



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable
Case No: 353/2016

In the matter between:

FACTAPROPS 1052 CC

FIRST APPELLANT

ISMAIL EBRAHIM DARSOT

SECOND APPELLANT

and

**LAND AND AGRICULTURAL DEVELOPMENT
BANK OF SOUTH AFRICA t/a THE LAND BANK**

RESPONDENT

Neutral Citation: *Factaprops v The Land Bank* (353/2016) [2017] ZASCA 45 (30 March 2017)

Coram: Tshiqi, Zondi and Van der Merwe JJA and Nicholls and Coppel AJJA

Heard: 1 March 2017

Delivered: 30 March 2017

Summary: The phrase 'mortgage bond' in s 11(a)(i) of the Prescription Act 68 of 1969 has a wide meaning and includes a special notarial bond in terms of the Security by Means of Movable Property Act, 57 of 1993: therefore the period of prescription applicable to a debt secured by such special notarial bonds is thirty years.

ORDER

On appeal from Gauteng Division, Pretoria (Msimeki J sitting as court of first instance):

The appeal is dismissed with costs on attorney and client scale.

JUDGMENT

Zondi JA (Tshiqi and Van der Merwe JJA and Nicholls and Coppin AJJA concurring):

[1] This appeal concerns the period of prescription applicable to a debt secured by a special notarial bond for the purposes of s 11 of the Prescription Act 68 of 1969 (the Prescription Act). Is it thirty or six or three years? This issue depends on the interpretation of the phrase 'mortgage bond' in s 11(a)(i) of the Prescription Act and on, specifically, whether that phrase is wide enough to include a special notarial bond. The issue must be considered against the following factual background.

[2] In May 1999 the respondent (the Land Bank) and the first appellant (Factaprops) entered into a written loan agreement in terms of which the Land Bank lent and advanced a sum of R250 000 to Factaprops. The second appellant (Mr Ismail Ebrahim Darsot) is the sole member of Factaprops. Payment of the loan amount was secured by the registration, on 18 April 2000, at the Pretoria Deeds Registry office, of a special notarial bond over a number of specified movable assets owned by Factaprops, in favour of the Land Bank as continuing covering security. As additional security, Darsot signed a deed of suretyship in terms of which he bound himself as surety and co-principal debtor *in solidum* to the Land Bank for the repayment, on demand, of all amounts due by Factaprops to the Land Bank.

[3] In the deed of suretyship, Darsot renounced all applicable legal exceptions and agreed that the suretyship was to remain in force as additional and continuing security, until all debts by Factaprops to the Land Bank were fully discharged.

[4] In terms of the loan agreement, Factaprops was to repay the loan together with interest as determined by the Land Bank, from time to time in five annual instalments. The full balance outstanding would immediately become due and payable, in the event of Factaprops failing to make payment of the amount due and owing on the various payment dates. The final instalment was due for payment on 15 June 2004. In breach of the loan agreement, Factaprops defaulted in its payment.

[5] On 14 October 2010, the Land Bank issued a summons against Factaprops and Darsot (the appellants), suing them jointly and severally the one paying the other to be absolved, among others, for payment of the amount of R491 203.05, together with interest at the rate of 14 per cent per annum, from 31 August 2010 to date of payment, with the said interest to be calculated and capitalized monthly. The summons was served on the appellants on 3 November 2010. The appellants defended the action and delivered a special plea in which they contended that the Land Bank's claim against them had become prescribed in terms of s 11(d), alternatively in terms of s 11(c), of the Prescription Act. In their special plea, the appellants alleged that the payment of the amounts owing to the Land Bank under the loan agreement became due and payable between 15 June 2000 and 25 June 2004. They contended that by the time the summons was served on them on 3 November 2010, being more than three years from the dates on which the alleged debts became due and payable, the claim against them had become prescribed.

[6] The Land Bank delivered a replication in which it denied that its claim had become prescribed. It argued that its claim was for the payment of a debt which was secured by a special notarial bond and that the applicable prescription period is thirty years.

[7] In the court below, the parties agreed on a stated case upon which the appellants' special plea of prescription was to be argued. They agreed that the Land Bank's summons was served on 3 November 2010, being a date more than six years from the date on which the debt arose. The Land Bank, however, contended that the prescription period of thirty years was applicable to its claim for the payment of a debt that is secured by a special notarial bond. It therefore argued that its claim had not become prescribed.

[8] The court below was requested to adjudicate on the following question: 'Is the applicable period of prescription in the instant proceedings thirty years in terms of section 11(a) of the Prescription Act (i.e. on the basis that the debt is secured by a mortgage bond) as contended by the plaintiff, or as contended by the defendants, six years as provided for in section 11(c) (i.e. on the basis that the indebtedness is secured by a notarial contract) or three years as provided for in section 11(d) (on the basis that the debt is one that arose from the loan agreement)?'

[9] The court below (Msimeki J) held that the Land Bank's claim had not prescribed and accordingly dismissed the appellants' special plea. It granted judgment in the amount claimed together with ancillary relief. It concluded that on a proper interpretation of s 11(a)(i) of the Prescription Act the phrase 'mortgage bond' includes a reference to a special notarial bond. The effect of that construction, reasoned the court below, was that the period of prescription of a debt secured by a special notarial bond is thirty years, not six or three years. The court below relied on the judgment of Rabie J in *Land and Development Bank of South Africa v Boeke & another*¹ in which it was held that the prescription period in respect of a debt secured by a special notarial bond is thirty years.²

¹ *Land and Development Bank of South Africa v Boeke & another* TPD unreported case no number 12506/07 of 17 February 2011.

² A similar conclusion was reached by Molopa-Sethosa J in *Land and Agricultural Development Bank of South Africa v Phato Farms (Pty) Ltd & others* 2015 (3) SA 100 (GP) para 69, although the issue before the court in that case related to the prescription period of a debt secured by a general notarial bond. Msimeki J disapproved of the reasoning and conclusion in the judgments of Phatudi AJ in *Land and Agricultural Development Bank of South Africa v Factaprops 1052 CC & another* [2015] 3 All SA 319 (GP) para 74 and Mabuse J in *Absa Bank Ltd v Hammerle Group (Pty) Ltd* [2013] ZAGPPHC 402 (20 December 2013) para 27, in which it was held that a special notarial bond is not a mortgage bond for the purposes of the Prescription Act.

[10] The appeal, with leave of the court below, is against its order dismissing the special plea and granting judgment in favour of the Land Bank.

[11] Section 11 of the Prescription Act is concerned with the periods of prescription of debts. It provides as follows:

‘The periods of prescription of debts shall be the following:-

(a) thirty years in respect of—

(i) any debt secured by mortgage bond; (The Afrikaans text says “n skuld deur verband verseker.”)

(ii) . . .

(iii) . . .

(iv) . . .

(b) . . .

(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.’

[12] The Prescription Act does not define the meaning of ‘mortgage bond’ nor does it make any reference to a ‘notarial bond’. The question is whether the term ‘mortgage bond’ in s 11(a)(i) of the Act also includes a special notarial bond. If that is the case, then a debt secured by a special notarial bond prescribes after thirty years and therefore the special plea raised by the appellants was correctly dismissed. If this is not so, then the Land Bank’s claim would be held to prescribe in three or six years.

[13] This court has said that when interpreting legislation, what must be considered is the language used; the context in which the relevant provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production.³

³ *Natal Joint Municipal Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA); [2012] JOL 28621 (SCA); [2012] 2 BPLR 133 (SCA) para 18.

[14] Counsel for the appellants submitted that a mortgage bond and a special notarial bond are not synonymous in law and for that reason, the phrase 'mortgage bond' in s 11(a)(i) of the Prescription Act, must be interpreted restrictively. He relied in support of his argument on the definition of 'mortgage bond' in s 102(1) of the Deeds Registries Act⁴ namely 'a bond attested by the registrar specially hypothecating immovable property' and of a 'notarial bond' as 'a bond attested by a notary public hypothecating movable property generally or specially'. He further referred the court to s 53(1) of the same Statute, which states that 'the registrar shall not attest any mortgage bond which purports to bind movable property or which contains the clause, commonly known as the general clause, purporting to bind generally all the immovable or movable property of the debtor or both and shall not register any notarial bond which purports to bind immovable property.' He argued that the provisions of s 102(1) and s 53(1) of the Deeds Registries Act provide a clear indication that the Legislature intended that a distinction between the two types of bonds be maintained.

[15] Counsel for the appellants also referred in support of his argument to the Security by Means of Movable Property Act⁵ read with s 2 of the Insolvency Act.⁶ His argument was that the distinction which the Insolvency Act draws between a mortgage bond hypothecating immovable property and a notarial mortgage bond hypothecating specially described movable property, is an indication that the Legislature did not intend to treat a mortgage bond and a notarial bond as synonymous.

[16] On the other hand, counsel for the Land Bank argued in favour of a wide meaning for the phrase 'mortgage bond'. He submitted that the term 'mortgage bond' in s 11(a)(i) of the Prescription Act should be interpreted expansively so as to include a special notarial bond hypothecating movable property in terms of the Security by Means of Movable Property Act. He, inter

⁴ The Deeds Registries Act 47 of 1937.

⁵ The Security by Means of Movable Property Act 57 of 1993.

⁶ The Insolvency Act 24 of 1936.

alia, relied on the following indicators to support his wide interpretation of the Prescription Act:

- (a) the ordinary grammatical meaning of 'mortgage bond';
- (b) the Afrikaans translation of 'mortgage bond' in both the 1943 and 1969 Prescription Acts;
- (c) the history of the Act.

[17] A close analysis of the language used in s 11(a)(i) of the Prescription Act and its history shows conclusively, in my view, that a wider interpretation contended for by counsel for the Land Bank, must be the correct one. This construction is reinforced by the following considerations. First, as regards its ordinary grammatical meaning, the Shorter Oxford English Dictionary on Historical Principles defines 'mortgage' as:

'The conveyance of real or personal property by a debtor (called the *mortgagor*) to a creditor (called the *mortgagee*) as security for a money debt, with the proviso that the property shall be reconveyed upon payment to the mortgagee of the sum secured within a certain period. Also applied to the deed effecting this, the rights conferred on the mortgagee, and the condition of being mortgaged. . . .'

From this definition, it is apparent that 'mortgage' may be used in relation to hypothecation of immovable property (real property) or movable property (personal property).

[18] Secondly, the Afrikaans texts in both the 1943 and 1969 Prescription Acts use the word 'verband' for 'mortgage bond'. The meaning of 'verband' according to HAT Verklarende Handwoordeboek van die Afrikaanse Taal is 'verbintenis volgens wetlike bepaling waardeur eiendom as sekuriteit gegee word vir 'n lening; while the Kritzinger and Labuschagne Verklarende Afrikaanse Woordboek 8th ed gives its meaning as 'verpanding van, beswaring op 'n eiendom'. It is apparent from these definitions that 'verband' may be used to cover both a mortgage bond in respect of immovable property, and a notarial bond in respect of movable property.

[19] Moreover, if one has regard to the history of the Prescription Act it is apparent that the term 'mortgage bond' had been consistently used in a wider

sense. The Transvaal Prescription Amendment Act of 1908⁷, which predates the Prescription Act of 1943, did not differentiate between mortgage bonds and notarial bonds for the purposes of prescription. It simply referred to 'mortgage bond, general or special...' There is no indication that the Legislature intended to deviate from that meaning when it used 'mortgage bond' in the 1969 Prescription Act.

[20] The phrase 'mortgage bond' has also been used to describe a notarial bond. For example, in *Oliff v Minnie*⁸ it was interpreted to mean an instrument hypothecating immovable property and other goods. In that case, the court was concerned with the question whether a mortgage bond over certain property remained a mortgage bond for the purposes of the computation of the period of prescription under Chapter 23 of the Orange Free State Law Book, even though the bond had become valueless as a security inasmuch as the first bond holder had caused the property to be sold in execution. It had been contended that, as there was no longer any property then hypothecated, the document had become merely an acknowledgement of debt subject to a much shorter term of prescription. Van den Heever JA said at 3D that: 'a mortgage bond as we know it is an acknowledgement of debt and at the same time an instrument hypothecating landed property or other goods.'⁹

[21] Thirdly, Chapter III of the Prescription Act, in which s 11(a)(i) is located, concerns prescription of debts and one of the philosophical justifications for prescription is that it relieves a debtor from having to defend a claim long after the event. Differently stated, prescription is about proof of debts and the purpose of the Act is to protect a debtor against claims that he may be unable to defend due to lack of evidence caused by the passage of time. Therefore

⁷ Transvaal Prescription Amendment Act of 1908, a statute which was later replaced by the Prescription Act of 1943. Sections 8 and 9 provided as follows:

'8. The period of prescription on any bill of exchange, or other liquid document or in respect of any written acknowledgment of debt or written contract of any nature (other than a mortgage bond, general or special or a promissory note not negotiated) shall be six years.

9. The period of prescription in respect of matters for which a period is not hereinbefore fixed shall be thirty years; provided that there shall be no prescription in respect of a judgment of a court of law.'

⁸ *Oliff v Minnie* 1953 (1) SA (1) A; [1953] 1 All SA 151 (A) at 153.

⁹ See also *Lief, NO v Dettmann* 1964 (2) SA 252 (A) at 264H.

longer periods of prescription are justified where transactions are matters of public record as is the case with special notarial bonds. The purpose of the Prescription Act thus provides a strong indication that the wider meaning of 'mortgage bond' was intended.

[22] Therefore, and accepting for the moment that in certain contexts, the phrase 'mortgage bond' might be given a narrow meaning that could exclude a notarial bond, I see no reason for adopting such a meaning in the interpretation of s 11(a)(i) of the Prescription Act. The preferable meaning is the one expressed by Van den Heever JA in *Oliff* which is also espoused by the learned author Loubser in *Extinctive Prescription*¹⁰ at 37. It follows, therefore, that the conclusions reached by Phatudi AJ in *Land and Agricultural Development Bank of South Africa*, para 74¹¹ and Mabuse J in *Absa Bank Ltd v Hemmerle Group (Pty) Ltd*, para 27,¹² cannot be sustained.

[23] The construction of the provision of s 11(a)(i) contended for by the appellants must be rejected. It ignores the language of the section, the context in which it appears, its purpose and the material known to its drafters. The appellants' reliance on the definition sections in the Deeds Registries Act and s 2 of the Insolvency Act, as tools for the interpretation of s 11(a)(i) of the Prescription Act, is misplaced. The fact that the phrase 'mortgage bond' in the Deeds Registries Act, is used in respect of immovable property and the phrase 'notarial bond' in respect of movable property, does not provide a basis for the conclusion that all other statutes should be interpreted in this manner. For instance, s 2 of the Insolvency Act uses the phrase 'mortgage bond' with reference to movable property in its definition section.¹³ Each Act

¹⁰ M M Loubser *Extinctive Prescription* (1996) at 37-38.

¹¹ *Land and Agricultural Development Bank of South Africa v Factaprops 1052 CC & another* [2015] 3 All SA 319 (GP).

¹² *Absa Bank Ltd v Hammerle Group (Pty) Ltd* [2013] ZAGPPHC 402 (20 December 2013).

¹³ Section 2 of the Insolvency Act 24 of 1936 defines 'special mortgage' as:

'a mortgage bond hypothecating any immovable property or a notarial mortgage bond hypothecating specially described movable property in terms of section 1 of the Security by Means of Movable Property Act, 1993 (Act No. 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 No. 18 of 1932), but excludes any other mortgage bond hypothecating movable property.'

must be interpreted with its particular objectives.

[24] The distinction between mortgage and notarial bonds in s 102 of the Deeds Registries Act¹⁴ serves a specific purpose, namely to assist the registrar in the performance of his duties under s 3 of the Deeds Registries Act, that is to say, which deeds he may or may not attest. This is so because not all deeds registered in a deeds office are attested by the registrar. Others, such as notarial contracts and bonds over movables are required to be attested by a public notary. Thus, when deeds are submitted to the registrar for registration or execution, he must examine them and reject those that purport to bind property which they may not bind under the Act or any other law.¹⁵ In other words, the distinction which s 102 draws between a mortgage bond and a notarial bond is only relevant for purposes of deeds attestation and registration.¹⁶ The provisions of ss 50(2), (3), (4) and (5) of the Act make it clear that, although these two bonds are constituted differently and the subject matter to which they relate is different, they may be registered to secure an existing debt, or a future debt, or both and once they are registered they give rise to similar legal consequences.

[25] As to costs, counsel for the Land Bank asked for costs to be paid on attorney and client scale on the basis that the notarial bond stipulates that should the Land Bank institute legal proceedings against the appellants, it will be entitled to attorney and client costs. The relevant clause of the notarial bond provides:

'The mortgagor shall pay all legal expenses, stamp duty, costs and charges in preparing and registering this Notarial Bond and the costs of cancellation thereof, and in general all costs, including costs between attorney and client and collection commission, which may arise out of or as a consequence of any claim or demand made, or legal proceedings instituted against the mortgagor in terms of this Notarial Bond.'

¹⁴ Section 102 of the Deeds Registries Act 47 of 1937.

¹⁵ H S Nel Jones *Conveyancing in South Africa* 4 ed (1991) at 14-15.

¹⁶ *Town Council of Springs v Moosa & another* 1929 AD 401 at 417.

[26] It was stated in *Sapirstein & others v Anglo African Shipping Co (SA) Ltd*¹⁷ that 'a court should give effect to an agreement between parties concerning their liability for legal costs arising out of a dispute between them.' There is no reason to depart from this principle in this case. The parties agreed that the appellants would pay costs as between attorney and client which may arise out of legal proceedings instituted against them in terms of the notarial bond.

[27] In conclusion I hold that the phrase 'mortgage bond' appearing in s 11(a)(i) of the Prescription Act should be read as including a special notarial bond and it follows, therefore, that the applicable period of prescription in respect of a debt secured by a special notarial bond is thirty years. The court below correctly dismissed the appellants' special plea of prescription.

[28] In the result the appeal is dismissed with costs on attorney and client scale.

D H Zondi
Judge of Appeal

¹⁷ *Sapirstein & others v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) at 14; See also *South African Permanent Building Society v Powell & others* 1986 (1) SA 722 (A) at 726 G-H.

Appearances

For the Appellants: C C Bester (with him L Mashilane)
Instructed by:
Ismail Ayob & Partners, Johannesburg
Phatshoane Henney Attorneys, Bloemfontein

For the Respondent: J G Bergenthuin SC
Instructed by:
Van Zyl Le Roux Attorneys, Monumentpark
Honey Attorneys, Bloemfontein