

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 4793/2012

In the appeal between:-

ANDRIES NICOLAAS EVERHARDUS
LOUW N.O.

First Applicant

RUSTU GUVEN ATALA N.O.

Second Applicant

CARL BOTHMA N.O.

Third Applicant

LEON WESSELS N.O.

Fourth Applicant

and

DAWID RYK VAN DER MERWE N.O.

First Respondent

GAVIN CECIL GAINSFORD N.O.

Second Respondent

BAREND PETERSEN N.O.

Third Respondent

SIVALUTCHMEE MOODLIAR N.O.

Fourth Respondent

INVESTEC BANK LIMITED

Fifth Respondent

THE MASTER OF THE WESTERN CAPE
HIGH COURT, CAPE TOWN

Sixth Respondent

THE MASTER OF THE FREE STATE
HIGH COURT, BLOEMFONTEIN

Seventh Respondent

THE REGISTRAR OF DEEDS,
BLOEMFONTEIN

Eighth Respondent

PIETER ADRIAAN GOOSEN

Ninth Respondent

AUBREY PHAGO LEDWABA

Tenth Respondent

ROUTLEDGE MODISE INC.

Eleventh Respondent

HEARD ON:

22 MAY 2014

JUDGMENT BY: VAN DER MERWE, J

DELIVERED ON: 21 JULY 2014

- [1] This application concerns the validity and preference of a mortgage bond.

BACKGROUND

- [2] Eagle Creek Investments 74 (Pty) Ltd (the company) was the owner of 18 portions of the farm Vaaldam Settlement No 177, district Heilbron, Free State Province, in total measuring approximately 625 hectares (the properties). The company was finally liquidated on 4 November 2011, whereafter the first to fourth respondents were appointed as the joint liquidators thereof. The joint liquidators sold the properties for the amount of approximately R5,5 million, which is held in trust pending this litigation. The essential purpose of the papers before me is to determine which party would be entitled to the proceeds of the sale of the properties.
- [3] The company intended to consolidate the properties and to develop them by establishing a residential golf estate named the Lizard Point Golf Residential Leisure Estate (the project). The intended development included the establishment of a township and subdivision of erven. For purposes of raising portion of the purchase price of the properties and the capital

required to establish the project, the company offered 100 investment opportunities to the general public.

- [4] In order to receive and administer these investments and to protect the interests of the investors, the Eagle Creek Investments 74 (Pty) Ltd Debenture Trust (the trust) was created in terms of section 117 of the Companies Act 61 of 1973 (the Act). The trust was formed by trust deed entered into on 2 November 2004 by the company as founder and by the ninth respondent and the tenth respondent as joint trustees. In terms of the trust deed the beneficiaries thereof are the holders of the debentures issued to the investors who subscribed to the investment offer by the company. The trustees accepted the fiduciary duties bestowed on them in terms of the trust deed to administer the debentures on behalf of the beneficiaries. The trustees were authorised to act as such in terms of section 6 of the Trust Property Control Act 57 of 1998 (the TPC Act) and the trust deed was lodged with the Master in terms of section 4 thereof.
- [5] The relevant provisions of the trust deed are the following:
- Each subscriber shall make payment of the amount of R330 000,00 to the trustees.
 - Upon such payment a non-interest bearing debenture in that amount shall be issued by the company and handed to the trustees to be held by them on behalf of the debenture holder.

- The trustee shall then pay over the subscription monies to the company, subject to the registration of a mortgage bond over the properties.
- As security for the repayment of the debentures, the company shall pass a first mortgage bond over the properties in favour of the trustees.
- The provisions of the trust deed shall be incorporated by reference in the mortgage bond.
- The company is obliged, after payment of certain specified costs, to utilise the subscription monies paid to it by the trustees for finalisation of the purchase and transfer to it of the properties and the development of the project.
- Each debenture shall be converted into an agreement of sale in respect of a specified proposed erf in the project linked to the debenture, in terms of clause 5 of the trust deed.

[6] In due course approximately 100 investors each paid the amount of R330 000,00 to the trustees. A debenture in that amount was issued to each in terms of the trust deed. The debentures are described as “Secured Non-interest Bearing Convertible Linked Debentures”.

[7] On 2 June 2005 the Registrar of Deeds, Bloemfontein registered the envisaged first mortgage bond over the properties in favour of the trustees in the amount of R33 million under number B10121/2005 (the debenture bond).

- [8] However, on 12 April 2006, the Registrar of Deeds registered a further first mortgage bond over the properties, this time in the amount of R200 million in favour of the fifth respondent (Investec). The reference number of this bond is B7073/2006 (the Investec bond). This was made possible by the fact that on 30 March 2006 the ninth respondent in his capacity as trustee of the trust in writing agreed to the waiver of preference of the debenture bond in favour of the Investec bond (the waiver of preference), with the result that the Investec bond enjoyed preference over the debenture bond. The waiver of preference was also noted by the Registrar of Deeds on the debenture bond on 12 April 2006. The Investec bond was registered to secure *inter alia* advances in the amount of approximately R32 million made by Investec to the company in respect of the project.
- [9] Despite having received the total amount of approximately R65 million from the trust and Investec, the company failed to commence with the physical development of the project and upon its liquidation the properties were its only assets. On or about 2 February 2010 the company circulated a letter to the debenture holders, stating that it is "... unfortunately not envisaged" that the company will develop the project in the foreseeable future. It further stated that the trustees will be requested to call a general meeting of debenture holders to consider the way forward. Such a meeting took place on 26 March 2010, although not attended by the trustees. This set in motion a chain of events that eventually led to the resignation of the ninth and tenth respondents as trustees of

the trust. The four applicants were appointed as trustees of the trust on 13 August 2012 and in that capacity they launched the present application on 22 November 2012. The essential relief claimed by the applicants is an order declaring that the waiver of preference is void and that the debenture bond ranks first in preference to the Investec bond.

[10] The eleventh respondent (Routledges) is a firm of attorneys that was instructed to register the Investec bond. As Investec has indicated that it might seek to claim damages from Routledges should the application succeed, Routledges obtained leave to intervene in these proceedings. The application is opposed only by Investec and Routledges, on a number of grounds.

[11] Before considering whether the waiver of preference is void, it is necessary to deal with the submissions by Investec and Routledges that the debenture bond is in any event invalid. In this regard both Investec and Routledges rely on non-compliance with section 118(3) of the Act. Investec also filed a counter-application for an order declaring that the debenture bond is null and void and for ancillary relief. In addition, Routledges relies on contravention of section 3(e)(i) of the Subdivision of Agricultural Land Act 70 of 1970 and of section 8(5), read with section 8(7), of the Free State Townships Ordinance 9 of 1969. Routledges also claims that the debenture bond is invalid on the ground that the

registration thereof was not authorised by the company. I deal with these defences in turn.

SECTION 118(3) OF THE ACT

[12] Section 116 of the Act provides that the company may create and issue secured or unsecured debentures, if the company is authorised to do so by its memorandum or articles. It is not alleged that the company was not authorised to issue debentures. A debenture (“skuldbrief”) is a document which creates or acknowledges indebtedness by the company to another for monies advanced to the company on loan. Sections 125 and 126 of the Act prescribe the form and content of such debentures. For present purposes it suffices to mention that these sections require that the debenture contains the term “debenture” or other term denoting a debenture, the terms of the debenture and specifically whether it is secured or unsecured.

[13] Section 117(1) of the Act deals with the binding of movable property as security for a debenture and section 117(3) then provides:

“The binding as aforesaid of immovable property may be effected by a mortgage bond, collateral mortgage bond or surety bond executed in favour of one or more debenture-holders or of a trustee for debenture-holders.”

Such mortgage bond must of course be registered in a deeds registry. As already indicated, in this case the binding

of the properties as security for the debentures was intended to be effected by registration of a mortgage bond in favour of the trustees of the trust. In this regard section 118(3) of the Act provides:

“If any such bond is in favour of a trustee for debenture-holders, certified copies of the debenture concerned and of the trust deed by which the trustee is appointed and in which his rights and duties are defined, shall be annexed to the said bond.”

[14] It is common cause that section 118(3) was not complied with in respect of the debenture bond. At no stage were any copies of debentures or of the trust deed annexed to the debenture bond. The question is what the effect of non-compliance with section 118(3) is on the validity of the debenture bond. Investec and Routledges argue that the debenture bond is a nullity, whereas the applicants argue that it is not.

[15] In **Schierhout v Minister of Justice**¹ Innes CJ said that it is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. That, however, is not always the case where a statute is not complied with. What must be determined in each case is whether the legislature intended the non-compliance with the statute to be visited with nullity² or, for convenience put differently, whether the provision was intended to be

¹ 1926 AD 99 at 109

² See **Standard Bank v Estate Van Rhyn** 1925 AD 266 at 274.

peremptory or directory.³ This requires construction of the statutory provision by consideration of its language, context, scope and purpose, especially the mischief that the legislature intended to prevent.⁴

- [16] In this regard certain guidelines have over the years been developed. In **Sutter v Scheepers**⁵ Wessels JA, whilst making clear that he did not pretend to provide an exhaustive list, set out the following guidelines. The word “shall” in a statute “... is rather to be construed as peremptory than as directory unless there are circumstances which negative this construction.” If a provision is couched in a negative form it is to be regarded as peremptory rather than directory. If on the other hand a provision is couched in positive language and no criminal or other sanction for non-compliance is added, there is a presumption in favour of an intention to make the provision only directory. If the statute contains no explicit statement that the contravening act is to be void or if no sanction for non-compliance is added and a consideration of the scope and objects of the provision leads to the conclusion and strict compliance therewith would lead to injustice or even fraud, then the presumption is in favour of the provision being directory. The reason for this is that in such a case “... greater inconveniences and greater impropriety would result from the rescission of what was

³ **Nkisimane and Others v Santam Insurance Co Ltd** 1978 (2) SA 430 (A) at 433H – 434D.

⁴ See **Swart v Smuts** 1971 (1) SA 819 (A) at 829C – 830C;

⁵ 1932 AD 165 at 173 – 174.

done, than would follow the act itself done contrary to the law.”⁶

Finally, Wessels JA pointed out that the history of the legislation may in some instances afford “a clue”.

[17] A penal sanction for contravention of a statutory provision generally indicates that the contravening act is void.⁷ There are cases, however, where the absence of a sanction leads to the conclusion that nullity was intended.⁸ This will especially be the case where the purpose of the provision will be defeated if the contravention thereof is not visited with nullity.

[18] Section 118(3) is couched in positive language and no sanction for non-compliance is added. This case illustrates that great injustice may flow from a finding that section 118(3) is peremptory. It would have the effect that a mortgage bond intended to secure loans actually made to the company by members of the public and actually registered by the Registrar of Deeds, thus giving constructive notice thereof to the public at large, provides no security. I accept the submission of counsel for Investec that the purpose of section 118(3) is to give notice to the public at large of information such as the terms of the debentures and the powers of the trustees in dealing with the security

⁶ Voet 1.3.16 quoted in **Standard Bank v Estate Van Rhyn**, *supra*, p 274.

⁷ **Standard Bank v Estate Van Rhyn**, *supra*, p 274.

⁸ See **Lupacchini NO & Another v Minister of Safety and Security** 2010 (6) SA 457 (SCA) paras [17] and [18].

provided by the company.⁹ But the question is whether holding that the section is directory will defeat that purpose.

[19] The information intended to be available in the records of the deeds registry, is obtainable elsewhere. A mortgage bond registered in favour of a trustee for debenture holders will invariably reflect that fact. Clause 11 of the trust deed provides that the company shall cause a register of debentures to be kept in terms of the Act and that a duplicate thereof shall be lodged with the trustees and updated from time to time. Section 128 of the Act provides that every company shall keep at its registered office a register of debenture holders showing the number of debentures issued and outstanding and whether or not they are payable to bearer and specifying the names and the addresses of the debenture holders other than bearers. Section 50 of the new Companies Act 71 of 2008 similarly obliges a company to establish and maintain a register of securities issued by the company. The definition of “securities” includes debentures. It requires little imagination to conclude that with this information the terms of debentures may be ascertained, even if the company in question is unhelpful.

[20] The authority and powers of a trustee derive from the trust deed. If the trust deed was lodged with the Master, as is the case here, a copy thereof could be obtained in terms of section 18 of the TPC Act. The TPC Act only applies to trusts as defined in section 1 thereof. In terms of this

⁹ See Henochsberg on the Companies Act 61 of 1973, Vol 1, p 228.

definition the ownership in property must pass to the trustee. The TPC Act therefore applies to a trust in the strict or narrow sense.¹⁰ In many cases the trustee of a debenture trust will only be a trustee in the wide sense of being entrusted with the affairs of others and not become vested with ownership of any property.¹¹ I accept therefore that the trust deed of a trust for debenture holders may in many cases not be obtainable in terms with the TPC Act. However, as counsel for Investec fairly pointed out, access to such trust deed may be obtained in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA). A trustee for debenture holders clearly falls within the definition of “private body” in section 1 of PAIA and accordingly access to the trust deed may be obtained in terms of Part 3 of PAIA for the exercise or protection of any right.

[21] I conclude therefore that although an interested person may to some extent be inconvenienced by non-compliance with section 118(3), the purpose of the section will not thereby be defeated. Such inconvenience is in my judgment outweighed by the other factors that I have mentioned.

[22] Counsel for Investec relied heavily on the judgment in **Klerck NO v Van Zyl and Maritz NNO and related cases**¹². In that matter the court dealt with a regulation under the then Sectional Titles Act 66 of 1971 that *inter alia* provided that a

¹⁰ See **Conze v Master Bond Participation Trust Managers Practice (Pty) Ltd** 1996 (3) SA 786 (C) at 794 to 795.

¹¹ This appears to be the position in terms of the trust deed of the trust but it is not necessary to decide this point.

¹² 1989 (4) SA 263 (SEC) at 281.

sectional mortgage bond hypothecating a unit held under a sectional title deed shall be prepared by a conveyancer and shall be signed by the mortgagor or his duly authorised agent, as well as with section 50(1) of the Deeds Registries Act 47 of 1937 which provides that a mortgage bond shall be executed in the presence of the registrar by the owner of the immovable property therein described or by a conveyancer duly authorised by such owner by power of attorney. The matter was decided on exception and the averment that the signature on the mortgage bond in question had been forged, had to be accepted. It had to be accepted therefore that the bond was not executed by the owner of the property *qua* owner or by a conveyancer authorised by her and that it was not signed by the person reflected therein as the mortgagor or his duly authorised agent. The court held that the purpose of these provisions was similar to that of legislation requiring contracts for the sale of land or suretyship agreements to be in writing, namely the promotion of legal certainty, the thwarting of fraud and perjury and the minimising of disputes and litigation. The court held that this purpose could be frustrated if strict compliance with these provisions were not insisted upon. This factor as well as the use of the word “shall” persuaded Kroon J that the provisions were peremptory and the bond a nullity.

- [23] As I have said, the intention of the legislature in respect of the consequence of non-compliance with a statutory provision must be determined by consideration of the factors and circumstances relevant to each provision. It is clear that

the relevant considerations in the present case are very different from those in **Klerck**.¹³

[24] In sum, section 118(3) is couched in positive terms, no sanction is added, great injustice may flow from insistence on strict compliance therewith, but its purpose will not be defeated if non-compliance is not visited with nullity. I conclude therefore that section 118(3) lays down what conveyancers should observe in respect of presentation of a mortgage bond in favour of a trustee for debenture holders for registration in a deeds registry. The Registrar of Deeds may refuse to register the bond until these requirements are met, but if the mortgage bond is nevertheless registered, it is not invalid.

INVALID SALES?

[25] The argument made by Routledges in the papers proceeds along the following lines. The trust deed read with the debentures, the letters of acceptance of the investment proposal of the company and the accompanying declarations made by the debenture holders, constitute contracts of sale that are prohibited by section 3(e)(i) of the Subdivision of Agricultural Land Act 70 of 1970 and/or section 8(5) of the Free State Townships Ordinance 9 of 1969. As a consequence the trust deed and the debentures are invalid and that vitiates the debenture bond.

¹³ The same applies to the other case relied upon on behalf of Investec, namely **Sheray Investments (Pty) Ltd v Town Council of Springs and Others** 1984 (4) SA 80 (W).

- [26] Section 3(e)(i) of the Subdivision of Agricultural Land Act provides that no portion of agricultural land shall be sold or advertised for sale except with the consent of the Minister in writing. Section 8(5) of the Free State Townships Ordinance provides that after an owner of land has taken steps to establish a township thereon, no person shall enter into any contract whereby any land in such township is sold, exchanged, leased or disposed of in any other manner except with the approval of the responsible MEC. Section 8(7) of the Ordinance specifically provides that any contract entered into in conflict with the provisions of section 8(5) shall be of no force or effect.
- [27] Each debenture states that it is linked to a particular stand number. These stands are reflected on a layout of proposed erven in the project that was attached to the trust deed. The letters of acceptance and declarations take the matter no further and no further reference thereto is required.
- [28] It is common cause that the properties comprise agricultural land and that the relevant Minister did not consent to the sale of any portion thereof. It is also common cause that the company has taken steps to establish a township on the properties and that the responsible MEC did not grant any approval as envisaged by section 8(5) of the Ordinance.
- [29] It is clear however that the argument is dependent thereon that the trust deed and debentures *per se* constitute contracts of sale of the proposed linked erven.

[30] The relevant provisions of the trust deed are the following:

- “5.1 The Company shall convert this Debenture into an Agreement of Sale for the linked erven on issuing of the Record of Decision for the Project by the relevant authorities, expected to be March 2005:-
- 5.2 The conversion of the Debenture in terms hereof, shall become effective on the Conversion Date, against surrender to the Company of the relevant Debenture certificate and signing of the Agreement of Sale for the relevant erven by the Debenture Holder and the Mortgagor.
- 5.3 The purchase price for the erven, as will be reflected on the Agreement of Sale shall be equal to the original issue price of the Debenture, being R330 000 (Three Hundred and Thirty Thousand Rand). It is hereby recorded that the official launch price for the remaining erven in the Project will be not less than R590 000 (Five Hundred and Ninety Thousand Rand), and only the Debenture Holders, as founding, members of the Project, will qualify for the reduced erven selling price through conversion of the linked Debenture. As founding members of the Project, the Debenture Holders will qualify for special benefits, for example lifelong free social membership of the Lizard Point Links Course, as well as use of the Private Founding Members Clubhouse, details of which will be fully described in the Agreement of Sale to be entered into between the Debenture Holders and the Mortgagor on the Conversion Date.”

- [31] These provisions stipulate that the conversion of a debenture shall take place on the surrendering of the debenture to the company and the signing of an agreement of sale for the relevant erf. The agreement of sale to be entered into will be for the reduced purchase price of R330 000,00 and will contain the further terms of the agreement, such as the full description of the special benefits of the debenture holder in respect of the project.
- [32] Therefore, although the company and the debenture holder did envisage that the debenture holder would eventually acquire ownership of a proposed erf, a right in respect of the erf would only be obtained by the debenture holder when an agreement of sale is entered into. This never happened.
- [33] I conclude therefore that the trust deed and debentures do not *per se* constitute agreements of sale. At the hearing counsel for Routledges argued that the erven were advertised in contravention of section 3(e)(i) and disposed of in contravention of section 8(5). What was advertised however, was the investment opportunity set out in the trust deed and the debentures which, as I have said, do not constitute sales. Also, the erven were not disposed of in terms of the trust deed and debentures. They would in future be disposed of in terms of deeds of sale. In my judgment the debenture bond is not invalid on this ground.

AUTHORITY TO EXECUTE THE DEBENTURE BOND

[34] In the answering affidavit on behalf of Investec, it was mentioned that the company gave power of attorney to register the debenture bond to “Pieter Abraham Goosen en/of ...”. The power of attorney afforded the said Pieter Abraham Goosen the power of substitution. It was pointed out that the name of Petrus Gerhardus Louw van Blerk was inserted, by means of a rubber stamp, in the power of attorney and that Mr van Blerk executed the debenture bond on behalf of the company. On behalf of Investec it was then said that the debenture bond “...may be invalid” for the reason that the person that executed the debenture bond was not authorised to do so.

[35] In response hereto, the applicants filed a comprehensive affidavit by Ms Sharon Ann de Lange, a conveyancer who at the time of the registration of the debenture bond was a director of Naudes Inc. Ms de Lange explained how it came about that Mr van Blerk executed the debenture bond. The said Mr P.A. Goosen was an attorney who instructed his correspondent in Bloemfontein, Naudes Inc, to execute the debenture bond. In terms of this instruction and the power of substitution, Mr Goosen effectively authorised any conveyancer of Naudes Inc to execute the debenture bond, depending on who would appear before the Registrar of Deeds on the particular day. The late Mr van Blerk was a conveyancer and a director of Naudes Inc. The insertion of the name of Mr van Blerk in the power of attorney by rubber stamp in the space left for that purpose took place in terms of accepted practice in all the deeds registries in the country.

None of this was disputed or even dealt with in the affidavits on behalf of Investec or Routledges.

- [36] It therefore came as no surprise that counsel for Investec indicated at the hearing that the possibility raised in the answering affidavit is abandoned. Nevertheless counsel for Routledges argued that I should find that the registration of the debenture bond was not authorised. For the reasons stated, this argument has no factual basis and is devoid of merit.

THE WAIVER OF PREFERENCE

- [37] It is settled law that in the absence of a contrary provision in a trust deed, the trustees must act jointly if the trust is to be bound by their acts.¹⁴ The trust deed of the trust contains no such provision. It is a proven fact that the ninth respondent acted alone when he executed the waiver of preference. Therefore, unless the contentions of Routledges that the ninth respondent was the only trustee of the trust at the time or that the debenture holders ratified the waiver of preference must be accepted, the trust was never bound by the waiver of preference.
- [38] The trust deed provides that the ninth and tenth respondents are the trustees of the trust. Each signed the trust deed in that capacity. Although it may not have been strictly

¹⁴ See **Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk** 2004 (3) SA 486 (SCA) paras [16] and [20];
Land and Agricultural Bank of South Africa v Parker and Others 2005 (2) SA 77 (SCA) paras [15] and [176];
Lupacchini NO & Another v Minister of Safety and Security, *supra*, paras [1] and [2].

required, letters of authority to act as such were issued to them in terms of section 6 of the TPC Act. In terms of section 21 of the TPC Act trustees are required to resign by notice in writing. Both the ninth and tenth respondent resigned as trustees of the trust on 23 November 2011, years after the execution of the waiver of preference on 30 March 2006.

- [39] At the time of the creation of the trust, the ninth and tenth respondents were partners of the firm Auret Goosen Ledwaba Attorneys. The tenth respondent resigned from the firm in November 2005. Routledges argued that in terms of the trust deed the tenth respondent then automatically ceased to be a trustee of the trust. Reliance was placed on the definition of “trustees”, namely

“**Trustee(s)**’ – means the designated Partners of the firm Auret Goosen Ledwaba Attorneys and its successor in title, and any future trustees duly appointed in terms of this Deed, whilst acting in that capacity.”

- [40] The designated partners of Auret Goosen Ledwaba Attorneys were obviously the ninth and tenth respondents. They were the first trustees of the trust. The definition understandably intends to include successors of the first trustees. It does not deal with the term of office of the first trustees and certainly does not provide that it terminates automatically on resignation from Auret Goosen Ledwaba Attorneys. In my judgment the tenth respondent remained

a trustee until his resignation as such and therefore the ninth and tenth respondents had to act jointly for the waiver of preference to bind the trust.

[41] I accept, without deciding, that the trust is a trust in the wide sense and that the trustees thereof act on behalf of the beneficiaries. I accept therefore that the waiver of preference may in law have been clothed with validity by ratification thereof by the debenture holders. But once again, Routledges' contention must fail for lack of any factual foundation. A waiver of preference of the debenture bond would at least amount to a modification of the rights of the debenture holders. The trust deed provides that this may only be brought about by special resolution taken at a properly constituted meeting of debenture holders. The evidence does not prove anything of this sort. The only piece of evidence relied upon by Routledges is a passage in a letter dated 5 August 2011 by an attorney who previously acted for the trustees, stating no more than that the debenture holders had been made aware of the waiver of preference approximately two years before.¹⁵

PRESCRIPTION

[42] What remains is Routledges' reliance on prescription. The first question is of course whether the applicants' claim for a declaratory order that the waiver of preference was *ultra vires* and that the debenture bond continues to rank first

¹⁵ In fact the author of the letter intended to refer to a meeting with three debenture holders on 30 March 2010.

and in preference to the Investec bond, constitutes a debt for purposes of the Prescription Act 68 of 1969.

[43] It has repeatedly been held that a debt for purposes of the Prescription Act is an obligation (on the part of the party that raises prescription) to do something or to refrain from doing something.¹⁶ In **Duet and Magnum Financial Services v Koster**¹⁷ Nugent JA preferred the term “liability” over “obligation”.¹⁸

[44] In **Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd**¹⁹ it was held that a claim for rectification of a contract is not a “debt”. As I see it, the essential reason for this finding is that by way of a claim for rectification of a contract the court is asked to declare what the parties to the contract to be rectified had in fact agreed. In **Bester**, Brand JA followed the decision in **Boundary Financing** and held that a claim for rectification of a deed of transfer do not rely on any obligation or liability on the part of the party in whose name the property was incorrectly transferred in the deeds registry and is therefore also not a debt.

[45] The present claim is no different. The claim does not rely on any obligation or liability to do or refrain from doing

¹⁶ See **Oertel v Direkteur van Plaaslike Bestuur** 1983 (1) SA 354 (A) at 370B; **Desai NO v Desai and Others** 1996 (1) SA 141 (A) at 146H – 147A; **Bester NO and Others v Schmidt Bou Ontwikkelings CC** 2013 (1) SA 125 (SCA) at 129J – 130A.

¹⁷ 2010 (4) SA 499 (SCA) para [24].

¹⁸ It is at least doubtful whether Nugent JA intended to extend the meaning of “debt” beyond the meaning attributed thereto in **Oertel** and **Desai**. See **Bester** para [14].

¹⁹ 2009 (3) SA 447 (SCA) paras [12] – [14].

anything. The claim is not for the enforcement of a debt. It merely serves to clarify, because there is a dispute, what has throughout been the actual legal position. In my judgment therefore the defence of prescription must also fail.

CONCLUSION AND ORDER

[46] In the result the application must be granted and the counter-application dismissed. Costs of both should be borne jointly and severally by Investec and Routledges. The parties before me were agreed that these costs should include the costs of Routledges' application for intervention and of two counsel.

[47] The following order is issued:

1. It is declared that the ninth respondent acted *ultra vires* in waiving the ranking order of preference of the first mortgage bond registered with the eighth respondent ("the Registrar of Deeds, Bloemfontein") in favour of the trustees, at the time, of the trust, under reference number B10121/2005 in favour of the mortgage bond registered with the Registrar of Deeds, Bloemfontein in favour of the fifth responded under reference number B7073/2006.
2. It is declared that mortgage bond B10121/2005 retains its status as ranking first and in preference to the mortgage bond B7073/2006.
3. The Registrar of Deeds, Bloemfontein, is directed to amend his records accordingly.

4. The counter-application is dismissed.
5. The fifth respondent and the eleventh respondent are jointly and severally ordered to pay the costs of the application and the counter-application, including the costs of the application for intervention by the eleventh respondent and of two counsel.

C.H.G. VAN DER MERWE, J

On behalf of applicants:

Adv A.P. Joubert SC
with him:
Adv G.P. van Rhyn
Instructed by:
McIntyre & Van der Post
BLOEMFONTEIN

On behalf of fifth respondent:

Adv G.W. Woodland SC
Instructed by:
Matsepes Inc
BLOEMFONTEIN

On behalf of eleventh respondent:

Adv G.B. Rome
Instructed by:
Lovius Block
BLOEMFONTEIN