THIENHAUS, NO v METJE & ZIEGLER LTD AND ANOTHER 1965 (3) SA 25 (A)

Citation	1965 (3) SA 25 (A)
Court	Appellate Division
Judge	Steyn CJ, Van Blerk JA, Ogilvie Thompson JA, Williamson JA and Wessels JA
Heard	February 22, 1965
Judgment	April 1, 1965
Annotations	☐

Flynote : Sleutelwoorde

Mortgage - Mortgage bond - Validity of - Essentials of as an instrument of hypothecation - Description of nature of debt not an essential - Identity of mortgagee wrongly stated - Does not preclue mortgagee from claiming preference on subsequent insolvency of mortgagor.

Headnote : Kopnota

Per WILLIAMSON, J.A. (VAN BLERK, J.A. and OGILVIE THOMPSON, J.A., concurring; STEYN, C.J. and WESSELS, J.A., dissenting): It is not an essential of the validity of a mortgage bond over immovable property, in so far as it is an instrument constituting a hypothecation, that there be any description of the details of the origin or nature of the obligation to be secured, save for a partial exception in this regard in connection with bonds to secure future debts. A defect relating to the form of a bond purely as an instrument of debt does not in itself destroy the validity of the bond as a deed of hypothecation. If the defect in form is such that it renders the obligation to be secured under the bond non-existent, then of course the hypothecation itself could be effected. Accordingly, where, the mortgagor and mortgagee were fully *ad idem* in regard to the essentials of a bond, it was registered in respect of the correct suretyship obligation of the mortgagor, rightly stating the total amount, it was registered against the title of the correct property of the surety company, and it set out the correct type of debt due by the person whose liabilities to the mortgagee were being so guaranteed, but by a slip of the conveyancer's pen, the identity of the latter person was incorrectly stated, that did not preclude a *jus in re* in the mortgaged property passing to the mortgagee on registration, entitling the mortgagee to a preferent claim on the subsequent insolvency of the mortgagor.

The decision in the South-West Africa Division in *Thienhaus. N.O v Metje & Ziegler Ltd. and Another*, confirmed.

Case Information

Appeal from a decision in the South-West Africa Division (BADENHORST, J.). The facts appear from the judgment of WESSELS, J.A.

O. Rathouse, Q.C. (with him *O. E. I. Measroch)*, for the appellant: As it stands, the bond secures a non-existent debt. It does not purport to afford, or in fact afford, any security at all for respondent's claim against the company named. At the date of the winding-up order respondent had a personal right to claim rectification of the bond against Batchelors (Pty.),

Ltd. Respondent is in the same position as a purchaser of immovable property in whose favour transfer has not yet been passed. The effect of the winding-up order was to establish a concursus creditorum. The claims of creditors had to be dealt with as they existed at the date of the winding-up order. A purchaser of immovable property could not thereafter have claimed transfer against payment of the purchase price. Nor, on the same principle, is respondent now entitled to enforce its personal right to rectification, since such enforcement would result in the creation of a *jus in rem* which did not exist at the time of the winding-up order; see *Harris v Buissine's Trustee*, 2 M. 105; *Loewenthal v Syferfontein Gold & Coal Estates, Ltd.*, 1904 T.H. at pp. 321 - 2; *Lucas' Trustee v Ismail and*

Amod, 1905 T.S. at p. 248; *Walker v Syfret, N.O.*, 1911 A.D at pp. 160, 166; *Consolidated Agencies v Agjee*, 1948 (4) SA at p. 189; *Thorne, N.O v Kajee*, 1962 (2) SA at p. 103; *Ward v Barrett, N.O.*, 1962 (4) S.A. at p. 736; 1963 (2) SA at pp. 552 - 3; *Weinerlein v Goch Buildings, Ltd.*, 1925 AD at p. 291; *Meyer v Merchants' Trust, Ltd.*, 1942 AD at p. 254; *Industrial Finance & Trust Co. (Pty.) Ltd v Heitner*, 1961 (1) SA at p. 522; *Durmalingam v Bruce, N.O.*, 1964 (1) SA at pp. 811 - 2. *Pienaar and Frankel v Fourie's Trustee and Another*, 1913 CPD 227; *Goodman's Trustee v Goldberg*, 1914 W.L.D. 119; *Wasserzug and Others v Ritch's Estate*, 1927 T.P.D. 231 and *Dowjee Co., Ltd v Dawjee & Co.*, 1930 T.P.D. 240, which suggest that a misdescription of the cause of debt does not invalidate the security created by the bond, should not be followed. As to *Pienaar and Frankel's* case, *supra* at p. 229, the fact that, as held there, it may not be necessary to state the cause of the debt in the bond, is no reason for holding that the cause of debt, when stated, is not an integral part of the bond and of the real security created by the bond. Logically there is no reason why the description of the cause of debt should not be regarded as an integral part of the bond and of the security created by the bond. There is no convincing reason given in the cases quoted for holding the contrary. Even if those cases are followed, the facts in the present case go far beyond a mere misdescription of the cause of debt. What is misdescribed in the bond is the identity of the debtor who is wrongly described as Gerrit Merjenberg. The identity of the debtor is the very basis of the bond. Where the person owing the debt is somebody other than the debtor as set out in the bond, the misstatement is vital and goes to the root of the bond. In such a case the misstatement is at least as important as a misdecription of the property mortgaged and the security is invalidated. Further, the bond in issue is a surety bond. If such a bond states clearly and explicitly, as this bond does, that it covers the indebtedness of A. it cannot be interpreted to cover the indebtedness of B. Just as a contract of suretyship is to be construed so as not to extend the obligation, so a surety bond is to be construed in the same way; see Caney, *Suretyship*, pp. 36 - 7; Wessels, *Law of Contract in South Africa*, secs. 3890, 3891, 3892, 3893, 3895, 3896; Pothier, *Obligations (Evans'* translation, sec. 404); *Hawkes & Co v Nagel*, 1957 (3) SA 126.

W. Oshry, Q.C. (with him *H. Berker)*, for the first respondent: A duly registered bond, in which the *causa debiti* merely is misdescribed, is nevetheless a valid bond, giving security on the sequestration of the estate of the mortgagor and creating a real right and not merely a personal right. The general provisions in relation to bonds, as they affect the present matter, are contained in secs. 50, 51, 52, 53, 54, 55 of Proc. 37 of 1939 (S.W.A.) as amended, and the regulations framed thereunder. For the definition of 'mortgage bond' and the requisite contents of a morgage bond, see sec. 102 of the Proclamation and reg. 41 (2) respectively. There is no provision which refers to the *causa debiti*, except in the case of reg. 4 (4) which requires that a deed of cession of a bond shall set forth the *causa* of such

cession. Sec. 100 provides that no act in connection with any registration in a Deeds

Registry shall be invalidated by any formal defect, unless a substantial injustice has by such act been done which, in the opinion of the Court, cannot be remedied by any order of the Court. The bond in question secures an existing debt. But the debtor was erroneously described as Gerrit Merjenberg instead of G. Merjenberg (Pty.), Ltd. For cases in which it has been held that a misdescription of a *causa debiti* does not invalidate a claim under a bond, see *Hare v Bird and Others*, 1 M. 331; *Stoll's Trustee v Krige & Bosman*, 3 M. 44; *Dowjee & Co., Ltd v M. M. M. E. Dawjee & Co.*, 1930 T.P.D. 240; *Wasserzug and Others v Ritch's Estate*, 1927 T.P.D. 231; *Pienaar & Frankel v Fourie's Trustee*, 1913 C.P.D. 227; *Goodman's Trustee v Goldberg*, 1914 W.L.D. 119. It is conceded that the effect of a winding-up order is to bring about a *concursus creditorum* and that the rights of creditors cannot thereafter be altered; see *Walker v Syfret, N.O.*, 1911 AD 141; *Consolidated Agencies v Agjee*, 1948 (4) SA at p. 189; *Thorne, N.O v Kajee (Pty.) Ltd.*, 1962 (2) SA 103; *Loewenthal v Syferfontein Gold & Coal Estates, Ltd.*, 1904 T.H. 316; *Ward v Barrett, N.O., and Another*, 1963 (2) SA 546; *Durmalingam v Bruce, N.O.*, 1964 (1) SA 807. But, in the present case, first respondent is not seeking to alter the rights of creditors by converting a personal right into a real right. A real right existed as at the date of liquidation in favour of first respondent by virtue of the duly registered mortgage bond, and the misdescription of the *causa debiti* does not destroy this real right. A registered mortgage bond is notice to the world, and in so far as the creditors of Batchelor (Pty.), Ltd. are concerned they had, in law, due notice of the existence of the bond, and their position cannot be prejudiced by any order for rectification in regard to the *causa debiti* which may be granted after the liquidation. *Durmalingam's* case is clearly distinguishable because in that case it was sought to substitute for the asset mortgaged, a different asset, i.e. to create, subsequent to the *concursus creditorum*, a preference in regard to an asset, where no such preference existed prior to the sequestration, whereas in the matter presently under consideration a preference already existed in respect of the property in issue at the date of the liquidation by virtue of a duly registered bond over that property. Nor does *Lief, N.O v Dettmann*, 1964 (2) SA 252, assist appellant. As long as a valid debt existed and the bond is duly registered over a particular property and in favour of a particular person, a real security is created, and the misdescription of the actual existing debt does not invalidate such a bond. The rectification of the bond does not affect the rights held thereunder, which remain real rights. It has not the effect of converting a personal right into a real right. In the present case the rectification would merely have the effect of correctly stating the true position and giving effect to the intention of the parties and would not affect the rights of third parties.

There was no appearance for second respondent.

Rathouse, Q.C., in reply.

Cur. adv. vult.

Postea (April 1st).

WILLIAMSON, J.A.

Judgment

WILLIAMSON, J.A.: The facts giving rise to this appeal are set out in full in the judgment of WESSELS, J.A., and there is accordingly no need for me to restate them in any detail. The appellant, in his capacity as liquidator of a company named The Batchelors (Pty.) Ltd., petitioned the South West Africa Division of the Supreme Court for an order that a mortgage bond passed by that company in favour of the first respondent did not create any valid preference in the liquidation. The bond had been registered over a property of the company in favour of the first respondent in respect of a certain claim on a suretyship undertaken by the company. That Court, in effect, dismissed the liquidator's application with costs; the order actually made was one *(a)* authorising a rectification of the bond by the substitution of the name G. Merjenberg (Pty.) Ltd. for the name Gerrit Merjenberg wherever the latter name appeared in the bond, *(b)* declaring that the bond created a valid preference in favour of the first respondent and *(c)* ordering the liquidator to pay the costs. The second respondent had given a ruling at a meeting of creditors in liquidation that the bond created a valid preference but he took no part in the proceedings on appeal or in the lower Court and abided the judgment of the Court. The appellant was given leave to appeal to this Court by the Court *a quo.*

No notice of appeal appears in the record in this matter but it may be assumed that the appellant desires, by an appeal, to obtain the orders sought by him in his petition to the lower Court. He there prayed for an order *(a)* that the surety bond in issue be declared to have created no valid preference in favour of the first respondent and *(b)* that the first respondent's claim be admitted in the liquidation as a concurrent claim in an amount of R66,483.07. The second part of the order sought is of significance in the sense that it emphasises that the liquidator, and apparently the creditors, accept the fact that the first respondent in truth had at all material times a valid claim against The Batchelors (Pty.) Ltd., based on the undertaking of that company to become a surety to the first respondent for the debts due by G. Merjenberg (Pty.), Ltd. to the first respondent and to two other firms who had ceded their claims against that debtor to the first respondent. On the facts appearing in the record that would indeed appear to be a proper admission by the liquidator.

G. Merjenberg personally was also a surety and co-principal debtor to the first respondent for the debts of the private company, G. Merjenberg (Pty.) Ltd., in terms of an undertaking signed by him in 1956. From that fact and from the terms of the agreement in 1960 signed by G. Merjenberg personally stating that

'Ek G. Merjenberg (Pty.) Ltd. gee hiermee my toestemming vir die berekening van rente, van 8 persent op al my rekenings . . .'

it is quite clear that the private company was in reality G. Merjenberg himself carrying on business under another name. That fact, of course, cannot detract from the position that the private company was in itself a separate legal *persona*. The same G. Merjenberg also executed the power of attorney on behalf of The Batchelors (Pty.) Ltd. to pass the bond in issue over the property of the company as security for the suretyship undertaken by the company in respect of the debts due by his trading company G. Merjenberg (Pty.) Ltd. to the first respondent; he

was, in fact, also the sole director of The Batchelors (Pty.) Ltd.

The bond was registered as a second bond over duly specified property of the latter company on April 17th, 1961. The bond itself, in describing the debt which it was intended to secure, stated in unambiguous terms that the mortgagor company bound itself as surety and co-principal debtor to the mortgagee (the first respondent) for certain debts due to the latter by Gerrit Merjenberg totalling R70,000.

The following further undisputed facts are also material to a decision of the matter:

(*a*) Gerrit Merjenberg (or G. Merjenberg) was not personally indebted to the first respondent in respect of the total liability of R70,000 referred to in the bond, although he was also surety and co-principal for portion of the debt due to the first respondent by G. Merjenberg (Pty.) Ltd.

(*b*) The Batchelors (Pty.) Ltd. intended, through its sole director G. Merjenberg, to bind itself as surety and co-principal debtor to the first respondent for debts due, directly or as the result of a cession, to the first respondent by G. Merjenberg (Pty.), Ltd. in the sum of R70,000.

(*c*) The Batchelors (Pty.) Ltd. similarly intended to mortgage its property to the first respondent as security for its said suretyship liability of R70,000 and the said mortgage bond was duly registered for that purpose by the common consent of the company, as surety, and of the first respondent, as creditor and mortgagee.

(*d*) The statement in the bond to the effect that the principal debtor in relation to the suretyship obligation being thereby secured was Gerrit Merjenberg, instead of the private company which he controlled, was solely due to an error on the part of the conveyancer responsible for drawing up the necessary documents for the registration of the bond; such conveyancer had been properly instructed by the parties to the bond.

The resultant factual position can be conveniently summarised in a slightly different form. The mortgagor and the mortgagee were fully *ad idem* in regard to (i) the nature and amount of the debt for which the mortgagor was standing surety and which had to be secured by the bond; (ii) the property to be mortgaged as security for the mortgagor's said suretyship obligation; (iii) the nature of the debts due by the principal debtor for which the mortgagee required a suretyship, re-inforced by a bond passed by the surety; and (iv) the identity of the debtor whose liabilities to the mortgagee were being thus guaranteed.

The bond was duly registered in respect of the suretyship obligation of the mortgagor, rightly stated to total R70,000; it was registered against the title of the correct property of the surety company; and it set out the correct type of debt due by the person whose liabilities to the mortgagee were being so guaranteed; but the identity of this latter person was incorrectly stated. The contention advanced on behalf of the liquidator is in effect that, merely because of this last-mentioned error appearing in the bond, the registration thereof did not result in a *jus in re* in the mortgaged property passing to the first respondent as mortgagee prior to the provisional liquidation of the company on November 24th,

1961; a final order of liquidation was granted on February 15th, 1962.

It is of course obvious that if the first respondent was not possessed of a real right in the mortgaged property as at November 24th, 1961, it would not thereafter, during liquidation, acquire such a right as a result of a recification of the term of the mortgage bond. The effect of the establishment of a *concursus creditorum* by the issue of a liquidation order or of a sequestration order was described in the oft-quoted words of INNES, J., in *Walker v Syfret, N.O.*, 1911 AD 141 at p. 166, in the following terms:

'The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order. Now, to deprive the estate of a valid defence to a claim against it is as prejudicial to the creditors as to take from it the most tangible asset of corresponding amount.'

It is therefore essential to determine exactly what rights the first respondent did have in regard to the bond as at the moment of liquidation.

The first step in such enquiry is to ascertain the requirements for the validity of a bond of this nature. In so far as statutory requirements are concerned, reference therefor in this case must be made to the South West Africa Proclamation, 37 of 1939; this Proclamation is in effect the Union Act 47 of 1937 with necessary local modifications. The Proclamation itself deals with mortgage bonds in secs. 50 to 60 inclusive; the only requirements therein in regard to what must be stated in a mortgage bond relate to the necessity for stating expressly in a bond intended to secure future debts that it is such a bond and also for fixing therein a maximum of such debts. In terms of sec. 10 of the Proclamation certain Deeds Registry Regulations were also published; by reg. 41 it is required that every mortgage bond must contain a clear description of the property to be hypothecated. It also requires that every cession of a bond shall set forth the *causa* of the cession. Other than that, there is no requirement by statute or by regulation - and the position in the Republic is the same - that a mortgage bond must contain a description of the origin or nature of the obligation or debt to be secured by the bond. If any inference can be drawn from the statutory provisions, it would seem to be that a description of the origin or nature of the obligation giving rise to the suretyship is not a factor which is an essential to the validity of a suretyship bond. That, however, is not conclusive and the question must be answered as to whether, as a principle of law apart from statute, a bond passed to secure the obligation of a surety must clearly specify the exact origin and nature of the debt in respect of which the suretyship arises.

It can perhaps be suggested that from certain *dicta* in such cases as *Union Government (Minister of Finance) v Chatwin*, 1931 T.P.D. 317, and *Oliff v Minnie*, 1953 (1) SA 1 (AD), it appears that the purpose of a mortgage bond is not only to effect an hypothecation of immovable property but also to settle the terms and conditions of the obligation to be secured. *Chatwin's* case in fact dealt solely with the question as to whether the parties to a certain mortgage bond had in fact intended the bond to record the terms of loan and the conditions

of repayment; it was not concerned with whether a mortgage should contain such particulars. In *Oliff's* case the Court was concerned with the question whether a second bond over certain property remained a mortgage bond for the purposes of the computation of the period of prescription under Chap. 23 of the Orange Free State Law Book, even though the bond had become valueless as a security inasmuch as the first bondholder had caused the property to be sold in execution. It had been contended that, as there was no longer any property then hypothecated, the document had become merely an acknowledgment of debt subject to a much shorter term of prescription. It was in that context that VAN DEN HEEVER, J.A., said at p. 3 E of the above report, that

'a mortgage bond as we know it is an acknowledgment of debt and at the same time an instrument hypothecating landed property or other goods.'

Another *dictum* by the same learned Judge may well be repeated in relation to this statement. I refer to the case of *R v Nsele*, 1955 (2) SA 145 (AD), where at p. 151 C he emphasised that

'judicial pronouncements should not be construed as if they were statutory provisions. Each is conceived to meet the exigencies of the case under consideration'.

Clearly a mortgage bond can be utilised both as an instrument of hypothecation and as a record of the terms and conditions of the obligation in respect of which the hypothecation is to create a security; in addition it is a matter of common and usual custom in the drafting of bonds to incorporate therein an unqualified admission of liability by the mortgagor. The reason therefor is, however, certainly not that such an acknowledgment is required for the validity of the bond as a means of creating a real right by hypothecation in favour of the creditor. The origin and the prime purpose of the custom is the facilitation of the obtaining of a quick and easy remedy, such as provisional sentence, against the mortgagor in case of his default.

In the recent case of *Lief, N.O v Dettmann*, 1964 (2) SA 252 (AD) at p. 259, VAN WYK, J.A., defined a mortgage bond for the purpose of that case as:

'An instrument hypothecating bonded property to secure an existing debt or future debt or both existing debt and future debts. Where a bond is intended to secure an existing debt it is inevitable that the amount of such a debt should be acknowledged in the bond . . . The bond is registered in the Deeds Office so that the world should have hnowledge 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 mortgagor cannot rely on the acknowledgment of indebtedness in the bond as correctly reflecting the debt owed to the mortgagee by the mortgagor at any particular time subsequent to the registration.'

This statement demonstrates the emphasis to be placed on the real object of a mortgage bond, viz. 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. It is an act

equivalent to the delivery of pledged movable property to a pledgee, which in turn serves as notice to the world at large that such movable property is similarly subject to a *jus in re aliena*. It is clear that there is no necessity for the world

WILLIAMSON, J.A.

at large to know the amount or nature or origin of the debt which is secured by a pledge of movables before the pledgee acquires a real right over such movables; logically there is no reason why the position should be any different in relation to the creation of real rights over immovables hypothecated in terms of duly registered mortgage bonds. The fact that such a bond may be employed for a purpose other than the hypothecation of the immovable property the subject of the charge, viz. the provision of a written acknowledgment of debt, and possibly also the settlement of the terms and conditions of the debtor's obligations, should not affect the legal operation of that portion of the instrument constituting the hypothecation. If a bond is drafted so as to fulfil these dual roles of a deed of hypothecation on the one hand and of an instrument of debt on the other, in testing its validity as a deed of hypothecation conferring a real right on the mortgagee, all content of the bond which is not required in law to effect a proper hypothecation, is in reality surplusage for that purpose. There is no authority, statutory or otherwise, that has been quoted in this matter or that I have been able to trace, which in so many words requires as an essential of the validity of a mortgage bond over immovable property, in so far as it is an instrument constituting an hypothecation, any description of the details of the origin or nature of the obligation to be secured; there is a presently immaterial partial exception in this regard in connection with bonds to secure future debts. In so far as it is an instrument of debt, other considerations may apply; for instance the provisions of sec. 5 of the Usury Act, 37 of 1926, must be complied with. In my view it would be an undue attention to formality to hold that a defect relating to the form of a bond purely as an instrument of debt could in itself destroy the validity of the bond as a deed of hypothecation. If the defect in form is such that it renders the obligation to be secured under the bond non-existent, then of course the hypothecation itself could be affected.

It is clear that a mortgage bond as a deed of hypothecation must relate to some obligation. As it was expressed by WESSELS, A.C.J., in *Kilburn v Estate Kilburn*, 1931 AD 501 at p. 506, a mortgage

'can secure any obligation whether it be present or future, whether it be actually claimable or contingent. The security may be suspended until the obligation arises, but there must always be some obligation, even if it be only a natural one, to which the security obligation is accessory'.

If on a *concursus creditorum* a mortgagee, or a pledgee, fails to establish an enforceable claim which it was intended should be secured by the hypothecation, the bond or the pledge, as the case may be, falls away.

In the present case there was at all material times an enforceable claim in existence which the bond was intended to secure. With or without rectification the debtor company before liquidation could never have been heard to say 'I am not bound by this bond because the debt which gave rise to my obligation as surety has been described as a debt, admittedly by

mistake, due by a different *persona* to the one for which I agreed to stand surety'.

It would have been a clear case of the parties to the transaction being completely *ad idem* as to all the essentials of their agreement, but

---

WILLIAMSON, J.A.

the written instrument incorporating that agreement failing, merely by accident, accurately to record that agreement. The position is fully covered by the remarks of DE VILLIERS, J.A., in *Weinerlein v Goch Buildings Ltd.*, 1925 AD 282, where, after a reference to authority, he states at p. 289 that

'from the above it is clear that the Romans did not allow the true agreement between the parties to be prejudiced by a slip of the pen or other inaccurate expression'.

On the same page the learned Judge of Appeal went on to deal with an argument that in relation to a contract such as the one there under consideration, a contract that had to be in writing in terms of sec. 30 of the Transvaal Transfer Duty Proclamation of 1902, special considerations apply. He said that counsel for the appellant:

'urged that the defendant claims on a document which *ex confesso* does not set out the true intent of the parties, and that, in view of sec. 30, there is no binding agreement between them. To seek to bind the plaintiffs to such a contract (so the argument runs) it is not a sufficient compliance with the section to show that there is a writing signed by both parties unless each term of the antecedent verbal agreement has been embodied in the writing. In the absence of such a term in the instrument the plaintiff cannot be said to have agreed to that term because he has not agreed to it in writing. It was said that the claim of the defendant involves as a first step the setting aside of the writing on the ground of mistake and then proof of the real agreement between the parties and approval of the document as corrected, and that the only case the defendant has is for relief to be restored to its previous position.

In my opinion, this argument cannot be supported. By putting the agreement in writing and signing it the parties have complied with the provisions of sec. 30. So far, therefore, as that section is concerned, the agreement stands. And as is clear from the authorities quoted above there is no necessity to set it aside if it happens to contain some mistake (*Perezius*, C. 4.21.11), all that is to be done is, upon proper proof, to correct the mistake, so as to reproduce in writing the real agreement between the parties. If that were not so, the contract would have to be set aside in the case of every slip of the pen or any mistake of omission or of commission, however trivial. Counsel for the appellants himself hesitated to go so far.'

In a concurring judgment, WESSELS, J.A., at p. 292 dealt with the matter upon the basis of the availability of the *exceptio doli* to the party seeking to uphold the contract in the form it would have assumed but for the mutual error in the description of land sold. Applying that decision to the present case, both parties were bound, in terms of their true agreement, from the moment the bond was registered. If the parties had earlier noticed the error in the bond in relation to the description of the agreed debts giving rise to the suretyship obligation undertaken by the mortgagor - the obligation actually secured by the bond - they could, if it

---

was considered necessary or desirable, have applied to the Registrar in terms of sec. 4 (1) *(b)* of the Proclamation - the same section appears in the Union Act, 47 of 1937 - for a correction 'in the name or description of a person . . . mentioned therein'; in the circumstances he would no doubt have granted a rectification. But it could hardly be contended that the bond then acquired its necessary accessory obligation so as to give it validity only as from that date.

It was certainly, however, not essential to the operation of the bond as a binding transaction as between the mortgagor and mortgagee that any rectification be obtained. Rectification may be a necessary step when some essential or desired act or result can only eventuate if the contract actually is correct in all its details. It is not necessary, in my view, to consider, for the purposes of this matter, the exact scope of

---

WILLIAMSON, J.A.

the principles of rectification in our law. Suffice it to say that the mortgagor company was bound under the bond, without any rectification thereof, in terms of its true contract as surety for the specified debts of G. Merjenberg (Pty.) Ltd., despite the error in the description of the person whose debts were guaranteed thereby. That bond, without rectification, also duly conveyed notice to the world, on its registration, of the existence of a security held by the first respondent over the specified property. The world at large was also notified of the existence of a suretyship obligation of R70,000 on which the mortgagor was liable to the mortgagee - a valid and binding obligation despite the error in the description of the original debtor. That misdescription could in no material way mislead or prejudice any person acquiring, as a result of the registration of the bond, knowledge of the existence of the charge upon the particular property hypothecated; it was, in fact, irrelevant to the creation by the bond of a real right over the property in favour of the mortgagee. In those circumstances it was not necessary for any steps to be taken by way of rectification for the bond to bring into being a valid *jus in re aliena* as security for the payment of a debt indubitably and undisputedly due by the mortgagor. That real right was in existence at the moment of liquidation; it did not require to be brought into existence thereafter.

It may be suggested that to hold that a valid hypothecation of property existed as at the moment the *concursus creditorum* was brought about, despite the inaccurate description of the debts guaranteed by the suretyship undertaking given by the mortgagor, would be opening the door to possible fraud. The mortgagee, it could be said, might be trying to gain security for an obligation which was never originally intended to be secured under the bond or an obligation which was non-existent when the bond was registered. In fact, of course, it is very difficult to shut the door to all possible attempts at fraud. A mortgagee holding a bond covering unspecified future advances may try to bring all sorts of debts under the security of the bond; a pledgee may try to retain his security in respect of a completely different debt to that which originally gave rise to the pledge. These positions have to be checked by a liquidator or trustee when claim is made. The mere possibility of fraud should not affect the legal position in any case. And in this case it is abundantly clear that there is no fraud on the part of the mortgagee in averring that the bond is security for the mortgagor's suretyship undertaking actually entered into. If there is anything which might possibly indicate *dolus* as emerging in the present matter, it is the attitude of the creditors in seeking to gain an advantage for themselves out of the admitted mistake of the conveyancer - a mistake which could never have misled them in any material respect. The fact that they are not allowed to

gain an advantage from the accidental misdescription, which in itself could not have caused prejudice, is not a prejudice suffered by them.

On liquidation there was a validly registered bond over adequately described property, the parties were properly described, the extent of the obligation secured was stated and further the nature of the mortgagor's liability - that of a surety and co-principal debtor - was set

WESSELS, J.A.

out, albeit possibly unneccessarily; the necessary ancillary obligation intended to be secured was in existence and creditors had not been prejudiced in any manner by the error in the bond. In those circumstances the bond, in my view, effectively hypothecated the property to the first respondent for the obligation intended to be secured. In the record there is some suggestion that the bond is voidable for other reasons; that may be so. But, it is not invalid as a security merely because of the error in issue.

Although I do not think it was necessary in the circumstances to rectify what I consider an irrelevant error in the bond, there is no real objection from a practical point of view to the order granted by the Court *a quo* standing as it is. In para. *(a)* of the Court's order it is, however, also declared that the bond creates a valid security in favour of the first respondent; this portion of the order can only relate to the position in so far as the present ground of invalidity is concerned and cannot derogate from the rights of the creditors, if so advised, to apply to have such bond set aside upon any other ground of invalidity. The order must be amended to set forth that qualification. Subject to that amendment the appeal is dismissed with costs.

VAN BLERK, J.A., and OGILVIE THOMPSON, J.A., concurred in the above judgment.

Judgment

WESSELS, J.A.: Leave to do so having been granted, the appellant appeals against the order of the Court below (BADENHORST, J.) declaring that a surety mortgage bond passed by The Batchelors (Pty.) Ltd. in favour of the first respondent on 17 April, 1961, may be rectified by the substitution of the name 'Gerrit Merjenberg (Pty.) Ltd.' for the name 'Gerrit Mejenberg' wherever the latter appears in the bond, and that the bond 'creates a valid security in favour of the first respondent'.

The salient facts, which are not in dispute, are the following.

On 19 February, 1956, Gerrit Merjenberg authorised first respondent

'to extend to Messrs. G. Merjenberg (Pty.) Ltd. a continuing credit for the supply of any goods and materials'

which the company may require, and, in the same instrument, bound himself

'as surety and co-principal debtor for the payment of any amounts already due or to become due, or for any balance of account due'

by the principal debtor.

At the time the bond was registered, Gerrit Merjenberg (Pty.) Ltd. was indebted to first

respondent in the sum of R70,000. It appears that first respondent and The Batchelors (Pty.) Ltd. concluded an agreement in terms of which the latter bound itself as surety for and co-principal debtor with Gerrit Merjenberg (Pty.), Ltd. in respect of the indebtedness above-mentioned, and undertook to secure first respondent by means of a second mortgage bond over immovable property belonging to it.

First respondent instructed its conveyancers to prepare a suitable mortgage bond to give effect to the agreement mentioned in the preceding paragraph and also requested Gerrit Merjenberg, in his capacity as sole director of The Batchelors (Pty.) Ltd., to execute the necessary powers of attorney authorising the registration of the bond in question.

WESSELS, J.A.

In drafting the surety mortgage bond, first respondent's conveyancers erroneously identified Gerrit Merjenberg, and not Gerrit Merjenberg (Pty.) Ltd., as the principal debtor. In the result a bond was registered which, in so far as it is material hereto, is in the following form:

'Be it hereby made known:

That Hans Ludwig Heinrich Gerd Meyer appeared before me, the Registrar of Deeds at Windhoek, he the said appearer being duly authorised thereto by a power of attorney dated the 25th March, 1961, and signed at Windhoek, granted to him by Gerrit Merjenberg in his capacity as sole director of the Batchelors (Pty.) Ltd.; (hereinafter called the 'mortgagor') and the appearer declared:

Whereas Gerrit Merjenberg is truly and lawfully indebted to Metje & Ziegler Ltd. (hereinafter called the 'mortgagees') in the sum of seventy thousand rand (R70,000) arising from and being -

> **as to the amount of fifty-thousand six hundred and eighty-seven rand, sixtytwo cents (R50,687.62) the purchase price for goods sold and delivered and to be sold and delivered by the said mortgagees to the said Gerrit Merjenberg to the maximum amount of and not to exceed the said amount of R50,687.62.**
>
> **As to the amount of seven thousand three hundred and eighty-eight rand sixty-five cents (R7,388.65) a debt due for goods sold and delivered by South West Asbest Cement Co. (Pty.) Ltd., to the said Gerrit Merjenberg duly ceded by the said Company to the said mortgagees; and as to the balance of eleven thousand nine hundred and twenty-three rand seventy-three cents (R11,923.73) a debt due for goods sold and delivered by Gustav Rosenthal (Pty.) Ltd. to the said Gerrit Merjenberg duly ceded by the said Company to the said mortgagees;**

which aforesaid sum of R70,000 the appearer q.q. hereby promises and undertakes to pay, or cause to be paid, unto the said mortgagees or other legal holder of this bond, its order, heirs, administrators or assigns, free of interest: Both capital and all other amounts due and payable under this bond the mortgagor shall be allowed, and also be obliged to pay on demand.

And whereas the said mortgagees require the indebtedness of the aforesaid principal debtor to be secured by the said mortgagor binding itself as surety and co-principal

debtor to the said principal debtor and also hypothecating the hereinafter described property as security therefor:

And whereas the said mortgagor has agreed to comply with such requirements: Now therefore, the appearer hereby renouncing the benefits *non causa debiti, errore calculi*, revision of accounts and no value received and *ordinis seu excussionis et divisionis*, declared and acknowledged the said The Batchelors (Pty.) Ltd. to be held and firmly bound as surety and co-principal debtor to Metje & Ziegler Ltd. for and on behalf of the said Gerrit Merjenberg, his heirs, executors, administrators or assigns, in the aforesaid sum of seventy thousand rand (R70,000) for the due and proper fulfilment by the said Gerrit Merjenberg of his obligations more fully set out above.'

The erroneous description of the principal debtor in the bond was only discovered after The Batchelors (Pty.) Ltd. was placed in liquidation in February, 1962. At a meeting of creditors first respondent proved a claim against the company in the sum of R47,170.69 'for goods supplied' and relied on the bond in question as security for its claim. Documents filed in support of the claim disclosed that it related to a debt owing to first respondent by Gerrit Merjenberg (Pty.), Ltd. and not by Gerrit Merjenberg personally.

Second respondent, who presided at the meeting of creditors, accepted first respondent's claim as preferent and admitted it to proof as such. Despite an objection subsequently lodged by the appellant, the second respondent persisted in his ruling that the claim was preferent.

The appellant thereupon petitioned the Court below for an order in the following terms:

'(1) **(*a*) Declaring that the surety mortgage bond 536/1961 dated 17th April, 1961, and passed by The Batchelors (Pty.) Ltd., in favour of Metje and Ziegler Ltd. does not create a valid security or preference in favour of Metje and Ziegler Ltd. and cannot now be rectified so as to create such security or preference and that the claim of Metje and Ziegler under the said mortgage bond is a concurrent claim only, and**

WESSELS, J.A.

(*b*) directing that the claim of Metje and Ziegler Ltd. in the said liquidation should be admitted as a concurrent claim in an amount of R66,483.07 (sixty-six thousand, four hundred and eighty-three rand, seven cents);

(2) Directing the first respondent to pay the applicant's costs of this application;

or such further or other order as this Honourable Court may deem meet.'

It appears from the petition that first respondent contended that it was

'entitled to claim rectification of the mistake made by its conveyancers in the drafting of the surety mortgage bond, a copy of which is annexure 'B5' hereto, by the substitution of the name 'G. Merjenberg (Pty.) Ltd.' for the name 'Gerrit Merjenberg' wherever it appears in the said bond (except the first place), and that, subject to such rectification, the first respondent is entitled to rank as a secured creditor in the

liquidation of The Batchelors (Pty.) Ltd. in respect of a claim of R66,483.07 (sixty-six thousand, four hundred and eighty-three rand, seven cents) being the total amount of

(1) its own, direct claim of R47,170.69 (forty-seven thousand, one hundred and seventy rand, sixty-nine cents) for the price of goods sold and delivered by itself to G. Merjenberg (Pty.) Ltd.,

(2) its claim as cessicnary of the amount of R7,388.65 (seven thousand, three hundred and eighty-eight rand, sixty-five cents), being the price of goods sold and delivered by South West Asbest Cement Company (Pty.) Ltd. to G. Merjenberg (Pty.) Ltd., and

(3) its claim as cessionary of the amount of R11,923.73 (eleven thousand, nine hundred and twenty-three rand, seventy-three cents), being the price of goods sold and delivered by Gustav Rosenthal (Pty.) Ltd. to G. Merjenberg (Pty.) Ltd.,

for all of which it contends that The Batchelors (Pty.) Ltd. is liable as surety and co-principal debtor in terms of the said surety mortgage bond as so rectified, and for which it claims, also in terms of the said bond as so rectified, the security of a second mortgage bond over the hereinbefore-mentioned immovable property of The Batchelors (Pty.) Ltd.'

In so far as the appellant is concerned it was conceded

'that the first respondent is entitled to rank as a concurrent creditor in the liquidation of the Batchelors (Pty.), Ltd. in respect of the said claim of R66,483 07'

but it was nevertheless contended

'that the said surety mortgage bond does not create a valid security or preference in favour of the first respondent in respect of the said claim and cannot now be rectified so as to create such security or preference and that the said claim is a concurrent claim only.'

The Court below upheld the contention advanced on first respondent's behalf, and its reasons for doing so appear from the following passage in the judgment:

'In the instant matter it is common cause that a debt existed at the date of the registration of the bond and at the date of the winding-up order the whole world had, by virtue of the registration of the bond in question, notice of the fact that the immovable property described therein had been mortgaged as security for the amounts mentioned in the bond and that Batchelors had bound itself as surety and co-principal debtor to the first respondent in the amount mentioned in the bond. The debt, it is true, was not properly described, but in my opinion such misdescription does not invalidate the bond. In my opinion this is not a case where the first respondent is seeking to convert a personal right into a real right after insolvency as was the position in *Durmalingam's* case, *supra*. The applicant is trying to set aside the bond because of the misdescription of the cause of debt and that, it is not entitled to do.'

The case referred to by the learned Judge in the passage set out above is reported as *Durmalingam v Bruce, N.O.*, 1964 (1) SA 807 (N) .

In this Court the basic submission advanced on appellant's behalf was that in our law real security can only be created where it is intended that by the due registration of a mortgage bond a charge is to be placed on a particular property so as to secure the mortgagee in respect of a particular debt owing to him by the mortgagor. It was further contended that it followed that, where the mortgage bond, as registered,

---

WESSELS, J.A.

in terms identifies the property subject to the charge, names the mortgagor and mortgagee therein and describes the particular debt which it is intended to secure, it is not permissible to go behind the terms of the bond in question so as to determine matters relating to the identity of the mortgaged property, or of the mortgagor or mortgagee or the debt which it was intended to secure, save in exceptional circumstances (none of which applies in this case), e.g., where a party to the bond claims as against the other party thereto that he is entitled to an order for the rectification thereof, so that proper effect might be given to the common intention of the parties.

It was conceded on first respondent's behalf that, a *concursus creditorum* having supervened, it was not entitled to claim a rectification of the bond so as now to create a valid right of security where none existed prior to the liquidation of The Batchelors (Pty.) Ltd. The basic submission advanced on first respondent's behalf was that, inasmuch as the mortgagor was in fact indebted to the mortgagee at the time the bond was registered, and inasmuch as it was the common intention of the parties that the property in question should be mortgaged so as to furnish real security for that indebtedness, the bond which was passed validly gave effect to that common intention and upon registration served to secure that debt, notwithstanding the fact that, through a mistake on the part of the first respondent's conveyancer, it described a non-existent debt and omitted all reference to the debt it was intended to secure.

In developing this argument in support of this contention counsel for the first respondent referred the Court to the provisions of Proc. 37 of 1939 (S.W.A.), and the regulations made in terms of sec. 10 thereof which were published in *Government Notice* 151 of 1939 (S.W.A.). He submitted that a consideration of the relevant statutory provisions justifies the conclusion that real security can be constituted by the registration of a bond which either omits a description of the debt which it is intended to secure or describes it incorrectly in a material respect.

Sec. 102 of the Proclamation above-mentioned defines a mortgage bond simply as 'a bond attested by the registrar specially hypothecating immovable property'. In giving effect to the definition it must be borne in mind that, in our law and practice, the object of a mortgage bond is not merely hypothecation but usually the settlement of the terms of the debt which it is intended to secure as well (*Union Government (Minister of Finance) v Chatwin*, 1931 T.P.D. 317). In *Oliff v Minnie*, 1953 (1) SA 1 (AD), it was stated by VAN DEN HEEVER, J.A., at p. 3, that,

'a mortgage bond as we know it is an acknowledgment of debt and at the same time

---

an instrument hypothecating landed property or other goods'.

In this regard I respectfully associate myself with the observation of VAN WYK, J.A., in *Lief, N.O v Dettmann*, 1964 (2) SA 252 (AD) at p. 259, that

'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'.

The considerations mentioned in the preceding paragraph tend to support the argument advanced on appellant's behalf rather than that advanced on first respondent's behalf. In stating this I am not

---

WESSELS, J.A.

overlooking the fact that the burden of the first respondent's contention is not that real security can exist without it being related to a debt to which it is accessory, but that it can be created by the registration of an instrument from which reference to the principal obligation has been omitted, provided such obligation in fact exists.

Chap. V of the Proclamation contains certain general provisions relating to the registration of bonds. If regard is had to the provisions of secs. 50, 51 and 52, I find myself unable to envisage circumstances in which any instrument can be duly registered and take effect as a valid mortgage bond without embodying at least some description of the debt which is sufficiently particularised so as, e.g., to evidence that it is intended to secure either an existing debt or a future debt or both existing and future debts. In the context in which the word 'debt' is employed, it connotes an obligation upon the mortgagor to pay a sum of money to the mortgagee, which is either owing at the time the bond is registered or which may become owing on a date after such registration. These provisions, too, tend to support the appellant's contention rather than that of the first respondent.

However, counsel for the first respondent also sought to rely on the provisions of reg. 41 (2), which particularises in detail how the mortgaged property is to be described in the mortgage bond, and reg. 41 (4) which requires that the deed of cession of a bond shall set forth the *causa* of such cession. It was contended in reference to these provisions, that the detailed requirements regarding the description of the property to be mortgaged, the requirement that a deed of cession should set forth the *causa* thereof and the omission to require that a description of the debt should be set forth in the bond, indicate that it is not essential that the mortgage bond should contain a description of the debt which it is intended to secure.

This submission is without any substance. It is clear beyond any doubt whatsoever that it is a matter of impossibility to register a bond without identifying the property to be mortgaged. Even if reg. 41 (2) were not to have been promulgated, it would in any event have been essential to identify the property to be mortgaged. The true purpose of this regulation is, therefore, not to impose a duty to identify the property, but to prescribe in detail how the property is to be described. Reg. 41 (4) does not assist the first respondent. In ordinary circumstances a cession of a right of action may be effected without any recital of the *causa* giving rise thereto, provided the intention of the cedent and cessionary to effect a cession is established. The Legislature no doubt thought it expedient to require that in the case of a cession of a bond the relevant *causa* should be set forth, but it does not follow from this that, because the regulations are silent in regard to the necessity of incorporating a description of

---

the debt in a mortgage bond, and do not prescribe in detail the manner in which the debt is to be described, the Legislature contemplated that a description of the debt was not essential to the validity of a mortgage bond and that it was, therefore, not necessary to deal with the matter in the regulations. The more probable explanation is that the Legislature had in mind that, having regard to the object of a mortgage bond, it was essential that

---

WESSELS, J.A.

the debt to be secured should be described therein, and that it was, therefore, unnecessary to refer to such a requirement either in the Proclamation or in the regulation, or to detail the manner in which the debt is to be described. It is to be noted that reg. 41 (4) prescribes that in the case of a cession of a bond the *causa* therefor should be set forth. In the case of a bond the *causa debiti* need not necessarily be recited, provided the debt to be secured is sufficiently identified by a description thereof.

It was, however, submitted on first respondent's behalf that the contention in question has been upheld in several decided cases. I propose dealing with them in chronological order.

It is convenient, at the outset, to refer to two early cases, namely, *Hare, q.q v Bird and Others*, 1 Menz. 331, and *Stoll's Trustee v Kriege and Bosman*, 3 Menz. 448. In my opinion neither case assists the first respondent, because it appears that in each case the real issue was whether the debt described in the bond related to the debt claimed to be secured thereby.

Counsel for first respondent relied strongly on the judgment in *Pienaar and Frankel v Fourie's Trustees and Another*, 1913 CPD 227. It appears that at a meeting of creditors of Fourie's insolvent estate the second respondent's claim in the amount of £195 16s. was admitted to proof as preferent on the strength of a first mortgage bond which described the debt as being for money lent and advanced. The applicants, who were also creditors, applied on notice of motion for an order expunging or amending second respondent's proof of debt. The papers before the Court disclosed that the original cause of debt was for goods sold and delivered, but that a promissory note was given for that debt. It was thereafter agreed that Fourie should pass a bond in favour of the second respondent in settlement of the promissory note and also of a small amount of £5 16s. for money lent and advanced. It was conceded that the claim was preferent to the extent of £5 16s. and that the balance of the amount was in fact due, but it was contended that the main portion of the debt was wrongly described in the bond which, therefore, conferred no preference in respect thereof. After reviewing the facts, BUCHANAN, J., stated (at p. 229):

'Now, I am not at all certain that, looking at the circumstances of the transaction, the cause of the debt cannot be described as money lent and advanced, as money was due, and which money, instead of being paid, was settled by giving the bond. It might be argued that cash was lent to Fourie under the circumstances and that the cause of debt sufficiently described the transaction. But the case need not be decided on that ground alone. I am not prepared to say that where there is a debt secured by bond, that bond creates no preference where the cause of debt is wrongly described. There is authority that if the cause of debt is not mentioned at all in the bond, then the *onus* is on the bond-holder to show that the debt actually exists.'

In the course of the judgment the learned Judge also observed:

'The applicants do not allege that there was no consideration given for the bond. They admit that there was a debt due, and the only question is whether it should rank as preferent or concurrent . . . A debt does exist secured by mortgage bond, and it is quite possible to hold that the cause of debt is correctly described in the bond. But so long as the bond stands the security exists, and gives a preference on the property hypothecated.'

In the result the Court declined to grant the relief claimed, but added

---

WESSELS, J.A.

'If the applicants wish to take the matter further they can do so either on the neat point of law raised or they can take action to set aside the bond.'

At the commencement of his judgment, the learned Judge stated:

'This application raises a question which may be considered one of first impression. At any rate no authorities directly in point have been cited by counsel on either side.'

The circumstances in which the learned Judge came to give his judgment and the rather guarded manner of expression employed by him lead me to doubt whether he ever intended to state, as his considered opinion, that a bond affords real security in respect of a particular debt notwithstanding the fact that that debt is not described in the bond.

In *Goodman's Trustee v Goldberg*, 1914 W.L.D. 119, the applicant sought an order expunging the proof of debt of the respondent which was admitted as preferent by virtue of a bond which had been ceded by the mortgagee to the respondent. The applicant contended that the affidavit attached to the proof of debt did not set out the *causa debiti* and that the bond, moreover, described the debt as being for money lent and advanced, whereas, if there were a debt at all, the *causa debiti* was the purchase price of the mortgaged property.

In the judgment there is reference to the case of *Pienaar and Frankel v Fourie's Trustees, supra*, but, so it appears, only in connection with the applicant's objection in so far as it was based on the ground that neither the formal proof of debt nor the affidavit accompanying it described the true *causa debiti*. In dismissing this objection, the Court relied on *Pienaar's* case in holding that

'It is sufficient for the affidavit and the proof to follow the terms of the bond'.

The further objection raised by the applicant was that although the bond purported to have been passed for money lent and advanced, the facts showed that the mortgagor did not owe any money to the mortgagee, and that the bond could, therefore, not be relied upon as furnishing real security for the debt to which the formal proof related. The Court held, however, that the applicant took 'too narrow a view' of the rather complex transaction which resulted in the bond being passed by the mortgagor in favour of the mortgagee. GREGOROWSKI, J., stated that

'It is necessary to consider whether the debt for which the bond was passed really

---

existed, and to identify the debt to which the bond gives preference'.

The learned Judge proceeded to an analysis of the transaction and determined that the debt mentioned in the formal proof of debt was in fact the debt described in the bond and accordingly dismissed the objection.

In *Wasserzug and Others v Ritch's Estate*, 1927 T.P.D. 231, the Court was concerned with a somewhat similar problem to that which was considered in the case of *Goodman's Trustee v Goldberg, supra*. Certain concurrent creditors of Ritch's insolvent estate sought an order setting aside the preference awarded to claims based on mortgage bonds. The objection was that there was a difference between the *causa debiti* stated in the proof of debt (i.e., for the sum realised by the mortgaged properties) and that stated in the bonds (i.e., for money lent and advanced). After considering the terms of the bonds in question and the relevant transactions which resulted in their registration, BARRY, A.J., stated, at p. 234:

'So that, on the construction which I have placed on the meaning of the bonds,

---

WESSELS, J.A.

there has not been to my mind a mis-statement as to the *causa debiti*. But, assuming that there has been a mis-statement the case of *Pienaar & Frankel v Fourie's Trustee*, 1913 CPD 227, which has been followed in our Courts in the case of *Goodman's Trustee v Goldberg*, 1914 W.L.D. 119, is authority for the proposition that even where the cause of debt is not properly or sufficiently described, if a debt was admittedly due, then so long as the bonds exist the security exists and the debts can be admitted as preferent. Here the debt is admittedly due, because the applicants do not question the debt but only the preference.'

In my opinion neither of the two cases last-mentioned supports the contention advanced on first respondent's behalf. In each case the substantial enquiry was whether it could be said that, upon a proper construction of the description of the debt in the bond, there was a correspondence between the debt so described and the debt in respect of which preference was claimed. I reiterate that it is the first respondent's contention in this case that a debt may rank as preferent notwithstanding the fact that there is no correspondence between its description and that incorporated in the bond, provided it appears (albeit dehors the bond) that the common intention of the parties was to secure that particular debt by the registration of the bond in question.

The last case to be considered is that of *Dowjee Co. Ltd v M. M. M. E. Dawjee & Co.*, 1930 T.P.D. 240. In this case the applicant applied for an interdict restraining the respondent from dealing with a bond which the former had passed in favour of the latter, pending the result of an action instituted by the applicant for an order declaring that the bond was of no force and effect on the ground that, notwithstanding the form of the bond (which stated the cause of debt to be money lent and advanced and to be lent and advanced), no money was in fact lent and advanced to the mortgagor by the mortgagee. It was contended on behalf of the respondents, *inter alia*, that they were not bound by the description of the consideration contained in the bond and that they could show that another consideration existed. This contention was conceded on behalf of the applicants. It was, however, argued on their behalf that this did not assist the respondents, inasmuch as the papers before the Court did

---

not set out any other cause of debt. The learned Judge (GREENBERG, J.) upheld the applicant's contention. In dealing with this issue, the learned Judge said (at p. 243):

'The position is that the bond purports to be for money lent and advanced, and, if my reading of the bond is correct, it means that money was lent and advanced to the applicant. On the evidence before me no money was lent and advanced to the applicant, and I think therefore that this would cast upon the respondents the obligation of showing some other cause of debt.'

The above-cited remarks of GREENBERG, J., should, however, be accorded weight with due regard to the concession made on the applicant's behalf and the fact that the Court was only concerned with the position as between the mortgagee and the mortgagor and not with the question whether real security had been effectively constituted by the registration of the bond in question in a form which omitted a description of the debt which it was intended to secure.

In my opinion, therefore, the above-mentioned cases furnish no real or cogent support for the first respondent's contention. In so far as it might possibly be said that they do at least furnish some measure of support, I am satisfied, for the reasons set out earlier in this judgment, that they ought not to be followed.

WESSELS, J.A.

It was submitted on first respondent's behalf that the system of constituting real rights of security by the registration of mortgage bonds aims only at giving notice to the world at large that the immovable property concerned is subject to a charge, and that a description of the particular charge in question is, therefore, an irrelevant consideration. This is taking too narrow a view both of the purpose and effect in our law of the registration of a mortgage bond and of the true nature of the real right in immovable property which is, and can only be, constituted by such registration. When the mortgagor causes a mortgage bond to be registered in favour of the mortgagee, he does so in order to give effect to an antecedent agreement between them - which may be either in writing or verbal - in terms of which the former bound himself to grant to the latter, as security for a debt, a real right in the immovable property concerned. This agreement is definitive of the personal rights and obligations of the parties, and the mortgagee may rely thereon, even prior to the registration of the bond, e.g., in seeking to restrain the mortgagor from undertaking any transaction involving the immovable property concerned which would derogate from the rights to which he is entitled in terms of the agreement. It is conceivable that, prior to registration, the agreement may also affect the mortgagor in regard to the immovable property concerned with knowledge of the terms of the agreement in question. A Court would refuse to countenance a transaction of this nature where it operates to defeat the contractual rights of the mortgagee, because it would be tainted with *dolus*. It is clear, however, that the agreement cannot ordinarily have any wider effect than that indicated above. A Court will determine the personal rights and obligations of the parties in accordance with the terms of their written agreement, except where it appears that it does not reflect their true common intention, in which case relief may be granted in appropriate circumstances by ordering a rectification thereof. It was stated by DE VILLIERS, J.A., in *Weinerlein v. Goch Buildings Ltd.*, 1925 AD 282 at p. 290, that, where there is real agreement between the parties, the Court would not refuse to recognise it simply because the memorandum thereof contains

some mistake through 'a slip of the pen'. The Court was dealing with the position as between the parties to the agreement. As I understand the judgment, however, it does not furnish authority for a somewhat wider proposition, namely, that, in so far as a third party is concerned, and in so far as his knowledge of the transaction might be relevant, the Court will determine the matter upon a consideration of the real agreement between the parties and not upon the version contained in the memorandum thereof, even where it appears that the third party's knowledge is restricted to that contained in the memorandum.

Having regard to the accessory nature of the real right which is constituted by the registration of a mortgage bond, it is notionally impossible for the antecedent agreement to be valid and enforceable without reference therein to the principal debt which it is intended to secure by the hypothecation. This is so irrespective of the question whether the agreement providing for the registration of the bond also gives rise to the relationship of creditor and debtor, or whether it is earlier or

WESSELS, J.A.

later in point of time than the creation of that relationship. It is of the essence of the real right which is constituted by the registration of a mortgage bond that it should be related to a debt, and the substantial reason why the antecedent agreement must of necessity refer to the debt which it is intended to secure is so that the nature and extent (i.e. the content) of the real right, which it is intended to constitute by the registration of a mortgage bond, may be exactly determined. It follows from this that the obligation resting upon the debtor is to effect the constitution of a real right in the immovable property concerned in favour of the creditor in accordance with the definition thereof in the agreement in question.

In so far as a mortgage bond aims at hypothecation, the primary function of the document is concerned with the accurate description of the content of the real right which it is intended to constitute by the registration thereof. To that end there must be, *inter alia*, a sufficient identification of the mortgagor and the mortgagee, and a detailed description, as provided for by the regulations, of the immovable property which is to be hypothecated. If regard is had to the true nature of the real right in question, I am of the opinion that it is essential that the mortgage bond should contain, in addition, a description of the principal debt to which it is accessory. The real right is constituted on the basis of the mortgage bond which, upon registration, becomes the exclusive memorial of the nature and extent of the mortgagee's real right of security. If the mortgage bond omits reference to the debt which it is intended to secure, it would then be silent on an important aspect of the mortgagee's real right, i.e., the debt in respect of which the hypothecation was undertaken. The real right has neither meaning nor legal efficacy except in relation to the debt which it was intended to secure. The description of the debt is, therefore, as essential to the definition of the mortgagee's real right as is, e.g., the description of the property to be mortgaged. In my opinion, the registered mortgage bond is in effect a document of title to a real right in immovable property, and should normally be dealt with as being definitive of the mortgagee's real right in much the same way as a deed of transfer is ordinarily conclusive of the transferee's rights in and to the immovable property concerned.

It follows from what I have stated above that registration aims primarily at the constitution of a real right, inhering in the mortgagee, upon the basis of the definition of that right in the mortgage bond. In my opinion there is no justification for holding that in our law the

registration of a mortgage bond aims only at giving notice to the world at large that the immovable property concerned is subject to a charge. It would be more correct to say that registration results in the publication to the world at large of the fact that the immovable property concerned is subject to the charge defined in the mortgage bond in question. However, even if due weight is given to this aspect of registration, there appears to be no logical reason why the publication of the transaction between the parties, which aims at the constitution of real security in respect of a particular debt, should be permitted in a truncated form so as to bring to the notice of the world only part of

---

WESSELS, J.A.

the content of the transaction in question. It might often be as important for third parties to know which particular debt is secured, as it is for them to have knowledge that certain immovable property is subject to a charge. Where the bond, as registered, in terms purports to secure a particular debt, it is quite unrealistic (save possibly in exceptional circumstances) to determine the rights of innocent third parties on the basis that, notwithstanding the terms of the publication in a formal public document, they were not entitled to accept that the right of security was accessory to that particular debt and to no other debt. The door would be opened wide to fraudulent practices and the rights of innocent third parties might be seriously prejudiced if it were to be held that the parties to a bond may set up as against innocent third parties a transaction substantially different from that published by them in the bond in question.

In the instant case it is common cause that the failure to describe the debt concerned in the mortgage bond is due to 'a slip' of the conveyancer's pen, and the question arises whether the principle applied in the case of *Weinerlein v Goch Buildings Ltd., supra,* can be used to assist the first respondent. The bond does not define the real right in accordance with the provisions of the antecedent agreement, and it is clear that, prior to the liquidation of the mortgagor, the first respondent could have insisted that the bond should be amended so as to bring it into conformity with the antecedent agreement. The first respondent would then rely upon his right flowing from the antecedent agreement and would not invoke the above-cited principle. The registration follows upon the unilateral act of the mortgagor who undertakes the transaction in order to discharge his contractual obligation to effect delivery of the real right defined in the agreement. As I see it, therefore, the abovecited principle can, and need, never be invoked in a case where the antecedent agreement records the true intention of the parties, and the mistake occurs only in the mortgage bond. If the mortgagee and the mortgagor agree that a mortgage bond is to be registered against immovable property (being, say, lot 364), the Court will apply the abovecited principle to rectify a written instrument which, through 'a slip of the pen', mistakenly describes the property to be mortgaged as being, say, lot 346 (being a less valuable piece of land belonging to the mortgagor). If, however, it were to appear that, prior to rectification, a mortgage bond had been registered identifying lot 346 as the mortgaged property, I am of the opinion that the above-cited principle could never be invoked so as to justify a conclusion that, notwithstanding the form of the bond, lot 364 was in fact affected by the registration, because the true intention of the parties related to that property and not to lot 346. The mortgagee's remedy is to claim a bond conforming with the antecedent agreement as rectified. It follows that the real right is constituted only when the bond in proper form is registered. It would not seem to matter whether the 'slip of the pen' affects the identification

---

of the property to be mortgaged, or any other feature which serves to define or limit the content of the real right to be constituted. I have already stated above that the identification of the debt to be secured is such a feature. It is at all times important to have

WESSELS, J.A.

regard to the distinction between the personal rights and obligations of the parties, which flow from the antecedent agreement, and the content of the mortgagee's real right of security, which is constituted solely by the registration of the mortgage bond in question, which is the only document of reference in regard to the nature and extent of that real right.

For the reasons set out above I conclude that in law real security in respect of a debt is validly constituted only where the bond, as registered, by description therein identifies the particular debt which it is intended to secure.

There remains for consideration an alternative contention advanced on first respondent's behalf, namely, that the bond in question, in so far as it relates to the direct claim of the first respondent in the sum of R47,170.69, being the price of goods sold and delivered by it to G. Merjenberg (Pty.) Ltd., validly secures an existing debt, namely a debt due by G. Merjenberg personally by virtue of the suretyship agreement dated 19th February, 1956, above referred to. The description of this debt does not, however, correspond with the description of the debt in the bond, and the alternative contention, therefore, cannot be upheld.

I would, therefore, allow the appeal.

STEYN, C.J., concurred in the judgment of WESSELS, J.A.

Appellant's Attorneys: *Howard & Wasserfall*, Windhoek; *Goodrick & Franklin*, Bloemfontein. First Respondent's Attorneys: *Lorentz & Bone*, Windhoek; *Kalil & Sorour*, Bloemfontein.