

CASES / VONNISSE

PARATE EXECUTIE CLAUSE IN MORTGAGE BOND VERSUS POST-DEFAULT AUTHORITY TO SELL

***Business Partners Limited v Mahamba*
(4568/2016) [2019] ZAECGHC 17
(26 February 2019)**

1 Introduction

The purpose of this note is to consider a case that came before a full bench of the Eastern Cape Division of the High Court in Grahamstown – namely, *Business Partners Limited v Mahamba* ((4568/2016) [2019] ZAECGHC 17 (26 February 2019)). The case touched on the age-old debate surrounding the validity of *parate executie* (summary execution or private sale) clauses in agreements that hypothecate property as security for the payment of a debt. Even though such clauses are popular in pledge agreements pertaining to movable property (including the hypothecation of incorporeal movables via a cession *in securitatem debiti*), this case involved a mortgage bond pertaining to immovable property. Moreover, as explained below, the impugned clause *in casu* technically was not a *parate executie* clause but an agreement entered into after the debtor defaulted on a loan.

A *parate executie* clause generally seeks to entitle the secured creditor to dispose of the hypothecated property through a private sale – that is, without going through the normal court processes – when the debtor defaults on payment obligations under the loan agreement. The validity of *parate executie* clauses has been debated since at least Roman-Dutch times (see Krause “The History of *Parate Executie*” 1924 41 SALJ 20), while the debate has also featured in modern South African case law and literature. More recently a constitutional dimension has been added to (and has revived) the controversy by virtue of the right of access to courts guaranteed in section 34 of the Constitution of the Republic of South Africa, 1996 (the Constitution). There is also a significant difference depending on whether a pledge of movable or a mortgage of immovable property is involved. It is moreover necessary to distinguish between *parate executie* clauses included in the bond itself and agreements subsequent to a debtor’s default in terms of which a debtor authorised a creditor to sell the property without having to go through the court processes.

In view of the judgment in *Business Partners v Mahamba* (*supra*), it is arguably necessary to revisit the matter and to clarify some aspects

surrounding *parate executie* clauses, such as the circumstances under which they are valid and invalid as well as how they differ from similar contractual arrangements between debtors and creditors. It is also necessary to affirm the difference in this regard between pledges of movable and mortgages of immovable property. The article also comments on the implications, in the residential mortgage foreclosure context, of the difference between *parate executie* clauses in mortgage agreements, on the one hand, and post-default agreements allowing a creditor to sell the property privately, on the other.

2 Business Partners v Mahamba

2 1 Facts

The case concerned a credit relationship between a close corporation (Alizw'amaHlubi Multi Skilling Centre CC) and a financier (Business Partners Limited). The sole member of the CC (Mahamba) concluded certain loan agreements on behalf of the CC with Business Partners. The latter as financier required of Mahamba to bind herself as surety for the debt and to register a surety bond over her immovable property as security for repayment of the loan granted to the CC as principal debtor (*Business Partners v Mahamba supra* par 1–4).

When the CC defaulted on its payment obligations to Business Partners, the latter sought payment from Mahamba as surety, as well as an order declaring her property executable as provided for in the surety bond (*Business Partners v Mahamba supra* par 7). After summons was issued and served on Mahamba, she and Business Partners engaged in settlement talks, which resulted in a so-called “agreement to pay debt” (*Business Partners v Mahamba supra* par 9). The salient portions of the settlement agreement for present purposes were clauses 3.2 and 3.3.

In clause 3.2, the surety authorised the creditor “to dispose of the property by private treaty or in such other manner as it deems fit”. Clause 3.3 went on to determine that the creditor would only embark on such a private sale if the principal debtor and/or the surety breached the terms of the settlement agreement. In such a case, the creditor would “be entitled to proceed with the marketing and sale of the property without further notice to the principal debtor and/or surety” (*Business Partners v Mahamba supra* par 12).

In addition to this settlement agreement, Mahamba signed a power of attorney in terms of which she authorised the creditor “to sell by private treaty or in any manner at such price and on such terms and conditions as it may in its sole discretion determine and to sign the deed of sale and at all such other documents as may be required to give effect to registration of transfer of (the property)” (*Business Partners v Mahamba supra* par 15).

Subsequently both the CC as principal debtor and Mahamba as surety failed to comply with the settlement agreement in that no payment was effected as required. On the basis of the abovementioned power of attorney, the creditor responded by mandating an auctioneering firm to sell the property, after which the property was indeed sold (*Business Partners v*

Mahamba supra par 16). After the sale, Mahamba approached the court *a quo* for an order declaring the sale unlawful and for an interdict restraining the transfer of ownership to the purchaser (*Business Partners v Mahamba supra* par 17). She contended that the sale was not preceded by due process of law because no fresh summons was issued and no order was obtained declaring the property executable (*Business Partners v Mahamba supra* par 18).

The creditor objected to this argument because, as the judge put it, Mahamba “had freely and voluntarily registered a bond over the property in favour of [Business Partners] and signed a power of attorney authorising [Business Partners], in its discretion, to sell the property by private treaty in the event of the principal debtor and [Mahamba] failing to discharge their indebtedness towards [Business Partners]” (*Business Partners v Mahamba supra* par 19).

It should be noted that one must approach this argument (or at least the way the court put it) with care. It creates the impression that the creditor relied on a clause in the mortgage bond itself, which is not the case. Instead, the power of attorney was signed separately, after the debtor had defaulted on the terms of the mortgage loan. This distinction is important because, as explained below, a *parate executie* clause is invalid if included in a mortgage agreement pertaining to land, while it is valid for a debtor to agree, after defaulting on a loan, to allow a creditor to sell the property.

2 2 Judgment of the court *a quo*

The crux of the judgment of the court *a quo* was summarised by the full bench (*Business Partners v Mahamba supra* par 20). The court *a quo* agreed with Mahamba’s contention and thus declared the sale unlawful on the basis that it was not preceded by due process of law. The court *a quo* regarded this as an unacceptable form of self-help because it supposedly permitted the creditor to take the law into its own hands by circumventing the courts. For this conclusion, the court *a quo* relied on the Constitutional Court case of *Chief Lesapo v North West Agricultural Bank* (2000 (1) SA 409 (CC)).

2 3 Judgment of the full bench

On appeal, the full bench regarded the judgment of the court *a quo* as “clearly incorrect” (*Business Partners v Mahamba supra* par 21). With reference to the facts, the court explained that Mahamba had an opportunity to seek the court’s protection when the original summons was issued seeking to have her property declared executable (*Business Partners v Mahamba supra* par 24) but that she chose an out-of-court settlement in terms of which she voluntarily authorised the creditor to sell the property if she could not fulfil the settlement agreement. The court effectively upheld the validity of the agreement on the basis that it is supported by the principle *pacta sunt servanda* (*Business Partners v Mahamba supra* par 25).

The court went on to confirm “for the sake of completeness” that “it is trite that a *parate executie*, which authorises execution without an order of court,

is valid, provided it does not prejudice, or is unlikely to prejudice, the rights of the debtor unduly” and that “a *parate executie* is not *per se* unconstitutional or offensive to public policy” (*Business Partners v Mahamba supra* par 27, citing *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 14D–F; *Eastwood v Shepstone* 1902 TS 294 302; *SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA)).

The court also distinguished between the case under discussion and the judgment in *Chief Lesapo v North West Agricultural Bank (supra)*. The latter case concerned a statutory provision that authorised the Northwest Agricultural Bank to seize and sell certain property without court authorisation. It was declared unconstitutional for unjustifiably violating the debtor’s right of access to court (s 34 of the Constitution). The case under discussion was different because the debtor voluntarily waived her right of access to court and voluntarily authorised the creditor to sell the property privately. In this regard, the court confirmed that it was lawful for the debtor, after default, to agree to allow the creditor to sell the property (*Business Partners v Mahamba supra* par 28, citing *Bock v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) par 7; *Juglal NO v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA) par 25; *Iscor Housing Utility Co v Chief Registrar of Deeds* 1971 (1) SA 613 (T) 616).

3 Validity of *parate executie* clauses as compared to similar arrangements

The judgment of the full bench is relatively straightforward, and the outcome cannot be faulted in general. However, a number of aspects should be clarified. This will be done with reference to some background information regarding the validity of summary execution clauses as well as other comparable contractual stipulations in the context of mortgage and pledge agreements (in general, see also Brits *Real Security Law* (2016) 64–65 and 162–180; *LAWSA XVII Mortgage and Pledge* par 366 and 427; Muller, Brits, Pienaar and Boggenpoel *Silberberg and Schoeman’s The Law of Property* 6ed (2019) 443–444 and 460–461; Kritzinger *Principles of the Law of Mortgage, Pledge & Lien* (1999) 22–23; Van der Merwe *Sakereg* 3ed (1989) 627–628 and 658–660).

The default position in any instance of debt enforcement is that the creditor must make use of the formal court processes to enforce its rights, by obtaining a judgment order as well as permission to have the relevant assets attached and sold in execution. It is trite that a creditor may not take the law into its own hands by seizing and selling property without following the proper procedures. However, attempts have been made over the years to devise contractual clauses in terms of which the debtor supposedly authorises the creditor to bypass the court processes. Some of these have been recognised, while others have been rejected.

The first example is a so-called *pactum commissorium* (or forfeiture clause) that purports to allow the creditor to “keep” (or become owner of) the pledged or mortgaged property if the debtor defaults on the loan – and this despite the size of the outstanding debt or the value of the asset. Such clauses have been outlawed since Roman times owing to the high risk of

abuse (C 8.34(35).3) – namely, that desperate credit seekers might easily agree to such a draconian provision in order to obtain financing (see also Voet 20.1.25). Modern South African case law confirms the invalidity of such clauses in mortgage and pledge agreements (see *Mapenduka v Ashington* 1919 AD 343 351–352; *Graf v Buechel* 2003 (4) SA 378 (SCA) par 9–11; *Bock v Duburoro supra* par 8; *Citibank NA v Thandroyen Fruit Wholesalers CC* 2007 (6) SA 110 (SCA) par 13).

A clause that appears similar to a *pactum commissorium* is one that provides for a so-called *quasi*-conditional sale. In terms of this arrangement, which has also been recognised since Roman times (*D* 20.1.16), if the debtor defaults, the creditor is permitted to invoke the clause in order to purchase the property from the debtor at a fair value determined after default. In effect, the creditor acquires the property while the fair value of the asset is set off against the outstanding debt and any surplus is returned to the debtor. Such clauses are less susceptible to abuse, and thus are recognised as valid in both mortgage and pledge agreements in South Africa. (See *Mapenduka v Ashington supra* 352–353 for a good explanation of the difference between *quasi*-conditional sales and *pacta commissoria*. For further authority that a clause permitting a *quasi*-conditional sale is valid in South Africa, see *Sun Life Assurance Co of Canada v Kuranda* 1924 AD 20 24–25; *Graf v Buechel supra* par 27–31; *Bock v Duburoro supra* par 9.)

The third example of attempts to bypass court processes is the most controversial – namely, the clause permitting *parate executie*, an immediate or private sale by the creditor without court authorisation. The *locus classicus* on *parate executie* in South Africa is *Osry v Hirsch, Loubser & Co Ltd* (1922 CPD 531). The court investigated the different opinions expressed by the Roman-Dutch authors as well as conflicting earlier court judgments. It concluded that a *parate executie* clause is valid in an agreement where movables are delivered in pledge to a creditor but that the debtor can seek the court's protection if the creditor acts in a way that prejudices his rights (*Osry v Hirsch supra* 547). This approach was confirmed and followed without much controversy during the decades that followed (see *Paruk v Glendale Estate Co* (1924) 45 NPD 1 4; *Mercantile Bank of India Ltd v Davis* 1947 (2) SA 723 (C) 736–737; *Aitken v Miller* 1951 (1) SA 153 (SR) 154–155; *SAPDC (Trading) Ltd v Immelman* 1989 (3) SA 506 (W) 508–509 and 511; *Sakala v Wamambo* 1991 (4) SA 144 (ZH) 147; *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 (2) SA 459 (C) 463).

However, at the turn of the new millennium, the constitutional validity of these clauses was placed in doubt in *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd* (2001 (1) SA 251 (E) 256). Prior to this case, the Constitutional Court had delivered two judgments in which it declared unconstitutional certain statutory provisions that permitted the seizure and sale of a debtor's property without court authorisation (see *Chief Lesapo v North West Agricultural Bank supra* and *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa; Sheard v Land and Agricultural Bank of South Africa* 2000 (3) SA 626 (CC)). The reason for the constitutional invalidity was that the statutory provisions in question unjustifiably denied the debtors their right of access to court. The judge in *Findevco v Faceformat*

(*supra*) relied on these judgments to reason that, basically, a contractual clause cannot permit a sale without court authorisation either. For reasons that need not be expanded upon here, the reasoning in *Findevco v Faceformat* (*supra*) was criticised convincingly by Scott “Summary Execution Clauses in Pledge and Perfecting Clauses in Notarial Bonds: *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd* 2001 (1) SA 251 (E)” 2002 65 *THRHR* 656.

The Supreme Court of Appeal in *Bock v Duburoro* (*supra* par 7 and 13) subsequently clarified the situation by reaffirming the authority of *Osry v Hirsch* (*supra*) and thus confirmed the validity of *parate executie* clauses in pledge contracts pertaining to movable property (see also *Juglal v Shoprite* *supra* par 11; *SA Bank of Athens v Van Zyl* *supra* par 10–16; and see further Steyn “Perfection Causes, Summary Execution (*Parate Executie*) Clauses, Forfeiture Clauses (*Pacta Commissoria*) and Conditional Sales in Pledge Agreements and Notarial Bonds: The Position Clarified” 2004 25 *Obiter* 443).

It can be noted that there remains some debate in academic circles surrounding the constitutional implications of *parate executie* clauses (see Cook and Quixley “*Parate Executie* Clauses: Is the Debate Dead?” 2004 121 *SALJ* 719; Scott “A Private-Law Dinosaur’s Evaluation of Summary Execution Clauses in Light of the Constitution” 2007 70 *THRHR* 289) and it also appears that such clauses are not lawful when included in most credit agreements that fall under the scope of the National Credit Act 34 of 2005 (see Brits “Pledge of Movable Under the National Credit Act: Secured Loans, Pawn Transactions and Summary Execution Clauses” 2013 25 *SA Merc LJ* 555).

For the sake of completeness, reference should briefly be made to so-called perfection clauses typically included in general notarial bonds – also because the court in *Findevco v Faceformat* (*supra* 256) appears to have conflated such clauses with *parate executie* clauses (see *Bock v Duburoro* *supra* par 15; Scott 2002 *THRHR* 656 and 659–660). A perfection clause in a general notarial bond authorises the creditor (bondholder) to demand delivery of the bonded movables when certain conditions are met (typically when the debtor defaults). Should the debtor refuse to deliver the assets to the creditor voluntarily, the creditor can enforce this duty by applying to court for an order perfecting the bond, which essentially amounts to an order for specific performance of the duty to deliver the property. When a court grants the application (in the form of an attachment order) and the movables are subsequently attached by the sheriff, the creditor’s security is “perfected”, thus placing the creditor in the position of a pledgee (a secured creditor) for all intents and purposes (see generally *Firststrand Bank Ltd v Land and Agricultural Development Bank of South Africa* 2015 (1) SA 38 (SCA) par 4; *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd* 2003 (2) SA 253 (SCA) par 3–6; *Development Bank of Southern Africa Ltd v Van Rensburg* 2002 (5) SA 425 (SCA) par 20).

Importantly for present purposes, a perfection clause in a general bond cannot logically be equated with a *parate executie* clause and it cannot be viewed as permitting the creditor to take the law into its own hands (self-help). The patent reason for this is that the creditor would require a court order to obtain possession of the property and thus there is no room for self-

help (see Scott 2002 *THRHR* 659–660; and on the perfection of general notarial bonds in general, see further Brits *Real Security* 212–227; Roos “The Perfecting of Securities Held Under a General Notarial Bond” 1995 112 *SALJ* 169).

Returning to *parate executie* clauses, it must be said that although the above discussion regarding the validity of *parate executie* clauses represents the general position, it is mostly focused on contracts whereby movables are pledged. Therefore, the next question is whether the position is the same for mortgage bonds pertaining to immovable property, also because the case under discussion involved a mortgage of land, not a pledge of movables (see also generally Schulze “*Parate Executie, Pacta Commissoria, Banks and Mortgage Bonds*” 2004 26 *De Jure* 256).

The leading case on *parate executie* clauses in mortgage bonds over immovable property is *Iscor Housing v Chief Registrar* (*supra*). Prior to this judgment, there was a degree of uncertainty whether the position set out in *Osry v Hirsch* (*supra*) with reference to the validity of *parate executie* clauses in pledges of movable property also applied to mortgage bonds over immovable property (see *Paruk v Glendale* *supra*; *Executors Testamentary of The Estate of DJ Van Wyk v CJ Joubert* (1897) 4 Off Rep 360; *Insolvent Estate of WC Evans and AA Evans v South African Breweries Ltd* (1901) 22 NLR 115; *John v Trimble* 1902 TH 146; and also Anonymous “Clause in Mortgage Bond Allowing Mortgagee to Sell in Case of Non-Payment of Debt” 1910 27 *SALJ* 527).

The court in *Iscor Housing v Chief Registrar* (*supra*) found that the general rule did not apply to immovable property and thus that *parate executie* clauses are unenforceable when included in mortgage bonds pertaining to land. The main reasoning was that neither case law nor the preponderance of common-law authorities extended the validity of such clauses to agreements involving land. Nevertheless, the court stressed that, despite a prohibition against agreeing to a private sale when the bond is passed, it is possible to agree to a private sale if the debtor subsequently defaults on the loan (*Iscor Housing v Chief Registrar* *supra* 616). Effectively, therefore, the latter circumstance is not caught in the general prohibition against *parate executie* clauses in mortgage agreements (for a discussion of *Iscor Housing v Chief Registrar* *supra*, see Isakow “*Parate Executie*” 1971 88 *SALJ* 310).

After being followed in other high court judgments (see *Mardin Agency (Pty) Ltd v Rand Townships Registrar* 1978 (3) SA 947 (W) 952–954; *Tenner v Leeufontein Mines (Pty) Ltd* 1982 (4) SA 586 (T) 588–589), the decision in *Iscor Housing v Chief Registrar* (*supra*) was also confirmed by the Supreme Court of Appeal in *Bock v Duburoro* (*supra* par 7) (see also *Citibank NA v Thandroyen* *supra* par 13). In *Bock v Duburoro* (*supra*), the Supreme Court of Appeal regarded the invalidity of *parate executie* clauses in mortgage agreements as trite while also confirming that it is permissible for the debtor, after default, to authorise the creditor to sell the property privately (citing *Iscor Housing v Chief Registrar* *supra* with approval; see also *Israel v Solomon* 1910 TPD 1183 1186–1187; *In re Cradock Building Society* (1896) 13 SC 99).

In view of the above, it is necessary to qualify the statement in *Business Partners v Mahamba* (*supra* par 27) confirming the general validity of *parate*

executie clauses without drawing a distinction between movable and immovable property. The authority is clear that *parate executie* clauses are valid only in pledge agreements involving movable property and not in mortgage bonds over immovable property. However, in both instances it is possible to conclude a post-default agreement authorising the creditor to sell the property privately.

A question that might require some reflection is why a distinction is made between movable and immovable property when it comes to the validity of *parate executie* clauses. The court in *Iscor Housing v Chief Registrar (supra)* did not provide a detailed principled analysis, except to point out that the implications of a wrongful or mistaken private sale (for instance, if the property was sold in terms of the *parate executie* clause without the debtor's knowledge while the latter actually had a valid defence against the creditor's claim) are significantly more serious and more complex to overturn in the case of immovable property than with movable goods (*Iscor Housing v Chief Registrar supra* 617). Although true, one could regard this reasoning as an over-generalisation that does not take account of high-value movables or of the reality that a mistaken private sale of movables could have similar (or even worse) consequences than a mistaken private sale of immovable property.

A stronger reason might be that, in the context of a pledge agreement, the creditor already has lawful possession of the property and thus a *parate executie* would only involve the private sale of the property, and not any private means to dispossess the debtor. On the other hand, with mortgage bonds, the creditor is typically not in possession of the property and thus a private sale would, at best, involve selling the property "out from under" the debtor while he still occupies it or, at worst, involve a private eviction of some kind. Therefore, a pledgee creditor does not have to use self-help to obtain possession of the movable before selling it, while such dispossession would indeed be necessary in the case of immovable property. Put differently, the theory is that *parate executie* clauses in pledge agreements do not permit unacceptable self-help, while such clauses in mortgage agreements, by implication, do (see also Scott 2002 *THRHR* 661 with reference to *Iscor Housing v Chief Registrar supra* 541).

It is important to note that, even though the court in *Business Partners v Mahamba (supra)* discussed the validity of *parate executie* clauses, the facts of the case did not truly involve a *parate executie* clause. Indeed, no such clause appeared in the mortgage bond in question. Instead, after the debtor had defaulted on the original agreement, the parties agreed in a separate agreement that the creditor could sell the property privately if the debtor breached obligations in the separate agreement. If there had been a *parate executie* clause in the mortgage bond itself, that would have been invalid because, as established above, such clauses are not permitted in mortgage agreements pertaining to land. However, it is clear that the parties may agree to a private sale after the debtor has defaulted on the loan, which is what happened in this case.

4 ***Parate executie* versus post-default authority to sell in the residential foreclosure context**

Post-default agreements allowing the private sale of mortgaged property are not novel in South Africa, but they have recently taken on a new dimension in the context of residential property. Without going into detail, it is well known that the procedure for foreclosing mortgage bonds and having residential property sold in execution has become more strenuous in order to protect homeowners from the unjustified limitation of their right to have access to adequate housing and the right not to be arbitrarily evicted from their home (s 26(1) and (3) of the Constitution respectively). The leading cases on this issue are *Jaftha v Schoeman*; *Van Rooyen v Stoltz* (2005 (2) SA 140 (CC)) and *Gundwana v Steko Development* (2011 (3) SA 608 (CC)), with many others having dealt with this topic as well. Moreover, High Court Rule 46(1)(a)(ii) was amended in 2010 to require a court, before authorising such a sale, to consider all the relevant circumstances of the case, while a more expansive amendment of the rules came into force in 2018 with the introduction of the new High Court Rule 46A and the new Magistrates' Courts Rule 43A (see GN R1272 in GG 41257 of 2017-11-17; for more detail on residential foreclosure topic generally, see Brits *Real Security* 68–100 and the other sources cited there).

The immovable property in *Business Partners v Mahamba* (*supra*) was residential in nature and was indeed Mahamba's primary residence (home). The court also mentioned that when summons was served on Mahamba in order to commence enforcement of the surety bond, she was informed of her rights under section 26 of the Constitution (the housing clause) and invited to present information to the court regarding the possible infringement of her rights in this regard (thus complying with the practice directive issued by the Supreme Court of Appeal in *Standard Bank of South Africa Ltd v Saunderson* 2006 (2) SA 264 (SCA) par 25–27; see *Business Partners v Mahamba supra* par 8). There is no indication that Mahamba made use of this opportunity and thus this factor had no impact on the matter.

One key development in mortgage foreclosure law in recent years is that a sale in execution of a home should, in accordance with the proportionality test, generally only be permitted if there is no other reasonable way to satisfy the creditor's rights – that is, if the forced sale of the home is the last resort (see *Jaftha v Schoeman supra* par 40 and 59; *Gundwana v Steko supra* par 53; High Court Rule 46A(2)(a)(ii)). One alternative to sale in execution could be that the house is put up for sale on the private market – for instance, in terms of an agreement between the debtor and creditor whereby the debtor authorises the creditor to sell the property on his behalf.

This option (which most banks provide as an alternative to foreclosure these days) is beneficial for other reasons as well. First, no judgment is taken against the debtor, which has positive implications for his or her creditworthiness and avoids negative information being recorded at a credit bureau. Secondly, the property is likely to be sold at a more favourable price than would be the case with a sale in execution at a public auction. This increases the chances that there might be a surplus for the benefit of the debtor. Thirdly, legal costs are kept much lower than would be the case if the

creditor had to go through normal enforcement processes, which also increases the chances (and size) of a surplus after the sale. Finally, losing one's home through a controlled private sale is undoubtedly more dignified than going through a potentially traumatic public enforcement, execution and eviction process (see s 10 of the Constitution: "Everyone has inherent dignity and the right to have their dignity respected and protected").

The judgment does not say so expressly, but these might be some of the reasons that Mahamba granted the bank authority to sell her home instead of going ahead with the normal enforcement process. Indeed, the service of summons on Mahamba probably inspired her acceptance of the settlement agreement that authorised the bank to sell the property on her behalf on the private market, being preferable to formally defending the matter in court. In any event, having regard to the benefits listed above (and there might be others), it is commendable that the court in *Business Partners v Mahamba* (*supra*) reaffirmed the validity of entering into such post-default agreements. A caveat might be that it is important to ensure that a summons (and thus the threat of legal action) does not unduly induce a debtor to agree to prejudicial terms in a settlement agreement. It should also be remembered that, when the creditor sells the property on the debtor's behalf, it does so as her representative (agent) and accordingly the creditor is subject to all the duties and limitations of an agent in terms of the common law of agency (*Sakala v Wamambo supra* 148).

At the same time, while the law continues to sanction post-default agreements authorising the bank to sell the property without court oversight, it probably remains necessary to outlaw the inclusion of a *parate executie* clause in the mortgage bond itself (that is, when the loan is granted and the mortgage passed). Agreeing to a private sale after default means that the debtor does so with full knowledge of his or her position and presumably under circumstances where the debtor does not believe that he or she requires the protection provided by the judicial process, or that it is otherwise worthwhile to defend the matter in court.

This is not the case when the debtor agrees to a private sale, years in advance, via a *parate executie* clause in the mortgage bond. If *parate executie* clauses were permissible in mortgage bonds, this would create an opportunity for creditors to bypass the protection that judicial oversight is meant to provide, particularly in the context of residential mortgage foreclosure. The debtor in such a case would have agreed to *parate executie* when the loan was granted – well before default, and thus before the need for judicial oversight arose. The clause would have the result that, when the debtor defaults, he or she would have to submit to the private sale and thus forfeit the protection afforded by the normal process. This would be problematic if the debtor would have liked to place information pertaining to his or her housing rights before a court if granted an opportunity to defend the creditor's application for a judgment and execution order. A *parate executie* clause (included in the bond itself, not agreed to post default) means that the debtor would forfeit this opportunity to defend the creditor's foreclosure application, and instead would have to approach the court for protection against prejudice as contemplated in *Osry v Hirsch* (*supra*). It can be noted that the debtor *in casu* did not provide information regarding any

prejudice that she suffered or would suffer if the creditor were to continue with the private sale. She merely challenged the inherent validity of the agreement and power of attorney in question, alleging that these amounted to a prohibited *parate executie* clause, which clearly was not the case.

The point is that the application of the constitutional-right-to-housing clause in the mortgage foreclosure context provides support for the continued prohibition against *parate executie* clauses in mortgage bonds. In *Gundwana v Steko* (*supra* par 44 and 47–48), the Constitutional Court explained that the voluntary registration of a mortgage bond does not mean that the debtor waives his or her protection, or that it ousts the court's responsibilities, under the housing clause. The same reasoning supports the notion that no clause in a bond (including one for *parate executie*) can be used to bypass the requirement of judicial oversight when a home is sought to be sold to settle a mortgage debt. At the same time, inasmuch as the housing clause buttresses the prohibition against *parate executie* clauses in mortgage agreements, it also supports the rule that permits the post-default granting of a power to sell the property. The reason for this is that, under circumstances where the debtor does not have a strong defence against the creditor's foreclosure application (and thus the sale in execution appears inevitable), the debtor can choose to authorise a private sale by the creditor, which may be less prejudicial to his or her rights – both financially and with reference to his or her dignity.

5 Conclusion

Contractual clauses designed to enable a creditor to bypass court processes have been and probably will remain controversial. A fine balance must be struck between the benefits and risks associated with legal constructs that allow the sidestepping of judicial procedures that are otherwise required. Freedom of contract must also be weighed against the policy that no one should be permitted to take the law into his or her own hands (self-help). Regarding mortgage bonds registered over immovable property, the current position remains that both *pacta commissoria* and *parate executie* clauses are invalid when included in the mortgage bond. However, a *quasi*-conditional sale agreement is permissible, even if included in the bond, provided that the creditor takes over the property at fair value determined after default. Furthermore, a post-default agreement in terms of which the creditor is authorised to sell the property without court oversight is valid and, as pointed out above, could be beneficial also for the debtor. Yet, if history is anything to go by, this conclusion is probably not the last word on the matter.

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