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DEFECTS RELATING TO MORTGAGE BONDS WITH PARTICULAR REFERENCE TO THE EXTINCTION OF THE PRINCIPAL OBLIGATION AND IRREGULARITIES PERTAINING THERETO

Christos Demetrius Christos

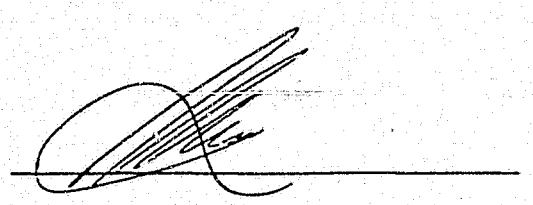
Research report for the approval of the Senate in fulfilment of part of the requirements for the degree of Master of Laws by Course-Work of which the other part consists of the completion of a program of courses.

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Johannesburg November 1985

DECLARATION

I declare that this dissertation is my own, unaided work. It is being submitted for the degree of Master of Laws in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in any other University.



C D CHRISTOS

23 day of NOVEMBER , 1985

TO SOULA

PREFACE

I wish to express my appreciation to my supervisor, Professor Johan David Van der Vyver, for his assistance , to Maria Barbosa for typing the dissertation, to my wife for her moral support and to Doctor C Matzukis for her kind assistance in the Latin translations.

Johannesburg
November 1985

Chris Christos

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1. All references are to page numbers

2. Underlined references indicate that the case is dealt with more fully, or that the facts of the case or critical commentary may be found at those pages.

3. "n" denotes footnote appearing on the relevant page mentioned.

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LIST OF ABBREVIATIONS

LEGAL PERIODICALS

SALJ - The South African Law Journal

LAW REPORTS

AC - Appeal cases, House of Lords & Privy Council

All ER - All England Law Reports

US - Reports of cases in the Supreme Court of the United States

Chapter I

INTRODUCTION

In order to acquire a decisive grasp of the abovementioned topic and in order to ascertain its parameters, it is necessary to understand what the term "mortgage" connotes. This aspect will be dealt with at the outset of this dissertation.

Secondly it is essential that one is apprised of the juridical nature of mortgage so that one has a clearer understanding as to what extent a particular defect will affect the transaction concerned. Thus, a material defect relating to a principal obligation will have as a concomitant effect, the extinction of the accessory obligation, whereas, the reverse situation would not necessarily lead to the extinction of the former.

Furthermore, by dissecting a mortgage into its underlying parts, one is then able to isolate the legal nature of each component and then utilise the cardinal principles relating to that branch of the law. This is particularly apposite in a field which has a "dual nature", such as mortgage, pledge or suretyship, where the respective parts do not necessarily have the same juridical base.

In defining "mortgages of conveyance" L C Warden[1] submits:-

> "There is perhaps no species of ownership known to the law which is more complex than that which has sprung from the mortgage of real property. This is by reason of the dual character of mortgage, which is frequently defined as a conveyance of property to secure the performance of some obligation, the conveyance to be void on the due performance thereof."

Fortunately, mortgage in our legal system suffers to a lesser extent from the complexities that are inherent in the American and English legal systems.[2]

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1. Warden L.C."Mortgages" Sattinger O C (eds) 1971 55 American Jurisprudence (2nd ed) 151 at 192.

2. The field of mortgage is further complicated by the existence of two kinds of mortgage which are governed, on the one hand, by legal principles and, on the other hand, by equitable principles. In the United States of America one has the mortgage of real property which is effected by the conveyance of property which is to secure the performance of the obligation, which conveyance becomes void upon the due performance of the obligation. In this instance the aspect of conveyance is exercised. One also has mortgages that are more akin to the South African mortgage, which is as security for a principal obligation: United States v Common Wealth Title Insurance and T Co (1904) 193 US 651. This later form of mortgage is sometimes also referred to as a chose in action or a trust. The use of the term "trust", however, appears to have been frowned upon; 55 American Jurisprudence (2nd ed) at 193-4 n14. Uniformity has been achieved in many jurisdictions by judicial decision or statute, by the adoption of the principle that a mortgage is in fact a security and not a conveyance; idem at 194. The English legal system has a similar dichotomy of mortgage into legal and equitable mortgages. However, in terms of the Law of Property Act of 1925 15 Geo V c20, the legal fee always remains vested in the true owner. Legal mortgages are in turn split up into two general categories, namely, mortgage by lease, and mortgage by a legal charge. Equitable mortgages on the other hand, can be classified into four different categories, namely,

Reference will be made to those legal systems in the course of this treatise, where relevant.

Although this topic will be confined to mortgages over immovable property, material relating to notarial bonds, liens, pledges, and suretyships will be examined in order to expand on certain principles and to support certain propositions. It will be observed that many of the underlying legal principles relating to suretyship are analogous to the underlying legal principles relating to mortgage bonds, which thus provides us with a convenient succor.

Finally, it may be mentioned that when dealing with the principal obligation, in order to avoid rendering a superficial treatise of the nature of the principal obligation due to its broad compass, it is intended to concentrate on the more predominant form of principal obligation, namely that founded in contract, and more particularly statutory restraints.

---

an agreement to create a legal mortgage, secondly a deposit of the title deeds of the property, thirdly the mortgage of an equitable interest and lastly equitable charges.

Chapter II

TERMINOLOGY

The term "mortgage" [1] has been accorded diverse connotations. Voet 20 1 1 states that:-

> 'Pignus generalius acceptum, quandoque jus conftitutum, quandoque rem ipfam obligatam, frequenter ipfam conventionem; quâ jus illud inducitur, defignat: quamvis verum fit, non ex conventione tantum, fed & à lege, vel praetore, vel judice, vel teftatore conftitui pignoris jus. Conventionale fenfu latiore & pignus in fpecie & hypothecam complecitur, adeo ut inter pignus & hypothecam tantum nominis fonus differat, & ex utroque actio hypothecaria nafcatur." [2]

---

1. It appears from Osborn's Concise Law Dictionary (7th ed) by Roger Bird at 224 that the term "mortgage" is an amalgam of the term "mort", meaning dead, which has Norman French origins and "gage", meaning a pledge, which has its origins in low Latin.

2. 20 1 1 "Taken in its more general sense, pledge denotes sometimes the right established, sometimes the very thing put under obligation, and often the actual convenant by which that right is produced. It is, however, true that the right of pledge is established not only by virtue of convenant, but also by law, or by the praetor or the judge, or by a testator.

   Conventional pledge, properly so called, in its broader sense embraces also hypothec, so much so that the only difference between pledge and hypothec is the sound of the names, and a hypothecary action arises from both of them." (Gane's translation).

Gane[3] in his translator's note to this passage, submits that pledge is that form of hypothecation which is accompanied by possession of the thing hypothecated, whereas hypothec is not so accompanied.[4] He submits that Voet often used either word convertibly. Gane in his translation of Voet has introduced the term "mortgage" which was unknown in Netherlands law and is generally used where immovables are concerned.

Wille [5] correctly contends that the term "mortgage" connotes a right, which right was not dealt with on a uniform basis by leading Roman Dutch authorities.

---

3. Ibid at 470.

4. The earlier and classical Roman law knew of two legal types of real security, namely fiducia cum creditore and pignus. The former was the earliest form of real security under the Roman law and was probably recognised in the third century B C; Pugsley D The Roman Law of Property and Obligations (1972) at 72. At a later stage hypotheca was introduced, which was embodied in a simple agreement without the requirements of mancipatio or traditio. Hypotheca is sometimes dealt with as a third form of security. Marcian says that there was no difference between this form of security and pignus.

   Ulpian and Justinian distinguished the two by submitting that pignus implies transfer of possession whereas hypotheca does not. Although the nomenclature hypotheca has Greek origins, Lee R W submits that it was merely a natural outgrowth of the Roman pignus; Elements of Roman law (1956) 4th ed at 177. Van der Merwe C G in Sakereg (1979) 439 submits that in the later classical law the distinction between pignus and hypotheca disappeared.

5. Wille G: The Law of Mortgage and Pledge in South Africa (1961) 2nd ed at 1.

Wille submits that Van Leeuwen and Grotius place no limitation on the nature of the property, the nature of the obligation or the manner in which the security is constituted. Other writers use the terms hypotheca, pignus or pandt in a restricted sense by limiting them to particular forms of mortgages and by limiting the principal obligation to money debts.[6] As to present-day usage, the dictum of Van Heerden J in Ex parte Mather N O and others[7] is instructive:-

> "The term 'mortgage', when used to denote a right, in its comprehensive sense, is a right over the property of another which serves to secure an obligation and, in its restrictive sense, is generally limited to describing securities over immovable property. Wille, Law of Mortgage and Pledge in South Africa, 2nd ed., p.1."

Statutory acceptance and usage of the term 'mortgage bond', as relating to immovable property, can be found in section 102 of the Deeds Registries Act 47 of 1937 which defines a mortgage bond as a bond attested by the registrar specially hypothecating immovable property. A bond hypothecating movable property is, in the same Act, purely referred to as a notarial bond. Thus it is evident that the legislature has utilised the nomenclature 'mortgage' to denote that the subject matter of the right is immovable property.

For the purposes of this dissertation, the use of the term 'mortgage' shall mean a real right over immovable property.

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6. Idem.

7. 1971 (3) SA 381 (D) at 385.

Chapter III

JURIDICAL NATURE OF MORTGAGE

Voet in his learned utterances stated that a hypothec is a kind of accession to a main obligation and as a general rule has no existence at all without one.[1]

This fundamental tenet constitutes the cornerstone of our law of mortgage and the locus classicus is the case of Kilburn v Estate Kilburn[2] where Wessels A C J, with whom Stratford J A, Roos J A, and Hutton A J A concurred, held that:-

> "it is true that you 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 ... it is therefore clear that by our law there must be a legal or natural obligation to which the hypothecation is accessory. If there is no obligation whatever there can be no hypothecation giving rise to a substantive claim."

---

1. 20 1 18.

2. 1931 AD 501 at 506.

The cases that have confirmed this irrefragible principle of mortgage are legion.[3] In the case of Oliff v Minnie[4] Van den Heever J A had the following to say with regard to the reverse situation, namely, the extinction of the hypothecation:-

> "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. But even if this bond ceased to be a mortgage bond within the contemplation of the section, then the instrument could have had further existence only as an acknowledgment of debt..."[5]

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3. Kadrinka v Lorentz 1914 TPD 32; Mahomed & Son Ltd v Estate Horvitch 1928 AD 1; Union Government v Fisher's Executrix 1921 TPD 328; Thienhaus N O v Metje and Ziegler Ltd 1965 (3) SA 25 (A); Chapman v Executors, Estate of Fynney (1888) 9 NLR 243 at 246.

4. 1953 (1) SA 1 (A) at 3.

5. See too the cases of Registrar of Deeds (Transvaal) v The Ferreira Deep Ltd 1930 AD 169 at 180; Lief N O v Dettman 1964 (2) SA 252 (A) at 265. Lubbe G F "Mortgage and Pledge" in Joubert W A (ed) The Law of South Africa 1983 (Vol 17) 287 at 291 para 396 refers to a notarially executed instrument known as a mortgage bond which is of a dual nature in that it usually serves both as a record of the principal obligation and its terms and of the mortgage relationship in its contractual and hypothecatory aspects. It is respectfully submitted that Lubbe could not have intended to have introduced the term 'notarially', as the notarial procedure is only adopted in respect of movable property. This is endorsed by the fact that this paragraph falls under the heading 'mortgage' which has been defined by the learned writer as a real right of security in an immovable asset. In the case of Union Government v Fisher's Executrix 1921 TPD 328 it was held that the mortgage bond was not a negotiable instrument.

The State and Federal law of the United States of America[6] has the same irrefrangible principle. Warden L C[7] thus summarises the position:-

> "The existence of an obligation to be secured is an essential element of a mortgage. The mortgage has no efficacy if unaccompanied by a debt or obligation... Accordingly, where the obligation secured fails, the mortgage is likewise commonly considered to be a nullity."

This distinctive feature which pertains to real security as opposed to other real rights, has with it the further distinguishing characteristic that the holder of the right does not receive a concomitant benefit of use and enjoyment of the thing hypothecated. Wille[8] thus submits that the distinctive features of mortgage, as opposed to other real rights, are:-

(a) an obligation to be secured;

(b) property to which the mortgage right is to attach; and

(c) the calling of the mortgage right into existince.

---

6. New Orleans National Banking Association v Adams, Adams & Regnaud [1883] 109 US 211.

7. "Mortgages" Sattinger O C and Others (eds) 1971 55 American Jurisprudence 2nd ed 151 at 277.

8. The Law of Mortgage and Pledge in South Africa (1961) 2nd ed at 4.

An attendant characteristic is that the real right of mortgage is indivisible.[9]

As to whether a mortgage is a movable or an immovable, the words of Wessels J A in Lief N O v Dettman[10] are pertinent:-

> "In my opinion the determining factor in classifying a mortgage bond either as an immovable or a movable for any particular purpose may, generally speaking, be said to depend on whether the purpose in question relates more particularly to the bond as constituting an acknowledgment of debt or as an instrument of title to a real right in the land hypothecated thereby."

---

9. Van der Merwe C G in Sakereg (1979) at 444 cites as authority for this proposition, Van Leeuwen Cens For 1 4 11 11 and Voet 13 7 6 Thus the property which is burdened as the security for the debt is not reduced in proportion to the reduction of the indebtedness. It is submitted that the Deeds Registries Act does not derogate from this principle, save with the exception of section 15(5) which relates to the participation of mortgage bonds (Van der Merwe C G ibid) The procedure known as part payment or reduction in cover where this relates to a continuing covering bond, purely affects the principal obligation and not the security. The provisions of section 56(2) and release of security generally, relate to the situation where the security comprises a number of erven or units which are individually released, usually upon the concomitant reduction of the principal obligation.
See, too, Voet 13 7 6, 20 4 4 and 20 6 2.

10. 1964 (2) SA 252 (A) 266.

Chapter IV

ANALYSIS OF THE DEFECTS RELATING TO THE PRINCIPAL OBLIGATION

1. Limitation in the nature of the principal obligation

In scrutinising those cases where the courts have held a mortgage to be defective, one will detect that in the majority of cases the destruction on extinction of the mortgage was due to an invalid principal obligation. Thus, it is apposite at this juncture to define the nature of an obligation with reference to the limits of the principal obligation so as to determine its legal restraints.

An obligation[1] is a jural[2] bond between two legal subjects in terms of which one, being the creditor, has a right to a particular performance against the other, being the debtor, the latter having a corresponding duty to render the performance.[3]

---

1. The law of obligations, things, succession and intelectual property, are divisions of the law of property. (Contra Hahlo H R & Kahn E, The South African Legal System and its Background (1968) at 120.) Obligations arise mainly from four sources, namely, contract, delict, unjustified enrichment, and by operation of law (the latter not being traditionally treated as being a source of the law of obligations).

2. A moral right to performance is thus not an obligation.

3. Inst 3 1 3 and D 44 7 3. The performance need not be monetary; however, the performance must have an economic value.

The principal obligation may be of any kind, and it has been stated[4] that it may be civil, praetorian, natural,[5] or honorary. Thus Wille[6] submits that it may arise from dowry, purchase, sale, letting and hiring, mandate, suretyship, and for a judgment. It may arise from delict or unjust enrichment,[7] performance of an act or a series of acts, a money debt, or in fact it may arise from any valid principal obligation.[8] It has

. . . . . .

4. Civil obligations are afforded full legal protection in that they are directly enforceable by an order for specific performance and indirectly by an award for damages for breach, or by sett-off, and can serve as the basis for a valid novation. Lotz J G "Obligations" in Joubert W A (ed) The Law of South Africa (Vol 19) 141 at 145.

5. A distinction should be drawn between naturales obligationes plenae (efficaces) and naturales obligationes minus plenae (inefficaces). Lotz J G ibid submits that the former are termed natural obligations in South African law, and the latter according to Voet were either wholly or partly discountenanced (obligationes impropata). Voet includes gambling transactions under those obligations which are wholly discountenanced.

6. The Law of Mortgage and Pledge in South Africa (1961) 2nd ed at 5.

7. Van der Merwe C J Sakereg (1979) at 447.

8. Lubbe G F "Mortgage" in Joubert W A (ed) The Law of South Africa (Vol 17) 285 at 294, contends that although the aforegoing is correct in theory, it has become customary in conveyancing practice to express the principal obligation as one sounding in money for a liquid amount. The underlying reason therefor is twofold. It is done in order to obtain the advantage of provisional sentence proceedings for mortgage, and secondly to facilitate the satisfaction of the mortgagees claim out of the proceeds of the mortgaged assets upon default or insolvency. It must be borne in mind that the Conventional Penalties Act 15 of 1962 may be applicable where the amount may be viewed by the courts as constituting a penalty. In this regard see the case of Parekh v Shah Jehan Cinemas (Pty) Ltd and others 1982 (3) SA 618 (D).

been treated as settled law that in the field of suretyship the principal obligation might be ad factum praestandum or ad faciendum aliquid.[9]

Thus, a suretyship for the performance by a building contractor of his obligations under a contract for the construction of a building was held to be a valid principal obligation. A further instructive case relating to the principal obligation in the field of suretyship which would be equally applicable in the field of mortgage, is the case of Beaufort West Municipality v Krummeck's Trustees & others.[10] This case accepted as a valid principal obligation, performance by a lessee of all his obligations under a lease agreement over and above the payment of rental. Forsyth C F[11] submits that the principal obligation may be or may include a negative obligation and in support of this contention cites the case of Segell v Kerdia Investments (Pty) Ltd,[12] which was an obligation by the lessee not to contravene by-laws.

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9. Corrans & another v Transvaal Government and Coull's Trustee 1909 TS 605 per Innes C G, Wessels J and Mason J; See too the provisions of Sec. 51 (1) (b) of the Deeds Registries Act 47 of 1937 which inter alia provides that no mortgage bond shall be of any force or effect for the purpose of giving preference or priority unless a sum is fixed in the bond as an amount beyong which future debts shall not be secured by the bond.

10. (1887) 5 SC 5.

11. Caney's The Law of Suretyship in South Africa (1982) 3rd ed at 38.

12. 1953 (1) SA 20 (W) at 25.

Further, it is submitted , the principal obligation will not be defective if it is expressed to be ,

1. claimable or contingent;[13]
2. present or future ;[14]
3. not legally enforceable;
4. the principal obligation of some other person, other than that of the mortgagor;[15]
5. in respect of a portion only of the principal obligation.[16]

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13. D 20 1 15; Voet 20 1 20; Pothier 20 1 n7; Kilburn v Estate Kilburn 1931 AD 501; Section 50(2) of the Deeds Registries Act 47 of 1937 specifies inter alia that a mortgage bond may be registered to secure an existing debt or a future debt or both existing and future debts; Section 50(3) provides that mortgage bonds intended to secure loans for building purposes are deemed to be bonds to secure existing debts; Estate Scheepers v Barclays Bank 1935 AD 153.

14. D 20 1 15; Voet 20 1 20; and S A Timber and Joinery Works (Pty) Ltd v The Sheriff and others 1955 (4) SA 56 (O).

15. D 20 1 15; Voet 20 1 18; Pothier 20 1 n7; Benjamin v Benjamin (1881) 1 EDC 273 and Goodman's Trustee v Goldberg 1914 WLD 119.

16. D 20 1 5 and Pothier 20 1 n7.

2. Defects relating to the principal obligation founded in contract.

2.1 Animus contrahendi

Roberts A A[1] states that one of the essential elements of a contract is that there must be a serious and deliberate intention on the part of the parties to create a legal bond; that is, there must be an animus contrahendi.[2] This element is accepted as being essential to a valid contract.

In the case of Kilburn v Estate Kilburn[3] a husband had, prior to his marriage, registered a notarial bond over all his property in favour of his proposed wife. There was no serious promise, nor was there any intention by him to pay his wife the amount secured by the bond. The underlying intention of the husband was that the wife should claim the sum in question, if and when the husband became insolvent.

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1. Wessels' Law of Contract in South Africa (1937) 2nd ed at 15.

2. Ibid at 22.

3. 1931 AD 501.

Accordingly, the court held that there was no legal obligation secured by the bond. Wessels A C J in examining the notarial bond, supported by the fact that no date was fixed on the bond, upheld the court a quo. Wessels J A[4] held:-

> "Now the Court below has found as a fact that there was no serious promise ... There was therefore no obligation secured by this bond and therefore in a concursus creditorum the appellant cannot claim on the bond."

A further case with a similar import was that of Mahomed & Son Ltd v Estate Horvitch.[5] Here a company, in which all the shareholders were Asiatics, wished to purchase certain immovable property. In order to circumvent the provisions of section 2 of the Asiatics (Land and Trading) Amendment Act (Transvaal) 37 of 1919, the company entered into a written agreement which provided that in consideration of an advance of £1650 to the seller, the latter would pass a bond over

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4. Ibid at 506.

5. 1928 AD 1.

the property for that amount. The company could inter alia take the rents of the property in lieu of interest; let the property on such terms as it thought fit; break down existing buildings and erect others; and, without the consent of the seller, sell and dispose of the property at its pleasure. There was no provision for repayment in the agreement; however, the power of attorney to pass the mortgage bond and the mortgage bond itself had a fixed date for repayment. The court held that the agreement did not constitute a contract of loan, since the so-called loan had never to be repaid and since it was manifest that the money passing to the seller passed as a consideration for the supreme rights of control of the property, which were conferred upon the company. Since there was no loan under the agreement, the conclusion was irresistible that the clause as to repayment was inserted in the power of attorney to pass the bond and the mortgage bond itself for the purposes of giving

the mortgage bond an appearance of one passed to secure a loan.. The bond was accordingly invalid under the Act. Stratford J A[6] held:-

> "... when the bond came to be passed there could be no loan to secure, for the £1650 had by the agreement, been appropriated to the purchase of the rights conferred on the appellants...and could not, therefore, whilst that agreement stood be appropriated to a loan agreement. No money was, therefore, lent or borrowed and the conclusion is irresistable that the clause as to repayment was inserted only for the purpose of giving the bond the appearance of one passed to secure a loan. The position is in complete analogy with the giving of a bond by the dummy registered owner of fixed property to an Asiatic ... "

It was submitted by counsel of the company in the court a quo that the mortgage bond and the agreement should be read together, and thus the provision in the bond as to repayment would supply the deficiency. It is submitted that, if there was a valid loan, such a deficiency would have been cured.[7]

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6. Ibid at 14.

7. Van der Post v Twijfelhoek Diamond Prospecting Syndicate (1903) 20 SC at 213.

2.2 Legality of the principal obligation

Associated with the above is the principle that the contract must be legally possible and not one which the law prohibits or regards as void.[1]

Here difficulties may be encountered where the legislature prohibits a particular transaction but does not expressly declare what the consequences of non-compliance will be. Coaker J F and Zeffert D T[2] submit that the general rule is that a contract infringing a prohibition will be treated as void and that this would be the case even where the only indication of a prohibition is the imposition of a criminal penalty on any person contracting in a particular way. It is submitted that the approach of Van Rensburg A D J, Lotz J G and Van Rhijn T A R[3] is to be preferred.

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1. Roberts A A Wessels' Law of Contract in South Africa 2ed (1951) at 21. He divides agreements which are legally impossible for convenience of discussion into two classes, namely, those prohibited by special enactment and those regarded by common law as being contra bonos mores. The general rule is ex turpi causa non oritur actio. Van Rensburg A D J, Lotz C J and Van Rhijn T A R "Contract" in Joubert W A (ed) The Law of South Africa vol 5 (1983) at 74 para 149 n1 state that no distinction is made between an immoral (turpis) and an illegal (iniustus) contract, the ex turpi causa maxim applying in either case.

2. Wille and Millin's Mercantile Law of South Africa 18th ed (1983) at 39.

3. See n1 above.

The latter writers submit that the mere fact that a penalty is provided for is not conclusive either way, and in every case it is a matter of construction of the particular statute. If the statutory provision is directory or permissive, the acts done will not be a nullity, whereas, if the statutory provision is peremptory or mandatory, all acts done in breach of the enactment will be null and void.[4]

In the case of Kadrinka v Lorentz[5] the causa of a mortgage bond was expressed to be arising from and being the amount of a settled account due by the mortgagor to the mortgagee. The mortgagor averred that a great part of the consideration for which the bond was given, was for liquor supplied on credit and accordingly not recoverable

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4. Schierhout v Minister of Justice 1926 AD 99 at 110 where Innes C J held that a disregard of the peremptory provisions of a statute is fatal to the validity of the proceedings. The case of Kuhne and Nagel (Pty) Ltd v Elias and another 1979 (1) SA 131 (T), where Boshoff A J P held that in order to ascertain whether the statutory provision is peremptory or directory one must look to the intention of the legislature which is determined by having regard to the language used, the scope and object of the enactment as a whole and the consequences in relation to justice and convenience of adopting one view as opposed to the other. Thus in interpreting the provisions of section 61(3)(b) of the Deeds Registries Act 47 of 1937, which inter alia states that every notarial bond shall disclose the place where the debtor resides and the place or places (if any) where he carries on business, the learned judge submitted that while the word "shall" was a strong indication that the provision was peremptory it would lead to injustice if the bond was treated as being void. For further indications as to the interpretation of a statute see Steyn L G Uitleg van Wette 5th ed (1981) by van Tonder S I E, Badenhorst N P, Volschenk C H & Wepener J N at 196-201.

5. 1914 TPD 32.

under section 82 of the Liquor Licencing Ordinance 32 of 1902. Part of the amount owing was in terms of a judgment which the court correctly construed as being novated by the mortgage bond. Mason J held that as the account included an illegal consideration which was not severable, provisional sentence could not be granted on such instrument. The ordinance inter alia stated that no person shall recover any sum of money or maintain any suit of law on account of any liquor sold by him on credit. It appears as if the court concluded that a contravention of the aforementioned provision rendered not only the recovery of the consideration legal but it also rendered the principal obligation illegal.

The case of Peri-Urban Areas Health Board v The South British Insurance Company Ltd[6] dealt with suretyship, i.e. the field of mortgage, however is still instructive.

Here the court per De Wet[7] found it not necessary to express an opinion as to whether the manner of making payment, which was prohibited by the exchang control regulations, would render the agreement voi as such provision was in fact severable.

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6. 1966 (2) PH A66 (T) at 234.

7. Idem

Nienaber P M,[8] submits that it is somewhat difficult to understand how a term regarding payment which is the very essence of one party's obligation and the other party's expectation can ever be said to be severable from the rest of the contract. He submits that a more satisfactory explanation is that the payment was not effected by virtue of the contract but was done by way of a favour, that is, extraneous to the terms of the contract.

2.2.1 Financial assistance

In the case of Albert v Papenfus[9] a mortgage bond and a deed of suretyship were entered into in order to secure due performance of the mortgagor's obligations in respect of payment of alledged goodwill. However, it was evident that the company had given financial assistance to the mortgagee in connection with the purchase of his shares and accordingly acted in contravention of section 86bis(2) of the Companies Act 46 of 1926. It was contended on behalf of the plaintiff mortgagee that the mortgage bond was not

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8. Nienaber P M "Miscellaneous Contracts (Carriage, Deposit, Exchange, Loans, Partnership, Service, Suretyship)" (1966) Annual Survey of South African Law 122 at 144.

9. 1964 (2) SA 713 (E).

invalidated by the contravention of the above section. Reliance was placed on the judgment of Roxburgh J in Victor Battery Co Ltd v Curry's Ltd,[10] which was to the effect that the section was only contravened if the financial assistance was valid, and if it was not, then the section was not contravened. Munnik J,[11] was unable to accept this argument and the learned judge submitted:-

> "To hold otherwise would mean that the whole object of sec. 86 bis(2) would in practice be defeated by any one willing to pay at most a penalty of R1000 - which in many cases may constitute an attractive and profitable commercial proposition."

Hahlo H R[12] submits that the above decision of Munnik J is correct, and in endorsing his submission quotes the words of Theron A J in Trans --

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10. [1946] 1 All E R 519.

11. Albert v Papenfus 1964 (2) SA 713 (E) at 721.

12. "Rendering Financial Assistance" (1964) 81 SALJ 281 at 282.

Africa Credit and Savings Bank Ltd v Union Guarantee and Insurance Co Ltd[13] who inter alia held:-

> "The general rule applicable to the construction of statutes is that every transaction carried out in contravention of the statutory prohibition should be considered null and void, despite absence of any express declaration of nullity... unless it appears from the wording of the statute, or from a consideration of its objects and its scope, that the legislature did not intend to render the prohibited transaction invalid."

Hahlo thereafter raises a question which did not call for decision, namely whether a mortgage bond in favour of a bona fide third party would be invalid. He suggests that in the event of the third party not being aware that the provisions of section 86bis(2) would be contravened, the company would be estopped from relying on the invalidity of the transaction as against

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13. 1963 (2) SA 92 (C) at 103.

the mortgagee, and to this extent Hahlo argues that the Victor Battery case should still be considered good law. A similar situation arose for decision in the case of Saambou Nasionale Bouvereniging v Ligatex (Pty) Ltd; Ex parte Stuart: in re Saambou Nasionale Bouvereniging v Ligatex (Pty) Ltd.[14] The proceeds of the mortgage bond had been used to purchase shares in the company, in contravention of section 86bis(2) of the Companies Act 46 of 1926. It was argued that as a consequence of the contravention, the agreement in respect of the sale of shares and the loan agreement were void. Eksteen J held that the loan agreement remained practically valid, as it was an entirely separate agreement. The reasoning of the learned judge was criticised by Beuthin R C[15] in that he felt that the learned judge did not sufficiently stress the state of mind of the mortgagee. He submits that had the mortgagee been aware of the illegal purpose of the loan, the validity of the loan agreement would have been in jeopard

14. 1976 (1) SA 868 (E).

15. "Act in Haste - Repent at Leisure" (1968) 85 SALJ 195 at 196; Beuthin R C "Company Law" (1976) Annual Survey of South African Law 289 at 305; Kerr A J "Agreements to Defeat the Purpose of Statutory Provisions" (1976) 93 SALJ 3; Kerr A J "Innocent Provisions of Funds used in Contravention of a Statutory Provision" (1976) 93 SALJ 143.

Thus, if the two contracts are not inextricably interwoven, and if the mortgagee was unaware of the illegal purpose, it is submitted that the mortgage bond would remain valid, there being no need to rely on estoppel.

It has been held that where a mortgage bond is passed in order to secure loan accounts of shareholders, this would not be a contravention of section 38 of the Companies Act 61 of 1973. This principle was enunciated in the case of Bay Loan Investment (Pty) Ltd v Bay View (Pty) Ltd [16] and Karnovsky v Hyams.[17]

2.2.2 Group Areas Act

Up to 1932 a scheme whereby a person holding immovable property as registered owner (called a nominee) in favour of a person who was prohibited from having such land registered in his name, was not considered to be illegal. This was usually coupled with a mortgage bond passed by the nominee holder in favour of the beneficial owner for the full purchase price and in some instances interest. Thereafter the Transvaal Asiatic Land Tenure Act 35 of 1932 was

16. 1972 (2) SA 313 (C).

17. 1961 (2) SA 368 (W).

passed.[18] In terms of section 7 of the abovementioned Act, fixed property was defined as inter alia any real right in immovable property, except a mortgage bond over immovable property securing a bona fide loan granted in the ordinary course of business. The Group Areas Act 41 of 1950 re-enacted the provision, and section 40 of the current Group Areas Act 36 of 1966 now provides that no person may acquire or hold on behalf or in the interests of any other person, any immovable property which the other person may not lawfully acquire or hold in terms of the Act. A contravention of this section is not only an offence[19] but property illegally held becomes liable for disposal. The proceeds of the sale cannot be applied towards the payment of any debt of anyone on whose behalf or in whose interests the property was acquired or held.

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18. The first attempt to curb the practice of nominee holding was section 2 of the Transvaal Asiatic (Land and Trading) Amendment Act 37 of 1919.

19. Proviso to section 41(5) of the Group Areas Act 36 of 1966.

Other cases dealing with contraventions of various Acts are Gasson v Franz[20] where the court refused to grant provisional sentence for a cession of a mortgage bond, the provisions of the Usuary Act 37 of 1927 having been contravened. It appears that the court was correctly influenced by the fact that on the evidence it appeared that the cessionary was merely a tool of the mortgagee and thus disposing of a possible argument of the cessionary raising estoppel to the defendants defence (although not specifically dealt with in the two-page judgement of Graham J P).

Certain statutory enactments relating to formalities will be conveniently dealt with under defects relating to the accessory obligation, as defects relating to formalities are generally more predominant under this latter head.

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20. 1929 EDL 376.

2.3 Capacity

2.3.1 Minors

Aside from common law restraints that exist with regard to a minors capacity to mortgage, which will be alluded to later, there also exists certain statutory restraints.

These restraints can be found in section 80 of the Administration of Estates Act 66 of 1965. One has to obtain authorisation from the master of the supreme court for a minor to mortgage his property, if the amount of the mortgage does not exceed R10 000,00. If the mortgage is greater than R10 000,00 then one has to petition the court. Furthermore, the master is only empowered to authorise such mortgage if it is necessary for the preservation or improvement of the property, or for the maintenance, education or other benefit of the minor. Meyerowitz D[1] suggests that the words 'other benefit' are wide enough to cover any purpose which would benefit the minor, for instance a mortgage to enable the minor to pay a claim for damages caused by such minor.[2]

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1. The Law and Practice of Administration of Estates 5 ed (1976) 303 at para 21 25.

2. Where the property to be mortgaged is jointly owned with the minor, the master will only have authority if the minors share does not exceed R10 000,00 and the mortgage is expressed to be joint, as opposed to joint and several.

In the unlikely event of a mortgage bond being registered without the required consent, it appears that the mortgage would be voidable upon the minor attaining majority.[3]

If the minor contracted without his guardians assistance, then a natural obligation would be create which is capable of being mortgaged.[5] Whether the same situation prevails where the minor acted fraudulently, is an open question.[6]

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3. Breitenbach v Frankel 1913 AD 390.

4. Boberg P Q R The Law of Persons and the Family with Illustrative Cases (1977) at 584.

5. See supra.

6. Barnard A H and Cronje D S P who wrote the 2nd ed of Olivier's book The South African Law of Persons and Family Law (1980) at 75, submit that the minor is bound to the contract on the basis of estoppel. They cite Vogel and Company v Greently 1903 NLR 252 in support of their contention. They also refer to Pleat v van Staden 1921 OPD 91 and Fouche v Battenhausen & Co 1939 CPD 228 where the same principle was applied. See too Pauw P "Kontraktuele Aanspreeklikheid van Minderjarige - Estoppel" (1976) THRHR 82 at 83. But see Boberg P Q R ibid 600 to 612 for criticism and for a comprehensive analysis of the various approaches to such contract.

2.3.2 Insolvency

An insolvent does not lose his capacity to conclude legal acts, but he is precluded from disposing of assets which fall in his insolvent estate. A mortgage of such assets would accordingly be prohibited.[7] It has been held[8] that where an insolvent purchased immovable property and passed a kustingsbrief for the balance of the purchase price, the property vested in the trustees and the mortgage bonds so passed were valid.

If a mortgage bond is passed prior to insolvency with the intention of defrauding the creditors, such mortgage bond may be set aside. Wille[9] submits that the principle, which is based on the case of Chin's Trustees v National Bank of SA,[10] equally applies to alienations made by way of mortgage. However, no cases have been reported in South Africa of a mortgage being set aside under the common law.

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7. Section 20 of the Insolvency Act 24 of 1936.

8. Warner's Trustees v Wicht (1886) 4 SC 463.

9. Wille The Law of Mortgage and Pledge in South Africa 2nd ed (1961) at 22.

10. 1915 AD 353.

The grounds upon which a disposition of property may be set aside, are, if such disposition is without value, or if it constitutes a voidable or an undue preference.

2.3.3 Intellectual disability

Persons falling under this category are infantes, persons that are insane, mentally defective persons, or senile persons who are considered to be intellectually disabled.[11] It has been held by the privy council in Molyneaux v Natal Land and Colonization Co (Pty) Ltd[12] that the juristic act of a person, insane at the time of the conclusion of an act, is completely void and not merely voidable. The master or the court's consent would equally be required by a tutor or curator in terms of section 80(2)(a) of the Administration of Estates Act 66 of 1965.

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11. Barnard A H and Cronjé D S P The South African Law of Persons and Family Law 2nd ed (1980) at 85.

12. [1905] AC 55.

2.3.4 Marriage

2.3.4.1 Prior to the 1st November 1984

Prior to the introduction of the Matrimonial Property Act 88 of 1984,[13] the wife was subject to the marital power of the husband in a marriage contracted in community of property.[14] Women subject to the marital power have a limited capacity to conclude legal transactions. This incapacity would result in the transaction being void. Forsyth[15] submits that in the case of a married woman, prodigal and lunatic, as they are incapable of contracting, no principal debt comes into existence, and it follows that there can be no suretyship. This would be equally applicable to mortgage. Lubbe[16] submits that there is uncertainty as to whether estoppel can operate to remedy this lack of contractual capacity. In the instructive case of Rand Wholesale Outfitters (Pty) Ltd v Cassels[17] the facts were as follows:

13. 1st November 1984.

14. Certain marriages which were by way of an antenuptial contract, retained the marital power of the husband over the wife.

15. Forsyth C F Caney's The Law of Suretyship in South Africa 3rd ed (1982) at 36.

16. "Mortgage and Pledge" in Joubert W A (ed) The Law of South Africa (1983) vol 17 295 at 304.

17. 1955 (2) SA 66 (W).

A married woman married in community of property passed a mortgage bond without her husband's knowledg or consent. The court held *per* de Wet J that estoppe could not operate to cure the wifes lack of *locus standi*. Further he stated that estoppel would only operate against her husband if he was privy to the misrepresentation. In order to found an estoppel against him it had to be shown that he had actual knowledge of the passing of the bond and not implied knowledge due to the document being registered at the deeds office.

2.3.4.2 *After 1st November 1984*

All marriages concluded after the 1st November 1984 without an antenuptial or accrual contract are deeme to be marriages in community of property, but with the exclusion of the marital power. The provisions of section 15(2)(a) provide that a spouse may not mortgage any immovable property forming part of the joint estate without the written consent of the other spouse. In terms of section 15(4) *ex post facto* ratification is not permitted. Furthermore, the consent must be given seperately in respect of each act and must be attested to by twc competent witnesses. Sinclair J[18] feels that

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18. *An Introduction to the Matrimonial Property Act* (1984) at 19.

the sanction imposed in respect of non compliance with section 15(2)(a) is much weaker than invalidity. Secondly, the above section only covers mortgage and does not affect the underlying principal obligation.[19] The consent, in order to enter into the principal obligation, may nevertheless fall under the provisions of section 15(2)(b) of the same Act.

The contractual capacity of a black woman is closely related to her marital status and is strewn with complexities. It would not be appropriate to deal with this topic here, as legislation will be introduced soon in order to amend the status quo.[20]

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19. Sinclair J speaking at a Seminar on Matrimonial Property on the 13th November 1985 at the Carlton Hotel.

20. For a more comprehensive exposition of this topic, see Olivier W H and Van der Post D J "Swartes se Regte op Grond met besondere verwysing na Huurpag" Consulta Series, Association of Law Societies, Pretoria (1985) and also Church J "A new Dispensation for Black Women? A note on Act 6 of 1981 Kwa Zulu" 1983 Comparative and International Law Journal of Southern Africa at 100.

2.4 Duress and undue influence

If the consent to the principal obligation is obtainted by force, threat or fear, which the law regards as improper, the contract is either void or voidable at the instance of the person upon whom it has been imposed.

Where the force is vis absoluta, that is actual physical force, the obligation will be void ab initio.[21]

Where one party has exercised undue influence over the other, the injured party has the right to abide by the contract or rescind the contract and claim restitutio in intergrum. In the case of Faustmann v Shadrick and Samartha[22] the learned judge postponed execution against immovable property to enable one of the mortgagors to bring an action to have the bond set aside on the basis of duress.

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21. Voet 4 2 1.

22. 1910 OPD 40.

3. Termination

A mortgage is terminated in a number of ways, inter alia:

(1) discharge of the principal obligation;

(2) effluxion of time;

(3) renunciation by the mortgagee;

(4) novation;

(5) merger;

(6) extinction of the mortgagors title;

(7) destruction of the mortgaged property;

(8) prescription;

(9) decree of court;

(10) sale in execution;

(11) sale on the insolvency of the mortgagor.

It sometimes happens that the mortgagee does not wish to release the security held in terms of such mortgage. In the case of Darling v Registrar of Deeds[1] De Villiers C J said that it is of the essence of every mortgage or pledge that the mortgagor or pledgor has the right of redemption. This right of redemption, usually termed

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1. 1912 AD at 28.

'equity of redemption',[2] is paramount in other legal systems. The right of redemption is also treated on a similar footing in South African law. Thus, where a mortgagee refuses to accept tender of the amount due by the mortgagor, the court will order the mortgagee to return the bond to the mortgagor duly receipted for cancellation.[3] Wille[4] correctly contends that the right of redemption cannot be taken away or postponed by any agreement made by the mortgagor prior to his default.

We will now discuss the so-called right of retention which has been held to be an exception to the principle enunciated above.

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2. Warden L C "Mortgages" Sattinger O C (eds) 55 American Jurisprudence 155 at 502 where he says that strictly speaking the term 'equity of redemption' is a misnomer since the mortgagor remains the legal owner of the land, and until foreclosure has the legal right to discharge the mortgage bond. See too Tyler E L G "Mortgage" Moore R P (eds) Halsbury's Laws of England 2nd ed (vol 32) 181 at 190 para 407:

   "Incident to every mortgage is the right of the mortgagor to redeem, a right which is called its equity of redemption, and which continues notwithstanding that he fails to pay the debt in accordance with the proviso of redemption . . .
   Any provision inserted in the mortgage to prevent redemption on payment of the debt or performance of the obligation for which the security was given is termed a 'clog' or 'fetter' on the equity of redemption and is void."

3. Michell v de Villiers (1900) 17 SC 85 at 87.

4. Wille The Law of Mortgage and Pledge in South Africa 2nd ed (1961) at 137.

4. Retention of security

4.1 Generally

It has been proffered by our courts, by Wille and some practisioners that a creditor is entitled to utilise the right of security of a mortgage, where the principal obligation has been extinguished, in order to secure another unrelated indebtedness.[1] For the sake of convenience the term "right of retention" will be utilised in order to describe this dubious precept.

This right of retention is also associated with the tenent of consolidation of mortgages which is accepted in some jurisdictions.[2]

It will be argued that the right of retention, with the attendant right of consolidation, is manifestly untenable. It is further proposed to demonstrate that the above proposition is not based on unequivocal legal principles.

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1. Brink's Trustees v S A Bank (1848) 2 M 381; Haarhoff v Cape of Good Hope Bank (1887) 4 HCG 304; Smith v Farrelly's Trustee 1904 TS 949 at 962; van den Heever v Cloete (1904) 21 SC 113; Hirschberg v Jackson 1933 CPD 238; Burger v Rautenbach 1980 (4) SA 650 (C); Voet 20 6 16; Van Leeuwen Censura Forensis 14 10 7 and 1 4 37 2; van der Keessel D G Thesis Selectae 435 and 450; Wille The Law of Mortgage and Pledge in South Africa 2nd ed (1961) at 91.

2. Section 93 of the English Law of Property Act 1925 15 Geo V c20.

4.2 Comparative law

4.2.1 United States of America

In the case of Wesley Williams v Hill McLean & Co[3] the court held that real property which was conveyed in a deed of trust could not be retained as security for any additional obligations not referred to in the deed. Warden L C[4] sets out the position as follows:-

> "Indeed, it is a general rule that a mortgage cannot, subsequently to its execution, be extended by parol agreement to secure debts or obligations other than those which it was executed to secure. Such an extension, if effective, would be equivalent to the execution of a new mortgage to secure the additional obligations. It therefore falls within the prohibition of the statute of frauds."

Warden, however, later in his article submits that there is support for the doctrine of consolidation, under which a person holding two or more separate

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3. [1857] 19 US 246.

4. "Mortgages" Sattinger O C and others (eds) 1971 55 American Jurisprudence 2nd ed 151 at 282.

mortgages on different estates of the same mortgagor may insist that all the mortgages shall be redeemed together. In this regard he cites the case of Pledge v White,[5] which is in fact an English decision. It is manifest that here the mortgagee is not attempting to introduce a further principal obligation under the umbrella of a mortgage bond where the principal obligation has been extinguished, but is merely linking the extinction of two existing mortgage bonds. Furthermore, the rule may not be applied against a subsequent mortgagee or creditor seeking to redeem.

The learned author thus submits that where there is a debt that is not secured by a mortgage, the broad rule is asserted that the payment of such debt may not be exacted as a condition of redemption from the mortgage.

4.2.2 New South Wales

The doctrine of consolidation as alluded to above, has been abolished by section 97 of the Conveyancing Act 1919.

4.2.3 England

The axiom of the mortgagors equitable right of redemption does not permit of retention of security once

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5. [1897] AC 187.

the principal obligation has been fulfilled.[6]

Consolidation is now governed by section 93 of the Law of Property Act of 1925.[7] The constraints imposed by the aforementioned Act are as follows:-

(1) There must not be a contrary intention expressed in the mortgaged deeds.

(2) The provision does not apply where all the mortgages were made before the 1st January 1882. Prior to the above date the right existed automatically, but thereafter the legislature made it necessary to reserve the right. Hayton D J[8] says that it is common practice for the mortgage to contain a clause excluding the operation of section 93 so as to permit consolidation. He further submits that in the case of both mortgages, the dates for redemption must have passed. Furthermore, the mortgages must be made by the same mortgagor.[9]

In the light of the aforegoing, it may be concluded that the general trend is to either abolish such right of retention or alternatively to impose

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6. Tyler E L G "Mortgage" Halsbury's Laws of England (1980) vol 31 181.

7. 15 Geo V c20.

8. Hayton D J Megarry's Manual of the Law of Real Property 6th ed (1982) at 265.

certain restrictions thereon.

4.3 Permutations

At this juncture it would be apposite to set out the possible permutations relating to the acceptance of the doctrine of retention of security, namely that:-

4.3.1 The principle cannot be accepted in South African law in any form whatsoever; or

4.3.2 The principle can be accepted provided the principal obligation is not extinguished - "tender"; or

4.3.3 The principle is only applicable to matters where the principal obligation is founded in pledge and must be interpreted within the perameters of certain constraints.

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