IN THE SUPREME COURT OF NAMIBIA CASE NO.SA 7/91

In the CIVIL APPEAL of:

ECKHARDT MEYER APPELLANT (Defendant in the Court a *quo*)

and

KARL-HEINZ HESSLING RESPONDENT (Plaintiff in the Court a *quo*)

CORAM: BERKER, C.J.; MAHOMED, A.J.A.; DUMBUTSHENA, A.J.A.

Date of hearing: 17 and 18th October 1991.

Delivered on : 1991.12.02

JUDGMENT

MAHOMED, A.J.A.: On the 23rd November 1984 the Respondent in this appeal ("the seller") entered into a written agreement ("the sales agreement") with the Appellant ("the purchaser"), in terms of which the seller sold to the purchaser the farm HAIDEHOF No.52 in the district of Omaruru, ("the farm") for a consideration of R67 500.00. The original sales agreement was in German but an agreed Afrikaans translation thereof was provided to the trial Court.

Paragraph 2.1 of the sales agreement as translated reads as follows:

> "Die koopprys is die bedrag van R67 500,00 (sewe-en-sestig-duisend vyfhonderd rand) en word deur die registrasie van 'n eerste verband by die Aktekantoor hipoteker verseker. Hierdie verband word saam met die

> oordrag van die plaas op die naam van die Koper geregistreer".

This is followed by paragraph 2.1.2 which is in the following terms:

> "Die betaling van die kapitaal van die verband word voorlopig op 2 (twee) jaar vasgestel. Die partye tot hierdie ooreenkoms het egter die reg om die betalingsdatum twee keer vir 'n verdere 6 (ses) maande te verleng. Sou dit die geval wees, moet die betrokke party die ander party 3 (drie) maande voor die verstryking van die 2 jaar in kennis stel. Dan kan die verband elke keer met 6 (ses) maande verleng word, maar egter nie langer as 3 (drie) jaar nie, waarna die kapitaal en rente betaalbaar is. Besitname van die plaas het alreeds plaasgevind".

Crucial to the disputes between the parties are the provions of paragraph 7 of the sales agreement to the effect that:

> "Indien die koopsom of die eerste verband nie betaal word nie, of indien enige ander voorwaardes van hierdie ooreenkoms nie nagekom word nie, het die Verkoper die reg om hierdie ooreenkoms tot niet te laat verklaar en sy eiendom weer in besit te neem, ongeag sy reg om die uitstaande bedrag of vergoeding vir enige skade wat as gevolg van die beeindiging van hierdie ooreenkoms ontstaan het, van die Koper te eis. Die Verkoper kan die Koper egter die oordrag van die plaas aanbied en die uitstaande bedrag deur middel van 'n hofsaak eis".

The agreement recorded that the purchaser was already in occupation of the farm and it was stipulated that transfer of the farm must occur as soon as possible.

The farm was duly transferred into the name of the purchaser and pursuant to the provisions of paragraph 2.1.1. of the sales agreement, a first mortgage bond ("the mortgage bond") was registered over the farm on the 10th May 1985. The mortgage bond sought to secure the purchase price of R67 500.00 and provided for interest at the rate of 15% per annum. It further provided that the principle sum had to be paid within a maximum period of three years from the date of registration "op voorwaarde dat die verbandgewer skriftelik 3 maande voor af loop van 2 jaar van datum van registrasie hiervan kennis gegee het aan die verbandhouer van sy voorneme om die voornoemde hoofsom met rente daarop eers na afloop van 3 jaar van datum van registrasie hiervan te betaal". No provision is made in the mortgage bond for the cancellation of the sales agreement itself.

It is common cause between the parties that no notice was given by the purchaser to the seller to extend the date within which the purchase price was to be paid in terms of the sales agreement itself or the mortgage bond. The seller accordingly contended that the purchase price was payable within two years of the date of the registration of the mortgage bond. The date of that registration was the 10th May 1985 and the period of two years expired on the 10th May 19.87. It is common cause that no portion of the purchase price had indeed been paid on or before the 10th May 19 87.

The seller thereafter sent a notice to the purchaser on the 26th May 19 87, purporting to cancel the sale agreement on the grounds that the purchase price had not timeously been

paid.

The validity of the seller's purported notice of cancellation on the 26th May 1987 was vigorously disputed both in the Court a quo and on appeal by Dr Hennina (assisted by Mr Du Plessis) who appeared on behalf of the purchaser.

Dr Hennina's attack on the seller's notice of cancellation (which was unsucessful in the Court a quo) rested substantially on three grounds.

1. The first ground was that on a proper interpretation of paragraph 7 of the sales agreement the seller had no right to cancel the sales agreement after the farm sold to the purchaser had been registered in the name of the purchaser and after the mortgage bond ^contemplated by paragraph 2.1.1. of the sales agreement had been registered.

2. In the alternative to the first ground, it was contended that paragraph 7 of the sales agreement required to be rectified in order to reflect the common intention of the parties at the time when the sales agreement was entered into, so as to substitute for the opening words of paragraph 7 the following:

> "Indien die koopsom nie betaal word of die eerste verband nie geregistreer word teen registrasie van transport nie, het die Verkoper die reg om hierdie ooreenkoms tot niet te laat verklaar en sy eiendom weer in besit te neem ....."

3. The third contention was that the seller's interpretation of paragraph 7 of the sales agreement gave to the seller a right to the cancellation of the sale and the retransfer of

ownership and that this amounted to an invalid and prohibited pactum commissorium in law.

THE PROPER INTERPRETATION OF PARAGRAPH 7 OF THE SALES AGREEMENT.

It is clear from paragraph 7 of the sales agreement that if the purchase price or the mortgage bond was not paid or if any other provisions of the sales agreement were not fulfilled by the purchaser, the seller had two remedies. The first remedy was to cancel the sales agreement and to take the property back. The second remedy was for the seller to "tender transfer of the farm to the purchaser" ("die koper egter die oordrag van die plaas aanbied") and to demand payment of the outstanding amount due to the seller by litigation in Court.

Dr Henning argued that the way in which the second remedy was formulated justified the conclusion that a cancellation of the agreement and a retransfer of ownership to the seller (on the grounds that the purchase price had not been paid) after the farm had been registered into the name of the purchaser (and after the mortgage bond had been registered) was never contemplated by the parties, because paragraph 7 requires the seller to tender transfer of the farm to the purchaser and such a tender is clearly premised on the basis that transfer to the purchaser has not yet taken place. Dr Henning accordingly argued that the whole of paragraph 7 must be understood to define the remedies of the seller prior to the registration of the farm in the name of the purchaser and the registration of the mortgage bond.

Mr Van der Merwe, (assisted by Mr Louw) countered this argument

by emphasising the clear words of that part of paragraph 7 of the sales agreement dealing with the seller's right to cancel the sales agreement on the grounds that the purchase price or the mortgage bond has not been paid. Mr Van der Merwe correctly contended that nothing in the express wording of paragraph 7 of the sales agreement sought to qualify that right of cancellation in the manner suggested by Dr Henning.

In my view the construction sought to be placed by Dr Henning on paragraph 7 of the sales agreement is unsound. It seeks to limit the seller's right to cancel the sales agreement (on the grounds of a failure to pay the purchase price or the mortgage bond) to the period before the registration of the mortgage bonds and the registration of the farm into the name of the purchaser. The first difficulty with that argument is that on that construction, the right to cancel the sales agreement on the grounds of a failure to pay the purchase price, could never arise because any claim to cancellation by the seller would be met with the answer that the purchaser has at least a period of two years before he is required to pay the purchase price and any purported cancellation of the sales agreement before the expiry of that period would be premature and ineffective in law. The only answer which Dr Henning suggested to meet this difficulty was that the purchaser might in fact have decided to pay the purchase price in cash before registration of the farm in his name and before registration of the mortgage bond and that paragraph 7 of the sales agreement was intended to equip the seller with the power of cancellation in such circumstances if the purchaser changed his mind and decided not to effect payment of the purchase price in cash. In my view this is an unconvincing answer. The parties

never comtemplated that the purchaser would make payment in cash. On the contrary the purchaser only expected to pay the purchase price after his return from abroad. He expected to be abroad for some two years. This is precisely the reason why the sales agreement provided that the purchaser had a minimum period of two years in which to pay the purchase price with a further extension of one year if the procedure referred to in paragraph 2.1.2. was properly followed. In the meanwhile transfer of the farm was to take place as soon as possible and simultaneously with the registration of the bond. In any event even if the scenario postulated by Dr Henning unfolded itself and the purchaser undertook to pay the purchase price in cash and thereafter changed his mind, any attempt by the seller to cancel the sales agreement on the ground that the purchaser had not paid the purchase price in cash would have been met with the answer that the purchaser always had the right to defer payment of the purchase price for at least two years in terms of paragraph 2.1.2. of the sales agreement and that his inability to give effect to a supervening desire to effect payment in cash, could not give to the seller a ground for cancelling the sales agreement.

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The submission that the right of cancellation provided for in paragraph 7 of the sales agreement was intended to be of operation only before the mortgage bond was registered is also manifestly inconsistent with the provisions of paragraph 7 for another reason. Paragraph 7 expressly provides that the right of cancellation arises upon the failure of the purchaser to pay the purchase price or the mortgage bond. It therefore postulates that when the right to cancel the sales agreement is invoked by

the purchaser the mortgage bond has already been registered. Counsel sought to overcome this difficulty by suggesting that the expression "indien die koopsom op die eerste verband nie betaal word nie" in paragraph 7 should in so far as it related to the mortgage bond be read as if it had stated "indien die koopsom op die eerste verband nie geregistreer word". That is in my view, however, nothing in the context of paragraph 7 of the sales agreement as a whole which would justify such a radical departure from the plain words of the paragraph.

To substitute the word "geregistreer" (registered) for the word "betaal" (paid) would effectively be to make a different contract for the parties. Moreover the suggested amendment would plainly be linguisticly awkward because the "koopsom" (purchase price) contained in the expression sought to be amended cannot be "registered".

Paragraph 7 of the sales agreement, dealing with the remedies of the seller, provides that in the circumstances referred to in that paragraph the seller has the right to cancel the agreement and "sy eiendom weer in besit neem". It was suggested that the underlined words support the inference that the right of cancellation was to be exercised before the transfer of the farm into the name of the purchaser and before the registration of the mortgage bond because after the farm was transferred into the name of the purchaser it would no longer be his property ("sy eiendom"). In my view this suggestion is also unsound. At the time when the sales agreement was entered into, the seller was indeed the owner of the farm and it was therefore perfectly understandable that he should refer to the farm as his property.

The parties contemplated, however, that on the date when cancellation was effected ownership would ordinarily have passed to the purchaser because of paragraph 4 of the sales agreement which provided that transfer be passed as soon as possible. For that reason paragraph 7 of the sales agreement provided that upon the cancellation the seller would be entitled <u>again</u> ("weer") to take ownership ("besit") of the farm. (The word "besitz" in German which is translated as "besit" in Afrikaans can mean "ownership" and was so understood by the parties according to the evidence.)

It was further contended on behalf of the appellant that the "koopsom" or "purchase price" could only have been owing during the period between the date when the sales agreement was concluded and the date when the farm was transferred to the purchaser and the mortgage bond registered and on this premise the right to cancel the sales agreement on the grounds of a failure by the purchaser to pay the purchase price, could not be a right which was exercisable after the transfer of the farm and the registration of the mortgage bond. It was contended in this regard that after the registration of the mortgage bond what was owing to the seller was no longer the purchase price but the "capital of the bond". . Whilst it is true that the sales agreement refers to the "capital of the bond" ("kapitaal van die verband") as well as the "purchase price" ("koopprys"), in the context of the agreement these expressions refer to the same concept. The "capital of the bond" was not to be advanced by any third party; it was simply the purchase price itself secured by the mortgage bond.

I am therefore not persuaded that on a proper construction of paragraph 7 of the sales agreement the right of cancellation given to the seller to cancel the agreement in the circumstances postulated by paragraph 7, was a right which was exercisable only before the registration of the mortgage bond and the transfer of the farm into the name of the purchaser. It is true that the alternative remedy given to the seller in the last sentence of paragraph 7 requires him to tender transfer of the farm and that this postulates a situation in which the farm has not yet been transferred. But this does not justify the conclusion that the remedy of cancellation which is an independent remedy provided for in the first sentence of paragraph 7 also postulates circumstances confined to the situation before the transfer of the farm into the name of the purchaser and the registration of the mortgage bond. In any event the alternative remedy given to the seller in the second sentence of paragraph 7 of the sales agreement is not inconsistent with such a remedy being exercised after the transfer of the farm into the name of the purchaser and the registration of the mortgage bond. The need to tender transfer would arise where there is a cancellation before transfer of the farm into the name of the purchaser takes place but where transfer has already taken place there would be no such need. The fact that this is not spelt out fully in the second sentence of paragraph 7 does not justify the conclusion that the seller was not entitled to enforce the alternative remedy merely because transfer of the farm into the name of the purchaser had already taken place.

Dr Henning contended vigorously that the terms of the sales

agreement were "extinguished through performance on transfer

of

ownership and registration of the bond. Thereafter the bond provisions would apply". He added that "by reserving, in clause 2.1. of the sale, the right to mortage security, the parties declared an intention that plaintiff would not reclaim ownership after transfer". He accordingly argued that the power of cancellation provided for in paragraph 7 of the sales agreement could only be of operation before the registration of the mortgage bond.

Dr Henning urged that paragraph 7 of the sales agreement had to be interpreted against the background of the commom law.

In support of this approach Dr Henning referred to the well-established principles pertaining to the law of mortgage and pledge in terms of which a mortgagee is obliged to obtain judgment for the outstanding debt secured by the mortgage bond and obliged further to pay the surplus of the proceeds of the judicial sale over the amount of the debt to the mortgagee, fBenson v Hirchhorn, 1936 NPD 277 at 278 - 279; Lee Introduction to Roman Dutch Law, 3rd ed. p.210; John v Trimble and Others, 1902, TH 146 at 156.); Oliff v Minnie, 1953(1) SA 1(A), 3 D-F; Union Government (Minister of Finance) v Chatwin, 1931 TPD 317, 321; Lief NO v Dettmann, 1964(2) SA 252 (A), 264H - 265D, 269E - F, 273 H, 276 C-D. Thienhaus NO v Metie and Ziegler Ltd and Another, 1965 (3) SA 25 (A), 31 D-E; Worman v Hughes, 1948 (3) SA 495 (A), 505; Swart en *n Ander v Cape Fabrix (Pty) Ltd, 1979(1) SA 195(A), 201 E-F, 201 G; Gravenor v Dunswart Iron Works, 1929 AD 299, 303; Scottish Union and National Insurance Co. Ltd. v Native Recruiting Corporation Ltd, 1934 AD 458, 465-466.)

There can be no doubt that a mortgagee relying on the terms of his mortgage bond is ordinarily required to obtain judgment for the outstanding debt and to pay any surplus of the proceeds of the sale in execution to the mortgagee. He cannot simply retain the mortgaged property in settlement of the debt. It does not follow from this, however, that a seller of property who has in terms of the agreement of sale, the right to cancel the sale if the purchase price is not paid, forfeits and extinguishes that right merely because he seeks to secure the purchase price by registering a mortgage bond over the property in his favour after transfer to the purchaser.

Mr Van der Merwe rightly drew a distinction between the sales agreement itself and the instrument by which the seller sought to secure the indebtedness of the purchaser in terms of the sales agreement. A mortgage bond is the instrument to which the purchase price is secured. The mere fact that the mortgage bond is registered to secure the purchase price does not extinguish or substitute or even novate the preceding debt arising from the obligation to pay the purchase price of the merx. Were it otherwise a seller of property who secured the purchase price by a mortgage bond over the property sold and who recovered only a third of the purchase price upon the foreclosure of the mortgage bond and the consequent sale in execution, would by seeking to secure the debt, be forced to forfeit and to extinguish his claim against the purchaser for the remaining two-thirds of the purchase price still unpaid after the sale in execution. The law prescribes no such ariomaly (De Wet & Yates, Kontraktereq en Handelsreg, 12th ed. page 239 and page 355; Lawsa, Vol.17, page

292, para. 397 and page 293, para. 398; Christie; Law of Contract in South Africa. pages 441 to 447).

It is perfectly true that if the seller in the present matter sought to enforce the mortgage bond, he would be obliged to obtain a judgment from the Court with respect to the balance of the purchase price and to obtain an order declaring the mortgage property executable. Any surplus from the proceeds of the sale in execution in access of the amount of the purchaser's indebtedness would have to go to the purchaser. The seller could not simply retain the mortgage property in satisfaction of the debt. The seller in the present case does not, however, seek to enforce the mortgage bond. He is seeking simply to enforce his rights in terms of the sales agreement. Strydom, A.J.P, (as he then was) held in the Court a guo that he was entitled to do so. In my view he was, on a proper interpretation of paragraph 7 of the sales agreement, correct in that conclusion.

Since the sales agreement gave to the seller the right to cancel the sales agreement (and since cancellation ordinarily entitles the seller to restitution) the order made by the Court a guo also included a declarator that the sales agreement had lawfully been cancelled and an order directing the purchaser to retransfer the farm to the seller and to give to the seller repossession of the farm. Was it competent for the Court to direct such retransfer and repossession on a proper interpretation of paragraph 7?

Dr Henning contended that "upon the transfer of the property and the execution of the mortgage bond the law of property took

over from the consequences of the law of contract". It is necessary

to examine what is intended by this submission. In so far as it is advanced to support the proposition that the transfer of the farm and the execution of the mortgage bond *per se* substituted or even novated the rights of the seller in terms of the sale agreement, it is unsound for the reasons I have previously discussed. But circumstances are conceivable in which the rights of the seller in terms of the sales agreement might not be enforceable in consequence of the conduct of the purchaser pursuant to the transfer of the farm into his name and the registration of the mortgage bond. If, for example, the purchaser had sold and transferred the farm to a *bona fide* third party the seller's right in terms of the sales agreement, to obtain retransf er of the property to him upon cancellation of the sales agreement, might not be enforceable. Similarly if the purchaser had obtained a loan from a third party secured by a second mortgage over the farm the seller might not be able to enforce his right to have the farm retransfered to him upon cancellation, without paying the indebtedness of the bond-holder. None of these problems arise on the facts of the present case, however, and therefore do not need to be considered. It is common cause that the farm is still registered in the name of the purchaser and that it is hypothecated only by the mortgage bond in favour of the seller in terms of the sales agreement.

In the result I am of the view that the transfer of the property into the name of the purchaser and the execution of the mortgage bond did not on a proper interpretation of paragraph 7 of the sales agreement preclude the Court a *quo* from ordering the purchaser to retransfer the farm to the seller and to give to the seller the possession thereof. (I will deal later with the

submission that even if this is the proper interpretation of what paragraph 7 of the sales agreement intended, it was a pactum commissorium prohibited by the common law.)

THE CLAIM FOR RECTIFICATION:

In his written heads of argument Dr Henning had contended in the alternative to his first argument that it was the common intention of the parties to limit the seller's right of cancellation in terms of paragraph 7 of the sales agreement to the period preceding the transfer of the property into the name of the purchaser and the registration of the mortgage bond. There was, however, no evidence in support of this contention on the record and after some argument Dr Henning wisely abandoned any reliance thereon, and the consequent claim for rectification based on this submission.

PACTUM COMMISSORIUM.

Dr Henning submitted that even if paragraph 7 of the sales agreement, properly interpreted, purported to give to the seller the right to cancel the sales agreement and to demand and take retransfer of the ownership of the farm after the farm is transferred into the name of the purchaser and after the mortgage bond is registered, such an agreement constitutes an invalid and prohibited pactum commissorium which is unenforceable in law.

He contended that the relevant principles of the law of Mortgage and Pledge to which I have previously referred in dealing with the proper interpretation of paragraph 7 of the

sales agreement

are relevant not merely to the interpretation of the paragraph 7 but also to its enforcibility.

Counsel relied on a passage in Wille; Mortgage and Pledge, 4th ed. 124 in summarising the relevant principles of application. This passage is to the following effect:

> "An agreement to the effect that if the debt is not paid by a certain date, or if the mortgagor is otherwise in default, the mortgagee may hold or keep the security as his own property, is known as a pactum commissorium. Such an agreement is absolutely illegal and unenforceable".

There is strong support for this statement by Wille in the authorities:

Vasco Dry Cleaners v Twycross, 1979(1) SA 603 (A) 611G;

John v Trimble & Others, 1902 DH 146, 155 - 156;

National Bank of South Africa Ltd v Cohens Trustee, 1911 AD 235, 242;

Mapenduka v Ashington, 1919 AD 343, 351;

Sun Life Assurance Company of Canada v Kuranda, 1924 AD 20, 24;

Iscor Housing Utility Co. & Another v Chief Registrar of Deeds & Another, 1971(1) SA 613 (T) ;

Abbot v Cawood, 1982(2) SA 153 (NC), 155H-156F;

German Civil Code, paragraph 1149.

Mr Van der Merwe on behalf of the purchaser, did not contend that these authorities did not support the statement of the law by Wille relied upon by counsel for the seller or that any of these cases were wrongly decided. His submission was, however, that

these authorities do not, in the circumstances of the present matter, assist the case sought to be made on behalf of the purchaser. Properly analysed, the arguments advanced on behalf of the seller appeared to me to be premised on two main propositions. The first proposition is that the relevant principles of the law of Mortgage and Pledge upon which counsel for the purchaser seeks to support his case are of no application in the present matter because the seller is not relying on the mortgage bond at all for his cause of action but on the enforceable provisions of the sales agreement itself. The second proposition is that an agreement in terms of which a seller of property is entitled to cancel the agreement and to be restored to the possession and ownership of the property sold, (if the seller does not pay the purchase price) is not a pactum commissorium prohibited by the common law, even if the seller has sought to secure the purchase price by a mortgage bond.

In considering the arguments advanced on behalf of the purchaser with respect to the proper interpretation of paragraph 7 of the sales agreement, I have already dealt with and rejected the submission that the effect of the registration of the mortgage bond and the transfer of the farm into the name of the purchaser, was to substitute or novate the rights and remedies of the seller in terms of the sales agreement where the purchaser had failed to pay the purchase price. In my view there is no such substitution or novation. The right of the seller to cancel the sales agreement in such circumstances remains intact. The right to be restored with the ownership and occupation of the farm sold is a legal consequence of the cancellation. It is in my view not dependent on any agreement between the parties. The right to

be restored to the ownership and possession of the property upon cancellation, would therefore be a right which the seller would ordinarily be entitled to enforce against the purchaser (subject to any real rights in the property vesting in bona fide third parties) even if the sales agreement was silent in this respect and had merely provided for the right of cancellation without spelling out the ancillary restitutional consequences of such cancellation.

It is therefore clear in my view that if the only relevant agreement between the parties in the present case was the sales agreement itself (and there was no mortgage bond to secure the purchase price) the right conferred upon the seller to cancel the sales agreement if the purchase price was not paid, could not be attacked as a prohibited pactum commissorium. Indeed there is a wealth of authority to support the proposition that the Courts would ordinarily enforce the provisions of an agreement in terms of which a seller is given the right to cancel an agreement for the sale of property, if the purchase price is not paid. A claim for the restitution of the res vendita following upon such cancellation would also then be enforced.

Voet: 18.3.2 and 20.1.25 (Gane Vol 3 p.292-3 and p.502);

North Vaal Mineral Co.Ltd v Lovasz, 1961 (3) SA 604 (T) at 606 B - E;

Van der Keessel 3.14.32 (Van Warmelo et al, Vol.4 p.389);

Christie: The Law of Contract in South Africa, pp.491 and and 496.

Bainess Motors v Piek, 1955(1) SA 534 (A) at 542 H.

Edengeorge Ltd. v Chamomu Property Investments, 1981 (3) SA 460 (T) at 467 F -*469 F;

Zimmerman, op.cit. p. 737-8 (see also note 147).

<u>Sasol Dorpsgebiede Bpk. v Herewarde Beleggings Bpk</u> ., 1971(1) SA 128 at 131 (0);

<u>Da Mata v Otto, N.O.</u>, 1972 (3) SA 858 (A) at 870 - 871.

If, as these and other authorities indicate, there is no prohibition against an agreement in terms of which a seller of property is entitled to cancel the sales agreement if the purchase price is not paid (and there is. a consequential right to the return of the <u>res vendita</u> because of the seller's right to restitution) does such an agreement become objectionable and unenforceable in law simply because the seller has sought to secure the purchase price by registering a bond over the property sold in terms of the sales agreement? Dr <u>Henning</u> contends that the agreement can and does become unenforceable in law because it constitutes a prohibited <u>pactum commissorium</u>.

None of the counsel appearing before us on appeal were able to refer to any modern authority which is directly in point and which deals with the enforceability of an agreement which gives to the seller not only a right of cancellation and restitution (on the grounds of a failure to pay the purchase price) <u>simpliciter</u> but which further provides for a mortgage bond over the <u>res vendita</u> in favour of the seller to secure the purchase price.

The position consistently maintained by Dr <u>Henning</u> was that in substance and in effect what the sales agreement purported to do was to give to the seller the right simply to take repossession and retransfer of property mortgaged to him without the obligation to foreclose the mortgage bond and without the obligation to pay to the mortgagor any surplus which might have been realised in excess of the debt of the

mortgagor following

upon a proper sale in execution. Counsel contended that such an agreement falls squarely within the ambit of a prohibited pactum commissorium.

The classical example of a pactum commissorium which the common law refuses to countenance arises from an agreement in terms of which the lender of money secures the debt of the borrower through a mortgage or pledge over the property of the borrower and there is a stipulation that if the money so loaned is not paid on due date the lender would be entitled to become the owner of the security pledged or mortgaged, regardless of its value. The public policy objection to this kind of arrangement seems to be based on two grounds. The first ground is that such an agreement is oppressive to the borrower because his position is weaker than that of the lender at the time when the agreement is entered into and such an agreement gives to the lender the unfair advantage of being able to take for himself property far in excess of the quantum of the loan when the date for the payment of the loan arrives and the borrower is unable to repay. The second objection is that such an agreement would often result in parate executie or some form of selfhelp without recourse to the Courts.

(C.J. Van der Merwe Sakereg : 2nd ed. page 659; John v Trimble & Others, 1902 TH 146 at 155-156; Vasco Dry Cleaners v

Twycross, 1979(1) SA 603 (A) at 611; Abbott v Cawood, 1982(2) SA 153 (NC) at 156 A; Voet, 20.1.25.

Neither of these objections would be of application in the present case. In the first place the purchaser is not from a

position of weakness mortgaging valuable property of his own (which he has acquired independently of the res vendita)in order to secure a lesser claim. The seller would upon cancellation be obtaining no unfair advantage. He would simply be getting back his own property, because the purchaser has not paid the purchase price. In the second place there is no parate executie involved. The seller would have to obtain a court order to direct the purchaser to retransfer the property to him following upon cancellation.

Dr Henninq argued forcibly that it was irrelevant to inquire into what the reasons for the prohibition against a pactum commissorium were in the common law. He contended that if the transaction fell within the terms of the prohibition, it was unenforcible and the Court had no discretion to make it enforcible simply because no unfairness might be involved on the facts of the present case. He referred to a number of authorities in which the prohibition against a pactum commissorium is set out in general terms without any qualifications or exceptions to accommodate other cases where the reasons which prompted the prohibition may not be of application.

(Warnkoniq, Dogmengeschichtliche Darstellunq der Lehre von der Lex Commisssoria beim Pfandrechte, published in Archiv fur die Zivilistische Praxis. (1841) 1 - 38, 312 - 388, (1842) 6 114, 226 - 255, 420 - 439, esp. at 60 - 78.

Codex 8.35.3? De Groot & Voetf Introduction to Dutch Jurisprudence 2.48.41 (Herbert's trans). Voet 20.1.25 (Gane, op cit 502/3). Counsel for the purchaser is in my view correct

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contending that the prohibition against a pactum commissorium is not confined to debts originating in money lending and that there is no exception created in the case of a debt secured by a mortgage which has its origins in the sale of property. If, for example, the purchaser in the present case had hypothecated a different property as security for the purchase price due to the seller in respect of the sale of the farm HEIDEHOF any agreement to the effect that the seller could retain such other property so high hypothecated if the purchase price on the sale of the HEIDEHOF farm was not paid, would constitute a pactum commissorium unenforcible in law. The fact that it originates in a transaction for the sale of land would not constitute a reason for exemption.

The reasons for the prohibition against a pactum commissorium, are nevertheless relevant in determining the ambit and limits of the prohibition. The prohibition has therefore been held not to extend to various categories of circumstances in which the reasons for the prohibition would be of no application. Thus in Simon Van Leeuwen's Censura Forensis (translated into English by Barber & Macfaydyen) part 1, Book IV, the following is said:

> "But when, however, the reason of the prohibition ceases, it is allowed so that the pledge may go to the creditor in payment of the debt, according to a

fair valuation of the price. (Costal.ad l.Titius 34, ff. de Pignor.act; Molin. de Usuris qucest.52; Bronchorst, miscell.controv. cent. 1, assert.77; Neguzant de Pignorib, 4 part princip. num. 6, vers, secundo fallit; Covarruv, Variar resolut. lib. 3, cap.2. num. 7, vers, secundo.) And so it has been decided by the Senate of Paris, according to Gregor. Tholosan. (Syntagma Jur. Univers. lib.122. cap. 9, num.14), and

by the Senate of Savoy, on the authority of Anton. Fab. (ad Cod, de Pact.pianor.lib. 8, tit.23,defin.l): and the reason is that an agreement as to selling back is preferable, and this is the sense of 1.16,S ult.ff. de Pignorib, et l.ult.in pr.ff. de Contrah.empt., in which the commissory clause appears, and no fraud is imputed to the creation of the agreement, for a debtor can sell his pledge not only to a third party, but also to the creditor (1.12, in pr.ff. de Distract, piqnor, 1.9, in pr.ff. Ouib.Mod.pign., 1.20,S 3, ff. de Pignor.act.) And in like manner the reason of the prohibition of the commissory clause also ceases if the debtor has expressly renounced the protection of the law found in 1.fin.Cod.dePact.piqnor., as if, with full knowledge of his rights, he has knowingly and willingly given up to the creditor the thing, subject to the burden of the pledge, for the amount of the debt (arg.l.l,S 5, ff. de Injur.iunct.l.pen,; Cod. de Pact.1.41, ff. de Minorib; Anton.Fab. ad.Cod.d.tit.defin.5)."

Crucial to the objection against a pactum commissorium is the fact that it purports to give to the creditor a right to enforce a substituted form of payment from the debtor by taking possession and ownership of the property mortgaged or pledged to secure the debtor's indebtedness. It is necessarily premised on the legal hypothesis that the contract giving rise to the debt (secured by a mortgage or pledge) remains alive. The obligation of the debtor in terms of that contract is sought to be fulfilled by a unilateral possession or ownership of the property pledged or mortgaged. (Reinhard Zimmermann: The Law of Obligations: Roman Foundations of the Civilian Tradition, pages 737 - 738; page 224). This is not what happens when there is a cancellation (and a consequential claim for the restitution of the property sold) even if it is mortgaged to the seller to secure the

purchase price. In the case of cancellation the creditor is restored to the possession and ownership of the property simply because the contract in terms of which the creditor parted with the property in the first place has been cancelled and ceases to exist. The property is returned to the creditor to put him into the position as if no contract had been entered into at all and not for the purposes of putting him into the position as if the obligations of the debtor were being fulfilled. It is for that reason that the law has always countenanced a claim for the return of property sold following upon a lawful cancellation of the contract in terms of which the seller has parted with the property.

(Voet: 18.3.2 and 20.1.25 (Gane Vol 3 p.292-3 and p.502);
North Vaal Mineral Co. Ltd. v Lovasz, 1961 (3) SA 604 (Y) at 606
B-E;
Van der Keessel 3.14.32 (Van Warmeloo et al, Vol.4 p. 389);
Christie: The Law of Contract in South Africa, pp. 4191 and 496.
Baines Motors v Piek, 1955(1) Sa 534 (A) at 542 H.
Endengeorge Ltd. v Chamomu Property Investments, 1981 (3) SA 460
(T) at 467 F - 469 F.)

When the contract between a purchaser and a seller ceases to exist in consequence of a cancellation, the ancillary rights and obligations of the parties in terms of the mortgage or

pledge executed to secure the obligations of the debtor, also cease to exist. It can therefore, in these circumstances never be contended that the creditor is in law enforcing the mortgage bond by a prohibited pactum commissorium. (See Huber; The Jurisprudence Of My Time, translated by Percival Gane, Chapter

51, paragraphs 6 and 7, page 317.)

It is perfectly true that the pragmatic result of a cancellation and restitution, such as that sought by the seller in the present case, would on the facts of this case be exactly the same as the result which would ensue from the enforcement of a pactum commissorium in terms of which the seller was given the right to the ownership and occupation of the property sold to the purchaser, if the purchaser did not pay the purchase price secured by the mortgage bond. The result is the same in both cases, however, because of the special facts of this case. The result would be totally different if, for example, the purchase price had been secured by a mortgage bond registered in respect of another property of the purchaser not constituting the res vendita and the res vendita itself had following upon the transfer to the purchaser been sold and transferred to a bona fide third party. The res vendita could then not effectively be returned to the seller and any attempt to assume ownership and possession of the other property of the purchaser mortgaged to secure the purchase price would legitimately be met with an objection based on the pactum commissorium.

These distinctions, in my. view, clearly show that when the seller in this case seeks an order of cancellation (and a consequential order for the retransfer of the farm) he is not seeking to enforce any pactum commissorium at all, notwithstanding the fact that the farm was mortgaged to secure the purchase price and notwithstanding the fact that the mortgage bond was registered in terms of a provision in the

sales agreement itself.

A cancellation of a sales agreement by the seller (and a consequential restitution of the property sold to the seller) not constitute an enforcement of a pactum commissorium merely because the property sold was mortgaged, anymore then such a restitution could be said to constitute a "penalty" (Da Mata v Otto N.0. . 1972 (3) SA 858 (AD) at 870 - 871; Sasol Dorpsaebiede Beperk v Herewarde Beleggings (Edms) Beperk, 1971(1) SA 128 (0);)

Indeed Dr Henninq was constrained to concede that the seller was entitled to cancel the sales agreement once the purchase price was not paid timeously and notice was duly given. He denied, however, that this entitled the seller to the retransfer of the farm.

In my view, however, the right to retransfer is simply the right of restitution which follows upon a lawful cancellation. I know of no legal principle which could legitimately be used to deny to the seller his right to such restitution and retransfer, merely because the res vendita was hypothecated by the purchaser to the seller in order to secure the purchase price.

In his thorough argument on behalf of the purchaser Dr Henninq also referred to De Groot, Introduction to Dutch Jurisprudence 2.4 8.41. In that paragraph De Groot states that -

> "The effect of a mortgage is not that a creditor may retain the mortgaged property for himself, or sell it on his own authority; nay more, he may not even stipulate by contract for the right of forfeiture of the ownership in default of payment, but he must, after obtaining judgment, allow the sale to take

place according to legal process and thus recover what is

due to himself".

This passage from De Groot does not deal with the right of the seller of a property(mortgaged to a purchaser) to reclaim ownership thereof following upon a lawful cancellation of the sales agreement but Dr Hennina appeared to suggest that De Groot must have had some situation in mind because paragrapah 41 is preceded by the following statement in 2.48.40.

> "....an earlier mortgage is preferred to a later without any distinction, except that Kustingbrieven executed upon the acquisition of purchase of any property take precedence, as regards such property, of prior general mortgages".

I have, however, examined the context in which paragraph 2.48.41 in De Groot appears and I am satisfied that what he states in that paragraph is not related to Kustingbrieven or some such analogous position. What De Groot is dealing with in paragraph 2.48.41 is the general principles pertaining to the law of mortgage. He is not applying his mind at all to the claims of a seller who seeks to recover mortgage property not in consequence of a pactum commissorium but pursuant to a cancellation of the underlining sales agreement which gave rise to the mortgage.

Finally, counsel for the purchaser relied on a passage in the "Kort Beqrip van Het Oud-Vaderlands Burqerliihk Recht". This passage reads as follows:

> "In sommige provincien, met name in Groningen en Friesland, sprak men wel van: recht van gereserveerden eigendom) . Ook bij overdracht van een recht van

beklemniing of een ander beperkt zakelijk recht (quasi-dominium), waarvan de prijs niet volledig was betaald, sprak men van het beding van gereserveerden eigendom. Leest men de woorden van de acten, waarbij dit recth van gereserveerden eigendom werd gevestigd, dan zou men kunnen menen, dat, als de koper in gebreke bleef de rente of de termijnen van de hoofdsom te voldoen, de onroerende zaak bij rechterlijk vonnis weer aan den verkoper kon worden toegewezen, en dat de koper dus het gekochte weer moest teruggeven, en zelfs alles, wat hij op de hoofdsom reeds had afbetaald, kwijt was, zonder recht van terugvordering; immers men nam in de acten de bepaling op, dat het geleverde eigendom van den verkoper bleef totdat de gehele hoofdsom en de verschenen rente zou zijn betaald. Niettemin had, althans blijkens 18e-eeuwse Groningse jurisspurdentie), in de praktijk de onbetaalde verkoper niet dit recsht van terugvordering; men achte het in strijd met het uit het Romeinse recht gerecipieerde verbod van de z.g. lex commissoria (beding van toeeigening van de verpande zaak, C.8.34 (35),; volgens deze jurisprudentie kan men het recht van gereserveerden eigendom slechts beschouwen als een hypoteek tot zekerheid van den verkoper, dus als een kusting. Men kan echter ook dan nog van recht van gereserveerden eigendom spreken, als men het woord eigendom maar opvat als gebrekkelijken eigendom. (vg.no.67); recht van hypoteek was immers ook een soort van gebrekkelijken eigendom)."

This passage was also brought to the attention of the Court a quo which dealt with it as follows:

"In die konteks van die aanhaling wil dit voorkom asof hier slegs die mening weergee word van "18e eeuwse Groningse jurisprudentie' wat, in teenstelling met *(wat) men kunnen menen' in die praktyk die verkoper nie toegelaat het om die verkoopte saak terug te vorder nie op grond daarvan dat dit in stryd was met

die verbod op die sogenaamde lex commissorium.

> Om sondermeer wat '18 eeuwse Groningse jurisprudence* gedoen het, as algemeen geldende reg te aanvaar, sou na my mening nie korrek wees nie. Uit die aangehaalde werk kom dit voor dat dit slegs die Groningse regsgeleerdes was wat hierdie mening toegedaan was. Immers die reg tot terugtrede by die koopkontrak was algemeen aanvaar. (Kyk Voet 18.3.1. en Van der Keessel 3,14.321".

In my view, the Court a guo was correct. The statements in Voet, 18.3.1. and 18.3.2. and Van der Keessel in 3.14.32 are further supported by what is said in Voet, 20.1.25 and by modern Authority in Southern Africa which has consistently applied the principle that there is no public policy objection to the claim by a seller for the restitution of the res vendita following upon a lawful cancellation of the sale.

(North Vaal Mineral Co. Ltd. v Lovasz , (supra); Baines Motors v Piek, (supra); Edengeorge Ltd. v Chamomu Property Investments, (supra).)

CONCLUSION:

In the result I have come to the conclusion that all three of the attacks on the judgment of the Court a guo launched on behalf of the appellant are unsound in law. The appeal is therefore dismissed with costs including the costs of the respondent consequent upon the employment of two counsel.

I.MAHOMED, ACTING JUDGE OF THE SUPREME COURT

H.J. BERKER, CHIEF

I concur

I concur

L.W.H. ACKERMANN, ACTING JUDGE OF THE SUPREME COURT

On behalf of the Appellant: with Adv. S.J. du Plessis

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On behalf of the Respondent: Adv.J.L. v.d. Merwe, S.C. with Adv.J.J.Louw, S.C.

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