

# The Registration of Special Notarial Bonds under the Security by Means of Movable Property Act and the Publicity Principle: Lessons from Developments in Belgium



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## Abstract

Many people do not own immovable property to offer as security but do have movable property which can be offered as security for the repayment of a debt. In today's world, where the costs of a motor car can exceed that of a house, the increasing value of movable things makes them popular and appropriate security objects. Under the common law pledge, delivery of the movable property from the pledgor (the debtor) to the pledgee (the creditor) has to take place in order for the pledgee to acquire a real security right in the property. Delivery of the property is aimed at ensuring compliance with the publicity principle. The principle of publicity entails that the existence of a real security must be known to the public. With the aim of promoting commerce, certain countries have taken the initiative in reforming their laws on pledge to allow the debtor to retain possession of the movable property that serves as security. Furthermore, technology has advanced to a level where national registration systems which can be accessed easily and at minimal cost can be established. The South African legislature enacted the *Security by Means of Movable Property Act 57 of 1993* which makes provision for a pledge without possession. This Act deemed a duly registered notarial bond over specified movable property to have been delivered as if delivery had in fact taken place, thereby substituting the common law delivery requirement with registration in the Deeds Office. On 30 May 2013 the Belgian House of Representatives adopted a *Belgian Pledge Act* which allows for a non-possessionary pledge on movable property subject to registration in a newly created public register called the Electronic Pledge Register. This article therefore examines the efficacy of the registration system of special notarial bonds in South African law and whether this form of registration complies with the publicity principle looking at the developments of a computerised registration system taking place in Belgium.

## Keywords

Delivery; electronic pledge register; movable property; pledge; real security right; possession; publicity principle; registration; special notarial bonds.

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## 1 Introduction

In recent years certain legal systems<sup>1</sup> have engaged in the legal reform of real security rights over movable property.<sup>2</sup> A real agreement followed by delivery in the case of movable property and registration in the case of immovable property is required for the creation of a limited real right. Delivery (registration in the case of immovable property) is aimed at ensuring compliance with the publicity principle through (direct) control.<sup>3</sup> The publicity principle entails that third parties should be able to infer from externally perceivable indications whether a real right in a thing exists and when the transfer of a real right from one person to another occurs.<sup>4</sup> With the aim of promoting commerce, the legal reform of real security law and particularly the law relating to pledge is meant to allow the pledgor to retain possession<sup>5</sup> of the movable property that serves as security rather than the pledgor having to deliver physical control of the property to the pledgee. There has been a substantial increase in the value and use of movable property (corporeal and incorporeal) as security for the repayment of debts as opposed to the situation in the past, when immovable property was generally seen as more valuable security than movables. Technological advancements also play a role in the reform of real security rights over movable property. The South African legislature has enacted the *Security by Means of Movable Property Act*<sup>6</sup> (SMPA), which economically justifies the position of a pledge without the debtor having to deliver possession of the movable property to the creditor. Before the enactment of the SMPA a special notarial bond had to be perfected before the bondholder acquired a real security right. This did not apply in the Province of Natal, which was

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<sup>1</sup> The Netherlands, Germany, Scotland and Belgium.

<sup>2</sup> An argument for the reform of real security law in South Africa was made in Scott and Dirix 2009 *THRHR* 575-598.

<sup>3</sup> Van der Merwe *Sakereg* 13.

<sup>4</sup> Mostert & Pope *Property Law* 56. See also Badenhorst, Pienaar and Mostert *Law of Property* 81.

<sup>5</sup> Possession refers to the broad interpretation. In other words, it refers to physical control. Any reference to possession therefore includes control and any reference to control includes possession.

<sup>6</sup> *Security by Means of Movable Property Act* 53 of 1993 (hereafter the SMPA).

regulated by the *Notarial Bond (Natal) Act*.<sup>7</sup> The purpose of the SMPA is to allow the debtor to retain control of the movable property that serves as security, as the same property may be utilised by the debtor in order to repay the debt.<sup>8</sup> This may be the case where, for example, the debtor, being a farmer, borrows money from the creditor and gives his tractor (movable property) as security for the repayment of the loan. The debtor may need his tractor to continue with his farming operations in order to generate an income enabling him to repay the loan. His practical business needs require this to be the case.<sup>9</sup> The SMPA regulates only special notarial bonds<sup>10</sup> and does not apply to general notarial bonds<sup>11</sup>. The SMPA deems the specified and described movable property over which a notarial bond has been registered to have been delivered as if actual delivery has in fact taken place.<sup>12</sup> In terms of the SMPA, the special notarial bondholder acquires a limited real right over the property that serves as security upon registration of the bond in terms of the *Deeds Registry Act*,<sup>13</sup> despite the absence of actual delivery. However, the specification and description requirement as provided for in section 1(1) of the SMPA has to be complied with. The test of specifying and describing the movable property as provided for in section 1(1) of the Act is set out in the *Ikea Trading und Design v BOE Bank*<sup>14</sup> (hereafter referred to as *Ikea Trading*). The test is whether a third party is able to identify the property from the description in the bond itself without recourse to extrinsic evidence. The use of the terms "specified and described" in the SMPA points to a stricter test than that under the *Notarial Bond (Natal) Act*,<sup>15</sup> which required the property to be "specially enumerated".<sup>16</sup> The Oxford Dictionary<sup>17</sup> defines "enumerate" as "mention one by one" or to "establish the number of". The development of the *Notarial Bond (Natal) Act*<sup>18</sup> regarding the identification requirement is set out in

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<sup>7</sup> *Notarial Bond (Natal) Act* 18 of 1932. For a comprehensive discussion on the applicability of the SMPA and the *Notarial Bond (Natal) Act* 18 of 1932 see Ntsoane *Legal Comparison of a Notarial Bond*.

<sup>8</sup> See Scott 1981 *De Jure* 156.

<sup>9</sup> See Scott 2010 *CILSA* 95.

<sup>10</sup> A special notarial bond burdens specifically described movable property belonging to the debtor. Scott 1995 *THRHR* 675.

<sup>11</sup> A general notarial bond applies to all the movable property of the debtor, corporeal and incorporeal. It is governed by the common law and the *Deeds Registries Act* 47 of 1937. Kleyn and Boraine *Law of Property* 385.

<sup>12</sup> Section 1(1) of the SMPA. Also see Scott "Law of Real and Personal Security" 268.

<sup>13</sup> *Deeds Registry Act* 47 of 1937.

<sup>14</sup> *Ikea Trading und Design v BOE Bank* 2005 2 SA 7 (SCA) (hereafter *Ikea Trading*).

<sup>15</sup> *Notarial Bond (Natal) Act* 18 of 1932.

<sup>16</sup> Brits 2015 *SA Merc LJ* 264.

<sup>17</sup> Stevenson and Waite *Concise Oxford English Dictionary* 477.

<sup>18</sup> *Notarial Bond (Natal) Act* 18 of 1932.

*Rosenbach and Co (Pty) Ltd v Dalmonte*.<sup>19</sup> In this case the court found the description of assets in general terms such as goods, stock-in-trade, merchandise, fittings, furniture and appliances to be insufficient for the identification required by the *Notarial Bond (Natal) Act*. Caney J (delivering the judgment of the full court) stated that the *Notarial Bond (Natal) Act*<sup>20</sup> was "concerned to prescribe safeguards in the interests of other creditors by requiring definition of the movables hypothecated in order to render identification as easy as possible with a view to shutting the door to frauds and reducing controversy to a minimum".<sup>21</sup> Whether this goal has been achieved still remains uncertain.

Sonnekus<sup>22</sup> explains that in terms of the *Notarial Bond (Natal) Act*<sup>23</sup> it was sufficient to say a bond has been registered over a certain number of cans of fish on a shelf. The issue is, therefore, not the number of cans on the shelf, but the specific description of each can of fish. Although Sonnekus welcomes the decision in *Ikea Trading*, he is concerned about the underutilisation of this form of security and considers the fact that the strict application of the description of the property renders it an expensive form of security.<sup>24</sup> He proposes that the thing could be described by using a special mark on the property. The description in the notarial bond must then indicate how the specific couch was marked in order to make it readily recognisable. The mark on the movable property would then have been described in the bond.<sup>25</sup>

The SMPA substituted actual delivery of a pledged object with registration in the Deeds Registry. The compliance of the registration with the publicity principle will depend on how organised and accessible the registration system is. This article therefore conducts an investigation of the South African registration system of movable property in comparison with developments taking place in the registration system in Belgium. Belgian law is relevant to the development of South African law because of its Roman-law origin, the reform of real security rights over movables in this

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<sup>19</sup> *Rosenbach and Co (Pty) Ltd v Dalmonte* 1964 2 SA 195 (N) 204G-205A.

<sup>20</sup> *Notarial Bond (Natal) Act* 18 of 1932.

<sup>21</sup> *Rosenbach and Co (Pty) Ltd v Dalmonte* 1964 2 SA 195 (N) 201H-202A.

<sup>22</sup> Sonnekus 2005 *De Jure* 135.

<sup>23</sup> *Notarial Bond (Natal) Act* 18 of 1932.

<sup>24</sup> Sonnekus 2005 *De Jure* 133-144: "Indien daardie onderbenutting aan die vermybare oorbeklemtoning van duur en omslagtige registrasievereistes te wyte is wat vermy kan word sonder om die anvanklike oogmerk van voldoende publisiteit te ondergraaf mits dit in samehang met 'n duidelike identifiseringsleutel en behoorlike bateregister gedoen word, behoort die moontlikheid ernstig oorweeg te word".

<sup>25</sup> Sonnekus 2005 *De Jure* 137-138.

jurisdiction, and its recent establishment of a registration system over movable property.

## 2 An overview of legislative developments

On 30 May 2013 the Belgian House of Representatives adopted a new Act on security interests - the *Belgian Pledge Act* - which allows for a non-possessory pledge over movable property. The *Belgian Pledge Act*<sup>26</sup> applies to all types of movable property, corporeal and incorporeal, including property that can be acquired in the future. In terms of the *Belgian Pledge Act*,<sup>27</sup> the pledge is perfected and becomes effective towards third parties after its registration in a newly created public register called the "Electronic Pledge Register". Prior to the introduction of the *Belgian Pledge Act*,<sup>28</sup> according to Scott,<sup>29</sup> the draughtsmen of the *Belgian Civil Code* had not paid much attention to a right of pledge since little value was attached to movable property at the time. At that time the pledge instrument was underutilised, not because of the small value of movables, but because they had certain disadvantages for the pledgor. The disadvantages related to the inefficacy of the registration system at that time. The reform of the law of real security right over movable property in Belgium was (as in South African law) also based on a desire to promote the economic needs of the debtor (the pledgor).

Prior to the enactment of the SMPA, the position of notarial bonds in South African law comprised *inter alia* of the array of laws governing special notarial bonds: the *Notarial Bond (Natal) Act*,<sup>30</sup> granting real security right to the creditor/bondholder but applicable only in Natal province; and the *Deeds Registries Act*,<sup>31</sup> granting no real security rights to the creditor/bondholder but merely a preference on the entire free residue of the insolvent estate<sup>32</sup> and uncertainties in the case of insolvency as reflected in *Cooper v Die Meester*<sup>33</sup> (hereafter referred to as the *Cooper*-case).

In 1982 the South African Law Commission embarked upon an investigation into real security rights over movable property. The final report was published in 1991 and acknowledged the need for a form of security that allowed the debtor to remain in control of his thing, while granting a real

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<sup>26</sup> *Belgian Pledge Act*, 2013.

<sup>27</sup> *Belgian Pledge Act*, 2013.

<sup>28</sup> On 11 July 2013.

<sup>29</sup> Scott 2010 *CILSA* 97.

<sup>30</sup> *Notarial Bond (Natal) Act* 18 of 1932.

<sup>31</sup> *Deeds Registry Act* 47 of 1937.

<sup>32</sup> Lubbe and Van der Merwe 1988 *TSAR* 554.

<sup>33</sup> *Cooper v Die Meester* 1992 3 SA 60 (A) (hereafter the *Cooper* case).

security right over the thing to the creditor.<sup>34</sup> The Law Commission's proposed Bill introduced two possible forms of security over movable property: (i) unregistered pledge without possession; and (ii) registered pledge without possession. Each of these is briefly considered in what follows.

### **2.1 Unregistered pledge without possession**

This proposed form of security did not require the debtor to give the creditor control over the property. All that was required was a written agreement signed by the parties in which the security object was specified and described. The proposal was that this agreement would have the same legal effect as a pledge – ie it would create a real security right. The unregistered pledge would therefore create a real security right without compliance with the publicity principle. Should the debtor be declared insolvent, section 83 of the *Insolvency Act*<sup>35</sup> would apply to the creditor. If the debtor is solvent but in default, the creditor has no preferred right over the debtor's other creditors. Furthermore, if the debtor offers the thing as security to another creditor(s), the first creditor has no right to claim the thing from these creditor(s) and in essence has no security. Sonnekus refers to this as "*mooiweers-sekerheidsregte*" (fair weather security rights) which means that the rights are effective only if the debtor is still in control of the thing and is declared insolvent. However, if the debtor is no longer in control of the thing and in default, the creditor has no security.<sup>36</sup> The unregistered pledge proposed in clause 1 of the Bill was not included in the SMPA.

### **2.2 Registered pledge without possession**

The second proposed form of security (clause 2 of the Bill) was the nationwide introduction of special notarial bonds over specified movables which would grant the creditor preference over the debtor's other subsequent creditors. The creditor has a right of preference as if he is in control of the movable property but is in fact not in control of the property. This form of security is based on the Natal regime.<sup>37</sup> The two requirements for the vesting of a registered pledge are registration of the notarial bond, and the satisfactory description of the movable property. Fulfilment of these two requirements justifies the non-possessory real security right over

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<sup>34</sup> SALC *Giving of Security*.

<sup>35</sup> *Insolvency Act* 24 of 1936.

<sup>36</sup> Sonnekus 1989 *TSAR* 525.

<sup>37</sup> Scott 1995 *THRHR* 673.

movable property.<sup>38</sup> This form of security has been included in the SMPA, and its inclusion was welcomed by most commentators.<sup>39</sup>

Sonnekus<sup>40</sup> distinguishes between security rights without possession ("*besitlose sekerheidsresgte*") and security rights without publication ("*publisiteitslose sekerheidsregte*"). Section 1 of the Bill amounts to security without publicity, whereas section 2 (special notarial bonds in the SMPA) amounts to security without possession. This article is concerned with security without possession as provided for in the SMPA and the effective compliance with the publicity principle through registration is therefore questioned. Possession is a means to an end, namely publicity. It is not an end in itself and can therefore be replaced by registration, which would then be the means to an end, namely publicity.

In the *Cooper*-case the then Appellate Division delivered a judgment that led to considerable confusion until the enactment of the SMPA. The judgment considered the urgent need for legislation to give legal certainty regarding special notarial bonds and their legal effect. In short: the court held that a special unperfected notarial bond gave no preference over the claims of other concurrent creditors, and consequently ranked below a general notarial bond (bonds).<sup>41</sup> The court did not acknowledge the common-law preference granted to special mortgages and relied solely on the provisions of sections 96-102 of the *Insolvency Act*.<sup>42</sup> The decision resulted in an unequal legal position for special notarial bondholders in Natal province as opposed to special notarial bondholders in other provinces.

The SMPA changed the unsatisfactory legal position established by the *Cooper*-case. However, the decision in the *Cooper*-case continues to govern unregistered special notarial bonds created after the commencement of the Act.

The *Belgian Pledge Act*,<sup>43</sup> enacted by the Belgian Parliament on 30 May 2013, has changed the law of real security rights over movable property in Belgium. The *Belgian Pledge Act* introduces a new title "XVII" in the *Belgian Civil Code* which replaces the provisions in articles 2071-2091. Dirix<sup>44</sup> states that the *Belgian Pledge Act* "contains a complete modernization of the legal framework regarding real security rights over movables including the

<sup>38</sup> Brits 2015 *SA Merc LJ* 250-251; Sonnekus 1989 *TSAR* 525.

<sup>39</sup> See Sonnekus 2005 *De Jure* 133-144; Brits 2015 *SA Merc LJ* 246-274. Van der Walt, Pienaar and Louw 1994 *THRHR* 614-623 criticised the security created by the SMPA as a very clumsy way of creating a new form of real security right.

<sup>40</sup> Sonnekus 1989 *TSAR* 546, 549.

<sup>41</sup> *Cooper* case 83-84.

<sup>42</sup> *Insolvency Act* 24 of 1936.

<sup>43</sup> *Belgian Pledge Act*, 2013.

<sup>44</sup> Dirix 2014 *IIR* 174.

retention of title and the legal lien". The Act, which follows the functional approach, is not yet in operation although it was expected to come into operation on a date to be determined by Royal Decree, but not later than 1 December 2014. This date was subsequently postponed to 1 December 2017 due to the substantial delay in the establishment of the Electronic Pledge Register. On 15 July 2016, the date of operation was again postponed to January 2018.

The *Belgian Pledge Act*<sup>45</sup> applies to all security interests over movable property, but does not amend either the *Mortgage Act*<sup>46</sup> or the *Financial Collateral Act*.<sup>47</sup> The *Belgian Pledge Act*<sup>48</sup> is not yet in operation and therefore this article conducts a theoretical evaluation of its significant but projected effect on the law of real security rights over movable property with specific reference to the new Electronic Pledge Register.

Below I explore the principle of publicity as a standard to measure the effectiveness of the registration system in both jurisdictions.

### 3 Principle of publicity

The South African and Belgian law acknowledges the principle of publicity as a cornerstone of real security rights.<sup>49</sup> It is a principle of the law of property that the existence of a real security right must be public knowledge.<sup>50</sup> Negating the principle of publicity infringes the basic principles of security and undermines insolvency law.<sup>51</sup> The publicity principle serves two purposes. Firstly, it ensures that a real security right (which is effective against third parties) cannot be kept secret.<sup>52</sup> Secondly, it provides information for those who might need it, such as actual or prospective creditors or third party purchasers.<sup>53</sup> In its *Model Law on Secured Transactions*<sup>54</sup> (*Model Law*) the European Bank for Reconstruction and Development considered the importance of secured credit in a growing economy. The Model Law was designed to provide a fair balance between the competing interests of debtors, secured creditors, and other parties who

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<sup>45</sup> *Belgian Pledge Act*, 2013.

<sup>46</sup> *Mortgage Act*, 1851.

<sup>47</sup> *Financial Collateral Act*, 2004. See Linklaters 2013 <https://www.linklaters.com/en/insights/publications/2013/may/new-law-on-security-over-movable-assets>.

<sup>48</sup> *Belgian Pledge Act*, 2013.

<sup>49</sup> Hamwijk *Publicity in Secured Transactions Law* 35. See also Dirix 2014 *IIR* 173.

<sup>50</sup> Badenhorst, Pienaar and Mostert *Law of Property* 56. Also see Reid 1997 *Acta Juridica* 236-237.

<sup>51</sup> Sonnekus 1993 *TSAR* 111.

<sup>52</sup> Van der Merwe *Sakereg* 13.

<sup>53</sup> Pienaar and Steven "Rights in Security" in Zimmermann, Reid and Visser (eds) *Mixed Legal Systems* 761.

<sup>54</sup> *UNCITRAL Model Law on Secured Transactions* (2016).



might have some dealings with the property that serves as security. This goal can be achieved only if the publicity principle has been sufficiently complied with. In terms of the *Belgian Pledge Act*<sup>55</sup> a pledge becomes a real security right and, in principle, effective against third parties at the moment of registration in the EPR.<sup>56</sup> There are certain exceptions to the rule. A pledge (a security right) will be effective against third parties without registration in the following circumstances: (i) the creditor (the security holder) has taken possession of the movable property;<sup>57</sup> or (ii) the creditor (the security holder) has taken control of the movable property.<sup>58</sup> In its strictest interpretation under these circumstances, the difference between possession and control is that "possession" means to be in physical control of the movable property, whereas to be in "control" means that the security holder is obliged to notify the debtor of the encumbered claim.<sup>59</sup>

Before the SMPA came into operation, Sacks<sup>60</sup> questioned the efficacy of registering security rights over movable property and whether this complies with the principle of publicity in the following terms:

The difficulties that arise from the fact that movable property can be moved, that movables are now so frequently mass-produced as to render the identification of an article extremely difficult and that no system of registering any interest in movable goods may exist at all call for very careful solutions to be rationally applied when movables are to be used as security.

Although the introduction of the SMPA brought about significant changes, registration as a means to comply with the publicity principle taking into account the current South African registration system still remains an issue that needs to be addressed. The fact that the debtor is not divested of the control of the property that serves as security allows him to transfer the title to someone else without any knowledge on the part of the creditor or third party. This may raise issues in the case of insolvency. Section 89(2) of the *Insolvency Act*<sup>61</sup> provides that a secured creditor who relies for the satisfaction of his claim solely on the proceeds of the property which constitute his security is not liable for any costs of sequestration other than the costs of maintaining, preserving and realising the property. This privileged position enjoyed by the secured creditor with a real security right should rely on the degree of publicity with which his real security right or preferential position is made known to the outside world. The acid test of whether or not a real security right is functional is whether it is effective if

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<sup>55</sup> *Belgian Pledge Act*, 2013.

<sup>56</sup> Article 26 of the *Belgian Pledge Act*, 2013.

<sup>57</sup> Article 39 of the *Belgian Pledge Act*, 2013.

<sup>58</sup> Article 60 of the *Belgian Pledge Act*, 2013.

<sup>59</sup> Dirix and Sagaert 2014 *EPLJ* 235.

<sup>60</sup> Sacks 1982 *SALJ* 605.

<sup>61</sup> *Insolvency Act* 24 of 1936.

the debtor becomes insolvent and grants the holder of the real security right a preference over other creditors.<sup>62</sup> A real security right is effective when the creditor can prevent the debtor from disposing of the movable property that serves as security. In the case of special notarial bonds, the debtor can easily alienate the movable property that serves as security without the creditor's knowledge. The third party will then receive the thing subject to the creditor's real security right. The question is whether the registration of the real security right in movable property serves as sufficient publicity to third parties and the debtor's other creditors. Two issues arise from the above: the effectiveness of the creditor's real security right over the movable property; and the legal position of the third party who has bought the property.

Creditors of the debtor and other third parties who may wish to have some dealings with the movable property that serves as security must be aware of the existence of the real security right to the property. Hamwijk<sup>63</sup> explains the position as follows:

[I]n both civil and common-law traditions the principle of publicity is regarded as a fundamental principle of property law and accordingly secured transactions law. In a nutshell, it is based on the idea that property rights (should) only have effect vis-à-vis third parties if they are actually public, ie can be known by such third parties.

The notion of non-possessory security has elicited considerable criticism in Europe in that it is seen as a violation of the publicity principle.<sup>64</sup> Hamwijk<sup>65</sup> discusses two different lines of reasoning with regard to publicity: the problem solving approach; and the dogmatic approach. The problem solving approach refers to the problem of the false appearance of creditworthiness. She formulates this approach as follow:

Hence, in the first line of reasoning (let us refer to it as the 'problem solving' approach), possession in the hands of someone who does not have any rights in the asset as suggested by its possession is said to cause the problem, whereas publicity would have prevented this problem.<sup>66</sup>

The problem-solving approach, according to Hamwijk, misled third parties into thinking that the debtor, by retaining control of the movable property that serves as security, owns or has exclusive control of the property with no real security right attached to it.

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<sup>62</sup> See Wood *Security and Guarantees* 3. Also see Eidenmuller and Kieninger *Secured Credit* 248.

<sup>63</sup> Hamwijk *Publicity in Secured Transactions Law* 35.

<sup>64</sup> Hamwijk *Publicity in Secured Transactions Law* 36.

<sup>65</sup> Hamwijk *Publicity in Secured Transactions Law* 37.

<sup>66</sup> Hamwijk *Publicity in Secured Transactions Law* 38.

The dogmatic approach refers to third parties' duty to respect property rights, which they can do only if they are aware of the existence of the rights. As I have already mentioned, the amount of protection given to third parties depends on the effectiveness and the accessibility of the registration system. An effective and accessible registration system will allow third parties to easily access the registration system in order to determine the existence of real security rights to the property. It is acknowledged that doctrinally third parties' duty to respect property rights may also flow from other branches of law, which this study does not intend to consider, and the remedies for interfering with such rights differ depending on the cause of action.

Hamwijk states that the publicity principle may be read in two ways: "publicize security rights as much as possible" or "property rights should not be enforceable against third parties, unless these rights were public to them".<sup>67</sup> Hamwijk argues that the publicity principle originates from the latter interpretation, as it is based on "typical *bona fide* protection rules".<sup>68</sup> A third party will easily place confidence in the debtor who is in control of the thing and should therefore be protected should the debtor sell the thing to him or offer it as security when there is another existing right over the thing. However, possession by the debtor (or even the creditor) offers no information as to who has a right in the thing, what that right is, and in what capacity the person holds the thing. Hamwijk proposes that a public filing would ensure compliance with the principle of publicity:

I believe that the original publicity principle has given way for a more modern reading of the publicity principle as to entail a call for public filing. In theory, this modern version of the publicity principle is better than the old one because it serves the interest of third parties across the full spectrum: both first-in-time owners and lenders and not second-in-time ('third') parties 'win' as the conflict is avoided in the first place.<sup>69</sup>

Hamwijk's argument is contrary to the statement made by Sacks,<sup>70</sup> where he questioned the efficacy of the registration of security rights and the absence of an effective registration system over movable property on the basis that movables can be moved from one place to another, which renders it difficult to identify them, an issue which this article seeks to address through a comparative analysis of the Belgian legal system.

A claim (a personal right), as an incorporeal thing, can also be the object of a real security right. The cession of a claim requires no publicity - the debtor

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<sup>67</sup> Hamwijk *Publicity in Secured Transactions* Law 50.

<sup>68</sup> Hamwijk *Publicity in Secured Transactions* Law 50.

<sup>69</sup> Hamwijk *Publicity in Secured Transactions* Law 52.

<sup>70</sup> Sacks 1982 *SALJ* 605.

need neither receive notice of nor consent to the cession of the claim.<sup>71</sup> This is the case because it is not certain whether compliance with the principle of publicity in the cession of claims can be achieved through registration or by any other means. Notice to the debtor of the existence of the pledge of a claim seems to be the method most favoured in ensuring compliance with the publicity principle. The registration of a pledge of a claim as a means to fulfil the publicity principle is said to place an unnecessary burden on the debtor to ascertain whether his creditor has not ceded or pledged his right against the debtor.<sup>72</sup> This, in my opinion, depends on how organised and accessible the registration system is. Belgian law acknowledged a pledge in respect of a claim even before the introduction of the *Belgian Pledge Act*.<sup>73</sup> In order to comply with the publicity principle in respect of a pledge of a claim, the pledgor's debtor has to be notified of the pledge.<sup>74</sup> It is generally accepted that the debtor must acknowledge the notification.

The registration of a pledge in the EPR also serves to determine the priority ranking of the security right. The pledge first registered enjoys preference over subsequent pledges.<sup>75</sup> This is in accordance with the principle of anteriority.<sup>76</sup> The principle of anteriority also applies in the case of a conflict between a registered pledge and a possessory pledge. In terms of this principle the date of registration and the date of dispossession are compared and the earlier date prevails over the latter one.<sup>77</sup> There are certain exceptions to the "first-in-time" rule. Article 58 grants priority to an unpaid seller; a subcontractor; and creditors with claims regarding repairs. In South African law the exceptions in the case of insolvency may include a lien and the landlord's tacit hypothec.

#### 4 South African registration system

South African law acknowledges a pledge without possession in the form of a special notarial bond. There can be no objection against the replacement of delivery with registration as a means of promoting the practical

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<sup>71</sup> Van der Merwe and Du Plessis *Introduction* 272. The debtor is protected by a rule that "a payment made in good faith to the cedent immunises [him] against liability towards the cessionary".

<sup>72</sup> Scott 1989 *THRHR* 460.

<sup>73</sup> See eg Case 29 March 1990, RW 1990-1991, 364. In this case the Belgian High Court recognised ways to meet the publicity principle (ie notification) other than the dispossession of the property as required by art 2076 of the *Belgian Civil Code*. The court held that the nature of the security object (intangible) must be taken into account as well as any other specific provisions adopted by the parties to meet the legal obligation.

<sup>74</sup> Article 2075 of the *Belgian Civil Code*.

<sup>75</sup> Article 57 of the *Belgian Civil Code*.

<sup>76</sup> The *Belgian Pledge Act*, 2013 did not make reference to the principle of anteriority. This principle therefore applies as provided for in the *Belgian Civil Code*.

<sup>77</sup> Dirix and Sagaert 2014 *EPLJ* 248.

commercial needs of the debtor. Compliance with the principle of publicity must however be adhered to at all times in the creation of real security rights. The success of a legal system's acknowledging a non-possessory pledge depends to a great extent on the existence of a registration system that complies with the principle of publicity. In terms of the SMPA, a special notarial bondholder acquires a real security right in the property that serves as security upon registration of the bond in the Deeds Registry. An unregistered notarial bond does not confer any form of security or preference on the special notarial bondholder over that of concurrent creditors of the insolvent estate.<sup>78</sup> The registration of a special notarial bond in terms of the SMPA entails that the bond document setting out the principal debt and describing the movable property that serves as security must be attested by a notary public and registered in the Deeds Registry.<sup>79</sup> The requirements for the registration of a notarial bond are dealt with in sections 61 and 62 of the *Deeds Registry Act*. In short, a notarial bond must be registered within three months of the date of its execution. This period may be extended by a court.<sup>80</sup> The notarial bond must disclose the place and date of execution and the place where the notary practices. Furthermore, it must disclose the place where the debtor resides and the place where he carries on business (if any).

Sonnekus and Neels<sup>81</sup> emphasise that the SMPA has not done away with the hassles and limitations attendant upon registration in the Deeds Registry. The SMPA does not address this issue and the difficulties and costs of registration consequently still impact negatively on the use of a special notarial bond. Prospective credit grantors will have to search all Deeds Registries in the country to ensure that the movable assets offered as security are not already subject to other real security rights. This is the case because the South African registration system still makes use of a manual registration system as opposed to an electronic registration system that one can easily access electronically at any given time convenient to all parties including third parties. The South African law is currently awaiting public feedback on the *e-Deeds Bill*.<sup>82</sup> The objective of this Bill is to:

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<sup>78</sup> Locke 2008 *CILSA* 136.

<sup>79</sup> Section 61 of the *Deeds Registry Act* 47 of 1937.

<sup>80</sup> Section 61(1) of the *Deeds Registry Act* 47 of 1937

<sup>81</sup> Sonnekus and Neels *Sakereg Vonnisbundel* 758.

<sup>82</sup> *Draft Deeds Registries Amendment Bill*, 2016; Anon 2016 <http://www.ghostdigest.com/articles/e-deeds-bill-published/55006>.

- 3.1 facilitate the enactment of electronic deeds registration provisions in order to effect the registration of large volumes of deeds as necessitated by the government's land reform initiatives; and to
- 3.2 expedite the registration of deeds by decreasing the time required for the deeds registration process.

However, this Bill does not address the issue of the registration of real security rights over movable property, but only land registration, although it does pave the way for the development of the online registration of real security rights.

In addition to the problems encountered regarding the registration of real security rights there is the negative system of registration in South Africa, where the Deeds Registry does not guarantee the accuracy of the information contained in the Deeds Registry records.<sup>83</sup> A real right can be created or a change of ownership can occur at any time, while this has not yet been registered in the Deeds Office.<sup>84</sup> This places third parties who might wish to have some dealings with the movable property in an unfavourable position in that they receive the property subject to the real security right of another creditor. According to Brits,<sup>85</sup> the legislature (in the SMPA) placed a special notarial bondholder in the position of a pledgee and in so doing "expressed a policy choice in favour of protecting the creditor's security regardless of who actually possesses the movable". He points out that the need for a valid form of pledge without possession outweighs the prejudice certain third parties might suffer. This strong position of the creditor is afforded only with due compliance to the provisions of the SMPA.<sup>86</sup> Compliance with the publicity principle is less dubious in the case of immovable than in the case of movable property due to the doctrine of constructive knowledge.<sup>87</sup> The rationale for this appears to be that since real security rights in respect of immovable property are registered, every person is deemed to have knowledge of the existence of the rights so registered in the Deed Registry.<sup>88</sup> This, in my opinion, seems to be based on the ground that immovable property cannot be moved from one place to another and is therefore easily identifiable, unlike movables. According to this study, the real problem is the ineffective registration system, although it is acknowledged that the difference in nature regarding movable and

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<sup>83</sup> See Schutte 2012 *PELJ* 120-151.

<sup>84</sup> Mostert and Pope *Property Law* 57.

<sup>85</sup> Brits 2015 *SA Merc LJ* 260.

<sup>86</sup> Particularly the specification and description requirements as provided for in s 1(1) of the SMPA.

<sup>87</sup> Mostert and Pope *Property Law* 57. See Van der Merwe *Sakereg* 340 on the doctrine of constructive knowledge.

<sup>88</sup> *Frankel Pollak Vinderine v Stanton* 2000 1 SA 425 (W) 432H.

immovable property (such as land) also contributes to the problems of non-compliance with the publicity principle.

Brits<sup>89</sup> suggests investigating the possibility of a "more sophisticated and computerised — yet simple, inexpensive and quick — system of publicity for security rights over movables". He points out that the SMPA was enacted in 1993 and that there have been innumerable technological advances since 1993. Although the registration of immovable in the Deeds Registry Office is effective and serves as fair publicity, an alternative asset registry for movable property should be considered. It is a shortcoming in the South African registration system that it is currently not possible for third parties to access the registry easily and inexpensively in order to establish the existence of a real security right over a specific movable property. All these shortcomings in the current registration system contribute to legal uncertainty and possible prejudice to either the creditor or third parties and the underutilisation of special notarial bonds as security in South African law.

## 5 The Belgian registration system

A pledge without possession vests and becomes enforceable against third parties upon registration in the EPR. A pledge agreement is required for registration and advance filing is therefore not possible.<sup>90</sup> The EPR encompasses principles similar to those enunciated in the Draft Common Frame of Reference (DCFR).<sup>91</sup> Access, fees, and any other matter relating to registration may be set by Royal Decree after consultation with the Commission on Privacy.<sup>92</sup>

In this section the registration process and certain functions of the EPR are considered. These are only guidelines, as the final regulations will be determined by the Royal Decree.<sup>93</sup> The EPR is organised on a national level and will be placed in the service of the *Hypothecken van de algemene administratie van de Patrimoniumdocumentatie van Financiën* (hypothecs of the general administration of *Patrimoniumdocumentatie* of Finance).<sup>94</sup>

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<sup>89</sup> Brits 2015 *SA Merc LJ* 272-273.

<sup>90</sup> Dirix 2014 *IIR* 174.

<sup>91</sup> See, eg, Hamwijk *Publicity in Secured Transactions Law* for a thorough discussion of notice filing in terms of art 9 of the Uniform Commercial Code.

<sup>92</sup> Article 34 of the *Belgian Pledge Act*, 2013.

<sup>93</sup> Advies Nr 15/2014 van 5 februari 2014 *Commissie voor de Bescherming van de Persoonlike Levenssfeer* <http://docplayer.nl/13356483-De-commissie-voor-de-bescherming-van-de-persoonlijke-levenssfeer.html>.

<sup>94</sup> Patrimonial documents are controlled by the Federale Overheidsdienst Financien (Federale Overheidsdienst Financien Date Unknown [http://financien.belgium.be/nl/over\\_de\\_fod/structuur\\_en\\_diensten/algemene\\_administraties/patrimoniumdocumentatie](http://financien.belgium.be/nl/over_de_fod/structuur_en_diensten/algemene_administraties/patrimoniumdocumentatie)).

The register is a computerised system directly accessible for online registration, renewal, and deletion of a pledge.<sup>95</sup>

Access to the register is subject to the authentication of the user. The precise rules for authentication are yet to be determined. Consultation of the EPR shall be free for the pledgor, pledgee, and a list of individuals as indicated in the Royal Decree. It is possible, depending on the Royal Decree's decision, that persons other than pledgees and the individuals listed may need to pay a fee to access the EPR.<sup>96</sup>

The pledgee who wishes to register a pledge must provide the following details: the identity of the pledgor (or his legal agent); the security object and the guaranteed obligation; and the maximum amount for which the obligation is guaranteed. The security objects must be described accurately.<sup>97</sup>

The *Belgian Pledge Act* places the responsibility on the pledgee to ensure that correct information is recorded in the EPR.<sup>98</sup> The pledgee will be liable against third parties who acted on the incorrect information in the EPR. He must inform the pledgor in writing once the pledge has been registered and also of any amendments. Once the pledgor receives the notification he has a chance to request the pledgee to remove or correct any inaccurate or incorrect data entries. Should the pledgee fail to do so, the pledgor may approach the *Dienst Hypotheken*, which will check the accuracy of the data and make any necessary corrections.

Third parties may access the EPR and view all the details provided by the pledgee. A registration number and date of registration will also be available. Specific rules pertaining to privacy are to be established by the Royal Decree. The pledgee may amend the details in the EPR if the details in the pledge agreement are amended, or if some details in the EPR are incorrect. The initial details and the amended details will show in the EPR.

The registration of the pledge will lapse after ten years.<sup>99</sup> If the pledgee wishes to renew the pledge he must do so before the registration lapses. Once the pledgor has settled the debt, the pledgee must remove the registration from the register. The pledgee and pledgor may agree that the

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<sup>95</sup> Eg renewal or deletion of any information that relates to registration. This National Pledge Register is said to encompass principles similar to those enunciated in the DCFR as far as the online search and registration are concerned.

<sup>96</sup> Dirix and Sagaert 2014 *EPLJ* 248.

<sup>97</sup> Article 31 of the *Belgian Pledge Act*, 2013.

<sup>98</sup> Article 31 of the *Belgian Pledge Act*, 2013.

<sup>99</sup> Article 35 of the *Belgian Pledge Act*, 2013.



registration be removed from the register before the debt has been settled. The pledge will then no longer be enforceable against third parties.

A transfer of the pledge together with the principal obligation must be recorded in the EPR. The registration must be done by the transferor and the identity of the transferee should be recorded.<sup>100</sup> How this is to be done is yet to be determined.

As stated above, the registration of the pledge renders it enforceable against third parties. Errors in the register will influence the effectiveness against third parties. The incorrect description of the pledgee, pledgor, or pledged object renders the pledge unenforceable against third parties, unless the incorrect information would not send a reasonable person on the wrong track. The incorrect description of the guaranteed obligation and the maximum amount secured by the pledge will not render it unenforceable against third parties.<sup>101</sup>

From the above it is evident that clear guidelines are in place for the regulation of the EPR. I conclude this discussion with the following remarks by Dirix and Sagaert:<sup>102</sup>

Furthermore, it remains uncertain whether the new Act will attain fully the economic objectives of the reform. The answer to that question also depends on the manner in which the pledge registry is organised and the cost of establishing security rights and access to the registry.

## 6 Conclusion

The publicity principle as a cornerstone of property law firstly requires that the existence of a real security right be made known to the public (third parties and/or potential purchasers). This means that third parties must be aware *inter alia* of the content of the right (including the nature of the real right and the principal debt secured by the right) and the security object. Secondly, the registration of the real right must be easily accessible and inexpensive. I am of the view that third party potential purchasers and/or creditors will be effectively protected if this route is followed. In other words, sufficient compliance with the publicity principle will ensure effective protection to third parties. Non-compliance with the publicity principle does not accord with the basic principles of real security rights and third parties

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<sup>100</sup> Peeters Law Date Unknown <http://www.peeters-law.be/documents/analyse-items/70-securities-on-movables.xml?lang=nl>.

<sup>101</sup> Peeters Law Date Unknown <http://www.peeters-law.be/documents/analyse-items/70-securities-on-movables.xml?lang=nl>.

<sup>102</sup> Dirix and Sagaert 2014 *EPLJ* 248.

are therefore left in the dark regarding the existence of a real security right over movable property.

This article has therefore revealed that despite the introduction of the SMPA, the legal position of notarial bonds in South African law still remains inadequate. The view is that the adequacy of notarial bonds, particularly special notarial bonds in terms of the SMPA, can be achieved through the establishment of an online electronic registration system that is easily accessible and inexpensive. The Belgian legislature adopted a functional approach when it drafted the new *Belgian Pledge Act*.<sup>103</sup> The Act was crafted to address practical problems regarding security over movable property. To give effect to the functional approach the EPR plays a vital role. Although the EPR is not yet operational, the guidelines for its operation may be of assistance in reforming South African real security law.

Reflecting on the purpose of publication, which is required for the vesting of a real security right, arguments are formulated indicating that the delivery of the movable property does not necessarily inform third parties of the right vested in that specific movable property. In South African law, the registration of real security rights as a form of publication has been questioned by many academics. In my view the registration itself is not the problem. The register is the problem. As indicated,<sup>104</sup> using a registration system specifically designed for the registration of rights in immovable property is problematic.

The time has come for the South African legislature to develop a registration system designed specifically for the registration of real security rights in movable property. In order to provide proper notice as required by the publicity principle, the registration system must be easily accessible and inexpensive. Regulations must be in place to determine exactly how the security object must be described, who is responsible for registration, and how amendments to and cancellations of the registered rights are to take place.

The guidelines for an online registration system provided in the Belgian EPR are a good starting point for the introduction and development of a register of real security rights in movable property in South Africa. A proper online registration system will satisfy the publicity principle and should ultimately do away with the distinction between general and special notarial bonds.

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<sup>103</sup> *Belgian Pledge Act*, 2013.

<sup>104</sup> See above at 4.

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## List of Abbreviations

CILSA	Comparative and International Law Journal of Southern Africa
DCFR	Draft Common Frame of Reference
EPLJ	Environmental and Planning Law Journal
EPR	Electronic Pledge Register
IIR	International Insolvency Review
LAWSA	Law of South Africa
PELJ	Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
SALC	South African Law Commission
SALJ	South African Law Journal
SMPA	Security by Means of Movable Property Act
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg

TSAR

Tydskrif vir die Suid-Afrikaanse Reg