

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

**REPORTABLE
CASE NO A566/00**

In the matter between:

NEDCOR BANK Ltd

Appellant

And

HJ KINDO

First Respondent

DK KINDO

Second Respondent

JUDGEMENT DELIVERED ON 28th DAY OF FEBRUARY 2002

HLOPHE, JP:

This is an appeal against the judgement of a magistrate sitting in Simonstown. The magistrate refused to grant an order declaring certain immovable property executable pursuant to the foreclosure of a covering mortgage bond No. 39734/99 in favour of Nedcor Bank Ltd in default case number 1414/2000.

The bank, hereinafter referred to as the appellant, was the mortgagee in respect of erf 2044 Ocean View, which mortgaged property was bonded as security for monies lent and advanced. Appellant's claim was for payment of the sum of R23139, 94 being the balance owing by the respondents to the appellant under and by virtue of the mortgage bond. In terms of the said mortgage bond the whole amount owing by the respondents to the appellant would become due in terms of the said bond. On the due date the respondents failed to pay the monthly instalments due by them in terms of the mortgage bond and the whole balance as aforesaid was due and payable. Accordingly the Appellant brought an action against the respondents for payment of the said amount plus interest as well as seeking a cost order against the respondents.

The court a quo granted relief sought against the respondents. However, it refused to declare the mortgaged property executable, hence, the present appeal.

Mr Maher appeared for the appellant. No appearance was made for the respondents. Mr Maher submitted, correctly in my view, that it is clear that the mortgage bond is legally valid and enforceable in that all the necessary statutory formalities in terms of the Deeds Registries Act, No. 47 of 1937 were complied with and the further general contractual requirements and formalities existed at the time that the agreement was entered into by the relevant parties.

The mortgage bond itself contains the usual standard terms. It does not, however, expressly make provision for the mortgaged property to be

declared executable in the event of foreclosure. In the circumstances, Mr Maher submitted that an express provision to the effect that the mortgagee may sell the mortgaged property is unnecessary given the legal consequences of a mortgage and indeed the very nature of a mortgage. Furthermore, he submitted that it was undoubtedly the intention of the parties that the immovable property would be hypothecated and that the mortgagee could avail itself of the real right afforded it by a mortgage and sell the hypothecated property, in the event of default on the part of the mortgagor.

In my judgement the crisp legal issue to be decided is whether or not the appellant is entitled to an order declaring the mortgaged property to be executable, despite the absence of an express contractual term in the

mortgage bond itself. In other words, does the mortgagee have an inherent or implied right to have the mortgaged property sold and to receive the amount of its debt from the proceeds of the sale in the event of a mortgagor defaulting? This implied right could, of course, arise either through the operation of the law i.e. by the very nature of the mortgage bond, or as a result of the intention of the contracting parties

There does not appear to be any recorded judgement dealing specifically with this crisp legal point. According to the *Digest* (D. 13.7.4) in Roman law the position appears to be that:

“[i]f there is an agreement for the *pignus* to be sold, made either initially or later, not only is the sale valid but also the buyer becomes the owner of the thing. However, even if there is no

agreement for the pledge to be sold, the rule we apply is that the sale is still allowed, unless, indeed, there is an agreement that it shall not be allowed. Indeed, when there is an agreement forbidding sale, the creditor, if he sells is liable for theft, except where the debtor has been given three warnings to pay and has failed to respond.”

The Roman Dutch authorities, following Ulpian, have similarly held that:

“[i]f the debtor does not pay the creditor what he owes it is open not only to the first creditor but also to a second to whom the pledge has been given in pledge to sell up the pledge. This is so provided that the original debtor is in default.”

See also Voet *Commentarius* 20.5.1.

According to Grotius in *Jurisprudence of Holland* (Vol 1) 2.48.41 (Tr. RW Lee). The position in Roman Dutch law was as follows:

“The effect of a hypothec is not that the creditor may appropriate to himself the encumbered property or sell it of his own motion: and, what is more, he may not by special conditions in the contract stipulate that the ownership shall be forfeited to himself in the event of non-payment of the debt; but he must, after obtaining a decree of the Court, allow the property to be sold by legal process, and so realise his claim.”

Mr Maher quite rightly submitted that the probable logic behind the earlier authorities approach, as set out above, is that it is quite clear that the payment of the debt is irrevocably bound to the mortgage bond. The latter effectively serves to secure the debt and this has the effect of ensuring that the mortgagee has a real right in the property so pledged. Furthermore it is a generally accepted principle of South African law that ‘where there is a right there is a remedy’. This principle is expressed in the maxim *ubi ius ibi remedium*. It is clear that the mortgagee’s right to sell the immovable property in execution follows automatically from the foreclosure. The only qualification in South African law is that a court order authorising execution is required, on the basis that pledgee or mortgagee only has a *ius in re aliena* and the courts must accordingly take care to guard the pledgor or mortgagor against any abuse by the former of this right. (See **Cape of Good Hope Bank (in liquidation) v Melle** (1893) SC at 289.) See also Silberberg and Schoeman – *The Law of Property* (3rd ed) 1992 at 419 and 429, where the learned authors state:

“the mortgagor’s first and foremost duty is of course to pay the

debt secured and the mortgagee's corresponding right is to 'call-up' or 'foreclose' the bond and to have the property sold, if payment is not forthcoming on the due date."

It is my judgement that a mortgagee is entitled to a court order declaring the immovable property to be executable once the bond is foreclosed. It is inconceivable that a separate application is required to declare the property executable in terms of section 66 of the Magistrates Court Act 32 of 1944, as it would be contrary to existing authority, thereby

defeating the entire object of a registered bond.

In addition, if were it not so, it would lead to absurd consequences whereby the mortgagee would have a right without a remedy, surely that cannot be. It is also certainly accepted banking practice that a deed of hypothecation, that is a mortgage bond over specified property, provides security which is effective at all times and which gives the creditor the right, on default of payment by the debtor, to have the mortgaged property sold in execution and to receive payment of the proceeds. (See Silberberg and Schoeman - *The Law of Property* (3rd ed) supra at 429.)

In my view the magistrate erred in refusing to declare the hypothecated immovable property in question executable, on the basis that there was no clause in the mortgage bond to that effect. The executability or otherwise of the property in question clearly arises by operation of the law. Thus it is my judgement that even in the absence of a clause in the mortgage bond to that effect, that, however cannot lead to a situation whereby the property cannot be declared executable. To hold otherwise would defeat the very purpose of securing a mortgage bond over immovable property. It would also defeat the very object of securing a mortgage bond, namely, that in the event of non-payment of a debt on the due date, the mortgagee is entitled to foreclose and to have a hypothecated immovable property declared executable. It is only in that way that the mortgagee would have the right and a remedy, in the event of non-payment and subsequent

foreclosure of the bond.

In the light of the conclusion to which I have come, it is unnecessary to deal with the other arguments advanced by Mr Maher on behalf of the appellant. In my view the appellant is entitled to an order declaring the immovable property to be executable pursuant to the judgement debt granted in its favour. There was no suggestion that the requirements of section 66(1) (a) of the Magistrate Court Act 32 of 1944, relating to “good cause” shown, were not satisfied *in casu*.

The following order is granted:

- a) The appeal is upheld with costs;
- b) The mortgaged property being Erf 2044, Ocean View held under Deed of Transfer No. T75162/1999 is declared executable.

HLOPHE, JP

I agree

MOTALA, J