The prescription period applicable to a debt secured by notarial bond

2016 Stell LR 374

Max Loubser
BA LLB DPhil (Oxon)
Director, Cluver Markotter Inc., Stellenbosch

1. Introduction

There are conflicting judgments on the question whether the 30-year prescription period provided for in section 11(a)(i) of the Prescription Act 68 of 1969 ("Prescription Act") for "any debt secured by mortgage bond" also applies to debts secured by a notarial bond. [1] The matter turns on whether the words "mortgage bond" as used in section 11(a)(i) should be interpreted to include a "notarial bond" and concerns various rules of interpretation and important policy considerations. This article contains an analysis of the recent cases with reference to the relevant rules of interpretation and policy considerations.

The following sub-sections deal with the relevant policy considerations (2); the rules or canons of interpretation to determine the meaning of "any debt secured by mortgage bond" (3), specifically grammatical or literal interpretation (3 1), context (3 2), purpose and policy of differential prescription periods (3 3), and different language texts of a statute as an aid to interpretation (3 4). The judgments are then considered critically (4), followed by conclusions (5).

2. General policy considerations

In Professor JC de Wet's 1967 Memorandum on prescription, [2] containing a draft for a new statute, which (with relatively minor amendments) became the Prescription Act, he was characteristically brief and to the point on the purpose and policy of extinctive prescription. He wrote that the essential purpose of extinctive prescription is to end the uncertainty that the effluxion of time brings in respect of a debt. [3] South African judicial statements on policy likewise refer to the promotion of certainty in the debtor-creditor relationship.

In *Oliff v Minnie* ("*Oliff*"), [4] Van den Heever JA referred to "two legislative motives: the supinity (*desidia*) of a plaintiff who does not enforce his rights, who should therefore blame himself, and the difficulty felt by defendants who have to repel ancient claims".

The practical purpose of extinctive prescription is explained in *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality*:

> "Although many philosophical explanations have been suggested for the principles of extinctive prescription …, its main practical purpose is to promote certainty in the ordinary affairs of people. Where a creditor lays claim to a debt, which has been due for a long period, doubts may exist as to whether a valid debt ever arose, or, if it did, whether it has been discharged. (See De Wet and Yeats *Kontraktereg en Handelsreg* 4th ed. at 255.) The alleged debtor may have come to assume that no claim would be made, witnesses may have died, memories would have faded, documents or receipts may have been lost, etc. These sources of uncertainty are reduced by imposing a time limit on the existence of a debt, and the relevant time limits reflect, to some extent, the degree of uncertainty to which a particular type of debt is ordinarily subject (s 11 of the Act)." [5]

The main object of extinctive prescription is to create legal certainty and finality in the relationship between debtor and creditor after the lapse of a period of time. The focus of extinctive prescription is primarily on the relationship between debtor and creditor, but wider considerations of public policy also apply, such as the promotion of certainty in commercial affairs of other interested parties, enhancement of the efficiency of the courts, and the promotion of societal stability. [6]

In particular, the institution of extinctive prescription serves the following purposes:

(1) it primarily protects the interests of the debtor, ensuring fairness to the debtor, who after a certain time becomes exempt from performance;

(2) it enhances the effectiveness and efficiency of the courts – judicial economy and the smooth functioning of the legal system are served, because parties are obliged to bring their disputes to the courts without undue delay, so that they can be effectively resolved;

(3) it promotes societal stability by bringing certainty and finality in the relationship between debtors and creditors; and

(4) to some extent, extinctive prescription also serves the interests of the creditor, who benefits from knowledge of the time after which it would be futile to institute action against the debtor.

These general policy considerations guide the courts in their application of the specific rules of extinctive prescription. The guiding policy considerations pertinent to the question discussed in this article are:

(a) that the primary focus of extinctive prescription is on protection of the debtor; and

(b) that extinctive prescription serves to eliminate uncertainty caused by what has been referred to as "the obfuscating power of time", [7] and that different categories of debt may be differently prone to such "obfuscation".

The interpretation of section 11(a)(i) of the Prescription Act will be examined against this policy background.

3. The meaning of "any debt secured by mortgage bond"

As mentioned above, the question whether the 30-year prescription period provided for in section 11(a)(i) of the Prescription Act in respect of "any debt secured by mortgage bond" applies also to debts secured by a notarial bond, turns on whether the words "mortgage bond" as used in section 11(a)(i) should be interpreted to include a "notarial bond". The English text of the Prescription Act was signed and assented to by the State President at the time, on 23 May 1969. The Afrikaans text of this section refers to "*'n skuld deur verband verseker*".

Determination of the meaning of "mortgage bond" (Afrikaans: "*verband*") as used in section 11(a)(i) requires application of the standard methods or canons of interpretation of statutes. These are: [8]

(1) grammatical or literal interpretation, which involves determining the "grammatical and ordinary sense of the words" used in the statute; [9]

(2) systematic or contextual interpretation, which calls for an understanding of a specific provision in the light of its context in a particular section or the statute as a whole;

(3) purposive or teleological interpretation, which involves interpretation with reference to the provision's purpose or *ratio* and its underlying policy objectives;

(4) historical interpretation, which requires considering a provision against its legislative background and allows qualified recourse to information concerning the genesis of the text of which the provision forms part; and

(5) reference to different language texts of a statute, to resolve a difference, inconsistency or conflict between the texts.

3.1 Grammatical or literal interpretation

For grammatical or literal interpretation, the courts determine the ordinary or common meaning of words as defined in dictionaries or as used in legislation, judgments, or other legal texts. These sources indicate that the words "mortgage bond" are used (a) in a narrow sense, to refer to a bond

passed over "immovable property", "fixed property" or "landed property", [10] but also (b) in a wider sense, to refer to a "mortgage" of "property" generally ("*eiendom*"), or "other goods", which could include movable property. [11] As a matter of language, "mortgage bond" in the wide sense can therefore also refer to a notarial bond passed over movable property.

The context often indicates whether "mortgage bond" is used in the wide sense or the narrow sense. For example, reference to registration of the mortgage bond "against the title of the property" indicates that a bond over immovable property is referred to. [12] Use of the terms "mortgagor" and "mortgagee" for parties to a notarial bond indicates that such a bond is regarded as a species

of "mortgage bond". [13] The texts referred to illustrate both the narrow and the wider possible meanings of "mortgage bond", and the concept "mortgage bond" is sometimes used to refer to a bond over movable property. These texts also illustrate that the interpretation of "mortgage bond" is not a matter of language only – the context and purpose of the provision in question must be examined. As a matter of language, the concept "mortgage bond" in section 11(a)(i) of the Prescription Act can therefore include a "notarial mortgage bond". This is also true of the word "*verband*" in the Afrikaans version of section 11(a)(i) of the Prescription Act. This word is commonly used to refer to a bond over immovable or movable property and where it refers to movable property, the word "*verband*" by itself indicates a notarial bond. [14]

3.2 Context

To determine whether the words "mortgage bond" in section 11(a)(i) of the Prescription Act also refer to a notarial bond, the context of the provision must also be taken into account. Definitions of "mortgage bond" in judgments are often context-bound and not intended to be comprehensive. If a case deals with a mortgage bond over immovable property, the court will mostly not be concerned with other possible meanings of the words "mortgage bond", but will confine itself to that particular kind of mortgage bond.

This is illustrated by the definition of "mortgage bond" in *Lexis-Nexis South African Dictionary of Legal Words and Phrases*, [15] which is essentially based on certain judicial statements in *Lief NO v Dettman* ("*Lief*"). [16] It is important to note the context in which this case deals with the concept "mortgage bond", namely that of a mortgage bond passed over "landed property" or "immovable

property". The case does not at all deal with the question whether the concept "mortgage bond", generally, should be understood in this narrow sense only. [17]

Context also determined the definition of "mortgage bond" in *Standard Bank of SA Ltd v Saunderson*, [18] where the issue was whether in this particular case, a sale in execution of the residential property over which the mortgage bond was passed, would be in conflict with the Constitution of the Republic of South Africa, 1996 ("Constitution") (the court decided that it would not be). The court defined "mortgage bond" *in this context* as follows:

> "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." [19]

The phrase "any debt secured by mortgage bond" in section 11(a)(i) should be considered both in the wider context of section 11 as a whole, and in the narrower context of the sub-section itself. Section 11 categorises different forms of "debt" and provides for different prescription periods for the different categories. Sub-section 11(a)(i) deals with the different kinds of "debt" subject to a 30-year prescription period. If one accepts, as a matter of language, that "mortgage bond" can have a wide meaning which includes a notarial bond, the question is whether the context of the phrase "any debt secured by mortgage bond" in section 11(a)(i), indicates a wide or a narrow meaning of "mortgage bond".

If "any debt secured by mortgage bond" was intended to have a narrow meaning, excluding a debt secured by notarial bond from the category of debts subject to a 30-year prescription

period, the effect in the context of section 11 would be that such a debt would be subject to a three-year prescription period, unless the debt arises from a "notarial contract" as referred to in section 11(c), in which case a six-year period would apply. This would be in exceptional circumstances, because a notarial bond normally does not constitute a "notarial contract". It is a form of security unilaterally provided by a debtor, who signs a power of attorney and other documents required to effect registration of the bond in favour of the creditor. In most cases, the underlying contract from which the debt arises is not notarially executed. If "any debt secured by mortgage bond" is interpreted to exclude a debt secured by notarial bond, the result in most cases would be that such a debt is subject to a three-year prescription period.

Whether this result accords with the purpose and policy of the system of differential prescription periods embodied in section 11, is the next question.

3.3 Purpose and policy of differential prescription periods

As shown in section 2 of this article, the institution of extinctive prescription in large measure serves to promote certainty in the relationship between debtor and creditor and to protect the debtor against the difficulties of disputing old claims. As noted in section 2, Van den Heever JA referred in *Oliff* to "two legislative motives: the supinity (*desidia*) of a plaintiff who does not enforce his rights, who should therefore blame himself, and the difficulty felt by defendants who have to repel ancient claims". [20] He referred to the prescription periods provided for in section 2 of chapter 23 of the former Orange Free State Code ("OVS Wetboek"), and indicated that "the class of written instrument" from which a debt arises or which secures a debt is an important factor in determining the applicable prescription period:

> "For the purposes of this inquiry it seems to me significant that these classes of actions are determined in sec. 2 not according to the nature or economic content of an action but entirely according to the class of written instrument upon which an action is brought." [21]

He added that longer prescription periods apply to documents, which are "of public record" and therefore more easily proved:

> "It seems, therefore, that this section excludes from the operation of the shorter period of prescription documents which, though they may relate to "transactions long gone by", are of public record, are easily proved and are not as much exposed to loss as writings in private custody. To these considerations it is quite irrelevant what a person entitled may hope to recover by suing on such an instrument." [22]

Each of the various categories of prescription periods (the 30-, fifteen-, six- and three-year categories) groups together debts sharing certain characteristics. The debts appear to have been "ranked" according to criteria which include the degree of permanence, accessibility and conclusiveness of the evidence required to prove the debt. According to these criteria, a debt secured by a notarial bond belongs in the 30-year category. It shares the important characteristics with debts secured by a mortgage bond over

immovable property and judgment debts. As described with reference to judgment debts, these characteristics are the following:

> "A claim established by judgement is as firmly and securely established as is possible and is thus affected by the 'obfuscating power of time' to a very much lesser extent than other claims. Moreover, the creditor has made it abundantly clear that he is serious about pursuing his claim; the debtor cannot, therefore, be under any illusion that he might not, one day, have to pay." [23]

From the point of view of certainty about the intentions of the creditor, durability of information (resistance to the "obfuscating power of time") and public disclosure by a combination of recordal in the protocol of a notary and registration in the Deeds Registry, a debt secured by a notarial bond, in the context of section 11 of the Prescription Act, belongs in the 30-year category referred to in section 11(a). In terms of these criteria, a debt secured by notarial bond should for the purposes of prescription, rank above debts arising from "a bill of exchange or other negotiable instrument" or a "notarial contract", which debts are subject to a six-year period under section 11(c) of the Prescription Act.

It would be at odds with the "ranking criteria" implicit in section 11, for a debt secured by notarial bond to be subject to the shortest possible prescription period (three years). The policy considerations referred to above indicate that a debt secured by a notarial bond belongs in the 30-year category provided for in section 11(a).

3.4 Different language texts of a statute as an aid to interpretation

Before 27 April 1994, three successive constitutions (in 1910, 1961, and 1983) provided for statutory bilingualism and the resolution of possible conflict or inconsistency between the Afrikaans and English versions of a text. [24] Section 35 of the 1983 Constitution, for example, provided that in instances of conflict between the English and Afrikaans versions of an act, the copy signed by the State President (when he assented to the act) prevailed. [25] The courts regularly compared Afrikaans and English legal terminology to assist in the process of interpretation of legislation and contracts. [26] Constitutional provision for bilingual legislation has thus been a feature of South African law since 1910. Multilingual statutory texts have provided the opportunity for comparison of various versions and have often served to enhance an understanding of a statute. [27]

Prior to 1994, both versions of an enactment were seen as equally authoritative. The signing of a particular version was a matter of chance: statutes were alternately signed in English and Afrikaans, and in the course of the deliberations preceding the passing of legislation it was not predictable which version would eventually be signed. [28]

In the cases dealing with section 35 of the 1983 Constitution and its predecessors, compatibility of the two versions of an act was assumed. [29] The constitutional mechanisms to resolve deadlock were usually invoked only as a last resort, and the courts usually attempted to use the two versions of a statute to clarify each other, no matter which text was signed. [30]

The approach of the courts to the conflict provisions can be summarised as follows: the conflict provisions were not only applied in cases of an outright and inescapable incompatibility between the two versions, but also in instances where the "conflict" was not much more than a mere "difference." There was also some support for the so-called "highest common factor approach," which required that differences between the two versions of an enactment be eliminated as far as possible by reconciling them, because a conflict between the two versions could only arise where one version said one thing and the other, something different. If one of the statutes had more meaning(s) than the other version, preference was given to the shared meaning(s) in both versions. The highest common factor approach was applicable only if the two versions were indeed capable of reconciliation.

The Constitution of the Republic of South Africa, 1993 ("Interim Constitution") contained, as does its 1996 successor, separate conflict provisions for the Constitution and for other legislation. Section 65 of the Interim Constitution provided that an Act of Parliament had to be enrolled of record in the office of the Registrar of the Appellate Division of the Supreme Court (presently the Supreme Court of Appeal), in such official languages as may be required. [31] In the case of conflict between various versions of an act so enrolled, the version signed by the President had to prevail. [32] A similar provision was made for provincial legislation. [33]

In *Du Plessis v De Klerk* ("*Du Plessis*"), [34] Kentridge AJ concluded with respect to section 15 of the Constitution Amendment Act of 1994 that the English phrase "all law in force" in section 7(2) of the Interim Constitution had to be understood with reference to the Afrikaans version "*alle reg wat van krag is*." The English "law in force" can be read as a reference restricted to statute law. The more inclusive Afrikaans word "*reg*" indicated that "law"

embraces common law as well as statute law. This much was clear from the Afrikaans wording of other sections of the Interim Constitution. For example, in sections 8(1) and 33(1) "*reg*" was used as the Afrikaans equivalent for "law." Under Kentridge AJ's interpretation, section 7(2) of the Afrikaans version thus, in effect, "prevailed" in spite of the section 15 requirement that, for purposes of the interpretation of the Interim Constitution, the English text had to prevail. [35] Kentridge AJ, relying on a "well-established rule of interpretation," decided to give preference to the Afrikaans version, because there was *no conflict* between the two versions:

> "[I]f one text is ambiguous, and if the ambiguity can be resolved by the reference to unambiguous words in the other text, the latter unambiguous meaning should be adopted. There is no reason why this common-sense rule should not be applied to the interpretation of the Constitution. Both texts must be taken to represent the intention of Parliament." [36]

Kentridge AJ finally justified his conclusion on the basis that Afrikaans had remained an official language with undiminished status in terms of section 3 of the Interim Constitution. [37] Since the judgment in *Du Plessis*, the courts have referred to the Afrikaans versions of both the Interim Constitution and the Constitution for clarification purposes. [38]

Section 82 of the Constitution provides as follows:

> "The signed copy of an Act of Parliament is conclusive evidence of the provisions of that Act and, after publication, must be entrusted to the Constitutional Court for safekeeping."

Section 82 does not provide for resolving possible inconsistencies between various versions of an act. It simply states that *one version* of an act (out of a possible eleven), namely the one signed by the President, shall be conclusive evidence of the provisions of the act. The absence of an explicit conflict resolution mechanism in section 82 raises certain questions, and much depends on how the concept of "conclusive evidence" in section 82 is construed. The phrase "conclusive evidence of the provisions of an Act" does not signify conclusive evidence of the meaning of an act; it simply states that the signed version is conclusive evidence of the language used. Du Plessis interprets section 82 as follows:

> "First, if as in the past, the President is going to continue signing different versions of Acts by turns and the signing of a particular version is going to remain a matter of chance, there is no "qualitative" reason for always preferring the signed text. Secondly, "conclusive evidence of the provisions of an act" is not conclusive evidence of the meaning of an Act: it simply says that "these are the linguistic signifiers used – the signed version is conclusive evidence of that". Nothing precludes the use of other versions of a provision to place a construction upon the signifiers used in the corresponding provision of the signed version. De Ville's suggestion [that "[o]nly the text that is signed will in future be regarded as being authoritative"] flies in the face of both sound strategies of statutory interpretation in the light of the Constitution and a commendable body of case law on dealing with statutory multilingualism." [39]

The Supreme Court of Appeal has held that the signed English version of provisions of a pre-1993 Act of Parliament prevails over an inconsistent Afrikaans counterpart. [40]

In *Janse van Rensburg v Minister of Defence*, [41] the Supreme Court of Appeal referred to the pre-1994 case law on statutory multilingualism,

particularly with regard to delegated legislation. [42] The court held as follows:

> "A court fulfils its function by attempting to give effect to the intention of the lawgiver. If the highest common factor approach is applied mechanically it may result in a construction which is purely arbitrary and which could not have been intended. Save, perhaps, where penal provisions are concerned, this approach should not be adopted as a rule of first resort. All other methods of interpretation should be considered with a view to arriving at the intention of the legislator. I leave out of consideration the possibility that the two versions may be so irreconcilable that a regulation may be held to be a nullity." [43]

The case of *Kotzé v Ongeskiktheidsfonds van die Universiteit van Stellenbosch* ("*Kotzé*"), [44] illustrates that a court may take into account the non-signed (Afrikaans) version of the Prescription Act to give effect to a relevant policy consideration. In the *Kotzé*-case the question was when prescription begins to run in respect of a debt payable "on demand" under section 12(1) of the Prescription Act, which refers to "due" in the signed English version and "*opeisbaar*" ("claimable") in the unsigned Afrikaans version. Duminy AJ undertook a linguistic analysis of the words "due" and "*opeisbaar*". He noted that the Afrikaans word "*opeisbaar*" indicates that the debt must be "claimable", which is not the same as "due". The term "due", according to the cases, means that "the debtor is under an obligation to perform immediately". [45] However, some cases also state the meaning of "due" as "claimable". [46] He concluded as follows:

> "*Ek kom dus tot die gevolgtrekking dat volgens die bewoording van art 12(1) van die Verjaringswet 68 van 1969, verjaring begin loop sodra 'n skuld, synde enige verpligting wat een persoon teenoor 'n ander moet nakom, opgeëis kan word, en dat die daadwerklike opeising daarvan nie daarvoor relevant is nie.*" [47]

The existence of the Prescription Act in two languages allowed the court in *Kotzé* to give effect to the policy consideration that a creditor should not be able to rely on its own inaction in order to delay the running of prescription.

The law on the use of different language texts of a statute as an aid to interpretation, as set out above, provides ample authority for the view that a court should, for the purposes of the interpretation of section 11(a)(i) of the Prescription Act, take into account the Afrikaans version of that section,

which, like its predecessor in the 1943 Prescription Act, provides for a 30-year prescription period for a debt secured by "*verband*".

The two language versions of the provision in question are not in conflict or even inconsistent. As a matter of language, as shown above, the concept "mortgage bond" can have a wide meaning which includes a notarial bond. As also shown in part 3 above, the Afrikaans word "*verband*" is used to refer to either a bond over immovable property or a bond over movable property. If it refers to movable property the word "*verband*" by itself indicates a notarial bond. [48] The word "*verband*" is the translation for both the English words "bond" and "mortgage". [49] The use of the two language texts as an aid to interpretation, in addition to the arguments on context and policy as set out above, indicates that "mortgage bond" should be understood to include a notarial bond.

4. Judgments considered

The judgments of Phatudi AJ in *Land and Agricultural Development Bank of SA v Factaprops 1052 & Ismail Ebrahim Darsot* ("*Factaprops*"), [50] and Molopa-Sethosa J in *Land and Agricultural Development Bank of SA v Phato Farms (Pty) Ltd* ("*Phato Pharms*"), [51] are discussed below, with reference to the principles of interpretation as set out in section 3 above.

In paragraph 1 of the *Factaprops* judgment it is said that the matter is one of "the correct or proper interpretation" of section 11(a)(i) of the Prescription Act, specifically "whether a special Notarial Bond ("notarial bond") could be construed as a mortgage bond". However, the judgment does not refer to methods or canons of interpretation, other than the following indications of the approach to interpretation

> "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"; [52]

> "it then becomes necessary to trace and find the origin and the meaning, if any, (*sic*) of the concept "mortgage bond" from our statute books and old authorities"; [53]
>
> "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." [54]

In paragraph 1 it is furthermore said that the matter "constitutes *res nova* in our law", although the judgment later refers to, and agrees with, the earlier judgment in *Absa Bank Ltd v Hammerle Group (Pty) Ltd* ("*Hammerle Group*") [55] and differs from the judgment of Rabie J, on the identical issue, in the same division, in *Land and Agricultural Development Bank of SA v A Boeke & Bellevue Auctioneers (Pty) Ltd* ("*Boeke & Bellevue Auctioneers*"). [56] The applicable principles on *stare decisis* are not referred to.

In paragraph 23, the judgment delivered by Phatudi AJ refers to the "Special Notarial Bond" in question, registered under the provisions of the Security by Means of Movable Property Act. In that paragraph and repeatedly in the rest of the judgment, the debtor who passed the notarial bond over certain specified movable property is referred to as the "mortgagor", and the creditor (respondent) is referred to as the "mortgagee". Surprisingly, the terminology deriving from "mortgage" is thus used to describe the parties involved, despite the conclusion in the judgment that a notarial bond does not qualify as a "mortgage bond". The judgment contains no acknowledgement that, as a matter of language, the concept "mortgage bond", in a wide sense, can also refer to a notarial bond.

Paragraph 26 states:

> "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 (*sic*) adequately the pure juridical meaning to be assigned to each for purposes of interpreting prescription of debts."

The judgment then quotes from selected statutes (there are in fact a number of other statutes also dealing with the concepts of "mortgage bond" and "notarial bond", not only four), pointing out that the concepts are distinguished in sections 50 and 102 of the Deeds Registries Act, [57] but not acknowledging that the concept "mortgage bond" is sometimes also used to refer to a notarial bond over movable property, for example in the definition

of "special mortgage" in the Insolvency Act and in section 34 of the Mining Titles Registration Act.

Paragraphs 27 to 37 of the judgment refer to differences between mortgage bonds and notarial bonds in respect of the nature, effect, property hypothecated and manner of execution, but do not discuss the relevance of such differences in the context of section 11(a)(i) of the Prescription Act; nor the policy considerations underlying this subsection, nor the possible aid to interpretation to be found in the different language versions of the subsection.

In paragraph 31 the court concludes, based only on the "language employed" in two statutes referred to, "that a notarial bond … cannot in my view, constitute a mortgage bond." The court then further concludes: "and accordingly, prescription of the debts secured by such divergent bonds, ought to differ both in effect and interpretation." This statement is a *non sequitur* if the differences between the two forms of bonds are *not* relevant in the context of section 11(a)(i) of the Prescription Act, while their shared characteristics *are* relevant.

In the context of section 11(a)(i), which is the category of debts subject to a 30-year prescription period, there are certain relevant characteristics common to both forms of bond, namely:

(a) certainty of the intentions of the creditor, who took steps to secure payment of the debt;

(b) certainty and durability of information and evidence about the debt (little danger of the "obfuscating power of time"); and

(c) public disclosure of the debt and the security for its payment, by registration in the Deeds Registry.

Furthermore, the policy considerations underlying section 11(a), as referred to above, support the view that debts secured by both kinds of bond should be subject to a 30-year prescription period in terms of section 11(a)(i). The judgment in this case does not adopt a contextual approach to the interpretation of section 11(a)(i); and does not refer at all to the policy considerations underlying the 30-year prescription period provided for in the subsection. The judgment also does not take note of the possible aid to interpretation to be found in the different language versions of the subsection or in its history. For these reasons the conclusion stated in paragraph 31 seems incorrect.

Paragraph 37 states:

> "Having reviewed the writings of some of our eminent commentators on the subject, I am inclined to lean in favour of the proposition that given the nature and character of a notarial bond, it can only be registered over movable assets of a debtor."

This appears to be a statement of an established legal principle, rather than a "proposition" to be in favour of; and neither this introductory statement nor the following statements explain why the kind of security afforded by a general and special notarial bond respectively, is relevant to the length of the prescription period applicable to debts secured by a notarial bond:

> "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." [58]

In paragraph 38, the judgment refers to Saner's *Prescription in South African Law*, and states that the author "submitted" that the three-year prescriptive period under section 11(d) of the Prescription Act applies in respect of "any other debt" not covered by the rest of the provisions of section 11. Phatudi AJ then states further: "I respectfully agree with this submission." It is not clear why this is described as a "submission" to be agreed with, given that this is exactly what section 11 of the Prescription Act says. It is also not clear how this "submission" advances the argument, given that the very question to be decided is whether a debt secured by notarial bond falls in the 30-year category provided for in section 11(a), or in the three-year category for "any other debt" under section 11(d).

Paragraphs 39 to 61 proceed to examine "the legal position bequeathed (*sic*) by our Courts on the subject". Broadly, this examination involves references to cases and statutory provisions mainly dealing with mortgage bonds over immovable property, such as *Lief*, [59] where a mortgage bond is defined, in the context of the case, as "an instrument hypothecating landed property". The cases and statutes referred to essentially deal with the real rights created in favour of the mortgagee by registration of a mortgage bond over immovable property. This is contrasted with the nature and effect of a notarial bond, which is registered over movable property and only creates a real right in the nature of a "pledge" if it complies with the requirements set out in section 1 of the Security by Means of Movable Property Act, which requirements are in essence that the notarial bond is passed over "corporeal movable property specified and described in the bond in a manner which renders it readily recognizable", and that the notarial bond "is registered after the commencement of this Act in accordance with the Deeds Registries Act …". Eventually the judgment concludes by expressing agreement with the following statement of Mabuse J in *Hammerle Group*: [60]

> "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." [61]

It does not follow from this "main attribute" of a mortgage bond over immovable property, that a debt thus secured should be subject to a 30-year prescription period, whereas the debt secured by a notarial bond should be subject to a three-year period. Although some movable property might by nature not last as long as 30 years, a consideration which Rabie J in *Boeke & Bellevue Auctioneers* referred to as "a rather compelling argument", is persuasively answered in the same paragraph:

> "However, not all movables would be destroyed in a period of 30 years. Furthermore, a general notarial mortgage bond would not necessarily be subject to this risk."

The judgment does not take into account other attributes common to mortgage bonds over immovable property and notarial bonds over movable property, attributes which are primarily relevant in the context of prescription, namely (a) certainty of the intentions of the creditor, who took steps to secure payment of the debt; (b) certainty and durability of information and evidence about the debt (little danger of the "obfuscating power of time"); and (c) public disclosure of the debt and the security for its payment, by registration in the Deeds Registry. Furthermore, the policy considerations underlying section 11(a) of the Prescription Act, as set out above, support the view that debts secured by both kinds of bond should be subject to a 30-year prescription period in terms of section 11(a)(i).

In *Phato Farms*, [63] the judgment delivered by Molopa-Sethosa J formulates the following key conclusions: [64]

> "From the abovementioned 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.
>
> 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.
>
> From the reading and analysis of the abovementioned authorities, a general notarial bond thus cannot be said to be a mortgage bond as envisaged in s 11(a)(i) of the Prescription Act." [65]
>
> "A special notarial bond registered over movables could be considered to be a mortgage bond as envisaged in s 11(a)(i) of the Prescription Act, as it confers a real right of security on the bondholder.
>
> The same cannot, in my considered view, be said for a general notarial bond."
>
> "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 s 11(a)(i) of the Prescription Act. In my view a general notarial bond in contention herein is a notarial contract as envisaged in s 11(c) of the Prescription Act, and thus the prescription period of six years applies." [66]

This judgment –

- does not acknowledge that the words and concept "mortgage bond" are sometimes used in statute and case law to refer to a notarial bond;
- contains a series of quotations referring to the concept "mortgage bond", without any systematic interpretation according to the standard canons of interpretation;

- does not take into account the context in which the concept "mortgage bond" is used in section 11(a)(i) of the Prescription Act and in the passages quoted;
- does not take into account the policy considerations underlying the Prescription Act in general and the section on differential prescription periods in particular;
- does not take into account the attributes which are common to mortgage bonds over immovable property and all notarial bonds over movable property – attributes which are primarily relevant in the context of prescription, as set out in section 3 3 above;
- does not take note of the possible aid to interpretation to be found in the Afrikaans version of the subsection or in its history, as set out in section 3 4 above;

- simply assumes that a notarial bond which does not confer a real right of security "cannot meet the definition of a deed or instrument by which a right of mortgage is created upon registration at the deeds registry", [67] without explaining why this should be so in the context of prescription and why the prescription period applicable to a debt secured by general notarial bond should differ so radically from the period applicable to a debt secured by special notarial bond; and
- simply asserts that a general notarial bond constitutes a "notarial contract", while most notarial bonds registered in deeds registries do not resemble a contract in either form or substance. (It is possible, of course, for a debtor and creditor to enter into a notarial contract, setting out the rights and duties of their debtor-creditor relationship, and that such a contract can be incorporated in a notarial bond registered to provide security for the debt. However, there is no indication whatsoever that this was the position in the *Phato Farms*-case.)

5. Conclusions

The judgments in the cases of *Hammerle Group*; [68] *Factaprops*; [69] and *Phato Farms* do not adopt a structured and contextual approach to the interpretation of section 11(a)(i) of the Prescription Act; and do not refer at all to relevant policy considerations underlying the "ranking" of prescription periods in section 11.

The relevant policy considerations are: (a) certainty of the intentions of the creditor, who took steps to secure payment of the debt; (b) certainty and durability of information and evidence about the debt (little danger of the "obfuscating power of time"); and (c) public disclosure of the debt and the

security for its payment, by a combination of recordal in the protocol of a notary and registration in the Deeds Registry.

The judgments under consideration also do not take note of the possible aid to interpretation to be found in the Afrikaans version of the subsection and in its history.

For these reasons, these cases appear to be incorrectly decided and the 30-year prescription period provided for in section 11(a)(i) of the Prescription Act in respect of "any debt secured by mortgage bond" should be understood to apply also to debts secured by notarial bond.

Summary

There are conflicting judgments on the question whether the 30-year prescription period provided for in section 11(a)(i) of the Prescription Act 68 of 1969 for "any debt secured by mortgage bond" also applies to a debt secured by a notarial bond. The matter turns on whether the words "mortgage bond" as used in the sub-section should be interpreted to include a "notarial bond".

This article contains an analysis of the recent cases with reference to the relevant policy considerations and rules of interpretation. The article examines the grammatical or literal meaning of the sub-section in its context, the purpose and policy reasons for differential prescription periods provided for in section 11 of the Prescription Act, and the different language texts of the sub-section as an aid to interpretation.

It is argued that the judgments holding that the words "any debt secured by mortgage bond" do not apply to a notarial bond do not adopt a structured and contextual approach to the interpretation of section 11(a)(i) and do not refer at all to relevant policy considerations underlying the "ranking" of prescription periods in section 11 of the Prescription Act. These considerations are: (a) certainty about the intentions of the creditor, as evidenced by steps taken to secure payment of the debt; (b) certainty and durability of information and evidence about the debt (the danger of the "obfuscating power of time"); and (c) public disclosure of the debt and the security for its payment, by a combination of recordal in the protocol of a notary and registration in the Deeds Registry.

On the basis of the relevant rules of interpretation and policy considerations it is argued that the judgments holding that the words "any debt secured by mortgage bond" do not apply to a notarial bond appear to be incorrectly decided and that the 30-year prescription period provided for in section 11(a)(i) of the Prescription Act for "any debt secured by mortgage bond" should be understood to apply also to debts secured by notarial bond.

1 In *Absa Bank Ltd v Hammerle Group (Pty) Ltd* (7457/13) [2013] ZAGPPHC 402 (20 December 2013) *SAFLII* <http://www.saflii.org/za/cases/ZAGPPHC/2013/402.html> (accessed 25-05-2016) (per Mabuse J); *Land and Agricultural Development Bank of South Africa v Factaprops 1052 & Ismail Ebrahim Darsot* (64702/2010) [2014] ZAGPPHC 293 (19 May 2014) *SAFLII* <http://www.saflii.org/za/cases/ZAGPPHC/2014/293.html> (accessed 25-05-2015) (per Phatudi AJ); and *Land and Agricultural Development Bank of South Africa v Phato Farms (Pty) Ltd* 2015 (3) SA 100 (GP) (per Molopa-Sethosa J) the courts decided that a "mortgage bond" as referred to in s 11(a)(i) of the Prescription Act does not include a "notarial bond"; whereas in *Land and Agricultural Development Bank of SA v A Boeke & Bellevue Auctioneers (Pty) Ltd* TPD 17-02-2011 case nos 12506/07 and 40079/08, Rabie J held that it does.

2 The Memorandum was subsequently published in JC de Wet *Opuscula Miscellanea: Regsgeleerde Lesings en Adviese van J C de Wet* (1979) 135-144.

3 108-109.

4 1953 (1) SA 1 (A) 4G-H.

5 1984 (1) SA 571 (A) 578F-H.

6 Farlam J, in *Ryland v Edros* 1997 (2) SA 690 (C) 712, refers to a number of authorities and concludes as follows:
"In my view it must be accepted that extinctive prescription was introduced, at least in part for the benefit of the public."

7 R Zimmermann *Comparative Foundations of a European Law of Set-Off and Prescription* (2002) 103.

8 LM du Plessis "Statute Law and Interpretation" in WA Joubert & J Faris (eds) *Law of South Africa 25* 2 ed (2011) para 326.

9 Para 314.

10 GF Lubbe & TJ Scott "Mortgage and Pledge" in WA Joubert & J Faris (eds) *Law of South Africa 17* 2 ed (2008) para 327.
"Definition and terminology. 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. The right serves to secure an indebtedness due to the creditor, the so-called 'principal obligation'. The creditor is known as the 'mortgagee' or 'bondholder', and the grantor of the real right is referred to as the 'mortgagor'."

11
See *Oliff v Minnie* 1953 1 All SA 151 (A) 153, per Van den Heever JA:
"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." [own emphasis]
See also s 1 of the Insolvency Act 24 of 1936 ("Insolvency Act"):
"'[S]pecial mortgage' means 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." [own emphasis]
S 34 of the Mining Titles Registration Act 16 of 1967 ("Mining Titles Registration Act"):
"Exclusion of general clause in mortgage bonds.— The Director-General shall not attest and register any mortgage bond which contains a clause purporting to bind generally all the immovable or movable property or registered rights of the debtor or both such immovable or movable property and such rights". [own emphasis]
RH Gouws *Verklarende Handwoordeboek van die Afrikaanse Taal* 4 ed (2000):
"*Verband s.nw. (~e) 3. Verbintenis volgens wetlike bepalinge waardeur eiendom as sekuriteit gegee word vir 'n lening; hipoteek: 'n Eerste verband van R500 000 op 'n woonhuis, verband wat voorkeur kry by uitbetaling*".
EA Martin (ed) *A Dictionary of Law (Oxford Dictionary of Law) (Oxford Paperback Reference)* 7 ed (2009):
"Mortgage: n. An interest in property created as form of security for a loan or payment of a debt and terminated on payment of the loan or debt. The borrower, who offers the security, is the mortgager; the lender, who provides the money, is the mortgagee. Virtually any property may be mortgaged (though land is the most common); exceptions include salaries of public officials. The name is derived from Old French (literally: dead pledge), since at common law failure to repay

on the due date of redemption (which in mortgages is set very early) formerly resulted in the mortgager losing all his rights over the property".
Dictionary Unit for South African English (ed) *Oxford South African Concise Dictionary* 2 ed (2010):
"Mortgage: 1. the charging of property by a debtor to a creditor as security for a debt (especially one incurred by the purchase of the property), on the condition that it shall be returned on payment of the debt within a certain period. 2. A loan obtained through the conveyance of property as security. v. Convey (a property) to a creditor as security on a loan."

12 See s 1 of the National Credit Act 34 of 2005 ("National Credit Act"):
"'[M]ortgage' means a pledge of immovable property that serves as security for a mortgage agreement;" [own emphasis]
S 1 of the Sectional Titles Act 95 of 1986 ("Sectional Titles Act"):
"'[S]ectional mortgage bond' means a mortgage bond hypothecating — a unit or an exclusive use area, land or an undivided share in such unit, area or land held under a separate sectional title deed; or …". [own emphasis]
S 1 of the Mining Titles Registration Act:
"'[M]ortgage bond' or 'bond' means a mortgage bond attested by the Director-General specially hypothecating any mining title, tributing agreement, stand title, surface right permit, water right, certificate of reservation of a trading site, personal servitude or bewaarplaats or any registered lease or sub-lease." [own emphasis]
S 34 of the Mining Titles Registration Act:
"Exclusion of general clause in mortgage bonds.— The Director-General shall not attest and register any mortgage bond which contains a clause purporting to bind generally all the immovable or movable property or registered rights of the debtor or both such immovable or movable property and such rights".

13 In *Land and Agricultural Development Bank of South Africa v Factaprops 1052 & Ismail Ebrahim Darsot* (64702/2010) [2014] ZAGPPHC 293 (19 May 2014) *SAFLII* <http://www.saflii.org/za/cases/ZAGPPHC/2014/293.html> (accessed 25-05-2015) para 23, Phatudi AJ refers to the "Special Notarial Bond" in question, registered under the provisions of the Security by Means of Movable Property Act 57 of 1993 ("Security by Means of Movable Property Act"). In this paragraph, and repeatedly in the rest of the judgment, Phatudi AJ refers to the debtor who passed the notarial bond over certain specified movable property as the "mortgagor", and to the creditor (respondent) as the "mortgagee". Surprisingly, the terminology deriving from "mortgage" is thus used to describe the parties involved, despite the conclusion in the judgment that a notarial bond does not qualify as a "mortgage bond".

14 See s 1 of the Insolvency Act (*Insolvensiewet*):
"*[S]pesiale verband" beteken 'n verband wat enige onroerende goed verhipotekeer of 'n notariële verband wat roerende goed spesiaal daarin beskryf, verhipotekeer ingevolge artikel 1 van die Wet op Sekerheidstelling deur Middel van Roerende Goed, 1993 (Wet 57 van 1993), of so 'n notariële verband geregistreer voor 7 Mei 1993 ingevolge artikel 1 van die Wet op Notariële Verbande (Natal), 1932 (Wet 18 van 1932), maar sluit nie in enige ander verband wat roerende goed verhipotekeer nie*". [own emphasis]
S 34 of the Wet op die Registrasie van Myntitels 16 van 1967 ("Wet op Registrasie van Myntitels"):
"*Die Direkteur-generaal attesteer en registreer nie 'n verbandakte waarin 'n klousule voorkom wat al die onroerende of roerende goed of geregistreerde regte van die skuldenaar of sowel daardie onroerende of roerende goed as daardie regte in die algemeen met verband heet te beswaar nie*." [own emphasis]
Gouws *Verklarende Handwoordeboek van die Afrikaanse Taal*:
"*Verband s.nw. (~e) 3. Verbintenis volgens wetlike bepalinge waardeur eiendom as sekuriteit gegee word vir 'n lening; hipoteek: 'n Eerste verband van R500 000 op 'n woonhuis, verband wat voorkeur kry by uitbetaling*".

15
TD Claassen *Lexis-Nexis South African Dictionary of Legal Words and Phrases* 2 ed (RS 18 2015):
"A *mortgage bond* may be defined as an instrument hypothecating landed property to secure an existing debt or a future debt or both existing and future debts" (s 50(2) of Deeds Registries Act 47 of 1937 ("Deeds Registries Act") and *Lief v Dettmann* 1964 (3) SA 259 (A)).
Lief v Dettmann 1964 (3) SA 259 (A) 259. In his judgment in this case Van Wyk JA said:
"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, and it is also essential that the maximum amount of future debts secured by the bond should be indicated. The bond is registered in the Deeds Office so that the world should have knowledge of the fact that there is a charge against the mortgagor's property; the object is not to notify the world that the mortgagor owes the mortgagee a specific sum of money. Creditors of the mortgage cannot rely on the acknowledgement of indebtedness in the bond as correctly reflecting the debt owed to the mortgagee by the mortgagor at any particular time subsequent to registration. The only real rights in favour of the mortgagee created by the registration of the bond are rights in respect of the mortgaged property, e.g. 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 respect of a debt, existing or future, and it follows that they cannot be divorced from the debt secured by them. On the other hand, such a debt can exist without being secured, and there seems to be no reason why a mortgagee should not be able to cede the debt without also ceding the security. It may be that where no cession of the bond is contemplated the mortgagor is entitled to claim a cancellation of the bond, but that is another matter. The real rights under the bond are immovable, but the debt is a movable. Cession of real rights in land require registration, but cession of a debt under a bond, being an incorporeal movable, requires no more than an agreement to cede."
In the same case, Wessels JA said:
"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 to loan, 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 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. Registration does not affect the nature of the principal obligation, which throughout retains its character as a personal right of action available to the mortgagee against the mortgagor for the payment of the interest and capital due in terms of the bond … In my opinion, the determining factor in classifying a *mortgage bond* either as immovable or movable for any particular purpose may, generally speaking be said to depend on whether the purpose in question relates more particularly to the bond as constituting an acknowledgement of debt or as an instrument of title to a real right in the land hypothecated thereby." (265-266).
Per Williamson JA in *Thienhaus v Metje and Ziegler Ltd* 1965 (3) SA 31 (A):
"The real object of a *mortgage bond* is to give notice to the world in general that a particular property of a debtor is the subject of a charge in favour of a particular creditor. The registration in a Deeds Office of the instrument of hypothecation is the means of informing other creditors that in respect of the hypothecated property a *jus in re aliena* exists in favour of the mortgagee. Logically there is no reason why the public at large should know the amount, nature or origin of the debt any more than it does in the case of a pledge of movables. In testing the validity of a bond 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 surplusage for that purpose. It is not an essential of the validity of a *mortgage bond* in so far as it is an instrument constituting an hypothecation that it should contain any description of the details of the origin or nature of the obligation to be secured."

16 1964 2 All SA 448 (A).

17 In *Lief NO v Dettman* 1964 2 All SA 448 (A) 452 the essential issue was stated to be "the contention that persons, other than those disclosed in the bonds as mortgagees, are or were the holders of real rights "in, to and under" the bonds in question, or that they are upon realisation of the bonds entitled to the proceeds thereof."
The various claims were described as follows:
"In each claim there is reference to a properly attested and registered mortgage bond purporting to secure the payment of money lent by the mortgagee to the mortgagor. Except where there are two or more mortgagees, the Board [the South African Board of Executors and Trust Co. Ltd., a company placed under liquidation] alone is disclosed and described as the mortgagee and as the lender of the money creating the principal obligation secured by the hypothecation of the immovable property in question."
The court held as follows (463-464):
"To sum up.
(1) On the registration of a mortgage bond a real right in the property hypothecated is constituted in favour of the mortgagee. In terms of the provisions of Act 47 of 1937 that right can be conveyed from the mortgagee to another person only by means of a cession of the mortgage bond duly registered by the Registrar in terms of the provisions of sec. 3(f) read with sec. 16 of the Act.(2) Sec. 54 in terms provides that a bond shall not be passed in favour of any person as the agent of a principal, and it follows that the Act does not permit a distinction between the registered mortgagee, as a purely nominal holder, and some other person, who is to be regarded in law as the beneficial holder of the rights embodied in the bond."

(2) Sec. 54 in terms provides that a bond shall not be passed in favour of any person as the agent of a principal, and it follows that the Act does not permit a distinction between the registered mortgagee, as a purely nominal holder, and some other person, who is to be regarded in law as the beneficial holder of the rights embodied in the bond."

18 2006 9 BCLR 1022 (SCA).

19 Para 2 [own emphasis].

20 1953 (1) SA 1 (A) 4G–H.

21 3G-H.

22 5A-B.

23 Zimmermann *European Law of Set-Off and Prescription* 113-114.

24 The Union of South Africa Act, 1909; s 67 of 9 Edw. 7, c. 9 (Eng.); s 65 of the Republic of South Africa Constitution Act 32 of 1961; s 35 of the Republic of South Africa Constitution Act 110 of 1983 (repealed).

25 Similar provisions applied with regard to provincial ordinances before 1 July 1986 (s 90(2) of Provincial Government Act 32 of 1961) and the enactments of the legislative assemblies of self-governing Black territories (s 33(1) of National States Constitution Act 21 of 1971 (repealed)).

26 See, for example, *Breytenbach v Stewart* 1985 1 SALR 167 (T) 170 (discussing the meaning of "*eerste opsie*" (first option) and interpretation).

27 GE Devenish *Interpretation of Statutes* (1992) 144-146; and see also MJB Wood "Drafting Bilingual Legislation in Canada: Examples of Beneficial Cross-

Pollination Between the Two Language Versions" (1996) 17 *Statute L Rev* 66 69 (examining examples of improvements made to English versions of legislation as a result of comparison to the French version).

28 *New Union Goldfields Ltd v Commissioner for Inland Revenue* 1950 3 SALR 392 (A) 405-406; *R v Silinga* 1957 3 SALR 354 (A) 358C.

29 Devenish *Intepretation* 144.

30 *Rosenberg v South African Pharmacy Board* 1981 1 SALR 22 (A) 30A-B; *Kopel v Marshall* 1981 2 SALR 521 (W) 526G-H; *Joint Liquidators of Glen Anil Development Corporation v Hill Samuel (SA) Ltd* 1982 1 SALR 103 (A) 109A; *Barclays Zimbabwe Nominees (Pvt) Ltd v Black* 1990 4 SALR 720 (A) 723E-F.

31 S 65(1) of the Interim Constitution (repealed), reprinted in DA Basson *South Africa's Interim Constitution: Text and Notes* (1994).

32 S 65(2) of the Interim Constitution.

33 S 141.

34 1996 5 BCLR 658 (CC) para 44.

35 Para 44.

36 Para 44.

37 Para 44.

38 *Langemaat v Minister of Safety & Security* 1998 4 BCLR 444 (T) 448J; *Wittman v Deutscher Schulverein, Pretoria* 1999 1 BCLR 92 (T) 115H.

39 Du Plessis "Statute Law and Interpretation" in *LAWSA 25* para 354 [footnotes omitted].

40 *Middelburg v Prokureursorde Transvaal* 2001 2 SALR 865 (SCA) para 6.

41 2000 3 SALR 54 (SCA).

42 Paras 13-18.

43 Para 18.

44 1996 (3) SA 252 (C) 258A-H.

45 *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) 532H.

46 *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) 532H; *The Master v IL Back & Co Ltd* 1983 (1) SA 986 (A) 1004G-H; *Benson v Walters* 1984 (1) SA 73 (A) 82C-E.

47 *Kotzé v Ongeskiktheidsfonds van die Universiteit van Stellenbosch* 1996 (3) SA 252 (C) 258G.

48 See s 1 of the Insolvency Act (*Insolvensiewet*):
"[S]pesiale verband" beteken 'n verband wat enige onroerende goed verhipotekeer of 'n notariële verband wat roerende goed spesiaal daarin beskryf, verhipotekeer ingevolge artikel 1 van die Wet op Sekerheidstelling deur Middel van Roerende Goed, 1993 (Wet 57 van 1993), of so 'n notariële verband geregistreer voor 7 Mei 1993 ingevolge artikel 1 van die Wet op Notariële Verbande (Natal), 1932 (Wet 18 van 1932), maar sluit nie in enige ander verband wat roerende goed verhipotekeer nie; Wet op die Registrasie van Myntitels, section 34: "Die Direkteur-generaal attesteer en registreer nie 'n verbandakte waarin 'n klousule voorkom wat al die onroerende of roerende goed of geregistreerde regte van die skuldenaar of sowel daardie onroerende of roerende goed as daardie regte in die algemeen met verband heet te beswaar nie." [own emphasis]
Gouws *Verklarende Handwoordeboek van die Afrikaanse Taal*:
"Verband s.nw. (~e) 3. Verbintenis volgens wetlike bepalinge waardeur eiendom as sekuriteit gegee word vir 'n lening; hipoteek: 'n Eerste verband van R500 000 op 'n woonhuis, verband wat voorkeur kry by uitbetaling". [own emphasis]

49 See the translations for "bond" and "mortgage" in DB Bosman, IW van der Merwe & LW Hiemstra *Tweetalige Woordeboek Bilingual Dictionary* 8 ed (2003). Literal translation of both words of the concept "mortgage bond" would result in the nonsensical "*verband verband*".

50 (64702/2010) [2014] ZAGPPHC 293 (19 May 2014) *SAFLII* <http://www.saflii.org/za/cases/ZAGPPHC/2014/293.html> (accessed 25-05-2015) 511.

51 2015 (3) SA 100 (GP).

52 Para 7.

53 Para 26.

54 Para 31.

55 (7457/13) [2013] ZAGPPHC 402 (20 December 2013) *SAFLII* <http://www.saflii.org/za/cases/ZAGPPHC/2013/402.html> (accessed 25-05-2016).

56 TPD 17-02-2011 case nos 12506/07 and 40079/08.

57 The reference to the Deeds Registries Act in *Land and Agricultural Development Bank of South Africa v Factaprops 1052 & Ismail Ebrahim Darsot* (64702/2010) [2014] ZAGPPHC 293 (19 May 2014) *SAFLII* <http://www.saflii.org/za/cases/ZAGPPHC/2014/293.html> (accessed 25-05-2015) para 26.2 is erroneous. The definition referred to is not that of "mortgage bond", but that of "notarial bond":
"The Deeds Registries Act ("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." [own emphasis]

58 *Land and Agricultural Development Bank of South Africa v Factaprops 1052 & Ismail Ebrahim Darsot* (64702/2010) [2014] ZAGPPHC 293 (19 May 2014) *SAFLII* <http://www.saflii.org/za/cases/ZAGPPHC/2014/293.html> (accessed 25-05-2015) para 37.

59 1964 2 All SA 448 (A) para 40.

60 (7457/13) [2013] ZAGPPHC 402 (20 December 2013) *SAFLII* <http://www.saflii.org/za/cases/ZAGPPHC/2013/402.html> (accessed 25-05-2016).

61 *Land and Agricultural Development Bank of South Africa v Factaprops 1052 & Ismail Ebrahim Darsot* (64702/2010) [2014] ZAGPPHC 293 (19 May 2014) *SAFLII* <http://www.saflii.org/za/cases/ZAGPPHC/2014/293.html> (accessed 25-05-2015) para 27.

62 TPD 17-02-2011 case nos 12506/07 and 40079/08 para 19.

63 2015 (3) SA 100 (GP).

64 Paras 69-70.

65 Paras 54-56.

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