond, because, in my opinion, this may shed some light on the various problems arising from the contrary contentions put forward on behalf of appellant and respondent respectively.*

*In terms of the provisions of sec. 102 of the Deeds Registries Act, 47 of 1937, a mortgage bond is defined as 'a bond attested by the Registrar specially hypothecating immovable property'. In Oliff v Minnie, 1953 (1)*

*SA 1 (AD), it was stated by VAN DEN HEEVER, J.A., (at 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'. In Union Government v Chatwin, 1931 T.P.D. 317, reference is made to the fact that the object of a mortgage bond is not merely hypothecation but the settlement of the terms of the loan as well. The obligation of the mortgagee to lend the money to the mortgagor and the latter's obligation to furnish the security stipulated for and to comply with the conditions as to repayment of the amount of the loan flow from their common consent to undertake the transaction. By their common consent alone, however, they only create personal rights and obligations, notwithstanding the fact that in part their consent aims at the constitution of a real right in immovable property which is to inhere in the lender. A consensual right to claim hypothecation of immovable property is prior to registration of a personal right available only against the debtor. When the debtor gives effect to the reciprocal obligation in this respect by causing the mortgage bond to be registered in the Deeds Registry then, and only then, is the real right properly constituted in favour of the mortgagee (Registrar of Deeds (Tvl) v Ferreira Deep Ltd., 1930 AD 169 at p. 180).*"

and at 276

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

[36] Lubbe and Scott *supra* state at par 328 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."*

and at par 367 they state that

*"Upon registration of the mortgage in accordance with the provisions of the Deeds Registries Act, a limited real right of security is created in favour of the mortgagee. The existence of this real right, which differs in several respects from other iura in re aliena recognised under South African law, entails that the proceeds of the mortgaged asset are earmarked for the satisfaction of the principal obligation to the exclusion of claims against the property at the instance of other creditors of the mortgagor."*

[37] Williamson JA stated in the case of **Thienhaus NO v Metje & Ziegler Ltd and Another 1965 (3) SA 25 (A) at 32F** that:

*"If a bond is drafted so as to fulfil these dual roles of a deed of hypothecation on the one hand and of an instrument of debt on the other, in testing its validity as a deed of hypothecation conferring a real right on the mortgagee, all content of the bond which is not required in law to effect a proper hypothecation, is in reality surplus age for that purpose."*

[38] In **Standard Bank of South Africa Ltd v Saunderson & Others 2006 (2) SA 264 (SCA) at par [2]** Cameron JA (as he then was) stated that:

*"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 repaid. The right to continued ownership, and hence occupation, depends on repayment. The mortgage bond thus curtails the right of property at its root, and penetrates the rights of ownership, for the bond-holder's rights are fused into the title itself."*

[39] Du Bois et al *supra* further state at par.369 that:

*"Since a mortgage is restricted to immovable assets and the requirement of delivery restricts the commercial usefulness of a pledge, a notarial bond attested to by a notary public may be registered over particular movables or all the movables assets of the debtor as security for a debt."*

[40] From the above mentioned authorities the following principles can be drawn:

- A "*mortgage bond*" and the right of "*mortgage*" are not the same thing.

- "*Mortgage*" refers to a real right of security in the asset of another which is created by registration in the Deeds Registry pursuant to an agreement between the parties.

- 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.

- The term "*mortgage bond*" refers to the deed or instrument, the registration of which brings about the right of mortgage.

[41] It is noted that the above mentioned authorities refer exclusively to immovable property as serving as security in terms of a mortgage bond. Du Bois et al go as far as to state that mortgage bonds are restricted to immovable assets.

[42] The test to be applied in considering whether a general notarial bond is a mortgage bond is whether the notarial deed is an instrument, the registration of which brings about the right of mortgage; i.e. does the deed bring about a real right of security in the asset of another, which is created by registration in the deeds registry?

[43] Looking at the facts of this case, it is common cause that the document relied upon by the plaintiff is a general notarial bond.

[44] Section 102 of the Deeds Act defines a notarial bond as:

> "*a bond attested by a notary public hypothecating movable property generally or specially*"

[45] There are two types of notarial bonds that can be registered over moveable property:

- a special notarial bond, in terms of which the movables hypothecated are specifically identified and described; or

- a general notarial bond, as in the present case; here no specific movables are specifically identified and/or described.

[46] Lubbe and Scott *supra* state at par. 400 that general notarial bonds as well as special notarial bonds, registered before 7 May 1993 over movables differed from both mortgage and pledge in that the creditor did not, in general, obtain a real right of security.

[47] The Security by Means of Movable Property Act 57 of 1993 ("*the Security Act*") now regulates the legal consequences of the registration of a notarial bond over specific movable property and the exclusion of the landlord's tacit hypothec in respect of certain movables, and provides further for matters concerned therewith. Corporeal movable property, specified in such a way that it is readily recognisable and which is hypothecated under a notarial bond registered after commencement of the Act in accordance with the Deeds Registries Act, is deemed to have expressly been pledged and delivered to the mortgagee; **refer Lubbe and Scott *supra* at par.404 and S 1(1) of the Security Act.**

**[48] A special notarial bond**, registered in accordance with the provisions of the Security Act, confers a real right of security on the bondholder insofar as the movables are deemed to have been pledged to the bondholder as effectually as if it had expressly been pledged and delivered to the bondholder.

[49] From the above analysis it clearly shows that, in respect of a special notarial bond registered after 7 May 1993, the bondholder acquires a

real right of security by way of a deemed pledge.

[50] In so far as **general notarial bonds** are concerned, Lubbe and Scott *supra* state at par. 405 that:

> *" the holder of a general notarial bond or a special notarial bond registered before 7 May 1993 does not enjoy a real right of security in the assets subject to the bond, so that there is nothing to prevent the owner from dealing with and disposing of assets subject to the bond. Such disposal results in the assets being released from the bond. It has accordingly been said that the bondholder enjoys no greater security than is afforded by the personal honesty of the debtor..... "*

[51] Harms JA stated in **Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd & Others 2003 (2) SA 253 (SCA) at par. 3** that:

> *"The general notarial bonds in question do not fall within the purview of the Security by Means of Movable Property Act 57 of 1993. Their effect is trite and I shall content myself by paraphrasing the relevant section from Joubert (ed) The Law of South Africa vol 17 (1st re-issue) para 517. The holder of a general notarial bond does not enjoy a real right of security in the assets subject to the bond. There is nothing to prevent the owner from dealing with and disposing of assets subject to the bond, or of bonding them to another creditor. The creditor cannot prevent an alienation or pledge of the assets subject to the bond, cannot follow up the property in the hands of the acquirer and cannot prevent a judicial attachment. The rights of the bondholder are of importance mainly upon insolvency. The bondholder is not a secured creditor and is entitled to a preference over the concurrent creditors of the insolvent only with*

*respect to the proceeds of assets subject to the bond."*

[52] In **IKEA Trading und Design AG v BOE Bank Ltd 2005 (2) 7 (SCA),** where the Court was called upon to consider whether a bond met the requirements of the Security Act, Lewis JA held that the notarial bond registered by Ikea over movable property did not meet the requirements of s 1(1) of the Security Act. The assets enumerated were not specified and described in the manner required by the section. That in the circumstances the bond did not create a deemed pledge of the property, and IKEA was not a secured creditor. In other words the notarial bond did not confer a real right of security.

**[53] Farmsecure Grains (Edms) Bpk v Du Toit and Another 2013(1) SA 462 (FB)**, also deals with this distinction between a general and a special notarial bond. Lekale J, with reference to the unreported decision of the Free State High Court in the matter of Sentraal-Oos (Koöperatief) Bpk v Potgieter and Another (FB case No 3870/94), stated that:

*"A perusal of the Sentraal-Oos decision reveals that the court was concerned with a general notarial bond in that matter, as opposed to a special notarial bond, which confers a real right. The applicant in Sentraal-Oos was a holder of a general notarial bond which it sought to perfect, and the court found, inter alia, that its contractual remedy was normally to first request or notify the respondents to release the hypothecated movables and to approach the court only as a last resort if the respondents refuse to oblige."*

and

*"I am convinced that the present matter is distinguishable from the*

*Sentraal-Oos application, insofar as the applicant herein is a holder of a special notarial bond which confers a real right on it ex lege (see s 1(1) of the Act).*

[54] From the above mentioned authorities, it is clear that a general notarial bond does not, and did not at the time the Prescription Act was enacted, confer a real right on the bondholder over the property, as in the case of a mortgage bond.

[55] Without conferring such a right, a notarial bond cannot meet the definition of a deed or instrument by which a right of mortgage is created upon registration at the Deeds Registry.

[56] From the reading and analysis of the above mentioned authorities, a general notarial bond thus, cannot be said to be a mortgage bond as envisaged in section 11(a)(i) of the Prescription Act.

[57] The plaintiff contends that the crisp question that arises for decision in this matter is the same as that was decided in the unreported judgment by Rabie J of this division in the matter of **Land & Agricultural Development Bank of South Africa v A. Boeke & Ano reported under Case No. 12506/07**.

[58] The plaintiff contends that the general notarial covering bond is a "mortgage bond" as envisaged in section 11(a)(i) of the Prescription Act, and that it accordingly carries a prescription period of thirty years.

[59] The plaintiff relies heavily for this proposition on the findings of Rabie J, of this division, in the Matter of **Land and Agricultural Development Bank of South Africa v Boeke & Another, case no. 12506/07.**

[60] The court in the above matter was called upon to consider whether **two special notarial bonds**, registered in accordance with the provisions of the Security Act, were "mortgage bonds" for the purposes of section 11(a)(i) of the Prescription Act.

[61] Rabie J found that both special notarial bonds were mortgage bonds for the purposes of section 11(a)(i) of the Prescription Act.

[62] The learned judge in the matter in question was specifically dealing with special notarial bonds. He was never asked to consider if a general notarial bond is a mortgage. A general notarial bond confers no real rights of security and accordingly can confer no right of mortgage.

[63] Surely there is a distinction between special notarial bonds and general notarial bonds. Rabie J in his judgment does not anywhere deal and/or refer to general (my underlining) notarial bonds.

[64] If one has regard to the authorities set out above, it is clear, in my view, that general notarial bonds cannot be said to be mortgage bonds as envisaged in S11(a) (i) of the Prescription Act; they [general notarial bonds) are clearly notarial contracts as envisaged in S11 (1) (c) and the prescription period thereof is six (6) years.

[65] In my considered view, the above judgment is distinguishable from the present matter.

[66] This court is seized with a **general notarial bond**, which, from the analysis of the above mentioned authorities, confers no real rights on the bondholder and, as an instrument, does not create the right of mortgage.

[67] From Rabie J's judgement aforesaid, it is clear that the argument that general notarial bonds confer no real right of security on the bondholder, an inherent characteristic of the right of mortgage, was never presented to him; the argument submitted to the court centred on the question as to whether movables could be secured by way of mortgage.

[68] Pursuant to the enactment of the Security Act, section 2 of the Insolvency Act 24 of 1936 was amended to define a 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*"

[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. [70] The same cannot, in my considered view, be said for a general notarial bond.

[71] Unlike a special notarial bond, or a mortgage bond over immovable land, a general notarial bond does not earmark assets which then provide a real right of security. As Harms JA stated in the Chesterfin case, referred to above:

> *"The holder of a general notarial bond does not enjoy a real right of security in the assets subject to the bond. There is nothing to prevent the owner from dealing with and disposing of assets subject to the bond, or of bonding them to another creditor. The creditor cannot prevent an alienation or pledge of the assets subject to the bond, cannot follow up the property in the hands of the acquirer and cannot prevent a judicial attachment."*

[72] Given that a general notarial bond does not earmark or specify movables as real security for the performance of a debt, and that the bond does not impact on the rights of ownership of the debtor in the same way as a mortgage bond or special notarial bond, it is improbable that the legislature would have provided for a prescription period of thirty years when the secured assets are so easily disposed of or alienated.

[73] The defendants, as opposed to the plaintiff, submitted that a general notarial bond is not an instrument that, on its registration, confers or creates a right of mortgage on, or in favour of the bondholder. That Insofar as the right of mortgage is not created by the instrument, the instrument cannot be considered to be a "mortgage bond" for the purposes of section 11(a)(i) of the Prescription Act.

[74] I have already stated that on the reading and analysis of the above mentioned authorities I am satisfied that a general notarial bond cannot be said to be a mortgage bond as envisaged in of section 11(a)(i) of the Prescription

Act. In my view a general notarial bond in contention herein is a notarial contract as envisaged in section 11(c) of the Prescription Act, and thus the prescription period of six (6) years applies.

[75] From common cause facts in this matter, the summons were issued and served more than six (6) years after the cause of action arose, accordingly the plaintiff's claim has prescribed.

[76] Regarding the defendants' second and/or alternative special plea of **Premature claim**, it is common cause that:

- The loan agreement has a breach clause **(clause 13)**;
- The Plaintiff has not pleaded that notice was given in terms of the breach clause[13];
- The Plaintiff relies on two causes of action namely the loan agreement as well as the bond agreement;

[77] The plaintiff contends that the bond agreement contains two clauses **(clause 8 and clause 18)** which allows the Plaintiff to proceed with summons without prior notice in the event of default

[78] The plaintiff further contends that having regard to the aforementioned it was not necessary for the Plaintiff to have called upon the First Defendant to remedy its default prior to the institution of the action as the bond allows the Plaintiff to act in the manner it did.

[79] The loan agreement provides, in **clause 13**, that:

> *"13. In the event of a material default as detailed in clause 12 above has occurred, Land Bank shall grant a reasonable remedy period and if such default has not yet been remedied within that remedy period, in addition to any other rights and remedies that may be available to the Land Bank at the time:*
>
> *(a) the full amount owing in terms of this loan (inclusive of all interest accrued and any or all costs and disbursements incurred in recovering the outstanding amount), will forthwith and without any further notice become due and payable by the Client and the Land Bank is entitled to withhold any amount not yet advanced to the client;*
>
> *(b) the Land Bank becomes entitled to perfect the security detailed in clause 3 above and to take all steps it deems necessary to realise the security; and*
>
> *(c) the Land Bank becomes entitled to terminate this agreement and claim damages.'* (emphasis added)

[80] The defendants contend that the plaintiff was required to provide the first defendant with a reasonable remedy period within which to remedy any alleged breach, prior to proceeding in terms of paragraphs (a) to (c) of clause 13.

[81] The Plaintiff was obliged to afford the first defendant notice to remedy in

accordance with clause 13 of the loan agreement. Until that is done, the Plaintiff cannot proceed in terms of clause 13 (a), which is to claim the full amount owing in terms of the loan. There is no dispute on the allegation that the notice to remedy was not afforded to the 1st Defendant.

[82] The defendants further contend that no remedy period was afforded in terms of clause 13. The plaintiff, in its replication does not dispute these allegations.

[83] In fact it is not in dispute that the plaintiff failed to afford the first defendant a reasonable notice period. This the plaintiff concedes, however, as already stated above, the plaintiff contends that it did not have to give the 1st defendant reasonable remedy period since the bond agreement contains two clauses (**clause 8 and clause 18**) which allows the Plaintiff to proceed with summons without prior notice in the event of default

[84] The defendants contend that Insofar as a contract creates a contractual ground for cancellation by an innocent party, the innocent party is obliged to use that contractual machinery unless the conduct of the defaulting party amounts to a repudiation of the contract. Repudiation is not alleged by the plaintiff; that the plaintiff was obliged to utilise the contractual machinery provided in clause 13 of the loan agreement.

[85] On the pleadings there appears to be limited dispute on this issue. The plaintiff, in replication, admits that no remedy period was afforded in terms of clause 13, and thereafter pleads that it is entitled to seek relief against the first defendant in terms of the notarial bond, and against the second to fourth defendants in terms of the suretyship agreements.

[86] The plaintiff pleads, in its replication, that on the basis of clause 8 of the notarial bond, the plaintiff's action is not premature. Clause 8 of the notarial bond reads as follows:

> *"8* ***Default***
>
> *Should the mortgagor be in breach of or fail to comply with any written agreement or agreements between the mortgagor and Landbank in respect of any amounts secured by this bond, or should the mortgagor be in breach of or fail to comply with any of the terms and conditions of this bond or should the mortgagor, at the request of Landbank, fail to pay to Landbank any sum which Landbank may lawfully claim, or should the mortgagor fail to meet any obligation or commitment to Landbank on the expiry date thereof or in the event that the mortgagor has reached a compromise with creditors or is placed under judicial management or in the event of the mortgagor's insolvency or liquidation or on receipt of a notice of an application for voluntary sequestration or the transfer of the mortgagor's estate in favour of creditors, or in the event of attachment of encumbered property in terms of a judgment of any court or the sale of property on the basis that amounts to a breach of the terms as set out herein or in any agreement, all amounts secured in terms of this bond shall, unless otherwise agreed in writing, immediately become payable in the discretion of Landbank and without Landbank being required to give the mortgagor notice thereof, notwithstanding the exercising of any other rights by Landbank, Landbank shall be entitled to institute legal action for the recovery of all such amounts and have the property mortgaged in terms of this bond declared executable in which event ...".*

[87] The plaintiff seem to rely on the underlined portion of clause 8, to the effect that all amounts secured in terms of the bond shall, unless otherwise agreed in writing, become payable without the plaintiff being required to give the first defendant notice.

[88] The defendants contend that in answers to this assertion:

- The notarial bond is an accessory obligation and, insofar as the principal obligation is not claimable, the plaintiff is precluded from seeking relief on the bond;

- Even if it is found that the accessory obligation can ground a cause of action despite a claim on the principal obligation being premature, the wording of clause 8 expressly provides that all amounts payable in terms of the bond shall, unless otherwise agreed in writing, become payable.

[89] It is so that the parties have agreed otherwise in writing. In terms of the written loan agreement between the parties, the plaintiff is obliged to comply with the contractual machinery of clause 13 prior to the claim being payable.

[90] Clause 13 of the loan agreement is peremptory, and does not give the plaintiff any discretion and/or other choice/election not to give the first defendant a reasonable remedy notice period.

[91] On the other hand **clause 8** of the notarial bond gives the plaintiff a discretion:

*"all amounts secured in terms of this bond shall, unless otherwise agreed*

*in writing, immediately become payable in the* ***discretion*** *of Landbank and without Landbank being required to give the mortgagor notice thereof...".*

[92] On a proper reading of the instruments together [the loan agreement and the notarial bond], in my considered view, clause 8, which is in any event, accessory to a principal obligation arising from contract, cannot override the peremptory provisions of clause 13.

[93] Du Bois et al *supra* state at page 631that:

"*Real security is, however, always accessory to a principal obligation arising from contract or operation of law and, in this sense, it has a contractual nature.*"

[94] In **Boland Bank v Pienaar 1988 (3) SA 618 (A)** a debtor defaulted on a principal debt which contained a lex commissoria to the effect that on failure to pay an instalment; all amounts would become due and payable. The principal debt was secured by a mortgage bond which contained a clause to the effect that the mortgagee shall have the right to foreclose without notice on failure by the mortgagor to pay any amount due under the bond on due date. The debtor sought to tender a belated payment which the creditor refused to accept. The Court found that he was entitled to seek relief in terms of the mortgage bond.

[95] The Boland Bank case differs significantly from the matter at hand. The Court held that the mortgagee's accrued right to cancel was not defeated by a belated tender of payment of the arrears before the exercised its election to cancel. In this case, the right to cancel, or to exercise any of the rights in clause 13 of the loan agreement, including a claim on the full amount owed in terms of

the loan, has not accrued to the plaintiff given its failure to comply with clause 13.

[96] In **Coloured Development Corporation v Sahabodien 1981 (1) SA 868 (C)** Rose Innes J stated that:

> *"The cause of action is the failure to comply with the terms of the principal 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. A 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. In regard to the aforegoing observations see Kilburn v Estate Kilburn 1931 AD 501 at 506; Thienhaus NO v Metje & Ziegler Ltd and Another 1965 (3) SA 25 (A).The obligation sought to be enforced by provisional sentence on a bond is thus always the principal obligation, in this case for payment of money due in redemption of a contract of loan; the cause of action thus arises ratione contractus*". (emphasis added)

[97] Furthermore, contrary to the plaintiff's assertions, clause 8 of the notarial bond does not provide the plaintiff with an independent cause of action based on the bond. Clause 8 expressly provides that the plaintiff's right to claim immediate payment on all amounts secured by the bond is subject to any other written agreement. The written loan agreement provides for a notice period in clause 13.

[98] Clause 8 in any event specifically stipulates that

> *"all amounts secured in terms of this bond shall,* ***unless otherwise agreed in writing,*** *immediately become payable in the discretion of Landbank and without Landbank being required to give the mortgagor notice thereof..."*.

[99] There is a written loan agreement between the parties, in terms whereof the plaintiff is obliged to provide the first defendant with reasonable remedy notice period within which to remedy any alleged breach; this the plaintiff has not done. The plaintiff thus sued the defendants prematurely, in the absence of compliance with clause 13 of the loan agreement.

[100] The position is the same *vis a vis* the second to fourth defendants who are sued on the suretyships.

[101] The suretyship agreements, like the notarial bond, are accessory to the principal debt.

[102] CF Forsyth and JT Pretorius, Caney's The Law of Suretyship, 5th edition, p99 state that:

> *"...if the surety is bound in simple terms for a principal obligation which is subject to a term or condition, he cannot be sued until the term has expired or the condition been fulfilled: Not until the principal debt is*

*due for fulfilment, whether by effluxion of time or performance of a condition (including a condition precedent to the institution of proceedings, such as notice to or demand upon the debtor) can a claim be successfully made against the surety."*

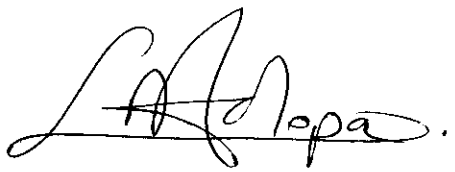
[103] In **Desert Star Trading 145 (Pty) Ltd & Another v No 11 Flamboyant Edleen CC & Another 2011 (2) SA 266 SCA** Ponnan JA said the following:

*"The appellants in each instance relied upon a deed of suretyship. It is so that a contract of suretyship is a separate contract from that of the principal debtor and his or her creditor. It is, however, accessory to that main contract. Thus for there to be a valid suretyship there has to be a valid principal obligation. Put differently, every suretyship is conditional upon the existence of a principal obligation. For, as Nienaber JA put it, '(g)uaranteeing a non-existent debt is as pointless as multiplying by nought'. It follows that a surety is not liable to a person to whom the principal debtor is not liable. It is well settled that the general rule is that a surety may avail himself or herself of any defences that the principal debtor has, save for those defences that are purely personal to the principal debtor."*

[104] The plaintiff is thus not entitled to claim on the suretyships in the absence of compliance with clause 13 of the loan agreement.

[105] After considering all the facts before me, the legal principles/ the authorities and the arguments of both parties, I am satisfied that on the facts before me the defendants have made out a case on the special pleas of prescription and premature claim.

[106] For all the above considerations, I made the order referred to in paragraph 1 above.



**L M MOLOPA-SETHOSA**

**JUDGE OF THE HIGH COURT**