Reportable	YES / NO
Circulate to Judges	YES / NO
Circulate to Magistrates	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE DIVISION, KIMBERLEY]

JUDGMENT

CASE NUMBER: 1826/2009

DANIEL JOHANNES WEPENER	FIRST APPLICANT
RIA WEPENER	SECOND APPLICANT

AND

FIRSTRAND BANK LIMITED	RESPONDENT

Date of hearing: 28 March 2014
Date of judgment: 13 June 2014

Phatshoane J

1. Mr Daniel Johannes Wepener and Ms Ria Wepener, the first and second applicants, are married to each other in community of property. They are applying for the rescission of a default judgment dated 28 June 2013 entered against them declaring their property known as Erf [4………]. situated at No [..] [J…] Avenue, [H……] Park, Kimberley, executable.

2. FirstRand Bank Limited, the respondent, took two points *in limine* against the application. Firstly it contended that the Wepeners are not entitled to condonation for the late filing of their application for the rescission because they were aware of the action proceedings including all the applications that were filed in consequence of the action. The second point raised is that the Wepeners acquiesced in a judgment by making certain payment arrangements before and after the Rule 46 judgment was obtained.

3. Three mortgage bonds were registered over the Wepeners' property, Erf [4…] Kimberley, in favour of the Bank as security for loans advanced to them between 14 February and 26 October 2005. The Wepeners' initial monthly instalment on their bond account was R8 839.27. From the correspondence attached to the Bank's papers they fell in arrears for the first time on 02 June 2007. As at 14 November 2008 they were in arrears in the amount of R56 924.81. The Bank foreclosed on the mortgage bonds and issued summons against them in 2009 for the payment of an amount of R 979 510.24 together with certain ancillary relief with regard to interest, costs and declaring their property executable. The summons was personally served on Mr Wepener who accepted service on behalf of Ms Wepener on 12 November 2009. They did not defend the action.

4. On 12 January 2011 the Registrar entered default judgment against the Wepeners for the amount claimed in the summons, interest on that amount at the rate of 15.5% per annum *a tempore morae*, costs of suit and declared their property executable.

5. Between 13 June 2011 and 19 August 2011 there were telephonic discussions between the Bank and the Wepeners and certain proposals were made with a view to finding possible solutions towards the settlement of the bond account. This came to naught. On 15 September 2011 the Banks' deponent, Ms Amelia Du Buisson, intimated that a voice mail message was left on Mr Wepener's telephone to call the Bank for the conclusion of what is called a "payment arrangement". Du Buisson says that Ms Wepener was also called but she intimated that she be called at a later date as she had prior engagements. Mr

Wepener confirms that he indeed received messages on his phone to return the Bank's calls but cannot say on which dates. He also acknowledged that the telephone numbers were left on his phone but not the name of a contact person.

6. The Bank states that on 19 September 2011 it directed a telephone call once more to Mr Wepener regarding a payment arrangement. He expressed his dissatisfaction with the Bank's conduct of the matter. Wepener stated that he was aware of the sale in execution scheduled for 29 September 2011 and requested a statement of his bond account from January 2010 onwards. On Mr Wepener's request the statement was forwarded to his branch. These allegations are denied by Mr Wepener.

7. The Bank explained that it was copied a letter dated 26 September 2011 from Mr Geoff Smith, an attorney, addressed to the sheriff stating that his firm had received instructions to make an application for the surrender of the Wepeners' estate on 20 October 2011. The Bank states that on account of this information it instructed the sheriff to stop the sale that was due to take place on 29 September 2011. The voluntary surrender of the Wepeners' estate was not made. Mr Wepener concedes that he intended to surrender his estate but on advice aborted this plan.

8. On 02 November 2011 the Bank contacted Mr Wepener who intimated that he was willing to enter into a payment arrangement. Du Buisson states that from then on negotiations ensued between the Bank and Mr Mike Sassin, the Group legal advisor of Midlink Financial services, on behalf of the Wepeners. With regard to these negotiations it suffices to mention that according to the Bank certain documents were sent to the Wepeners for completion and were telephoned on numerous occasions to return them but to no avail.

9. On 22 December 2011 Midlink Financial Services directed a letter to the Bank's attorneys in which Sassin made a proposal on the instruction of the Wepeners that their monthly instalment on the bond be escalated to R10 000.00 until the arrears on the bond were liquidated. At that stage the Wepeners were in arrears in the amount of R342 200.87.

10. On 14 March 2012 the Bank addressed an e-mail to Sassin which reads:

> "As discussed, the Bank acknowledges receipt of a request to structure a payment arrangement and advise that we agree to a monthly instalment of R12 000.00 reviewable in 6 months. Please be advised that an immediate payment of R12 000.00 is required to pend our legal action and the next instalment is to be paid on the 1st April 2012. A debit order will be implemented for the April instalment.
>
> **Please further be advised that should Mr Wepener default on one payment, the arrangement will be withdrawn and our legal action will resume.**
>
> Please do not hesitate to contact me should you have concerns".(My emphasis).

11. On 26 March 2012 the Bank received a Distress Customer Debt Payment Arrangement (DCDPA) agreement and a debit order authorisation document signed by the Wepeners. The following were the salient but elaborate terms of the agreement as paraphrased:

11.1 That the Wepeners were in default or otherwise experiencing financial difficulty and that the parties had entered into a temporary arrangement (DCDPA) to assist the Wepeners.

11.2 That the terms and conditions of the main agreement [the mortgage bonds/ loan agreements] would remain in full force and effect except as amended by the terms of the DCDPA.

11.3 That the DCDPA would only apply for the duration stipulated therein and upon termination the terms of the main agreement would be enforceable.

11.4 That the Wepeners agreed to pay R12 000.00 monthly for a period of six months with effect from 01 April 201 to 01 September 2012.

11.5 That **on the expiry of the term the DCDPA arrangement would terminate automatically without notice to the Wepeners.** At that stage the monthly premiums would increase and the Bank would notify them of the new monthly premiums in writing.

11.6 That the Wepeners had to sign a Debit Order Authorisation in respect of all amounts owing in terms of the main agreement and the DCDPA.

11.7 That the default clauses set out in the DCDPA were additional to those set out in the main agreement. That the Wepeners would be placed in default of the arrangement if they failed to pay any amounts due in terms of the arrangement or the main agreement. That should the Wepeners be in default of the arrangement the Bank may, without notice, in its discretion, claim immediate repayment of the full outstanding balance; terminate the arrangement and the main agreement, upon which all amounts owing to the Bank by them shall then forthwith be payable in full.

11.8 That no extension of time, waiver or relaxation of any of the provisions or terms of the DCDPA or the main agreement would operate as estoppel against the Bank in respect of its rights under the arrangement and the main agreement, nor shall it operate so as to preclude the Bank thereafter from exercising its rights strictly in accordance with the arrangement and the main agreement.

11.9 The DCDPA did not constitute a novation of the Wepeners' obligations in terms of the main agreement.

12. The debit order authorisation signed by the Wepeners selected the first day of each month as the day on which the debit order would be processed. The Bank states that on 01 April 2012, the first day in respect of which the debit order was to take effect, it was returned unpaid clearly for lack of funds. The Bank therefore applied "set off" by debiting a different account held by the Wepeners with an amount of R12 000.00 and credited same to their bond account. This is vehemently denied by the Wepeners. They maintain that from annexure "DJ5" attached to their Replying Affidavit the Bank collected two payments of R12 000.00 from their account on 02 April 2012 resulting in one debit order being reversed. Be that as it may, on 02 May and 02 June 2012 the debit orders were honoured.

13. The Bank maintains that on 29 June 2012 Mr Wepener requested the extension of time to make payment. According to Du Buisson, the Bank's deponent, Mr Wepener was informed that in exceptional circumstances monthly instalment

could be paid up to 10 July 2012 but late payment would not be tolerated for subsequent months. This averment is denied by the Wepeners.

14. In the following months the Wepeners paid their temporarily agreed instalment of R12 000.00 on 09 July 2012; 24 August 2012; and 17 September 2012. On these three months the debit orders were processed on the first day of the months and were dishonoured. As for the subsequent incidents (in October 2012) Du Buisson states in her affidavit:

> "6.40 On 08 October 2012, the respondent [the Bank] had a telephonic discussion with the Cape Town office of the first applicant [Mr Wepener] regarding the non-payment in October 2012, and he said that there were no funds in the account as he gets paid by the 15th of the month, and he was requested to telephone the respondent's Johannesburg call centre to discuss this.
>
> 6.41 On 16 October 2012, the respondent telephonically informed the first applicant that the enforcement of the judgment would be proceeding and that he needed to pay the full arrears on the account to stay the execution. On 16 October 2012, R12000.00 was paid to the bond account. As at that date, such arrears were R360992.44. On 29 October 2012, the respondent telephonically informed the first applicant that it had noted that payment, and that it was holding over to see if the November 2012 debit order would be honoured on 01 November 2012 or if a payment would be made by credit transfer on that date, and the first applicant responded that he should be telephoned the following day as he would then give the way forward as he could not talk then.
>
> 6.42 On 01 November 2012, the respondent telephonically asked the first applicant if the debit order was going to be honoured and the first applicant just hung up the call. The respondent immediately telephoned back and the first applicant just hung up the call again. On 01 November 2012, the debit order was submitted and returned unpaid…
>
> 6.43 No payments at all were made to the bond account during November 2012"

15. Save to admit that he paid R12 000.00 on 16 October 2012 Mr Wepener claims not to bear any knowledge of some of the aforesaid averments. He intimates that he had difficulties in receiving commission from his employer in November 2012 and that he attempted to explain the situation to the Bank. However, he confirms that he did not make any payment in November 2012.

16. On 01 December 2012 a debit order was submitted and returned unpaid. This had become an established pattern of not effecting payment on the first day of the month as agreed with the Bank. In subsequent months the Wepeners paid the R12 000.00 on 05 December 2012, 10 December 2012, 02 January 2013,

13 February 2013, 18 March 2013, 30 April 2013, 09 May 2013, 24 May 2013, 21 June 2013, 26 July 2013, and 30 August 2013. The Bank states that none of these payments settled the arrears on the bond account and were not in terms of any arrangement made with it.

17. On 16 May 2013 a writ was issued in terms of Rule 46(1) for execution against the Wepeners' movable assets. The Bank received a *nulla bona* return. On 30 May 2013 the Bank called Mr Wepener twice in an attempt to conclude a new payment arrangement. The Bank intimates that at first Mr Wepener said he be called later. Later on that day when he received the second call from the Bank he informed the Bank that he was in a hurry but undertook to return the call. He did not call the Bank as promised. Mr Wepener did not gainsay this statement except to state that it was the Bank's official that promised to call him back which never materialized.

18. In *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) it was held: **that judicial oversight is required where execution is sought against the homes of indigent debtors after judgment on a money debt.** After much was said and done the Bank brought an application in terms of Rule 46 of the Uniform Rules on 04 June 2013 declaring the Wepeners' immovable property executable. The application was personally served on Mr Wepener. Once more the Wepeners did not oppose the application. In the unopposed Motion Court of 28 June 2013 before Erasmus AJ an order was issued declaring the Wepeners' immovable property executable. The order of Erasmus AJ supersedes that of the Registrar to the extent that Registrar declared the property executable whereas he was incompetent to do so.

19. Following the order declaring their property executable the Wepeners say that they received a letter from the Bank advising them to contact it for a possible solution to the impending problem. They interpreted this letter as an invitation for them to apply for a fresh DCDPA, which they did. They further claim to have and to still be paying the Bank the amount of R12 000.00 monthly since the implementation of the terminated DCDPA. They submitted therefore that this would be an alternative to the execution of the property.

20. The Bank's response is that the payment of R10 000.00 which is proposed in the new application for DCDPA was not acceptable to it and that the Wepeners and their legal advisor were informed that their proposal had been rejected.

21. I now turn to the points *in limine* raised by the Bank. Ms Sieberhagen, for the Bank, contended that the application for condonation of the late filing of the application should fail because the Wepeners were aware that the summons had been issued against them; furthermore they were knowledgeable of the fact that default judgment had been entered against them by the Registrar; that following this, an application in terms of Rule 46 of the Uniform Rules to declare their property executable was successfully launched against them after which the Bank proceeded with the execution steps against their immovable property. The relevant part of Rule 46 provides:

"46(1)(a) No writ of execution against the immovable property of any judgment debtor shall issue until-

(i) a return shall have been made of any process which may have been issued against the movable property of the judgment debtor from which it appears that the said person has not sufficient movable property to satisfy the writ; or

(ii) such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of rule 31(5), by the registrar: Provided that where the property sought to be attached is the primary residence of the judgment debtor no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property."

22. The application for rescission of a default judgment is ordinarily brought under Rule 31(2)(b) which provides:

"A defendant may within 20 days after he has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet."

23. For the sake of completeness Rule 42 provides:

"42 Variation and Rescission of Orders:

(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
(c) an order or judgment granted as the result of a mistake common to the parties.

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."

24. Mr Olivier, for the Wepeners, contended that the Wepeners' application was not brought in terms of Rule 31 or Rule 42 of the Uniform Rules of the Court but was premised on Common Law. He relied on *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) in support of his argument. He contended that under common law it was only necessary for the applicant to establish good cause for his/her default; a reasonable defence and good prospects of success at the hearing in due course. He further argued that it was not necessary for the application to be brought within 20 days as set out in Rule 31(2)(b) but within a reasonable time. Mr Olivier invoked the following dictum at 1042 F-H in the above case for his submission:

"Thus, under the common law, the Courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient case shown. This power was entrusted to the discretion of the Courts. Although no rigid limits were set as to the circumstances which constituted sufficient cause (cf examples quoted by *Kersteman (op cit sv* defaillant) the Courts nevertheless laid down certain general principles, for themselves, to guide them in the exercise of their discretion. Broadly speaking, the exercise of the Court's discretionary power appears to have been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case. The *onus* of showing the existence of sufficient cause for relief was on the applicant in each case, and he had to satisfy the Court, *inter alia*, that there was some reasonably satisfactory explanation why the judgment was allowed to go by default. It follows from what I have said that the Court's discretion under the common law extended beyond, and was not limited to, the grounds provided for in Rules 31 and 42 (1),.."

25. The Wepeners aver that they consulted with their counsel on 12 August 2013 with a view to launching this application. They gathered the necessary documents such as the application in terms of Rule 46, bank statements, proof of payments and the like which they provided to their counsel on 23 August 2013. This application was served and filed on 28 August 2013. Assuming that

Rule 31 applied, if days were to be reckoned from 28 June 2013, date on which the order was made, the application would be 22 days late but if days were to be counted from the date the writ was served on the Wepeners, that is on 16 July 2013, they would be about 10 days out of time with their application. The Wepeners do not say when they became aware of the order. Nevertheless, in my view, the period of delay is insignificant and condonable.

26. Ms Sieberhagen contended that the Wepeners cannot challenge the judgment given by Erasmus AJ because they acquiesced in it and therefore their right to have same rescinded and set aside has become perempted. In my view, the question of acquiesce in the judgment is interrelated with the enquiry whether the Wepeners established good cause and therefore the two issues need to be dealt with under the same rubric. The doctrine of peremption was enunciated as follows in *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 268.

> "It comes to this, that if an unsuccessful litigant by unequivocal conduct, inconsistent with an intention to appeal, shows that he acquiesces in the judgment, then he cannot continue to prosecute his appeal. The principle was stated in *Daner's* case (1920, A.D. p. 594), as follows:-
>
> 'if the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven'.
>
> This is the doctrine. If a man has clearly and unconditionally acquiesced in and decided to abide by the judgment he cannot thereafter challenge it."

27. The Wepeners state that they did not oppose the application because their legal advisor, Mr Sassin, informed them that this may be an exercise in futility due to the fact that the Bank had already obtained an order from the Registrar declaring their property executable; that they had to avoid costs; that negotiations were underway and the likelihood existed that the execution process could be brought to a halt.

28. Mr Olivier argued that an attorney's negligence may not be imputed on his client. He contended that irrespective of the advice the Wepeners received and

even if the Court were to find that they failed to establish good cause they have a *bona fide* defence on merits.

29. In *Hlatswayo v Mare and Deas* 1912 AD 242 at 253, in respect of an application to re-open a default judgment Solomon J held:

> "If therefore, the party against whom judgment had been given had once acquiesced in it, his right to re-open it is lost.
> So far there is no difficulty about the law, but then the important question arises as to what is meant by a party to an action acquiescing in the judgment. In my opinion the effect of the authorities on this subject is to show that when once a party to an action has done an act from which the only reasonable inference that can be drawn by the other party is that he accepts and abides by the judgment, and so intimates that he has no intention of challenging it, he is taken to have acquiesced in it. I do not think that in order to show acquiescence on the part of any person it is necessary to prove an agreement between the parties that the appeal should be abandoned; or that his conduct has been such as to estop him from denying that he has acquiesced in the judgment: or even that he has in fact abandoned any intention of appealing, provided only that his conduct has been such as to lead to the clear conclusion that he does not intend to assail the judgment."

30. In *Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C) at 804C-E the Court made the following pronouncement:

> "It is clear on authority that a defendant who knows that default judgment is to be taken against him and does not demur but allows the plaintiff to take his course, is presumed to be in wilful default and is not entitled to rescission of the judgment. In this Division there are the decisions of *Hendricks v Allen* 1928 CPD 519 (Gardiner JP and Watermeyer J); *Chedburn v Barkett* 1931 CPD 421 (Gardiner JP and Sutton J) and *Newman v Ayten* 1931 CPD 454 (Gardiner JP and Sutton J) to the effect that, in the words of Gardiner JP in *Hendricks v Allen* at 521:
> 'If he knows that a case is coming on, and whatever his motive, deliberately refrains from entering appearance, then it seems to me there is wilful default: His reason need not be, to my mind, that he knows he has no defence; he may have some other motive, but, knowing that he is summoned to appear, if he deliberately fails to enter an appearance, from whatever motive, it seems to me there is wilful default. As my brother Watermeyer points out to me, to quote the words of Bowen LJ, if he knows what he is doing, and intends what he is doing, and is a free agent; if he knows he is neglecting the summons and intends to neglect the summons, then there is wilful default.'

31. Ms Sieberhagen's argument that the Wepeners acquiesced in the judgment is persuasive. There is no doubt that from the time that the summons was served on them they have shown no interest in defending the matter notwithstanding personal service of numerous legal processes.

32. Mr Olivier argued that primarily the basis of this application is that the relevant circumstances were not placed before Erasmus AJ and that she did not properly consider all those circumstances that were placed before her. This sounds more like an argument in an appeal as opposed to a rescission of a judgment. He contended further that the applicants serviced their bond regularly although they made payments belatedly. Therefore, it was argued, the Court should not have declared their property executable. He further argued that the DCDPA was not placed before Court when it considered the Bank's application and that had this agreement been placed before the Court it could have come to a different conclusion.

33. The Bank concedes that in its application in terms of Rule 46 it did not deal with the DCDPA because in its view it was irrelevant because the Wepeners failed to comply with same. In any event, it argued that when it obtained the judgment the full amount of the debt was due and payable. In *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at 94 para 25 it was held:

> "[25] However, a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the Judge who granted the judgment, as he was entitled to do, was unaware, as was held to be the case by Nepgen J in Stander[*Stander and Another v Absa Bank* 1997 (4) SA 873 (E)]. See in this *regard Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) ([2003] 2 All SA 113) in paras 9 – 10."

The learned judge proceeds as follows at 95 para 27:

> "[27] Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A Court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment."

34. Mr Wepener states in the Founding Affidavit that in terms of the DCDPA the payment to the Bank was to be made on the date he received his salary. Belatedly, in his Replying Affidavit he maintains that one Ms Van Dieman, a Bank official, was informed that Mr Wepener did not earn a monthly salary but worked on a commission basis and that his commission was not always paid on the first of every month with the result that the debit order put into effect on the first day of every month was not feasible. Mr Wepener also refers to a letter dated 23 August 2013, annexure “DJ3”, from his legal advisor directed to the Bank’s attorneys in which it is denied, *inter alia*, that the debit order payment was a material term of the DCDPA. What Mr Wepener states is clearly irreconcilable with paragraph 3.2 of the DCDPA (see para 11.6 above) and the debit order authorisation form which makes it plain that he has selected the first day of each month in respect of which the debit order is to be processed.

35. In my view, in terms of clause 12.3 of the DCDPA, insofar as the Wepeners were in default of payment, the Bank was entitled without notice to them to proceed and claim immediate repayment of the full outstanding balance or to terminate the arrangement. The fact that the Bank did not contact them after the lapse of the six months of the DCDPA for possible review of the repayment does not advance their case because by that time they were in default of payment. They were also in default of the main agreement. Clause 19 of the mortgage bonds reads:

> “Any failure by the Bank to exercise its rights in terms of this bond and any indulgence allowed to the mortgagor shall not operate as a waiver or abandonment by the Bank of any of its rights hereunder”.

Clause 27.3 thereof stipulates:

> “No latitude, extension of time or indulgence which may be given or allowed by the Bank to the mortgagor in respect of any payment provided for in this bond or the performance of any other obligations hereunder shall under any circumstances operate as a waiver or a novation of, or otherwise affect any of the Bank’s rights in terms of or arising out of this Bond, or preclude the Bank from enforcing, at any time and without notice, strict and punctual compliance with each and every provision or terms hereof”

36. The Wepeners explained that the property in issue is their primary residence. They reside with their 6 year old daughter and that Ms Wepener is unemployed. Mr Wepener further says that he is only left with R10 000.00 as disposable income with which to pay off the bond. Despite this, he maintains that he is in a position to pay the amount R12 000.00 as per the lapsed DCDPA. He states that the couple's original monthly obligation towards the Bank was R8 800.00. The Wepeners maintain that if they lose their primary residence they will be out in the street. In *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) at 269 paras 2-3 the Court held:

"[2] A mortgage bond is an agreement between borrower and lender, binding upon third parties once it is registered against the title of the property that upon default the lender will be entitled to have the property sold in satisfaction of the outstanding debt. Its effect is that the borrower, by his or her own volition, either on acquiring a house or later, when wishing to raise further capital, compromises his or her rights of ownership until the debt is repaid. The right to continued ownership, and hence occupation, depends on repayment. The mortgage bond thus curtails the right of property at its root, and penetrates the rights of ownership, for the bond-holder's rights are fused into the title itself.

[3] The value of a mortgage bond as an instrument of security lies in confidence that the law will give effect to its terms."

37. See also *ABSA Bank Ltd v Petersen* 2013 (1) SA 481 (WCC) at 495-496 para 34 and authorities quoted therein.

38. It is important to mention that *Standard Bank of South Africa Ltd v Saunderson and Others* (supra) was overruled by the ConCourt in *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) only to the extent that it held that a Registrar is constitutionally competent to make execution orders in respect of immovable property when granting default judgment in terms of Rule 31(5)(b). In the *Gundwana* case the ConCourt stated authoritatively as follows at 625 paras 48-49 with regard to a default judgment vis-a-vis the issue of a primary residence defence:

"[48] An agreement to put one's property at risk as security in a mortgage bond does not equate to a licence for the mortgagee to enforce execution in bad faith.

[49] I conclude that the willingness of mortgagors to put their homes forward as security for the loans they acquire is not by itself sufficient to put those cases beyond the reach of *Jaftha*. An evaluation of the facts of each case is necessary in order to

determine whether a declaration, that hypothecated property constituting a person's home is specially executable, may be made. It is the kind of evaluation that must be done by a court of law, not the registrar. To the extent that the High Court Rules and practice allow the registrar to do so, they are unconstitutional."

The Court proceeded as follows at 626 para 54:

"[54] In *Jaftha*, Mokgoro J, before listing some relevant factors that needed to be considered in judicial oversight of the execution process, warned that 'it would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight'. Mindful of that warning, I would merely add the following. It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided."

39. The papers demonstrate overwhelmingly that there have been considerable indulgences afforded to the Wepeners by the Bank in an effort to find solutions towards the settlement of their debt. It also shows clearly that they were not always appreciative of the Bank's magnanimity and created their own way of effecting payment contrary to what they agreed upon with the Bank. At their current rate of payment and the proliferating interest the Wepeners will only sink deeper into debt as has been the case for a lengthy period.

40. In the final analysis I am satisfied that the Wepeners did not establish good cause and have no reasonable prospects of success or a *bona fide* defence at a hearing in due cause. Their application stands to be dismissed. Costs on an attorney and client scale are provided for in the loan agreements and/or the three mortgage bonds and should therefore follow.

ORDER:

1. The application for rescission of Judgment is dismissed with costs on an attorney and client scale.

MV PHATSHOANE

JUDGE

For the applicants: instructed by	Adv A.D. Olivier Haarhoffs Inc
For the respondent: instructed by	Adv A.S. Sieberhagen Duncan & Rothman Inc