THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

Case no: 150/2002

In the matter between:

OTTO FRIEDERICH GRAF **APPELLANT**

and

HANS JOACHIM WERNER BUECHEL **RESPONDENT**

CORAM: HOWIE P, SCHUTZ, STREICHER, CLOETE and LEWIS JJA

HEARD: 13 MARCH 2003

DELIVERED: 27 MARCH 2003

Summary: **A *pactum commissorium* in a contract of pledge is unenforceable even if the pledgor is not the pledgee's debtor. The creditor may keep the thing pledged if the pledgor has at any time agreed that he may do so, provided a fair price is given. If a rule of the common law is clear and unambiguous, it is a wrong approach to apply that rule only if the policy considerations underlying the rule are present. If the reasons for the rule have fallen away then the rule may have to be changed.**

JUDGMENT

CLOETE JA/

CLOETE JA:

INTRODUCTION

[1] The present appeal concerns primarily the question whether a *pactum commissorium* in a contract of pledge can be enforced if the pledgor is not the pledgee's debtor; and also the question whether, if the value of the pledge is less than the debt, the contract should be regarded as being in the nature of a conditional sale and therefore valid.

THE FACTS

[2] The respondent, the applicant in the Court below, was the sole shareholder and director and the only loan account creditor of Western Seaboard Development (then a close corporation but later a company, and to which I shall refer as 'the company'). The company purchased immovable property with the intention of developing a sectional title hotel on it. The appellant, the respondent in the Court below, lent the purchase price to the company against the security of a mortgage bond registered in his favour over the property. It was a term of the loan agreement that if conditions relating to the development of the property were not met by a fixed date, the appellant would become entitled to repayment of the

capital amount lent and interest thereon. The conditions were not met.

[3] Subsequently the appellant, the respondent and the company entered into an agreement ('the extension agreement') in terms of which the appellant granted the company an extension of time for payment of its indebtedness. In terms of the extension agreement, the respondent and the company undertook to deposit with a firm of attorneys a number of documents, including the share certificates in respect of the issued share capital of the company; share transfer forms in respect of such shares signed by the respondent and blank as to transferee; a cession in respect of the respondent's claim on loan account against the company, duly signed by the respondent; and a power of attorney authorising the appellant to pass transfer of the company's immovable property to himself or his nominee and to sign all relevant transfer documentation on behalf of the company. Further in terms of the extension agreement, the company and the respondent authorised the attorneys to release the documents to which I have referred, to the appellant, if the company had not paid its indebtedness to the respondent timeously.

[4] Clause 9 of the extension agreement, which is central to the issues in this appeal, provided *inter alia*:

'ELECTION:

In the event of default and on delivery of the documents GRAF [the appellant] will be entitled, without prejudice to any other rights which GRAF may have, either to acquire the COMPANY by transferring the shares in his own name or that of his nominee, and accepting cession of the loan claims, or alternatively to pass transfer of the immovable property to himself or his nominee.

If GRAF elects to take transfer of the immovable property, the transfer value of the property will be equal to the market value thereof as determined by DAVID NEWHAM, or in the event of DAVID NEWHAM being unable or unwilling to act, by GRAHAM ALEXANDER, or in the event of both of them being unable or unwilling to act then such valuer as will be appointed by the President for the time being of the SA Council of Valuers whose decision, acting as expert and not as arbitrator, will be final and binding on the parties.

GRAF's claim against the COMPANY will be reduced by the said value of the immovable property. Transfer will be passed by GRAF's conveyancers.'

[5] The company failed to repay its indebtedness to the respondent. It was in fact insolvent. A provisional order of winding-up was issued at the suit of the appellant on 26 April 1999 and a final order followed on 9 September of the same year.

[6] On 7 May 1999 and in terms of clause 9 of the extension agreement, the shares of the company were transferred from the name of the respondent into the name of the appellant.

THE ISSUES

[7] In the Court below the respondent sought in motion proceedings to undo the transfer on the basis that the provisions in clause 9 of the extension agreement permitting the appellant to acquire his shares and loan account, constituted a *pactum commissorium* and were therefore invalid. The learned Judge (Selikowitz J) held in his favour and gave the following order (together with an order for costs):

'1. Declaring that the portion of clause 9 of the agreement concluded between Respondent, Applicant and Western Seaboard Development (Proprietary) Limited on 11 February 1999 which reads, '*to acquire the COMPANY by transferring the shares in his own name or that of his nominee, and accepting cession of the loan claims'* is a pactum commissorium and accordingly invalid;

2. Declaring that the transfer during May 1999 to Respondent of 1 000 (One Thousand) shares in Western Seaboard Development (Proprietary) Limited in terms of clause 9 of the aforesaid agreement is invalid and of no force and effect.'

The learned Judge subsequently granted leave to appeal to this Court against the order.

[8] On appeal the following two submissions which had been made by the appellant in the Court below, and which were rejected by the learned Judge, were repeated:
(1) that because the shares and loan account were 'pledged'[1] to the appellant by the respondent, and not by the appellant's debtor, the company, the provisions of clause 9 of the extension agreement permitting the appellant to take transfer of the shares and loan account did not amount to an invalid *pactum commissorium*; and, in the alternative,
(2) that because the value of the property pledged did not exceed the amount of the company's indebtedness to the appellant, clause 9 must be construed as a conditional sale.

PACTUM COMMISSORIUM

[9] A *pactum commissorium* in the context of a pledge is an agreement that if the pledgor defaults, the pledgee may keep the security as his own property. Such an agreement was prohibited in the Roman law by the Emperor Constantine early in the fourth century AD. The prohibition was perpetuated by the Emperor

[1] Put more accurately, the rights in the shares and the loan account were ceded *in sercuritatem debiti*; but where a right is ceded with the object of securing a debt, the cession is regarded as a pledge of the right in question: *Millman NO v Twiggs and Another* 1995 (3) SA 674 (A) at 676H-J and cases there quoted. No reason, commercial or otherwise, requires in a case such as the present that such a cession of incorporeal rights should be dealt with differently from a pledge of a movable and it was so dealt with in the context of a *pactum commissorium* in *Sun Life Assurance Co of Canada v Kuranda* 1924 AD 20.

Justinian in C8.35(34).3, which reads:

'*Quoniam inter alias captiones praecipue commissoriae pignorum legis crescit asperitas, placet infimari eam et in posterum omne eius memoriam aboleri. Si quis igitur tali contractu laborat, hac sanctione respiret, quae cum praeteritis praesentia quoque depellit*[2] *et futura prohibet. Creditores enim re amissa iubemus recuperare quod dederunt.*'

The passage may be translated as follows:

'Since amongst other harmful practices the severity of the *lex commissorium* in pledges is on the increase, it has been decided to invalidate it and abolish all memory of it for the future. If therefore anyone is oppressed by such a contract, he shall find relief by this decree, which annuls such provisions past and present and proscribes them in future. For we decree that creditors shall give up the thing pledged and recover what they have given.'

It is of importance for the purposes of the present appeal to note that the second sentence begins '*si quis*' (if anyone) and not '*si debitor*' (if a debtor).

[10] The prohibition against a *pactum commissorium* in a contract of pledge was very much part of the Roman Dutch law. Grotius *Introduction* 2.48.41 *(*Maasdorp's translation 2nd ed p 192) says:

'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 the legal process and thus recover what is due to himself.'

Simon van Leeuwen *Censura Forensis* 1.4.8.7 (Barber and Macfadyen's translation pp 54-5) says:

'The other is the *pactum commissorium*, by which it is agreed between the debtor and creditor that if the debtor does not pay on the stipulated day, the thing pledged should go to the creditor, and this is prohibited by law.'

Voet in his *Commentary on the Pandects* 20.1.25 (Gane's translation vol 3 p 502) says:

'As regards a commissory agreement, it is true that it is correctly attached to a purchase; and that according to the opinion of some it was perhaps also

[2] The Latin text is taken from the Krueger version of the *Corpus Iuris*. Other texts have '*repellit*'. The difference is not significant.

tolerated of old in pledges and hypothecs. Nevertheless it is found to have been later discountenanced in the latter by Constantine as being harsh and fraught with unfairness.'

Van der Keessel[3] says:

'Dis oorbekend dat die regsgevolg van 'n pand nie is dat die skuldeiser, by wanbetaling van die skuld, die pand vir hom behou nie; meer nog, selfs indien dit d.m.v. 'n uitdruklike ooreenkoms beoog is, is so 'n *lex commissoria* deur die reg verwerp.'

[11] The prohibition has also been received into the modern South African law[4]: *Mapenduka v Ashington* 1919 AD 343; *Sun Life Assurance Co of Canada v Kuranda supra* n 1; *Vasco Dry Cleaners v Twycross* 1979 (1) SA 603 (A) at 611G.

[12] The appellant's counsel pointed to the reason why the prohibition was introduced by Constantine. Voet *loc cit* says:
'The reason is that anyone with whom the arrangement is made that, on the debt not being paid within a definite time, the pledge shall remain with the creditor for the debt, would often find that things of the greatest import and value would go to pay off a paltry liability. A needy debtor, pressed by tightness of ready cash, will readily allow any hard and inhuman terms to be written down

[3] *Praelectiones Iuris Hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam* edited by Van Warmelo, Coertze, Gonin and Pont, and translated into Afrikaans by Gonin, vol 3 p 473 (ad Grotius 2.48.41).

[4] There is one statutory exception in the Cape: s 14 of Act 36 of 1889 (C) provides: 'A pledge pawned for ten shillings, or under, if not redeemed within the year of redemption, shall become and be the pawnbroker's absolute property.' Successive sections provide, however, that pledges pawned for above ten shillings shall be disposed of by sale by public auction and not otherwise (although the pawnbroker may bid and purchase the pledge) - s 16; and that any surplus above the amount of the loan and profit due at the time of the sale, less the cost of the sale, shall be paid by the pawnbroker to the holder of the pawn ticket on demand made within three years after the sale - s 19.

against him. He promises himself smoother times and better fortune before the day put into the commissory term, and thus hopes to avert the harshness of the agreement by payment; though such a hope, quite slippery and deceptive as it is, not seldom finds nothing at all to encourage it in the aftermath.'

Solomon JA in *Sun Life Assurance Co of Canada v Kuranda, supra* at 24 said of a *pactum commissorium*:

'[T]he very essence of that pact is that the creditor is entitled to retain the article pledged, however great its value may be, in satisfaction of a debt, however small in amount. And it was because of the harshness and injustice of such an arrangement made with the debtor in straitened circumstances that the Emperor Constantine decreed that such pacts should for the future be prohibited.'[5]

[13] The appellant's counsel also placed reliance on the following *dictum* of Mahomed AJA in *Meyer v Hessling* 1992 (3) SA 851 (Nm SC) at 864I-865D:

'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 and Macfadyen) part I book IV[6], 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 quaest.* 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.* 22, *cap.* 9, *num.* 14), and by the Senate of Savoy, on the authority of Anton. Fab. (*ad. Cod. de Pact. pignor. lib.* 8, *tit.* 23, *defin* 1); and the reason is that an agreement as to selling back is preferable, and this is the sense of *l*.16 § *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 (*l*.12, *in pr. ff*. *de Distract. pignor, l*.9, *in pr. ff*. *Quib. Mod. pign., l*.20, § 3, *ff*. *de pignor. act.)*. And in like manner the reason of the prohibition of the commissory clause also

[5] See also Zimmerman *The Law of Obligations Roman Foundations of the Civilian Tradition* pp 223-5 s.v. 'The consequences of non-redemption of the pledge', where the development of the Roman law is set out.

[6] Chapter 8 para 7.

ceases if the debtor has expressly renounced the protection of the law found in *l. fin. Cod. de Pact. pignor*, 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*.1, § 5 *ff. de Injur. Junct. l. pen.*; *Cod. de Pact. l*. 41, *ff de Minorib.*; Anton. Fab. *ad Cod. d. tit. defin.* 5).'[7]

[14] The crux of the submission on behalf of the appellant was (I quote from the heads of argument):

'There was a very clear, single policy which underlay the prohibition of pacta commissioria … That policy finds no application in the case of a third-party pledgor, who cannot be presumed to be labouring under the same disadvantages as a debtor at the time of entering into the agreement.'

[15] The approach adopted by the appellant's counsel is fallacious because it postulates that whether or not a rule of the common law which is clear and unambiguous applies to a given situation, depends upon an examination of whether the policy considerations which led to the law being enacted, are present. Such an approach has already been rejected by this Court: *Langeberg Voedsel Bpk v Sarculum Boerdery Bpk* 1996 (2) SA 565 (A) at 570E-571F, where it was held[8] that where a rule of law is clear and in general terms, it is unnecessary to enquire in each instance whether the considerations which motivated the rule are present. Such an enquiry, apart from constituting a juridically unsound approach, leads to casuistic reasoning and uncertainty in the law particularly where, as in the case of the rule under discussion in the matter just cited, the reasons which motivated the rule do not accord with modern conditions prevailing when the rule is sought to be enforced.

[16] The rule laid down by Constantine is quite clear: a *lex commissorium* in a contract of pledge is prohibited both in the case of the poor man in acute need of money and in the case of the rich man who is not. The rule is aimed at a dangerous tendency, not only at particular cases. The rule is also in general terms: it is not limited to a pledge made by the debtor.[9] In such circumstances it is

[7] The punctuation as it appears in the translation quoted, and the original text, has been inserted.

[8] At 570I and 571D-E.

[9] There is, with respect, no warrant for Schiller *Selected Texts and Cases on the Roman Law of Things with an excurses on the Roman Law of slavery* to translate '*commissoria pignorum legis*

simply not permissible to allow the policy behind the rule to dictate its applicability, any more than it is permissible as the law presently stands[10] to have regard to views expressed during debate in Parliament during the passage of a bill in order to interpret a modern statute which is clear and unambiguous in its terms. Both are laws; both apply to all situations to which they, in terms, relate; and - absent constitutional considerations - that is an end of the matter. Of course, if it can be established that things have so changed since the rule was instituted as to render the rule no longer appropriate, that may be reason to change the rule or abolish it altogether.[11] I shall return to the constitutional aspect shortly.

[17] The passage from Van Leeuwen quoted in *Meyer v Hessling, supra* explains why the prohibition does not apply in the particular cases referred to. But that passage is not authority for excluding the prohibition where the particular facts do not accord with the policy considerations behind the prohibition; and it is in that sense that the passage of the judgment in *Meyer v Hessling, supra* relied on by the appellant's counsel and which precedes the quotation from Van Leeuwen, must be understood.

[18] The appellant's counsel submitted that there was indeed a constitutional consideration present, namely, that contracts should be enforced: *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 15G-16F; and that 'contractual autonomy is a part of freedom' (*ibid* at 35F).

[19] I do not consider that the common law requires development to limit the general prohibition on *pacta commissoria* so as to exclude its operation where the pledge is made by a third party. It may be that the third party is the corporate alter ego of the debtor,

crescit asperitas' in C8.34(35)3 as 'the hardship which the agreed foreclosure of the pledge imposes upon the debtor grows' (underlining supplied). There is similarly no justification for Van Leeuwen loc cit (quoted in para [10] above) and Schorer (note 266 to Grotius 2.48.41) to limit the pactum commissorium to an agreement between a debtor and a creditor. Schorer's note begins 'Grotius disapproves of an agreement (pactum commissorium) between a debtor and creditor to the extent that, if the debt be not paid at the proper time, the mortgaged property is to become the property of the creditor in full ownership for the amount of the debt …'

(Maasdorp's translation, 2nd ed p 546). All three authors are plainly dealing with the factual situation which would most commonly arise and must not be understood as placing a restrictive interpretation on the phrase '*si quis*' emphasised in para [9] above.

[10] See the minority judgment of Mokgoro J in *Case and Another v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) 624-5, n 18.

[11] Cf the remarks of Schutz JA in *Langeberg Voedsel Bpk v Sarculum Boerdery Bpk, supra,* at 572G-H and Howie P in para [30] of the as yet unreported judgment in *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd*, case 32/2002.

as in the present case, or subject to the same pressures as the debtor (eg the debtor's spouse or parent), or a person whom the debtor will be obliged to compensate in full if the pledged article is forfeited.[12] But in any event, the potential for injustice ─ particularly usury and an unfair distribution of an insolvent pledgor's assets ─ remains, regardless of whether the pledgor is also the debtor. Accordingly, the limitation on contractual freedom is, in my view, justifiable especially in the light of the constitutional protection of the values of dignity and equality.

[20] Furthermore, the Civil Codes of France, Germany, Belgium and the Netherlands, all countries which had a common law similar to our own, contain a prohibition in general terms.

[21] The French Civil Code[13] provides in art 2077 that 'A pawn may be given by a third party for the debtor'. The immediately following article, art 2078, provides:

'A creditor cannot, in case of non-payment, dispose of the pawn: but he can apply to the Court to be authorized to retain the pawn as payment to the extent of its value, according to an appraisal made by experts, or to have it sold at auction.

All covenants allowing a creditor to appropriate the pawn, or to dispose of it without complying with the formalities above set forth, shall be void.'

[22] The German Civil Code[14] contemplates that the pledgor may not be the debtor ─ for example, § 1225 says, inter alia: 'If the pledgor is not the personal debtor, the claim passes to him, to the extent that he satisfies the pledgee'. §1229 provides:

'An agreement made before the existence of the right to sell, by which the

[12] Cf Voet *loc cit* 'Nor does it matter either whether an agreement of this sort takes place between debtor and creditor, or between a debtor and his surety; nor whether the debtor has given this safeguard when assigning pledge and surety together, or has established the pledge for the surety himself to secure his indemnity. We know that the surety himself is also a creditor of him for whom he went surety; and thus there is alike the same opportunity for unfairness and the same reason to prompt the discountenancing of such an agreement.'

[13] Translation by Henry Cachard in the revised edition at pp 543-4.

[14] Translation by Simon L Goren at p 222.

ownership of the thing falls to the pledgee or is transferred to him, in case he does not, or does not in due time, receive satisfaction, is void.'

[23] The Belgian Civil Code provides in art 2077 that 'A gage may be given by a third party for the debtor', and in the immediately following article, art 2078:

'A creditor may not, in default of payment, dispose of the gage except for obtaining an order at law whereby such gage will remain with him in payment and up to the amounts due, according to a valuation made by experts, or will be sold at auction.

Any clause is void which authorizes the creditor to appropriate the gage for himself or to dispose of it without the above procedures.'[15]

[24] The New Netherlands Civil Code[16] which came into operation on 1 January 1992 also contemplates a person other than the debtor pledging property. For example, arts 233.1 and 234.1 provide:

'233.1. The grantor of a pledge or hypothec, who is not himself the debtor, is liable for depreciation of the property to the extent that the security of the creditor is endangered by this depreciation and that he or a person for whom he is responsible can be blamed therefor.

234.1. If property of both the debtor and a third person has been pledged or

[15] The Constitution of Belgium and the Belgian Civil Code as amended to September 1, 1982 by John H. Crabb.

[16] The quotations which follow are taken from the translation by Haanappel made under the auspices of the Ministry of Justice of the Netherlands at the Quebec Centre of Private and Comparative Law.

hypothecated to secure one and the same debt, the third person can demand from the creditor who proceeds to execution that the property of the debtor be included in the sale as well and that it be sold first.'

Article 235 then follows, and that article is not limited to pledges given by debtors. It provides:

'Any stipulation whereby the pledgee or the hypothecary creditor is given the power to appropriate the pledged or hypothecated property is null [original text: 'is nietig'].'

[25] In conclusion on the comparative survey of the law of some Western European countries, I can do no better than quote what Maasdorp JA said in the minority judgment in *Mapenduka v Ashington, supra* at 358:

'The reasons on which this law is grounded are as sound to-day as they were in the times of Constantine.'

That position remains.[17]

[26] There is accordingly no merit in the first argument advanced on behalf of the appellant. Nor is there any merit in the second argument.

CONDITIONAL SALE

[27] Despite the provisions of the Code to which I have already

[17] See also what Kotze JA said of the *actio de pauperie* in O'Callaghan NO v Chaplin 1927 AD 310 at 366:
'The doctrine, therefore, which they [the common law authors] state was observed in actual practice in their time, has since been accepted by the more modern and maturer jurisprudence, and still prevails as existing law in several civilised European countries as well as our own.'

referred, D 20.1.16.9 provided that 'It can be a term of a *pignus* or *hypotheca* that if the money is not paid by a certain date, the creditor can have the property as buyer at a fair price then to be assessed' because 'in this case, there is, as it were, a conditional sale'.[18]

[28] In *Mapenduka v Ashington, supra,* De Villiers AJA, in whose judgment Wessels AAJA concurred, analysed the common law authorities and concluded by stating the law as follows (at 352 in fine–353):

'The language of the Digest is designedly indefinite. It is not a real sale, for the transaction does not lose the character of a pledge and the debtor retains the right to claim his property against payment of the debt. But if when the time for payment arrives the debtor is willing that the creditor should retain the pledge as his own, there can be no objection to this provided a fair price is given.'

Maasdorp JA said at 357 that:

'[W]e may take it that these two laws [C 8.35(34).3 and D 20.1.16.9] existed side by side, and that while the *lex commissoria* was invalid in pledges, the parties could still agree that if the debt was not paid on the due date, the pledgees could take over as purchaser the subject of the pledge at a price to be fixed at the time the debt became due. To that extent C*onstantine's* strict law in the *Code* condemning the *lex commissoria* is relaxed',

[18] Watson's translation in *The Digest of Justinian* by Mommsen, Krueger and Watson (eds.) vol 2 p 585.

and the learned Judge of Appeal goes on to show that both the provisions of the Code and the Digest were received into the law of Holland, Germany and France.[19]

[29] The passage quoted from the judgment of De Villiers AJA[20] in the previous paragraph of this judgment must be read in context. That passage is preceded by a discussion of the old authorities for the purpose of determining when the valuation of the thing pledged must be made. It must not, as was suggested in argument, be taken as authority for the proposition that the pledgor cannot, at the time the pledge is concluded, agree with the creditor that the latter may keep the thing pledged if the debt is not paid, provided a fair valuation of the thing is made when the debt falls due; nor must it be taken as authority for the proposition that such agreement is not binding on the pledgor if he is unwilling when the debt becomes due that the creditor retain the thing. What is decisive is the proviso that a fair price is to be given when the debt falls due, not the time when the agreement is concluded. Indeed, it is evident from D 20.1.16.9 (quoted in para [27] above) that such an agreement may be a term of the pledge; and an agreement made at that time was upheld in

[19] As I have already pointed out, the judgment is a minority judgment but it is consistent with the majority on this point.
[20] Followed in *Van der Westhuizen v Sibiya* 1961 (4) SA 413 (N) at 436D.

Sun Life Assurance Co of Canada v Kuranda, supra, because it was found that the requirements of the proviso were satisfied (see 25-26). It is perhaps desirable to emphasize that to the extent that the valuation exceeds the amount owing to the debtor, the excess belongs to the pledgor.

[30] In the present case there never was an agreement, whether express or tacit, that the security pledged could be taken over at a just price. Clause 9 of the extension agreement provides that if the appellant elects to take transfer of the immovable property owned by the company, the property will be valued at its market value and the appellant's claim against the company will be reduced accordingly. By way of contrast, no such valuation provision is included if the appellant elects to acquire the shares and the respondent's loan accounts in the company.

[31] The submission on behalf of the appellant that if the value of the article pledged in the event proves to be less than the debt, D 20.1.16.9 governs the position, cannot be upheld. Contracts against public policy are judged objectively, regard being had to 'the tendency of the proposed transaction, not its actually proved result'[21]

[21] And for that reason it was, with respect, incorrect for Lange AJP to have had regard to the facts in *Dawson v Eckstein* (1905) 10 HCG 15 at 19.

- per Innes CJ in *Eastwood v Shepstone* 1902 TS 294 at 302.[22] Here, the contract provided that in the event of default, the appellant would be entitled to elect to acquire the respondent's shares and loan account in the company. The contract did not provide that a fair valuation (or indeed that any valuation) would be made of the shares and loan account. The present facts are accordingly distinguishable from the facts in *Sun Life Assurance Co of Canada v Kuranda, supra,* where the basis of the valuation was agreed upon and the question at issue was whether such basis would result in a fair valuation at the time the security was realised. That part of clause 9 which deals with the acquisition of the shares and loan account is nothing other than an invalid *pactum commissorium*, as the learned Judge in the Court below correctly held.

ORDER

[32] The appeal is dismissed with costs, including the costs of two counsel.

[22] Approved in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 8J-9A/B and *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 783C.

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T D CLOETE
JUDGE OF APPEAL

Concur:
HOWIE P
SCHUTZ JA
STREICHER JA
LEWIS JA