SA 7/91

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.; ACKERMANN, A.J.A.

Date of hearing: 17 and 18th October 1991.
Delivered on : 1991|12|02

JUDGMENT

ACKERMANN, A.J.A.

The relevant facts are set forth in the judgment prepared by my brother MAHOMED which I have had the privilege of reading. I am in agreement with his conclusions for the reasons stated by him but would like to add further reasons of my own for supporting the conclusion that clause 7 of the deed of sale concluded on 23rd November 1984 does not constitute a prohibited *pactum commissorium* which is unenforceable in law.

In Roman law the prohibition against the *pactum commissorium* in the case of pledge, i.e. a provision that, upon non-payment of the loan secured by pledge, the creditor could cancel the agreement and retain the property pledged as his own, is found in Codex 8.35.3. and was rendered in English as follows in Mapenduka v. Ashington 1919 AD 343 at 356:

> "Since among other objections to the *lex commissoria* in the case of pledges, there is its increasing harshness, we declare it invalid, and wipe out all memory of it in future. If any person, therefore, is subject to such an agreement, he shall find relief in this decree which

> rejects such existing contracts, and prohibits them in future. For we decree that creditors shall give up the thing pledged and recover what they have given"

The rationale for this prohibition is explained by Prof. R. Zimmerman The Law of Obligations, Roman Foundations of the Civilian Tradition (1990) as follows at 224:

> ".....the parties had to come to some arrangement regarding the consequences of non-redemption of the pledge as part of their *conventio pignoris*. Thus, for instance, they could agree on a conditional transfer of ownership on the basis of either sale or *datio in solutum*. If the debt remained undischarged, the pledgee was to be taken to have bought the pledge or to have received and accepted it in lieu of fulfillment. Such clauses represent the contractual variant of the old forfeiture regime, and it is obvious that they are problematic and dangerous. If the pledge was valuable, the creditor would try to insist on their inclusion in the contract, and the debtor, hard pressed for money and overoptimistic as far as his ability to repay was concerned, was usually not in a position to resist these pressures. The Romen lawyers, therefore, tried in various ways to mitigate the effect of these forfeiture clauses, in order to protect the pledgor; in post-classical times, such clauses fell foul of Constantine's prohibition of *leges commissoriae* and were regarded as invalid".

R. Dannenbring Roman Private Law (3rd ed.) (A translation based on the tenth revised German edition of Romisches Privatrecht by Max Kaser) comments in similar vein at 161:

> "However, in consequence of the shortage of credit prevailing in the post-classical time misuses by usurious exploitation multiplied in that creditors accepted things the value of which far exceeded the value of the secured debt, in order to make an excessive profit where the

> debtor proved to be unable to pay. A statute of Constantine (A.D. 320), therefore, prohibited the clause which provided for the foreclosure (*lex commissoria*, a *lex contractus* = term of a contract) and Justinian retained this regulation (CTh.3.2.1 = C.8.34.3)".

Voet 20.1.25 explains the reason for the prohibition in the following terms (Berwick's translation):

> "Inasmuch as if it might be agreed upon that when a debt is not paid within a certain time the creditor is to retain (as his own) the thing pledged for the debt, things of the greatest importance and value would often be ceded in payment of a very trifling debt; the debtor, needy and pressed by the straitened condition of his pecuniary circumstances, readily submitting to the insertion of hard and inhuman conditions (in the bond) and holding out to himself the promise of better times and fortune before the arrival of the day fixed by the *pactum commissorium*, and hoping that the asperity of the pact will be averted from him by payment; a slippery and fallacious hope, however, to which the event not rarely fails to respond".

This passage (in Berwick's translation) is quoted with approval in Mapenduka v. Ashington, supra, at 351.
G.F. Lubbe, Mortgage and Pledge, in The Law of South Africa (ed. Joubert) Vol. 17 p. 285 at 327 states the following in dealing with the *pactum commissorium* in the case of mortgage and pledge:

> "The ratio for the prohibition of this clause lies in the inherent possibility that a prospective credit grantor may exploit the weak financial position of a borrower and the latter's too often misplaced optimism about his prospects, in order to obtain, by way of a *pactum commissorium* a windfall disproportionate to the extent of the indebtedness towards himself".

While the prohibition against the *pactum commissorium* in the case of mortgage and pledge simpliciter is well established in the modern derivative Roman Dutch law systems (as appears from the authorities cited by my brother MAHOMED) the reason for such prohibition is equally well-established and clear as aptly summarised by Lubbe, supra.

Save for a passage cited to us from de Blecourt and Fischer Kort Begrip van Het Oud-Vaderlands Burgerlijk Recht at 258 (par. 182) we were referred to no authority which expressly sought to apply the prohibition against a *pactum commissorium* to the case of a cancellation clause in a deed of sale where the *res vendita* is to be burdened (and subsequently is burdened) with a mortgage bond as security for payment of the purchase price.

As my bother MAHOMED has pointed out, the Courts will 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 and a claim for the restitution of the *res vendita* following upon such cancellation enforced. It is interesting to note that in Baines Motors v. Piek 1955(1) SA 534(A) at 542 H, van den Heever, J.A., dealing with the enforceability of a *lex commissoria* in a contract of sale, remarked as follows:

> "The *lex commissoria* annexed to a contract of pledge, which has also been mentioned in this connection, has no bearing upon our problem. It was a condition that, if the debtor fails to pay on due date, the pledged article becomes the property of the pledgee. By decree the Emperor Constantine declared such pacts invalid with retrospective effect on the ground of their being oppressive..." (emphasis added)

and observed at 543 H- 544 A that

> "It appears, therefore, that the same agency which has in general abolished the Roman-dutch rules governing

conventional penalties - namely Court usage - has saved it in the case of the contract of sale. The process has been the same as that by which in Roman law the *lex commissoria* was abolished as far as pledge was concerned but retained in connection with other contracts; the only difference is the extent of the field covered by the retention of the exception.

A *lex commissoria* was itself a *pactum adjectum.* If agreed upon without further qualifications, it merely resulted in the rescission of the sale, both parties making restitution (Voet 18.3.2 and 3)."

It seems to me that the above remarks suggest a cautious approach to the extention of a prohibition pertaining to the sphere of pledge to that of sale, merely because payment of the purchase price has been secured by a pledge of the *res vendita*.

As pointed out in Baker v. Probert 1985(3)SA 429(A) at 438J-439B, a claim for restitution of performance following upon cancellation of a contract for breach is not a *condictio* and is to be regarded as a distinct contractual remedy.

The general, equitable, rule is that upon cancellation of a contract for breach both parties must restore what they have received under the contract, in order that they may be restored to the respective positions they were in at the time they contracted. Since the rule is founded on equity it has been departed from in a number of varying circumstances where considerations of equity and justice have decreed this to be necessary. But mutual restoration is the general requirement: See, for example, Feinstein v. Niggli & another 1981(2)SA 684(A) at 700F-701A and van Heerden en Andere v. Sentrale Kunsmis Korporasie (Edms.) Bpk. 1973(1)SA 17(A) at 31 G-H.

It seems to me that there is in principle no warrant for extending the prohibition against a *pactum commissorium* in the case of mortgage and pledge simpliciter to a contract of sale

merely because the *res vendita* is burdened with a mortgage in favour of the seller to secure payment of the purchase price. The reasons for the prohibition in the case of pledge simpliciter are:

(a) the weak financial position of the borrower;
(b) the often misplaced optimism of the borrower about his prospects to repay the loan;
(c) which lead to the borrower being oppressed by the creditor demanding security out of all proportion to the amount of the debt in order to obtain a windfall.

The purchaser on the other hand, save in those extreme and exceptional cases where he is indeed oppressed by the seller and might avail himself of the doctrine of "undue influence", is generally speaking not in such a position at all. The purchaser is a free contracting party and there is no basis for assuming that he enters into the contract of sale because he is in a weak financial position. Moreover, if the property he purchases disproportionately exceeds in value the purchase price, this is to his distinct advantage both at the time of concluding the contract as well as at any later stage should he seek financial assistance from other quarters to pay the purchase price of the *res vendita*.

Such public policy considerations as might dictate the prohibition in the case of pledge and mortgage simpliciter are simply not present in the case of sale, where payment of the purchase price is secured by a pledge or mortgage of the *res vendita*. It would therefore, in my view, require compelling authority to persuade a court to extend the prohibition against a *pactum commissorium* to a contract of sale such as the present.

My brother MAHOMED has rightly, in my view, rejected the reliance placed by appellant's counsel on Grotius, Introduction 2.48.40 and 41, as authority for extending or applying the prohibition to a contract of sale coupled with a

pledge. I agree with his reasons for so doing and would add only one further observation in this regard.

A "kustingsbrief", that is to say a special hypothec constituted over immoveable property to secure the purchase price, or part of the purchase price of such property, refers not only to such a hypothec in favour of the seller of the property in question but also one in favour of any other person for money lent by such third party to the purchaser in order to enable the purchaser to pay the price of the property hypothecated. See: In Re Insolvent Estate of Buissinne, Van der Byl and Meyer v. Sequestrator and Attorney-General (1828) 1 Menz 318 at 327. Silberberg and Schoeman The Law of Property (2nd ed.) 440 and v.d. Merwe Sakereg (2nd ed.) 640.

The latter form of "kustingsbrief" (i.e. in favour of a third party to secure a loan by such third party to the purchaser) may well be subject to the prohibition against a *pactum commissoria*. This is not relevant, however, to the present case. The fact that the expression "kustingsbrief" can relate to two substantially different hypothecs warrants caution when considering the use of the concept by common law writers. This is a further reason for finding that Grotius, Introduction 2.48.41, is not dealing with the case of a seller seeking to recover mortgaged property pursuant to the cancellation of the underlying sales agreement which gave rise to the mortgage.

Reliance was also placed by appellant's counsel on Bechmann, Der Kauf nach gemeinen Recht vol 2 p. 528 to 529 in support of the proposition that the *actio empti* for the return of the property which results from the exercise of the *lex commissoria* in the sale is excluded once the *pactum reservatae hypothecae* is implemented. The passage referred to does not support the proposition advanced. The question being addressed in the passage is whether a *lex commissoria*, seen as a type of condition (which is not a construction which finds favour today) has "dinglich wirkung", i.e. whether on breach of contract ownership of the property sold automatically vests

in the seller again without delivery or transfer. In the cited passage the author considers the implications of "dingliche wirkung" and its merits, matters which are not relevant to the present argument.

The reference in de Blècour and Fischer, op cit., to "18e-eeuwse Groningse jurisprudentie" is therefore the only authority which might support the argument advanced. I say "might" because in the passage cited a provision in the deed (of sale) is being considered which provides that, on breach, the purchaser not only had to restore the *res vendita* to the seller but also forfeited everything he had paid on account of the purchase price ("en zelfs alles, wat hij op de hoofdsom reeds had afbetaald, kwijt was, zonder recht van terugvordering"). From the passage it is not clear whether "18e eeuwse Groningse Jurisprudensie" applied the prohibition to the recovery of the *res vendita simpliciter* or to recovery of the property as well as retention of monies paid on account of the purchase price. Even if it means the former I do not think we ought to adopt this authority. As already indicated it is a false analogy to extend the prohibition against the *pactum commissorium* in the case of mortgage and pledge simpliciter to a *lex commissoria* where the *res vendita* is mortgaged to secure payment to the seller. The rationale of equity, fairness and public policy which justify the prohibition in the case of pledge and mortgage is absent in the case of sale. There is no good reason for limiting in this manner the *lex commissoria* which is generally held to be enforceable in contracts of sale.

For these reasons as well as those stated by my brother MAHOMED I am of the view that clause 7 of the deed of sale in question does not constitute a prohibited *pactum commissorium* which is unenforceable in law.

I agree that the appeal be dismissed with costs including the costs of the respondent consequent upon the employment of two counsel.

L.W.H. ACKERMANN
ACTING JUDGE OF APPEAL