De Villiers C J in the Mabunya case submitted that an agreement whereby a creditor would in the event of non payment, be entitled to buy for a reasonable price the property submitted as security, would be valid. He quotes the Digest 18 1 81 and Voet 20 1 21 to substantiate the above.

Wille is of the view that an agreement of this nature would be perfectly valid, as it is considered to be a conditional sale and is enforceable by the mortgagee.[8] He refers to an analogous agreement, namely that a pledgee of a life insurance policy may, on the default of the pledgor, cancel the policy and apply its surrender value to the payment of the debt secured.[9]

8. The Law of Mortgage and Pledge in South Africa (1961) 2nd ed at 80.

9. Ibid and Sun Life Assurance Co of Canada v Kuranda 1924 AD 20 at 25 . Solomon J A in the instant case submits that the agreement between the plaintiff and the assurance society concerned, merely provided that on non-payment of the debt on due date it was entitled to cancel the policy, such provision would amount to a pactum commissorium. However, the agreement went on to provide that the society could apply the cash surrender value on such cancellation to the payment of the loan and interest, and should the surrender value on such policy exceed the amount of the loan together with interest, then such excess would be payable to the legal owners of the policy. The addition of those clauses made it a perfectly just and equitable agreement.

De Wet and Yeats[10] have difficulty with this proposition and contend:

> "Dieselfde beswaar wat Voet en ander teen die pactum commissorium opper, kan ook teen hierdie soort afspraak gemaak word, nl. die gevaar dat 'n hardvogtige skuldeiser misbruik maak van sy magsposisie en die skuldenaar tot die sluiting van die beswarende ooreenkoms beweeg."

2.2.5 Recent developments

Hunt P M A[11] is of the opinion that section 1(1) and section 4 of the Conventional Penalties Act 50 of 1962 brings pacta commissoriae in mortgage bonds and pledges within the purview of the Act.

This argument does not appear to have been pursued in the recent case of Abbott v Cawood,[12] nor is this opinion shared by Coaker J F and Zeffert D T.[13] The opinion of the latter authors is to be preferred.

10. De Wet and Yeats Die Suid-Afrikaanse Kontraktereg en Handelsreg 4th ed by De Wet J C & van Wyk A H (1978) 361 n132.

11. "Did Homer Nod" (1964) 81 SALJ 238.

12. 1982 (2) SA 153 (NC).

13. Wille and Millin's Mercantile Law of South Africa 18th ed (1984) at 392.

3. Defects in form

3.1 General

There is no standard mortgage bond form prescribed by the Deeds Registries Act 47 of 1937, save for two specific types of mortgage bond, namely collateral and surety mortgage bonds. The question arises as to whether formal defects in the mortgage instrument would invalidate the mortgage bond.

At the outset it is appropriate to set out the provisions of section 100 of the Deeds Registries Act 47 of 1937:

> "No act in connection with any registration in a deeds registry shall be invalidated by any formal defect, whether such defect occurs in any deed passed or registered, or in any document upon the authority of which any such deed has been passed or registered or which is required to be produced in connection with the passing or registration of such deed, unless a substantial injustice has by such act been done which in the opinion of the court cannot be remedied by an order of court."

With regard to the aforementioned provision, where a permit in terms of the Group Areas Act 36 of 1936 incorrectly cited the transferees name, Cilliers J stated as follows:-

1. Ismail v Apex Permanent Building Society and another 1966 (4) SA 79 (W) at 81

> "The error or defect concerns the form of the document and not the substance. It is therefore a formal defect. There is in this case no evidence of any substantial injustice, indeed of any injustice, which has been done to anybody as a result of this defect."

Accordingly the court held that the instrument was valid and binding.

3.2 Power of attorney

An instructive case and an oft cited one is that of Sutter v Scheepers.[2] The facts, briefly stated, are as follows:-

The mortgagee claimed provisional sentence for a sum owed in terms of a third mortgage bond registered against the mortgagors' farm. The mortgagors resisted claim on two grounds:

(1) when the power of attorney, upon which the bond in question was executed, was signed by the mortgagor, it did not contain any particulars as to what was hypothecated and what liability was incurred by the respondent. It was signed in blank and given to the mortgagee under the distinct understanding that he was only to hypothecate a life usufruct of the mortgagor and his wife and not to bind him in any further way. The mortgagee fraudulently authorised the conveyancer to insert a clause

2. 1932 AD 165.

that the mortgagor and his wife were to be jointly and severally liable for the debt.

(2) The second defence was based on the fact that the power of attorney to pass the bond was not properly attested, and therefore was invalid.

With regard to the first defence, the court held that if a person signs a blank power of attorney, he must take the consequences if his faith in the grantee has not been justified.[3] The second defence hinged on the interpretation of section 56 of Act 13 of 1918 which was of similar import to the present provision of the Deeds Registries Act 47 of 1937.[4] Wessels J A laid down certain tests and concluded that the provisions of section 56 were directory in meaning and said that to hold any other view would open the doors to injustice and fraud.[5] This approach was applied to section 95(1) of the Deeds Registries Act 47 of 1937 by the courts in Hersch v Bedelia Gift Centre (Pty) Ltd[6] and Barclays National Bank Limited v Wollach.[7]

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3. Ibid at 175.

4. Section 95 (1).

5. Ibid at 174 and 176.

6. 1958 (3) SA 838 (O).

7. 1980 (1) SA 615 (C).

3.3 Description of causa, parties and property

In Thienhaus N O v Metje & Ziegler Ltd and another,[8] as mentioned in the previous chapters, if a defect relating to the form of the bond is such that it renders the obligation to be secured under the bond non-existent, then the hypothecation itself would be affected. However, a defect relating to a form of the bond purely as an instrument of debt does not itself destroy the validity of the bond as a deed of hypothecation. This principle was endorsed by the Appellate Division in the above case, with Wessels J A dissenting. The material facts of the above case were that the principal debtor was erroneously described in a surety bond as being an individual as opposed to a company. The appellant petitioned the court below for an order declaring that the surety mortgage bond did not create a valid security or preference and that such bond could not now be rectified. Accordingly, in liquidation the claim of the respondent should be admitted only as a concurrent claim. The mortgagor and mortgagee were fully *ad idem* with regard to:-

(1) The nature and the amount of the debt for which the mortgagor was standing surety and which had to be secured by the bond;

8. 1965 (3) SA 25 (A).

(2) The mortgaged property as security for the mortgagors suretyship obligation;

(3) The nature of the debts due by the principal obligation; and

(4) The identity of the debtor whose liabilities to the mortgagee would be thus guaranteed.[9]

Williamson J A[10] held that it would be an undue attention to formality to hold that the 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. The learned judge was of the view[11] that this description could in no material way have misled or prejudiced any person requiring knowledge of the existence of a charge upon the particular property hypothecated, and it was abundantly clear that there was no fraud involved. Wessels J A,[12] in the instant case, was of a different view. After a thorough anyalysis of various decided cases relating to the description of a causa debiti, he con-

9. Ibid at 29.

10. Ibid at 32.

11. Ibid at 34.

12. Ibid at 35.

cluded that they ought not to be followed.[13] The thrust of his dissent lay with the nexus between the antecedent agreement and the principal debt which it was intended to secure by the hypothecation.[14] The real right would have neither meaning nor legal efficacy, except in relation to the debt in which it was intended to secure, and accordingly the description of the debt, he argued, was an essential to the recognition of the mortgagee's real right. Both Wessels J A and Williamson J A were mindful of the possibility of fraud and the possible prejudice to the rights of innocent parties. Schoeman[15] remarks that the decision is far-reaching. In particular, in so far as any description of the details of the origin or nature of the obligation to be secured is, since the Thienhaus case, not an essential requirement of a mortgage bond as an instrument of hypothecation. The only essentials being the identity of

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13. Ibid at 42 - The material cases referred to were:- Pienaar and Fraenkel v Fourie's Trustees and another 1913 CPD 227; Goodman's Trustee v Goldberg 1914 WLD 119; Dowjee Co Ltd v M M E Dawjee & Co 1930 TPD 240; and the somewhat tenous case of Wasserzug and others v Ritch's Estate 1927 TPD 231.

14. Ibid at 43.

15. Silberberg and Schoeman The Law of Property 2nd ed by Schoeman J (1983) at 436.

the property mortgaged, the parties to the mortgage and such other information as may be sufficient to indicate the existence of a principal obligation. He prefers the majority view, as it prevents the unnecessary frustration of the real right by technical irregularities. He feels that the Thienhaus case may be qualified in due course if it can be shown that the incorrect description of the principal debt in a mortgage bond has misled a creditor to act to his prejudice.

3.4 Instrument of Debt

An additional requirement with regard to the form of a mortgage bond has been imposed by the Limitation and Disclosure of Finance Charges Act 73 of 1968.[16] The provisions of section 2(9) provide inter alia that no person shall in respect of a money lending transaction stipulate for demand or receive from a borrower or credit-receiver or lessee, finance charges not disclosed in an instrument of debt executed by the money lender in respect of any such transaction. The term 'instrument of debt' is defined in section 1 of the same Act as including a bond but does not include any covering bond insofar as it purports to convey security for future advances. Thus, in the light of the above two provisions, certain

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As amended by the Limitation and Disclosure of Finance Charges Amendment Act 90 of 1980.

building societies have deemed it fit to include the instrument of debt in the mortgage bond itself.

The conveyancer signs the mortgage bond on behalf of the mortgagee in compliance with section 2(9) of the above Act. This obviates the necessity of having a separate instrument of debt. However, it appears that the building societies have not placed much weight on the proviso to the definition of instrument of debt, as they utilise the same procedure in respect of covering bonds. That being so, they are prejudicing themselves with regard to finance charges in respect of future advances. Tucker R S,[17] in an informative article on the above Act, feels that the conventional costs clause does not purport to convey security for future advances but rather for future indebtedness. He also refers to section 50 of the Deeds Registries Act 47 of 1937, which provides that mortgage bonds intended to secure loans for building purposes shall be deemed to be bonds to secure existing debts. In order to remedy this anomalous situation, he adopts the view that a separate instrument of debt must be signed by the creditor in respect of a bond falling within the ambit of the proviso to section 1, or where a readvance is made under such covering mortgage bond.

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17. Tucker R S "Limitation and Disclosure of Finance Charges Act" (1980) De Rubus 581 at 582 para 5.

The views of Tucker are shared by Vorster H,[18] who adds that he has serious difficulty with the proposition that a mortgage bond, which is in law required to be executed by the money lender, can be said to be thus executed merely because it appears that on the face of it an irrelevant and legally insignificant signature has been placed thereon on behalf of the money lender. It can be said that the document has been 'signed' on behalf of the money-lender, but he submits that it cannot be said to have been 'executed' on behalf of the money-lender. He submits that the intention of the legislature with regard to section 2(9) of the said Act seems to have been to compel the money-lender to enter into an underlying instrument of debt on the strength of which the mortgage bond is executed. His understanding of the legislature's intention may possibly be endorsed by the fact that the mortgagor does not receive a copy of the mortgage bond itself, and accordingly a seperate instrument of debt would furnish the mortgagor with a record of the financial provisions of the transaction involved. It may be mentioned that certain transactions are exempt from the provisions of the above Act,[19] the most prevalent for our purposes being that the said Act does not apply to a money-lending transaction in terms of which the

18. Vorster H "Notes to the Paper delivered by Henry Vorster on the Limitation and Disclosure of Finance Charges Act ('Ladofca')" delivered at a Symposium in March 1981, at 57.

19. Section 15.

principal debt, on the date on which such transaction is entered into, exceeds the sum of R100 000,00.

Chapter VI

CONCLUSION

Having briefly traversed some of the defects relating to mortgage bonds, one may safely conclude that in order to understand the nature and effect of such defect one must be mindful of the dual nature of mortgage.

The majority of mortgages which are found to be invalid, usually have a defect which affects the validity of the principal obligation. It is at this initial stage that a greater degree of care should be implemented. The act of registration of a mortgage bond in respect of a defective principal obligation does not cure an underlying defective principal obligation.

Furthermore it appears that the courts are loath to declare a mortgage bond to be of no force or effect where there is a defect in the attendant mortgage instrument. The real right of mortgage would then fall away, but this would not necessarily affect the validity of the principal obligation.

Finally, it is hoped that our courts will have the opportunity to squarely address the issue of irregular retention of security and it is hoped that they will conclude that such retention is invalid and does not form part of our law.

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