

MORTGAGE BONDS AND EXECUTION AGAINST RESIDENTIAL PROPERTY

Introduction

In this lecture we will consider the following questions –

1. What is the nature of a mortgage bond? What sort of relationship does it create between the parties to it; and
2. When is it lawful and constitutional to attach and sell in execution someone's home in order to recover a debt?

Mortgage Bonds

A mortgage bond is an instrument, created by agreement, that secures a claim for **repayment of principal debt** or, less commonly, **performance of a principal obligation** against movable or immovable property. It grants the mortgagor a limited real right in the property against which the debt is secured. The limited real right continues until the principal debt or obligation is discharged. If the principal debt or obligation is not discharged the mortgagee may sell the property in order to recover the debt from the proceeds of the sale. This happens through a process, subject to judicial control in appropriate cases, called a “sale-in-execution”.

If the mortgagor is sequestrated or goes into liquidation, the mortgagee has a preferent claim over the property which forms part of the sequestrated or liquidated estate.

A mortgage may be granted over **corporeal moveables** and **all immovables** (i.e. corporal and incorporeal). Examples of incorporeal immovables include registered long leases or mineral rights.

The parties to a mortgage are:

1. the **debtor** (the person who owes the debt), who becomes the **mortgagor** of the property; and
2. the **creditor** (the person to whom the debt is owed), who becomes the **mortgagee** and acquires a limited real right in the property mortgaged.

The creditor's limited real right comes into existence upon registration of the mortgage bond against the title deed of the property.

No mortgage (or indeed no limited real right of security) can exist without a principal obligation (See **Kilburn v Estate Kilburn 1931 AD 501**). The corollary of this is that, as soon as the principal debt or obligation is extinguished, so is the limited real right and the mortgagor is entitled to the cancellation of the mortgage. The obligation to cancel the mortgage bond and to pay the principal debt are reciprocal obligations or obligations "*pari passu*". Once the debt is paid, there is no basis upon which the mortgagee may resist cancellation of the bond. The obligation to cancel the bond goes hand in hand with the obligation to pay the debt. (See **Nulliah v Harper 1930 AD 141 at 152**)

The functions of a mortgage bond: *Theinhaus v Metje and Ziegler 1965 (3) SA 25 (A)*.

In *Theinhaus*, it was held that mortgage bonds serve a number of functions:

1. They confirm the existence of a limited real right of the mortgagee to the property as security for the payment of the principal debt;
2. They serve as a written acknowledgement of the debt itself;
3. They serve as a record regarding the conditions of interest, payment and default on the principal debt.

Importantly, however, a mortgage bond **need not contain a description of the source of the principal obligation**. Mortgage bonds often do contain such a description, but this is not strictly required as a condition for the validity of the bond.

In *Theinhaus*, a mortgage bond was passed over property of a company known as “The Bachelors (Pty) Ltd”. A man called Gerrit Mejenberg was the sole director of both “The Bachelors (Pty) Ltd” and “Gerrit Mejenberg (Pty) Ltd”. The bond was registered in favour of a company known as Metje and Ziegler Ltd.

The case reveals a bewildering web of cessions and suretyships between the two companies, two other companies not named in the judgment and Mejenberg in his personal capacity. These relationships are not really relevant for present purposes. It appears, though, that The Bachelors (Pty) Ltd stood as surety for all the debts of Gerrit Mejenberg (Pty) Ltd due to Metje and Zeigler Ltd. It bonded its property to Metje and Zeigler Ltd as security in the event that it could not satisfy the suretyship. This gave rise to what is referred to in the case as the “surety mortgage bond”.

The relevance of the case lies in the fact the surety mortgage bond contained an error. Instead of referring to the obligation secured as the suretyship for the debts of “G. Mejenberg (Pty) Ltd”, it referred instead to “G. Mejenberg”, meaning Mejenberg in his personal capacity. Accordingly, the source of the principal obligation was

incorrectly described. The error was never rectified. The Bachelors (Pty) Ltd then went into liquidation.

The question was whether Metje and Ziegler Ltd retained a preferent claim over The Bachelors (Pty) Ltd's assets. The liquidator, Thienhaus, thought not, on the basis that the mortgage bond was invalid because it incorrectly described the source of the principal obligation. Theinhaus applied to the High Court for a declaration that the surety bond did not confer a preferent claim on Metje and Ziegler Ltd. His application failed.

The appeal to the Appellate Division was dismissed by a majority of three to two. Williamson JA held that the "*real object of a mortgage bond*" is "*to give notice to the world in general that a particular property of a debtor is the subject of a charge in favour of a particular creditor.*" Accordingly, it is not "*essential to the operation of the bond as a binding transaction as between the mortgagor and mortgagee that any rectification [of the mistake in the description of the principal debt] be obtained . . . That bond, without rectification . . . duly conveyed notice to the world, on its registration, of the existence of a security held by [Metje and Ziegler Ltd] over the specified property. The world at large was also notified of a suretyship bond 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 on 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*". (underlining added).

Accordingly, the true purpose of the mortgage bond is to give notice to the “whole world” of the existence of the limited real right. It is not a requirement for its validity that it accurately disclose the obligation secured.

Execution Against Residential Property

Introduction

The value of a mortgage bond as security for a debt is that it enables easy execution on the property against which it is secured. It normally creates what is known as a “liquid claim” for the sale of property against which it is registered. A liquid claim is founded upon a document which contains an unconditional acknowledgement of indebtedness for a fixed amount of money. A mortgage bond is just such a document (although the exact nature of the indebtedness at the time execution is claimed must normally be certified).

The claim to attach and sell the property against which the mortgage bond is registered is known as a “liquidated demand” upon which it is possible to obtain judgment from the Registrar of a Court if the debtor does not respond to the summons claiming payment of the principal debt and the right to execute against the property.

Before the advent of the Constitution, this was unproblematic. The Registrar of a High Court (or the Clerk of a Magistrates’ Court) could grant an order declaring all property subject to a mortgage bond executable. A sale in execution could then proceed in the manner envisaged in the rules of the relevant court.

The Constitution, however, changed the position. Because Section 26 (1) of the Constitution gives everyone the right of access to adequate housing, a sale in execution of a person's home obviously infringes that right. This does not mean that a mortgage bond can never be executed against residential property. But it does mean that, in addition to the validity of the bond itself, and proof that the principal debt has not been satisfied, special considerations are relevant when a mortgage bond is executed against a person's home.

These considerations, when they apply and what process should be adopted to explore them, have been subject to some controversy. The contours of the debate are set out in the cases dealt with below.

Jaftha v Schoeman; Van Rooyen v Stoltz and others 2005 (2) SA 140 (CC)

In 1998, Ms Jaftha borrowed R250 from the second respondent in the *Jaftha* matter (Ms Skaarnek), which was to be repaid in instalments. Although Ms Jaftha had paid some of the instalments, Ms Skaarnek referred the matter to the third respondent in both matters (Markotter Attorneys), the only firm of attorneys in Prince Albert, on the grounds that Ms Jaftha had not repaid her debt. Judgment was taken against Ms Jaftha in the Prince Albert magistrate's court in an amount which had escalated to R632,45 including interest and costs. Thereafter, and during the course of 2000, she made a further few payments through Markotter Attorneys.

However, Ms Jaftha was then hospitalised and when she returned home she discovered that her house was to be sold in a sale of execution to pay her outstanding debt to Ms Skaarnek. In March 2001 she was informed by Markotter

Attorneys that she would need to pay R5 500, including accrued interest, to prevent the sale of her home. Having made two further payments to Markotter Attorneys of R300 and R200 respectively, she went to their offices in July 2001 only to discover that she would have to pay R7 000 to prevent the sale of her home. This amount was way beyond her means and Markotter Attorneys were not willing to give her another chance to pay. Ms Jaftha was forced to vacate her meagre property following its sale in execution for R5 000 on 17 August 2001 to the first respondent in the *Jaftha* matter (Mr Schoeman).

Ms Van Rooyen is also an unemployed woman. She has three children. She too is poor and has never been to school. In 1997 her husband acquired their home with a state subsidy of approximately R15 000. After her husband died in 1997, she inherited the home. In 1995 she purchased vegetables on credit to the value of approximately R190 from the second respondent in the *Van Rooyen* matter (Ms Goliath). In this case too, Ms Van Rooyen was unable to repay the debt and Ms Goliath instituted proceedings which were also initiated by Markotter Attorneys against Ms Van Rooyen in the Prince Albert magistrate's court. The amount claimed was R198,30 plus interest and costs. Ms Van Rooyen's home was sold in execution for R1 000 on the same day as that of Ms Jaftha. It was common cause that both Jaftha and Van Rooyen had unsatisfied judgments against them obtained by other creditors; in the case of Ms Jaftha four others and in the case of Ms Van Rooyen two others.

See the Jaftha case: paras 3 to 5

Both Jaftha and Van Rooyen applied to have the sale of their homes set aside. They pointed out, in the first instance, the trifling amount of the debts executed upon. They also challenged the constitutional validity of s 66 (1) (a) and 67 of the Magistrates' Court Act insofar as these sections permitted a person's home to be sold in execution without judicial oversight.

The process by which a debt is recovered in the Magistrates' Court is as follows:

If the defendant in an action to recover a debt fails to enter an appearance to defend, the plaintiff is entitled to lodge with the clerk of the court a request for default judgment. After this request has been lodged, and where the claim is for a liquidated debt, the clerk of the court, as opposed to a magistrate, enters judgment in favour of the plaintiff.

Rule 36 of the Magistrates' Court Rules deals with the process in execution, which occurs when the judgment in the plaintiff's favour has not been satisfied. The process of execution starts with a warrant prepared by the judgment creditor's attorney and which is issued and signed by the clerk of the court and addressed to the Sheriff. The process does not need to involve the courts at all in circumstances where the original judgment was entered by consent or default but, if this is not the case, the process in execution may only be issued with leave of the court, which is sought at the same time as the granting of the judgment.

Therefore, if the judgment is entered by default because of, for example, the non-appearance of the defendant and where the debt is for a liquidated amount, the entire process occurs without any oversight by the courts. If judgment is not entered

by default and is granted after a hearing, court oversight occurs only at that initial hearing because Rule 36(7) provides for the application which initiates the process of execution to occur simultaneously with the granting of judgment and not at a later date.

Section 66(1) (a) of the Act prescribes the process from the time a court gives judgment in favour of a creditor until the ultimate sale in execution of the debtor's immovable property. The Sheriff calls at the home of the debtor and attaches movable property sufficient to settle the debt. If insufficient movables exist the Sheriff issues a *nulla bona* return, which reflects that there is insufficient movable property to settle the debt. On the strength of the fact that no movables are found, the clerk of the court is obliged to issue a warrant of execution against the immovable property. It is for him or her to decide whether, in the light of the sheriff's *nulla bona* return, insufficient movables exist to satisfy the judgment. Once he or she is satisfied of this fact, it follows that the debtor's immovable property will be sold in execution.

See the Jaftha case: paras 15 and 16

The question before the Court in Jaftha was whether this process allowed for a person's home to be taken away from them unjustifiably. It is important to note at the outset that the execution process does not deprive a person of occupation of their home. It deprives them of ownership. So the first question the Court in Jaftha had to answer was whether a deprivation of ownership infringed s 26 of the Constitution: the right of access to adequate housing.

The Court decided that it did. The Court held that security of tenure is a constituent of the right of access to adequate housing and any measure which interfered with security of tenure was an infringement of the right. Because ownership is an incident of security of tenure, to deprive a person of ownership of their home will always be an infringement of their right of access to adequate housing.

See the Jaftha case: paras 25 to 34

The question remains, though, whether such an infringement is justified in terms of s 36 of the Constitution. The Court held that there will always be circumstances in which execution against a person's home will be justifiable in terms of s 36. Whether an execution is justified will depend on factors such as the nature and size of the debt, the position of the debtor, the position of the creditor, whether there exist other means to collect the debt, whether the debt may yet be paid in the absence of execution, the circumstances in which the debt arose and so on. An execution will should not be granted if it would be grossly disproportionate response the debtor's default in all the circumstances.

See the Jaftha case: paras 40 to 42 and para 56

The difficulty with s 66 (1) (a) is that it obliges the clerk of the Magistrates' Court to issue a warrant of execution without considering whether the execution is justified. S 66 (1) (a) therefore plainly permits unjustified executions.

See the Jaftha case: para 43 and 44

Accordingly, the Court declared s 66 (1) (a) unconstitutional to the extent that it did not require a judge to weigh up the factors relevant to whether or not an execution is justified.

Standard Bank of South Africa v Saunderson 2006 (2) SA 264 (SCA)

The Constitutional Court's decision in *Jaftha* raised the question of the lawfulness of bond executions.

If a Court is required to weigh up the proportionality of executing against a person's home, then does the process by which a mortgage bond holder is entitled to have a property declared specially executable also need to be subjected to judicial scrutiny in all cases?

The Supreme Court of Appeal in *Standard Bank v Saunderson* thought not. This was so for the following reasons:

1. The right to adequate housing is not engaged in all cases of execution against residential property. Execution against a luxury home or holiday home or against commercial property would not obviously infringe the right.
2. In *Jaftha*, the debt upon which the creditor sought to execution was not specifically secured against the debtor's home. The situation of a mortgage bond debtor is, though, different. Its effect is that the borrower, by his or her own volition, either on acquiring a house or later, when wishing to raise further capital, compromises his or her rights of ownership until the debt is repaid. The right to continued ownership, and hence occupation, depends on

repayment. The mortgage bond thus curtails the right of property at its root, and penetrates the rights of ownership, for the bond-holder's rights are fused into the title itself.

3. The value of the mortgage bond as an instrument of security depends for its value on the creditor's knowledge that he can obtain quick and easy execution. Were the mortgage bond as an instrument of security compromised, this could have a serious impact on the availability of mortgage bonds.
4. Even the Court in Jaftha acknowledged that a mortgage bond debtor is in a position somewhat different to an ordinary debtor.

The Saunderson Court accordingly held that, even assuming that execution against a mortgaged home could infringe the right of access to adequate housing, it is hard to imagine circumstances under which it would not be justified. It is highly unlikely that the right to execute would even be denied altogether – unless some sort of abuse of court procedure could be demonstrated.

See the Saunderson case: paras 1, 2, 3, 15, 16, 17, 18 and 19

It is though, possible to imagine that a court may delay execution in circumstances where a debt may yet be paid, but a mortgage bond debtor in such a case would be required to bring to the court's attention circumstances which justified such an order.

See the Saunderson case: para 20

The Court in *Saunderson* also considered whether a Registrar of the High Court should be empowered to grant an order declaring property specially executable. The Court held that he should be so empowered, provided that he was referred a matter to a judge in open court where he is in any doubt that execution is justified – even in cases where he is approached informally by the mortgage bond debtor.

See the *Saunderson* case: para 24

The Court finally acknowledged though, that it is possible that execution on a mortgage bond may infringe the right of access to adequate housing, even where there is no defence to the claim for payment. In these circumstances, the Court held that all summonses seeking execution on a bond must draw to the defendant's (debtor's) attention that he or she may claim that his or her rights of access to adequate housing may be infringed by the execution, and drawing his or her attention to their right to make submissions to a court to support that claim.

See the *Saunderson* case: paras 25 and 26

Gundwana v Steko Development CC 2011 (3) SA 608 (CC)

The SCA's decision in *Saunderson* was overturned in *Gundwana*, a recent decision of the Constitutional Court.

In that matter, the applicant, Elsie Gundwana, fell behind with her bond payments to Nedbank. The bank then began the process of execution against her home. She telephoned the bank to make arrangements to repay the arrears on the bond before judgment was taken against her. She said the bank agreed not to take judgment against her if she paid certain amounts, which she duly paid.

Unknown to her, the bank nonetheless took judgment against her from the Registrar of the High Court at Cape Town. The judgment included a provision entitling it to sell her property in execution of the debt owing on it. However, the bank did not sell her property in execution of the debt for further four years, during which it continued to accept payments on the bond as if nothing had happened.

Four years later, Gundwana fell into arrears again. The bank then immediately sold her home in execution on the authority of the judgment it had obtained four years previously. The new owner of the property, Steko Development CC, then sought and obtained an order for her eviction, which she unsuccessfully appealed against.

Gundwana then applied directly to the Constitutional Court for an order declaring that the judgment upon which the bank had executed was unlawfully obtained because it was granted by a Registrar and not a Judge. Essentially, the argument was that *Saunderson* was wrongly decided.

The Constitutional Court agreed. In the first place, it confirmed that the effect of *Jaftha* was that “*where execution against the homes of indigent debtors who run the risk of losing their security of tenure is sought, after judgment on a money debt, further judicial oversight by a court of law, of the execution process, is a must*”.

See Gundwana para 41

The Court then went on to consider an argument, advanced by reference to the decision of the SCA in *Saunderson* that the fact that a mortgagor places his or her home at risk voluntarily renders judicial oversight unnecessary.

The Court accepted that a mortgagor voluntarily places her ownership rights at risk when she puts her property up as security for the principal debt, and thereby accepts that the property may be executed upon in order to obtain satisfaction of the debt.

But, Froneman J asked –

“[D]oes that particular willingness imply that she accepts that –
(a) The mortgage debt may be enforced without court sanction;
(b) She had waived her right to have access to adequate housing or
eviction only under court sanction of s 26 (1) and (3); and
(c) The mortgagee is entitled to enforce performance, in the form of
execution, even when that enforcement is done in bad faith?
I think not.”

See Gundwana paragraph 44

Accordingly, the Court declared that it is unconstitutional for the registrar of a High Court to declare a person’s home executable when ordering default judgment.

Absa Bank v Ntsane 2007 (3) SA 554 (T)

An application of the above principles came in *Absa Bank v Ntsane*. There, the Court refused to grant an order declaring a home specially executable because it had been acquired with the assistance of a state subsidy and because the amount in which the bond debtor was in arrears at the time the bank decided to execute upon it was a mere R18,46. For this reason, the bank called up the full amount owing in terms of the bond: R62 042, 43.

See the Ntsane Case: para 12

The Court in Ntsane held that it could and should enquire from the bondholder why such a small sum that is in arrears cannot be collected in another way. It can also refuse to grant execution against a home where the results would be so iniquitous or unfair to the house owner that the enforcement of the full rights to execution would amount to an abuse of the system. The Court decided that, on the facts, the bank was abusing its rights.

See the Ntsane Case para 79 and onwards.