

**PERFECTION CLAUSES, SUMMARY
EXECUTION (*PARATE EXECUTIE*) CLAUSES,
FORFEITURE CLAUSES (*PACTA COMMISSORIA*)
AND CONDITIONAL SALES IN PLEDGE
AGREEMENTS AND NOTARIAL BONDS
– THE POSITION CLARIFIED**

1 Introduction

A number of recent cases in various divisions of the High Court and in the Supreme Court of Appeal have concerned clauses, in notarial bonds and in agreements for cession of rights *in securitatem debiti*, which permit the creditor, upon default of the debtor, without recourse to a court, either to take possession of, to retain, to acquire or to sell the property provided as security for the performance of the debt. The decisions reflect a measure of controversy surrounding the validity of such clauses in light of the rule against self-help and section 34 of the Constitution (Act 108 of 1996) which provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. Other considerations which have been taken into account have been freedom of contract, the principle of *pacta sunt servanda* and whether such terms are *contra bonos mores*. The validity of such clauses has significance, particularly, for grantors of credit, who frequently rely upon them to provide security for their debtors' obligations, and, consequently, for commerce generally.

In the most recent case, *Bock v Dubororo Investments (Pty) Ltd* (2004 2 SA 242 (SCA)), notably, the Supreme Court of Appeal overruled the decision in *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd* (2001 1 SA 251 (E)), in which it was held that summary execution was unconstitutional, and, consequently, we have greater clarity in relation to this issue. It is useful, I submit, to analyse the decision in *Bock v Dubororo Investments (Pty) Ltd* (*supra*) in the context of the applicable general legal principles and relevant precedent, to gain perspective on the current legal position.

2 The common law position

Our courts have consistently applied the rule against self-help. For example, in *Nino Bonino v De Lange* (1906 TS 120), a clause in a lease agreement entitled the lessor, upon the lessee's breach, to cancel the lease and to

prevent, without recourse to law, the lessee from having access to the leased premises. Innes CJ stated,

“[T]he Court cannot recognise such a provision. It is an agreement which purports to allow one of the two contracting parties to take the law into his own hands, to do that which the law says only the court shall do, that is to dispossess one person and to put another person in the possession of property. It purports to allow the lessor to be himself the judge of whether a breach of contract has been committed. And having decided in his own favour to allow him of his own motion to prevent the lessee from having access to the premises. Only a court of law can do those things. The parties cannot stipulate to do them themselves”(123).

In a mortgage bond, a summary execution clause in respect of immovable property is invalid. In *Iscor Housing Utility Company v Chief Registrar of Deeds* (1971 1 SA 614 (T) 616-617), Claassen J explained that debtors need to be protected against creditors taking undue advantage of their impecunious position and that summary execution (*parate executie*) is tantamount to the creditor taking the law into his hands. Claassen J, citing an example of where a creditor honestly, but mistakenly, believes that the debtor is in default and sells the debtor's house without prior notice to him and passes transfer to an innocent third party, who becomes owner and demands that the mortgagor move out, observed that the mortgagor might have had a valid defence, such as set-off or waiver, in respect of the debt. The judge stated that, “[t]o ... permit execution in respect of immovable property without reference to the mortgagor would ... be contrary to the dignity, equity and spirit of our legal procedure” (623).

In the pledge of movables, however, our courts have upheld the validity of summary execution clauses. In the case of *Osry v Hirsch, Loubser & Co Ltd* (1922 CPD 531), Kotze JP pointed out the anomaly of regarding a summary execution clause in a contract as invalid, yet permitting a debtor, upon his default, to agree that the creditor may take possession of and sell his property, in order to satisfy the debt. Kotze JP also pointed out that, while the earlier Roman Dutch jurists regarded summary execution as invalid, in the eighteenth and nineteenth centuries, it was permissible, and he stated,

“The spirit of modern Jurisprudence is in favour of the liberty of contract, and there is practical wisdom in the observation of De Villiers CJ, in *Henderson v Hanekom* 20 SC 519: ‘All modern commercial dealings proceed upon the assumption that binding contracts will be enforced by law. However anxious the court may be to maintain the Roman Dutch law in all its integrity there must, in the ordinary course, be progressive development of the law, keeping pace with modern requirements’”(546).

Observing that Van der Linden (*Laws of Holland* Book I, Chapter 12) stated that the creditor, armed with a stipulation entitling him to summary execution, “will in such event act more safely in requesting the authority of the judge before proceeding to a sale”, Kotze JP stated,

“The conclusion at which I have arrived is that an agreement of sale, by means of *parate* execution, of movables delivered to a creditor is valid in law. It is, however, open to the debtor to seek the protection of the court if, upon any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights”(547).

In the context of pledge, a *pactum commissorium* is an agreement that, if the pledgor defaults, the pledgee may keep the security as his own property. The common law was set out in the judgment in *Graf v Buechel* (2003 4 SA 378 (SCA)): in Roman Law (from the time of the Emperor Constantine onwards) and in Roman-Dutch law, *pacta commissoria* were not permitted in pledge agreements. The position is the same in modern South African law. In *Sun Life Assurance Co of Canada v Kuranda* (1924 AD 20), Solomon JA explained it thus,

“The very essence of ... [a *pactum commissorium*] is that the creditor is entitled to retain the article pledged, however great its value may be, in satisfaction of a debt, however small in amount. And it was because of the harshness and injustice of such an arrangement made with the debtor in straitened circumstances that the Emperor Constantine decreed that such pacts should for the future be prohibited” (24).

However, there is nothing to prevent a debtor from selling the pledged article to the creditor at a price which reflects fair valuation of it, at the time of the sale (see *Graf v Buechel supra* par 27-29; and *Mapenduka v Ashington* 1919 AD 343 352-353 and 357). The agreement to sell the pledged article to the creditor, in the event of the debtor’s default, may be concluded at the time of the pledge; what is crucial is that the price should be determined by fair valuation of the article at the time when the creditor buys the pledged article, that is, only after the debtor’s default (see *Graf v Buechel supra* par 29).

3 The impact of the Constitution: cases decided since its enactment

3 1 Lesapo’s case and First National Bank; Sheard v Land and Agricultural Bank

In *Chief Lesapo v North West Agricultural Bank* (2000 1 SA 409 (CC)), the Constitutional Court declared unconstitutional and invalid section 38(2) of the North West Agricultural Bank Act 14 of 1981 which permitted the Bank to seize a defaulting debtor’s property, without recourse to a court of law, and to sell it by public auction in defrayal of the debt owed to the Bank. The court held that section 38(2) limited the debtor’s right of access to courts afforded by section 34 of the Constitution. Mokgoro J stated:

“[T]he ordinary way of securing execution in settlement of debts due is through the court process, and the seizure of the property against the will of the debtor in possession of such property for that purpose without an order of court amounts to self help. This is an infringement of section 34” (par 19).

Regarding the right of access to courts as “foundational to the stability of an orderly society ... [ensuring] the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help” (par 22) and, weighing the interest of the Bank in obtaining speedy and inexpensive realisation of its securities against the interests of its debtors in having disputes resolved by the application of law decided before a court, the court

concluded (par 29) that section 38(2) was not a reasonable and justifiable limitation, as intended by section 36(1) of the Constitution.

Shortly thereafter, in *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)), on the same basis, the Constitutional Court declared unconstitutional and invalid section 34(1) and section 55 of the Land Bank Act 13 of 1944, which contained similar provisions.

3 2 *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd*

The question arises whether the same reasoning applies to render unconstitutional summary execution clauses in contracts. In *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd* (*supra*), the applicant obtained an order, in the Eastern Cape Local Division, to take possession of the respondent's movables, upon his default, in order to perfect its security under a general notarial bond which contained a clause permitting this. A rule *nisi* was also issued calling upon the respondent to show cause why the applicant should not be authorised to dispose of the respondent's movable property "by public auction, public tender or private treaty or otherwise in the applicant's sole discretion", as provided for in the notarial bond. On the return day, there was no appearance for the respondent, but Froneman J raised the issue of the constitutionality of such an order. Froneman J was of the view that the court could not sanction "a private kind of execution"(par 19) for the debt owed, stating,

"If legislation which allows the attachment and sale of movable goods given as security without recourse to courts is unconstitutional, even where there is no dispute about the debtor's indebtedness, why should the common law allow it? I can see no valid reason why it should. Section 39(2) of the Constitution applies to the interpretation of both legislation and the common law. The leading case for upholding the validity of *parate executie* clauses in respect of movables is *Osry v Hirsch, Louber & Co Ltd* 1922 CPD 531. In that case the rule against self help was considered unimportant (541, but compare *Iscor Housing Utility Co v Chief Registrar of Deeds* 1971 1 SA 613 (T) 616H). *Lesapo's* case tells us that the rule is of fundamental importance to our Constitution. I consider myself bound by the ratio of *Lesapo's* case in the present matter" (par 19).

Counsel for the applicant emphasised that it was not seeking to bypass the courts, but for an order for the specific performance of the terms of the general notarial bond. However, the court refused to confirm the order, stating that it could not enforce specific performance of invalid contractual clauses.

This decision was criticised by Scott ("Summary Execution Clauses in Pledge and Perfecting Clauses in Notarial Bonds" 2002 *THRHR* 656), who submitted, *inter alia*, that this approach undermines the value of a general notarial bond as a form of security. Her criticisms have been endorsed by the Supreme Court of Appeal in *Bock v Dubororo Investments (Pty) Ltd* (*supra*), discussed below.

3 3 *De Beer v Keyser*

The case of *De Beer v Keyser* (2002 1 SA 827 (SCA)) concerned a franchise agreement, in the money-lending industry, which provided for the recovery of the loan by requiring the borrower to surrender his bank cash card and to disclose his personal identification number (“pin”) to the lender, and to authorise the lender to use the card to draw against the account. The respondents (the franchisees) argued that the franchise agreements were unenforceable as such technique amounted to a form of *parate executie* and was contrary to public policy. However, Nugent AJA distinguished the “pin and card” technique from summary execution, the principal objection to which is that, without judicial control, the property may be sold by the creditor on terms which are unduly prejudicial to the debtor, for example, for a price which satisfies the debt but which is nevertheless well below the value of the property. In this case, the borrower gave the lender authority to use the card to withdraw only what is lawfully due, just as, in the view of Nugent AJA, in a debit order, a commonly used method of debt recovery. Further, the court observed that there could be no question of the judicial process being circumvented as, in the event of the indebtedness being disputed, the debtor could countermand the authority or seek the intervention of the court. The court reasoned that, merely because the “pin and card” method of collecting the debt creates the opportunity for fraud to occur, it does not mean that the practice is contrary to public policy, and held that the franchise agreements were enforceable.

It may be mentioned that both counsel and the court apparently overlooked that the “pin and card” method of debt recovery had been prohibited in a schedule to the Usury Act 73 of 1968 (see GN R6959 in GG 21893 of 2000-12-13). Had this been taken into account, I submit that the decision would have turned on the effect of the illegality of the “pin and card” method upon the enforceability of the franchise agreements. A conclusion that it rendered the agreements void, would have affected the outcome significantly.

3 4 *Senwes Ltd v Muller*

The case of *Senwes Ltd v Muller* (2002 4 SA 134 (T)) concerned the validity of three special and general notarial bonds which contained clauses authorising the creditor, upon the debtor’s default, without any prior notice or legal process, to take possession of the movables referred to in the bonds, in order to perfect and protect its security, and to sell them *in rem suam* at a public auction. When the debtor defaulted, he refused to allow the creditor to take possession of the hypothecated movables, and the creditor applied for an order authorising this. It was common cause, and the court adopted the approach, that these clauses were legally unenforceable and invalid to the extent that they purported to permit the attachment and sale in execution of the hypothecated movable property without prior notice or legal process, which rendered them contrary to public policy. Referring with approval to

the *Chief Lesapo v North West Agricultural Bank, First National Bank and Sheard v Land and Agricultural Bank of South Africa*, and *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd* cases, Moseneke AJ stated that “[b]oth under our common law developed over the last 100 years or more, and under the current Constitution the provisions of [these] clauses ... offend some of the most basic tenets of our sense of what is right, just and fair”(142).

Consequently, the only issue for decision was whether the illegal aspects of these clauses were severable from each contract, or whether they rendered the contracts invalid. The court, applying the rationale adopted in *Sasfin (Pty) Ltd v Beukes* (1989 1 SA 1 (AD)) held, in the circumstances, that the offending words which authorised the creditor to perfect its security and to sell the movables without prior notice or legal process were severable and that the applicant was contractually entitled to protect its security interest by seeking a court order which permitted it to take possession of the movables covered by the notarial bonds. Moseneke AJ further stated that, once having taken possession of these movables in terms of a court order, the applicant would not be entitled to put the movables up for sale or execution without first having obtained an appropriate court order.

3 5 *Shoprite Checkers v Juglal NO Jumbo Trust*

In *Shoprite Checkers (Pty) Ltd t/a OK Franchise Division v Juglal NO Jumbo Trust t/a OK Foods Port Shepstone* (DCLD case no 6049/01), the Durban and Coast Local Division per Hurt J held that a summary execution clause in a general notarial bond, passed by the respondent (the franchisee) over its movable property, in order to secure its indebtedness to the applicant (the franchisor) for credit facilities extended to it, was not unconstitutional. Clauses in the bond entitled the applicant, upon the respondent’s default, forthwith, without prior notice to the respondent, to take and retain, at the respondent’s expense, possession of its business and/or its hypothecated assets and to conduct its business, and also to sell and dispose of the business and the hypothecated assets by public auction, public tender or private treaty, in the applicant’s discretion.

One of the issues was whether these clauses were valid. Hurt J disagreed with the reasoning and the result in *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd (supra)*, first, on the basis that the same yardstick should not be used to test the constitutional validity of contractual stipulations and legislative provisions. Hurt J stated that “(t)here is a fundamental difference between the universal imposition of obligations by way of statutory enactment and the individual acceptance and assumption of obligations in the common law of consensual contract”. Further, Hurt J disagreed that the rule against self-help was considered unimportant, in *Osry v Hirsch, Loubser & Co Ltd (supra)*, and that the common law of contract which allows summary execution of movables infringes the right of recourse to the courts entrenched by section 34 of the Constitution.

Hurt J commented, in relation to Claassen J's remark (see the *Iscor Housing Utility Company v Chief Registrar of Deeds supra* 617) that "it would be safer to proceed before a Judge", that this was a reference, not to proceeding by way of action or application for a judgment on the debt, but to obtaining the sanction of the court before attaching and selling the property. Hurt J observed that it had, at least in the last thirty years, become the practice for notarial bondholders to seek a rule *nisi* authorising them to attach bonded property for the purpose of "perfecting their security" and to sell it in due course. Considering Smalberger JA's view, in the case of *Sasfin (Pty) Ltd v Beukes (supra)*, that

"[a] clause for *parate executie*, which authorises execution without an order of court, is valid ..., provided it does not prejudice, or is not likely to prejudice, the rights of the debtor unduly ... As stated in *Eastwood v Shepstone* ... [1902 TS 294], it is the tendency of the proposed transaction, not its actually proved result, which determines whether it is contrary to public policy" (14),

Hurt J emphasised that it is open to the debtor to impugn the validity of a summary execution clause (as envisaged by Kotze JP, in *Osry v Hirsch, Loubser & Co Ltd supra* 457) on the ground that it is against public policy (which he obviously does as soon as he receives notice that the creditor intends invoking the clause) or to challenge the manner in which the creditor goes about enforcing the clause. In the circumstances, the judge concluded that

"[T]he common law, insofar as stipulations for *parate* execution are concerned, is that stipulations, which are not so far-reaching as to be contrary to public policy, are valid and enforceable; that, as a matter of practice, creditors seeking to enforce such stipulations take the precaution of applying for judicial sanction before doing so; and that the debtor can avail himself of the court's assistance in order to protect himself against prejudice at the hands of the creditor".

Hurt J turned to consider whether the common law, thus stated, requires development or modification, envisaged by sections 8, 173 and 39(2) of the Constitution, to bring it into conformity with the Constitution and, in particular, section 34. Hurt J was of the view that, contrary to the decision in *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd (supra)*, which was based upon the premise that a summary execution clause detracted from the rights entrenched by section 34, "the validity of such a clause under the common law is hedged about with conditions, and a form of practice, which, in fact, fully preserve the debtor's right to approach the court for relief". Further, bearing in mind that, by virtue of section 39(3) of the Constitution, the Bill of Rights does not deny the existence of other rights or freedoms which are recognised or conferred by the common law, customary law or legislation, to the extent that they are consistent with the Bill, Hurt J stated that "[a] court should be chary of developing the common law in a way which impinges upon the fundamental principles of contract such as the freedom of contract on properly consensual terms and the principle of *pacta sunt servanda* which, ... it ... [could] be safely said, are fundamentally consistent with the Bill of Rights". Thus, the court concluded that the common law relating to

the type of summary execution clause in the notarial bond in issue did not require modification in order to bring it into line with the Constitution.

Hurt J was referred by counsel, in argument, to an unreported decision in *Shoprite Checkers Ltd v Cannonball CC* (CPD cases 8701/2001 and 8731/2001), a case in the Cape Provincial Division, dealing with identical clauses in notarial bonds, which Oosthuizen AJ had distinguished from *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd (supra)* by incorporating an implied term that the creditor would only enforce his rights in a manner consistent with the Constitution. Hurt J did not comment on the judgment of Oosthuizen AJ, save to express agreement with the result of the decision.

The rationale behind Hurt J's judgment, I submit, accords largely, not only with Scott's subsequently published comments, referred to above, but also, particularly, with the views expressed by Olivier JA, in the subsequently reported case of *Brisley v Drotsky* (2002 4 SA 1 (SCA)), in which the Supreme Court of Appeal provided a clear indication of its approach to the constitutionality of clauses in agreements concluded between private individuals.

3 6 *Graf v Buechel*

In *Graf v Beuchel (supra)*, involving cession *in securitatem debiti* of shares and loan accounts, the Supreme Court of Appeal, relying on the reasoning adopted in *Millman NO v Twiggs* (1995 3 SA 674 (A) 676), and in *Sun Life Assurance Co of Canada v Kuranda (supra)*, stated (see *Graf v Beuchel supra* 382) that no reason exists, commercial or otherwise, for a cession of incorporeal rights to be dealt with differently from the pledge of a movable.

It was held that a *pactum commissorium* in a pledge is void even where the pledgor is not the pledgee's debtor. Counsel for the appellant, relying on *dicta* in *Brisley v Drotsky (supra* 15-16 and 35), submitted that constitutional considerations which should be taken into account were that contracts should be enforced, and that "contractual autonomy is a part of freedom". However, Cloete JA was of the view (par 19) that the potential for injustice, particularly for usury and an unfair distribution of an insolvent pledgor's assets, which *pacta commissoria* created, justified the limitation of contractual freedom, in the light of the constitutional protection of the values of dignity and equality. Cloete JA noted, after analysis (see par 20-25) of legislative provisions in a number of Western European jurisdictions, that a similar legal position obtains there.

The court emphasised, however, with reference to the case of *Mapenduka v Ashington (supra)*, that a conditional sale, at fair valuation at the time of purchase and not at the time the agreement is concluded, in a pledge agreement, is valid. It should be noted (see par 29) that, if the valuation exceeds the amount owing by the debtor, the excess belongs to the pledgor.

4 **Bock v Dubororo Investments (Pty) Ltd**

The case of *Bock v Dubororo Investments (Pty) Ltd (supra)* involved a cession of shares in a company by principal debtors to their creditors as security for the repayment of loans which had been granted to them. The debtors defaulted, the creditors called up the loans and, purportedly acting in terms of the cession agreements, took over the shares at a time when their value had plummeted. The creditors credited the principal debtors with the value attributed to the shares and claimed the balance outstanding from the sureties who contended that the creditors, by taking over the shares after the prices had plummeted, acted to the prejudice of the sureties, which led to their release.

It was also contended that the creditors had exercised rights to *parate executie*, which was unconstitutional. Harms JA considered a clause in one of the agreements which provided that, upon default of the debtor, the creditor was entitled “immediately or at any time thereafter irrevocably and *in rem suam* or at its discretion ... to realise the securities ... or to take over the securities at ... [its] election at a fair value ...” and pointed out (par 16) that the creditors did not exercise their right of *parate executie*, but instead exercised their right to purchase the pledged shares at a fair price. Referring to *Graf v Buechel (supra)*, Harms JA confirmed that, while a *pactum commissorium* in a pledge agreement is void, an agreement that a creditor may keep a pledge, upon the debtor’s default, at a fair price then determined, is similar to a conditional sale and is valid. Harms JA held (par 29) that the deeds of suretyship entitled the banks, at their discretion, to decide when to realise the pledges and that, in the circumstances, the conduct of the creditors was not prejudicial to the sureties. The appeals were dismissed, with costs.

Harms JA stated that *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd (supra)* par 15) was incorrectly decided, agreeing with Scott’s criticism (2002 *THRHR* 656 657) that Froneman J failed to make a crucial distinction between perfection clauses, statutory measures empowering the state to seize, without the intervention of the courts, property from debtors and summary execution clauses in pledge agreements. As Scott had pointed out, *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd (supra)* concerned a creditor applying for a court order to enforce a perfection clause in a contract, and not a right to *parate executie*. Further, Harms JA was not prepared to extend the proscription of statutory provisions by the Constitutional Court, as had occurred in *Chief Lesapo v North West Agricultural Bank (supra)*, to a clause in a contract providing for summary execution of movables which are lawfully in the possession of the creditor. Harms JA emphasised (par 4) that, while our common law has always recognised that self-help is unlawful, the rules regarding *parate executie* draw a sensible distinction between the case where security is in the hands of the debtor and where it is in the hands of the creditor.

A crucial section of the judgment, for the purposes of this analysis, I submit, is found in paragraph 7, where Harms JA stated that a clause in a mortgage bond permitting the bondholder to execute without recourse to the mortgagor or to the court, by taking possession of the property and selling it, is void. Nevertheless, after default, the mortgagor may grant the bondholder the necessary authority to realise the bonded property (see the *Iscor Housing Utility Company v Chief Registrar of Deeds supra* 616). Harms JA then stated that “[i]t does not matter whether the goods are immovable or movable: in the latter instance, to perfect the security, the court’s *imprimatur* is required (cf *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd* 2003 2 SA 253 (SCA))”. Harms JA proceeded to explain that “it is different with movables held in pledge: a term in an agreement of pledge, which provides for the private sale of the pledged article and in the possession of the creditor, is valid but a debtor may ‘seek the protection of the court if, upon any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights’ (*Osry v Hirsch, Loubser & Co Ltd supra* 547).” As Harms JA observed, Smalberger JA expressed the proviso slightly differently (see *Sasfin (Pty) Ltd v Beukes (supra)* 14) by stating that, to be valid, a *parate executie* clause should not prejudice, or be likely to prejudice, rights of the debtor unduly. This, according to Harms JA, meant that the clause should not contain execution provisions that would be *contra bonos mores*.

5 Conclusion

Thus, the Supreme Court of Appeal, in *Bock v Dubororo Investments (Pty) Ltd (supra)*, has clarified the legal position concerning perfection clauses, summary execution (*parate executie*) clauses, *pacta commissoria* and conditional sales in pledge agreements and notarial bonds, which, I submit, may be summarised as follows:

- A *pactum commissorium*, in a pledge agreement, is void (even where the pledgor is not the debtor), but a conditional sale, or a provision that the creditor may take over the pledged article at a fair price then determined, is valid. If the pledged article realises an amount in excess of the debt secured by it, the excess belongs to the pledgor.
- A perfection clause is valid and may be enforced by court order, in the event of the debtor’s default and his or her refusal to allow the creditor to take possession of the pledged property in terms of such clause. In such a case, whether the property is immovable or movable, the court’s sanction is required for the perfection of the security.
- In relation to immovable property, *parate executie* is invalid. In relation to movable property, a distinction is drawn between cases where the pledged property is in the possession of the creditor and where it is in the possession of the debtor. Where the pledged movable property is in the possession of the creditor, a term in the pledge agreement which

provides for the private sale of it by the creditor is valid but a debtor may “seek the protection of the court if ... he can show that ... the creditor has acted in a manner which has prejudiced him in his rights” (see *Osry v Hirsch, Loubser & Co Ltd supra* 547), and as long as it does not contain provisions that are contrary to public policy (in that they prejudice, or are likely to prejudice, the rights of the debtor unduly (see *Sasfin (Pty) Ltd v Beukes supra* 14)).

- Agreements for *parate executie*, where the pledged movables are in the possession of the creditor, do not offend section 34 of the Constitution, as they do not entitle the creditor to take the law into its hands nor to bypass the courts and to seize and sell property which is in the lawful and undisturbed possession of the debtor.

The following issues, I submit, remain to be clarified.

- Consider the situation where a notarial bond contains a perfection clause and a clause which entitles the creditor, upon the debtor’s default, to sell, without recourse to the debtor, or to the court, the debtor’s movables (which are in the possession of the debtor). If the debtor defaults, and refuses to allow the creditor to take possession of movables covered by the notarial bond, the creditor must first obtain a court order before it may take possession of such movables. Thereafter, once having obtained possession of the movables with the sanction of the court, if the creditor wishes to sell them, is the creditor obliged first to obtain a court order authorising it to sell them? Or, on the other hand, once the creditor has perfected its security, with the sanction of the court, does this entitle the creditor to sell the goods without having to resort to any further legal process? In other words, is this situation covered by Harms JA’s statement (see *Bock v Dubororo Investments (Pty) Ltd supra* par 7) of the position in relation to *parate executie* of movables which are in the possession of the creditor?

Presumably, I submit, a creditor who applies for a court order authorising it to perfect its security by taking possession of the movables covered by the notarial bond, would be wise to apply simultaneously for a rule *nisi* to be issued, calling upon the debtor to show cause why the movables should not be sold, and to obtain the desired order on the return day. But, it may be asked, is the creditor obliged to adopt this procedure in light of the decision in *Bock v Dubororo Investments (Pty) Ltd (supra)*?

- Cession of incorporeal property in *securitatem debiti* is regarded as a pledge of a movable which is in the possession of the creditor. In the circumstances, in *Bock v Dubororo Investments (Pty) Ltd (supra)*, the creditors elected not to exercise their right to *parate executie*. But what if they had elected to do so? Would they have been entitled to sell the shares without recourse to the debtor, or to the court? My submission is that the potential for, or tendency towards, prejudice to the debtor’s

interests could be substantial in such circumstances and the example provided by Claassen J (see the *Iscor Housing Utility Company v Chief Registrar of Deeds supra* 617) to illustrate an objection to *parate executie* of immovable property and the prejudice it could pose for a mortgagor who might not actually have been in breach or who might have had a valid defence, is equally applicable here.

- A final issue which, in my submission, apparently defies logic is the distinction which is drawn between summary execution of immovable, as opposed to movable, property. *Parate executie* in relation to immovable property is invalid, yet, in relation to movable property, it is valid. As Scott pointed out (664), the distinction should not be based on the value of the property as, nowadays, various types of movables have values which far exceed that of immovable property. My submission is that statutory requirements (as, *eg*, in the Deeds Registries Act 47 of 1937), including the transferor's written authority, for the transfer of title in immovable property, create, *per se*, protection for the interests of the debtor. On the other hand, however, pledged movables held by the creditor may be sold and transferred very easily, without reference to the debtor. Surely this poses greater potential for prejudice to the pledgor of movables than to the mortgagor of immovables? This, in my submission, calls for a reconsideration of the basis upon which our law regards *parate executie* of mortgaged immovable property as invalid, yet permits it, albeit with qualifications, in relation to hypothecated movables.

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