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**“Suspension of Rights – Property Interest of a Creditor During Business
Rescue”**

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September 2013

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CHAPTER 1: INTRODUCTION

1.1 Problem Statement

The Companies Act 71 of 2008 ('Companies Act 2008') brought about innovative new concepts into our law. Of these is business rescue, which entails the facilitation of rehabilitating a company that appears that it will unlikely pay its debts as they become due within six months or appears likely that it will become insolvent within six months.¹ This provides for the temporary supervision of such a company, the temporary moratorium on the rights of claimants against it, and the development and implementation of a plan to restructure its affairs in order to either maximise its likelihood of solvency or to maximise the likelihood of a better return for its stakeholders than it would in liquidation.² During such time, a business rescue practitioner ('practitioner') is appointed to oversee the proceedings,³ who is then given the power during business rescue to entirely, partially or conditionally suspend any obligation of a company in business rescue, arising out of an agreement entered into before the proceedings, and which the obligation would otherwise become due during those proceedings.⁴

This enables a practitioner to suspend a company's repayment obligation in terms of a loan agreement, which in many cases may be secured by the registration of a mortgage bond in the deeds office. In these circumstances, a practitioner's power is exercised not only in respect of the contractual right, but also the underlying limited real rights. This is because there is an interdependent two tier legal relationship. Firstly, there is the underlying loan agreement in terms of which personal rights exist between a creditor and a company. Secondly, there is the registered mortgage bond giving rise to ancillary limited real rights over a company's immovable property. This dissertation seeks to examine the legal consequences that flow from the suspension of such an obligation in such instances, and in particular whether the power is compatible with the constitutional right to property.

¹ Section 128(1)(b), read with section 128(1)(f) of the Companies Act 71 of 2008.

² Ibid.

³ Section 128(1)(d) of the Companies Act 71 of 2008

⁴ Section 136(2)(a) of the Companies Act 71 of 2008.

1.2 Structure of the Dissertation and Outline of Analysis

1.2.1 Chapter 2: Our Deeds Registry System

Key to the legal issue in this dissertation is that a mortgage bond is registered. It will be shown that history tells us that our registration system is based on the publicity principle and, therefore, registration is required for the creation, transfer and termination of all real rights in immovable property.

This chapter forms an important theoretical foundation, which explores the history of our deeds registration system, ultimately highlighting the significance of registration. It will be seen later that real rights in a mortgage bond vest immediately at the time of registration. As such, it is very useful to have a deep understanding of our registration system so that in later chapters it can be determined whether a practitioner's power can legally affect registered real rights.

1.2.2 Chapter 3: Defining and Distinguishing between Personal Rights and Real Rights

To understand the legal nature of the obligation that a practitioner is able to suspend during business rescue, one needs to differentiate between the rights enjoyed by a creditor in a loan agreement and the rights enjoyed in a mortgage bond and draw specific distinctions between these rights.

It will be shown later that when a creditor has an enforceable claim against a debtor in terms of a loan agreement, it is in a creditor's personal capacity. On the other hand, rights enjoyed by a creditor in a mortgage bond are so enjoyed in relation to the secured property only. The basis of these rights is, however, in relation to the underlying claim. As such, it is important to differentiate between personal rights and real rights so as to later understand how they interplay between the two. This chapter will focus specifically on drawing this distinction by critically defining what personal and real rights are, and indicating how the courts have used accepted principles to draw the distinction.

1.2.3 Chapter 4: Critical Analysis of a Mortgage Bond

When a creditor seeks to secure a claim a debtor would normally provide real security, which entails that a creditor enjoys certain rights over property belonging to a debtor. A mortgage is a specific category of real security, which is distinguishable from others in that it is only

obtained upon registration. To physically register a mortgage, a mortgage bond attested by the registrar, specially hypothecating immovable property, would be registered.

It will be seen herein that upon registration, limited real rights in the immovable property of a debtor vest in a creditor which include restraining its alienation, the right to seek an execution order and claiming preference in its proceeds upon its sale in insolvency. It will be shown in this chapter that these limited real rights are ancillary in nature and cannot be separated from the underlying claim.

1.2.4 Chapter 5: The Extent of the Business Rescue Practitioner's Power to Suspend Rights

The enabling suspension provision in section 136(2)(a) of the Companies Act 2008 appears to be modelled on Chapter 11 of the United States of America Bankruptcy code. The provision in its current form was not without controversy and amendments before it actually came into effect. In this chapter we will look at the legislative history of the provision and do a comparative analysis with its United States counterpart.

After having understood the significance of registration, the purpose of this chapter is to determine the exact extent of the power of a practitioner to suspend any obligation. On face value, the power of a practitioner to suspend is limited to personal rights of a creditor. However, because of the two legal tier relationship, this may not necessarily be the case. It is in this chapter that it will be determined whether the power to suspend any obligation includes rights flowing from a mortgage bond.

If indeed the power to suspend extends to rights enjoyed in a mortgage bond, then the question arises whether there should be some form of registration to note the suspension of these rights. In order to determine whether we can learn anything from the United States registration system in this regard, it will be beneficial to first compare their system with ours.

1.2.5 Chapter 6: The Right to Property

Section 25(1) ('property clause') of the Constitution of the Republic of South Africa, 1996 ('Constitution') provides that no person may be deprived of property except in terms of law of general application and such law may not permit arbitrary deprivation. In order to determine whether section 136(2)(a) of the Companies Act 2008 offends the property clause, this chapter will unpack the property clause and determine, firstly, what constitutes property,

secondly, what constitutes deprivation, and lastly what would amount to arbitrary deprivation of property in terms of the Constitution.

1.3 Methodology

The principles discussed in chapters 2 to 4 have their origin in common law and, therefore, reliance will be placed on case law and published textbooks in the field of property law. Common law principles in case law develop over time and so court cases will be, far as possible, chronologically discussed as they were decided.

Chapters 2 to 4 lay the theoretical foundation and form the basis of chapter 5, which takes out all the key principles derived from chapters 2 to 4 to determine the exact extent of the power of a practitioner to suspend rights.

Chapter 6 tests the constitutionality of section 136(2)(a) of the Companies Act 2008 against the property clause by dividing issues into little components. Each component is looked at by firstly discussing the law and then applying the law to each component accordingly.

CHAPTER 2: OUR DEEDS REGISTRY SYSTEM

A mortgage bond is always seen in relation to ownership of land, in respect of which it will later be seen that publicly has become the best form of legitimising and protecting ownership. This today manifests itself in the form of registration in the deeds office and as such, any right or burden relating to ownership comes about publicly. A mortgage bond is nothing more than a burden or curtailment of ownership and it follows that the consequences of curtailment in ownership follow on registration. This is all confirmed in the historical development of our registration system, which reads somewhat like an adventure themed book, set in the times of empires attempting to expand their territories.

2.1 Historical Background

In ancient times ownership of both movables and land could be maintained only by the continued possession of might.⁵ However, with the development of civilised conditions some method of establishing proof of ownership was necessary in the event of a dispute.⁶ Land surveying is one such method, which can be traced as far back as the history of the Egyptian people who have a civilisation that is thousands of years old.⁷ If one looks at their history, a system for the transfer of ownership similar to our system existed there in 3000BC.⁸

Interestingly enough, this system can also be traced in biblical times as recorded in the Bible. Jeremiah 32:9-14⁹ gives us an indication that during that time there was a system for the

⁵ WV der Beer & RF Rorke *Newall's Law and Practice of Deeds Registration* 2ed (1964) 1.

⁶ Ibid.

⁷ Maxwell 'History of Land Surviving', 10 October 2011, available at <http://www.maxwell-land-surveying.com/history-land-surveying>, accessed on 13 July 2013; see also Wikipedia regarding Surveying, available at <http://en.wikipedia.org/wiki/User:RekonDog/Surveying>, accessed on 14 July 2013, where it is said that when the Nile River overflowed its banks and washed out farms and homes boundaries were re-established by a rope stretcher, through the application of simple geometry. The nearly perfect squareness and north-south orientation of the Great Pyramid of Giza, built circa 2700, affirm the Egyptians' command of surveying.

⁸ AS West *The Practitioner's Guide to Conveyancing and Notarial Practice* consulta 16 2ed (2009) 1; see also L Duhaime 'Land Titles | Beginner's Guide to the Law Behind the Official Registration of Land Ownership', 13 August 2012, available at <http://www.duhaime.org/LegalResources/RealEstateTenancy/LawArticle-1432/Land-Titles-Beginners-Guide-to-the-Law-Behind-the-Official-Registration-of-Land-Ownership.aspx>, accessed on 13 July 2013, where it is said that official records of land ownership date 3000 BC, where in ancient Egypt rulers kept a royal registry to record land ownership for taxation purposes.

⁹ '9 so I bought the field at Anathoth from my cousin Hanamel and weighed out for him seventeen shekels of silver. 10 I signed and sealed the deed, had it witnessed, and weighed out the silver on the scales. 11 I took the deed of purchase--the sealed copy containing the terms and conditions, as well as the unsealed copy-- 12 and I gave this deed to Baruch son of Neriah, the son of Mahseiah, in the presence of my cousin Hanamel and of the witnesses who had signed the deed and of all the Jews sitting in the courtyard of the guard. 13 In their presence I gave Baruch these instructions: 14 "This is what the LORD Almighty, the God of Israel, says: Take these documents, both the sealed and unsealed copies of the deed of purchase, and put them in a clay jar so they will last a long time."

transfer of land relating to the formalities in respect of registering a deed of transfer, which is comparable to our system as it exists today.¹⁰

2.1.1 The Dutch system of land ownership

Our system of ownership of land as it exists today was foreign to the indigenous inhabitants of South Africa, who were nomadic tribes whose custom recognised that land within the area of a tribe vested in the tribe and not individuals.¹¹ It is the earliest colonists and merchants who brought with them to South Africa the Dutch version of the European legal tradition that recognised and upheld private individual ownership of land.¹² Separate elements of the Roman law and Germanic customary law within the Dutch legal tradition gave effect to the publicity principle underlying ownership and subsequent transfer of land.¹³ In Roman law, land had to be transferred by mere “delivery”.¹⁴ On the other hand, Germanic law transfer of land involved more formalities and greater adherence to the publicity principles, such as a declaration by the transferor of the intention to transfer land in the presence of witnesses.¹⁵ However, as time progressed formalities were made official and transfer of land had to take place before the court of the place where the land was situated.¹⁶ This principle was made of general application in Holland when Emperor Charles V issued a placaat in 1529,¹⁷ in terms of which every sale or hypothecation of land was required to take place before a judge.¹⁸ Any sale of land contrary to the placaat was null and void.¹⁹ This was reinforced by Emperor Phillip II when he issued a placaat in Holland around 1560, stating that the secretary of each city had to keep a register of all sales and taxation of land.²⁰ The effect of this placaat was that in Holland transfer of land and the transfer and creation of any other rights to land had to be registered.²¹

¹⁰ AS West op cit (n8) 1.

¹¹ RJM Jones & HS Nel *Conveyancing in South Africa* 4ed (1991) 3.

¹² PJ Badenhorst, JM Pienaar, H Mostert & M van Rooyen *Silberg & Schoeman's Law of Property* 4ed (2003) 190.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ PJ Badenhorst et al op cit (n12) 191.

¹⁷ Ibid.

¹⁸ RJM Jones & HS Nel op cit (n11) 3.

¹⁹ AS West op cit (n8) 1.

²⁰ Ibid.

²¹ Ibid.

2.1.2 The introduction of the Dutch system of transfer of land to South Africa

History of colonisation and expansion northwards in South Africa determined the underlying principles of our system of registration.²² The provisions of the placaaen by Emperors Charles V and Phillip II were incorporated into the laws of the Cape through enactment and extensions in the Political Ordinance of April 1580 and sections of a placaat issued by Holland on 22 December 1598.²³ Even though these provisions were first issued into the Cape for taxation purposes only,²⁴ the incorporation of the placaaen saw the establishment of some form of land registration in the Cape. It is said that land registration in South Africa began with the issue of two freehold grants of land in the Liesbeek Valley of Rondebosch²⁵ and thereafter twenty-two transfers as well as twenty-one bonds were registered by around that time.²⁶ Prior to this, however, there was no actual registration of title in South Africa.²⁷ This led to Simon van der Stel, the Governor of the Cape Colony, issuing a resolution and proclamation in 1686 whereby all registration of land was made obligatory.²⁸ Land owners were given two months to register their title, failing which they forfeited their right to the land.²⁹ The transfer of land had to be effected before judges, but in order to make the transfer secure, an interval of a year and a day had to lapse, after the transfer was acknowledged, without any claim to the land being made by anyone else.³⁰ In South Africa there were no judges at the time and so two commissioners were appointed by the Court of Justice.³¹ The commissioners executed deeds, and later executed deeds in the presence of the colonial secretary until 1828.³²

2.1.3 Registration of mortgage bonds.

The resolution and proclamation of van der Stel did not make for the registration of mortgage bonds and all that was required was for mortgage bonds to be executed before the commissioners of justice.³³ In 1714, a placaat was issued whereby all mortgage bonds also had to be submitted for proper registration, failing which bondholders lost the preference that

²² RJM Jones & HS Nel op cit (n11) 3.

²³ PJ Badenhorst et al op cit (n12) 191.

²⁴ WV der Beer & RF Rorke op cit (n1) 3.

²⁵ G Denoon 'The Development of Methods of Land Registration in South Africa' (1943) 60 *SALJ* 179.

²⁶ *Ibid.*

²⁷ AS West op cit (n8) 1.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ G Denoon op cit (n25) 182.

³¹ *Ibid.*

³² RJM Jones & HS Nel op cit (n11) 3.

³³ AS West op cit (n8) 1.

they were afforded against other creditors.³⁴ Sale of land very often took place on credit, for which mortgage bonds were passed.³⁵ The mortgage bonds hardly exceeded one page and were not endorsed against the title deeds of the property concerned.³⁶ The lack of endorsement against title deeds and a register that did not contain a concise summary of the registration history contributed to insecurity and uncertainty regarding ownership and mortgaging of land.³⁷ Reforms were introduced gradually to remedy this, but it was only under British rule that the most serious shortcomings in the registration system were rectified.³⁸

2.1.4 The introduction of cadastral survey in South Africa

An efficient system of registration of title of land and registration of rights in land is impossible unless each registered unit of land is surveyed and represented on a diagram or general plan.³⁹ It is under the British rule that cadastral survey as the basis of the present registration system in South Africa was introduced.⁴⁰ Land surveying commenced with the advent of British settlement in the Cape around 1813.⁴¹ There were diagrams annexed to grants of farms prior to the introduction of the cadastral system, but these diagrams were mere sketch plans.⁴² It was only from 1813 that the sketch plans were replaced by grants with diagrams based on survey.⁴³ In 1813 Sir John Cradock, Governor of the Cape Colony, issued a proclamation which provided that land held under grants with sketch plans prior to 1813 had to be resurveyed and the grants reissued.⁴⁴

2.1.5 The introduction of the registrar of deeds in South Africa.

From the beginning of 1823 English replaced Dutch as the official language and the commissioners were assembled at the office of the chief secretary under the Court of Justice,⁴⁵ but the office was abolished with the establishment of the Supreme Court and it was

³⁴ Ibid.

³⁵ AS West op cit (n8) 2.

³⁶ Ibid.

³⁷ PJ Badenhorst et al op cit (n12) 192.

³⁸ Ibid.

³⁹ RJM Jones & HS Nel op cit (n11) 1.

⁴⁰ PJ Badenhorst et al op cit (n12) 192.

⁴¹ RJM Jones & HS Nel op cit (n11) 3.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ PJ Badenhorst et al op cit (n12) 192.

⁴⁵ G Denoon op cit (n25) 182.

considered necessary to appoint a registrar of deeds.⁴⁶ Ordinance No. 39 of 1828 was issued, which provided for the preparation, execution and registration of deeds of transfer and mortgage bonds.⁴⁷ It is for this purpose that the office of the registrar of deeds was instituted and took over the responsibility of the commissioners and secretary.⁴⁸ The first registrar of deeds was also the registrar of slaves and deeds in Cape Town.⁴⁹ Initially, the registrar was responsible for the preparation of transport deeds,⁵⁰ but as a result of vast expenses which were incurred with building of roads, an investigation was held to curb expenses where possible.⁵¹ Clerks in the deeds office who were responsible for the preparation of deeds were dismissed at work in terms of Ordinance No. 14 of 1844 and the work was afforded to advocates.⁵² This was the start of the office of the conveyancer as we know it today.⁵³ It was only later that qualified conveyancers were employed for purposes of preparing deeds,⁵⁴ after passing a qualification exam set by the Supreme Court.⁵⁵ Although deeds were prepared in the deeds office, conveyancers soon monopolised the preparation of all deeds and this gave rise to the regular and methodical examination of deeds by staff in the deeds office.⁵⁶

2.1.6 The land register

The dismissal of clerks in 1844 saw the land register being established in that same year.⁵⁷ It consisted of a series of consecutive entries in chronological order of details in deeds of transfer.⁵⁸ The purpose of the land register is given in *Houtpoort Mining and Estate Syndicate, Ltd v Jacobs*⁵⁹ where Wessels J, at 108-109, held that:

‘[t]he can therefore be but little doubt that...registration...was for the purpose of publicity, partly that land should not be sold twice over to different purchasers, and partly so that persons who had and claim upon the land might assert these claims before the purchaser took possession.’

⁴⁶ RJM Jones & HS Nel op cit (n11) 3.

⁴⁷ AS West op cit (n8) 2.

⁴⁸ PJ Badenhorst et al op cit (n12) 192.

⁴⁹ RJM Jones & HS Nel op cit (n11) 3.

⁵⁰ PJ Badenhorst et al op cit (n12) 192.

⁵¹ AS West op cit (n8) 2.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ PJ Badenhorst et al op cit (n12) 192.

⁵⁵ RJM Jones & HS Nel op cit (n11) 4.

⁵⁶ AS West op cit (n8) 2.

⁵⁷ PJ Badenhorst et al op cit (n12) 192.

⁵⁸ Ibid.

⁵⁹ 1904 TS 105.

The land register was the only public source of information with regards to registration of land and mortgage bonds and thus:

‘[t]he only registration which our law and practice recognises as binding upon third parties is the registration upon the Land Register against the title of the property...’⁶⁰

What is binding on third parties are real rights, because if we have:

‘...regard the origin of registration in Holland and its subsequent adoption at the Cape..., we must be convinced that the Land Register was only used to record real rights.’⁶¹

Therefore, there can be no recordation of real rights outside the land register⁶² and it follows that any rights affecting land ought to be recorded in the land register to be binding on third parties.

2.1.7 Uniformity

The Deeds Registries Act 19 of 1891 provided for procedures which had to be followed for acceptance of deeds of transfer and mortgage bonds for registration in the deeds office of Cape Town.⁶³ The procedure was transplanted partially in other areas of the country, and after the creation of the Union in 1910 a movement towards a uniform system of registration was initiated.⁶⁴ The enactment of the Deeds Registries Act 47 of 1937 (‘Deeds Registries Act of 1937’) and its subsequent amendment largely ensured uniformity in this regard.⁶⁵

2.2 Our Deeds Registry System

In terms of section 16 of the Deeds Registries Act of 1937, ownership of land may be conveyed from one person to another only by means of a deed of transfer. Section 16 further provides that other real rights in land shall be conveyed from one person to another by a deed of cession attested by a notary, but notarial cession will not be necessary in respect of conveyance of real rights acquired in a mortgage bond. The main mechanism of section 16 is to ensure sufficient publicity in the context of land title.⁶⁶ Thus in terms of section 16, the South African registration system is, to a large extent, based on the registration of deeds.⁶⁷

⁶⁰ *Houtpoort Mining and Estate Syndicate, Ltd v Jacobs* supra (n59) at 110.

⁶¹ *Hollins v Registrar of Deeds* 1904 TS 603 at 605.

⁶² *Lucas' Trustee v Ismail and Amod* 1905 TS 239 at 248.

⁶³ AS West op cit (n8) 2.

⁶⁴ PJ Badenhorst et al op cit (n12) 192.

⁶⁵ Ibid.

⁶⁶ PJ Badenhorst et al op cit (n12) 193.

⁶⁷ CR van der Walt & GJ Pienaar *Introduction to the Law of Property* 5ed (2008) 137.

Registration of deeds in its simple form usually implies that deeds are registered at face value and that a registered deed does not necessarily serve as conclusive proof of a person's ownership to land or other real rights.⁶⁸ The registration authorities are usually not prepared to guarantee the accuracy of registered details, but the procedure has been refined so that it provides security.⁶⁹

2.2.1 Characteristic of our system of registration

We differentiate between two land registration systems, namely negative system being the registration of deeds and positive system being the registration of title.⁷⁰ Where a system of registration of deeds prevails, the deeds are registered at face value and the title is not guaranteed.⁷¹ The correctness of the registered information is not guaranteed, because the land register can be incomplete or incorrect,⁷² due to the possibility of some statutory forms of acquisition of ownership and some rights affecting third parties not being published in the land register.⁷³ The registration system of the Netherlands is an example of a system of registration of deeds, which generally provides a fairly complete picture of rights in land but are incorrect or incomplete in a number of cases.⁷⁴

In terms of the system of registration of title, the identity of land is specific and indisputable and the title is guaranteed.⁷⁵ There is security, completeness of records and protection persons who have rights in land.⁷⁶ The Torrens system, operating in a number of jurisdictions such as Australia and New Zealand, is an example of a system of registration of title.⁷⁷ Under this system, land cannot be disposed of in any way other than by transfer and registration.⁷⁸

⁶⁸ CR van der Walt & GJ Pienaar op cit (n67) 137.

⁶⁹ Ibid.

⁷⁰ AS West op cit (n8) 3.

⁷¹ Ibid.

⁷² CR van der Walt & GJ Pienaar op cit (n67) 138.

⁷³ PJ Badenhorst et al op cit (n12) 213.

⁷⁴ PJ Badenhorst et al op cit (n12) 214.

⁷⁵ AS West op cit (n8) 3.

⁷⁶ Ibid.

⁷⁷ PJ Badenhorst et al op cit (n12) 215.

⁷⁸ Ibid.

It is difficult to classify the South African registration system either as absolutely a system of registration of deeds or a system of registration of title.⁷⁹ Our system of registration possesses characteristics of both systems of registration of deeds and registration of title.

It contains characteristics of a system of registration of title in that the Deeds Registries Act of 1937 imposes a duty on the registrar to keep land registers, containing the necessary particulars for purposes of maintaining an efficient registration system.⁸⁰ The Act also imposes a duty on the registrar to examine all deeds and other documents submitted to the registrar's office for registration.⁸¹ Furthermore, the principle on which our system rests provides that only a registered owner, in whose name the title must be registered, or his nominee may convey rights in land.⁸² This is further supported by the principle that each owner or holder of a right in land remains the owner or the holder until registration, or a court order providing otherwise, or dispossession by operation of law.⁸³

On the other hand, our system contains characteristics of a system of registration of deeds in that there are several ways by which real rights can pass without the deeds records being simultaneously amended.⁸⁴ The best known examples would be instances of acquisitive prescription or marriage in community of property, where the registered deeds do not reflect the passing of ownership.⁸⁵ In all other instances, ownership of land will pass by delivery in the form of registration, pursuant to an agreement reflecting the parties' intention to give and receive ownership.⁸⁶ As such, there can be no guarantee of the validity of a title in a system that takes into account intentions of the parties.⁸⁷ Beyond ownership, the office of the registrar of deeds is not liable for any mistakes regarding registration, except in the case of bad faith or malicious acts resulting in damages.⁸⁸ This gives room for the office of the registrar of deeds in certain instances to make mistakes without being held liable.

Registration of deeds and registration of title cannot, however, be regarded as two separate and distinct systems of which are mutually exclusive.⁸⁹ As such, it can be said that the

⁷⁹ PJ Badenhorst et al op cit (n12) 216.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² AS West op cit (n8) 4.

⁸³ Ibid.

⁸⁴ CR van der Walt & GJ Pienaar op cit (n67) 138.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ CR van der Walt & GJ Pienaar op cit (n67) 138.

⁸⁹ PJ Badenhorst et al op cit (n12) 213.

South African land registration system is a unique system which is ultimately a combination of both systems.⁹⁰

2.2.2 Effect of registration

Transfer of ownership of movable objects takes place only if the object is delivered to the new owner.⁹¹ In the case of immovable property, transfer takes place by means of registration, which is a manifestation of the common law requirement that publicity must be given to transfer of ownership.⁹² The application of the publicity principle entails that registration is required for the creation, transfer and termination of all real rights in immovable property.⁹³ However, some authors believe that holders of real rights are protected not because of registration per se, but because a real right has been created, registration simply having been one of the requirements for the creation.⁹⁴ It is submitted that this is true with regards to real rights of ownership, because a person can acquire real rights without registration like, for example, acquisitive prescription or marriage in community of property. However, same cannot be true with regards to real rights in a mortgage bond, because such rights, as will be seen later, only come about at registration with no exception.

The whole idea of registration is in essence publicity and centralisation in the deeds registry as affording notice to the world.⁹⁵ In *Frye's (Pty) Ltd v Ries*,⁹⁶ the Appellate Division gave an interesting account of the effect of registration. Giving judgement for the majority, at 583A-E, Hoexter JA held that with regard to the effect of registration:

‘...there is no doubt that the ownership of a real right is adequately protected by its registration in the Deeds Office. Indeed the system of land registration was evolved for the very purpose of ensuring that there should not be any doubt as to the ownership of the persons in whose names real rights are registered. Theoretically no doubt the act of registration is regarded as notice to all the world of the ownership of the real right which is registered. That merely means that the person in whose name a real right is registered can prove his ownership by producing the registered deed. Generally speaking, no person can successfully attack the right of ownership duly and properly registered in the Deeds Office. If the registered owner asserts his right of ownership against a particular person he is entitled to do so, not because that person is

⁹⁰ AS West op cit (n8) 5.

⁹¹ CR van der Walt & GJ Pienaar op cit (n67) 125.

⁹² Ibid.

⁹³ CR van der Walt & GJ Pienaar op cit (67) 137.

⁹⁴ PJ Badenhorst et al op cit (n12) 76.

⁹⁵ *Commissioner for Inland Revenue Appellant v Estate Graaff Respondent* 1935 AD 210 at 215. This was the view of the court of first instance, although the Appellate Division did not express any opinion as to the correctness or otherwise of the case referred to in arriving at this view by the court of first instance.

⁹⁶ 1957 (3) SA 575 (A).

deemed to know that he is the owner, but because he is in fact the owner by virtue of the registration of his right of ownership.’

Our deed registry system is intended for delivery of real rights by way of publicity through registration. The effect of registration will be that ownership is vested and protected. Similarly, rights in a mortgage bond are vested and protected by virtue of registration. Upon registration, there will be no doubt as to the real rights registered in a person’s name. Registration of real rights is then notice to the whole world that a person owns the registered real rights. However, this does not mean that everyone is deemed to know a person is the owner of the registered real rights, but rather it merely means that the person can prove his ownership by producing the registered deeds.

In *Ex Parte Menzies Et Uxor*⁹⁷ King J considered the Appellate Division case of *Frye's (Pty) Ltd v Ries*, and in particular the passage given by Hoexter JA at 583A-E, but stated at 459 that:

‘[t]he above-quoted passage is...an authoritative statement of the principle that the effectiveness of registered title does not rest on a legal fiction of universal knowledge deemed to follow from registration, but on the contrary rests in general on a valid registration itself. It was not, in my view, intended to mean more than that.’

King J’s view is that there are well recognised instances where enforceable rights of ownership in immovable property do arise without registration, and thus it follows logically that it is possible to lose enforceable rights of ownership in immovable property without registration, such as losing ownership through acquisitive prescription. That being the case, King J held that the mere fact of registration cannot be decisive. This view should, however, be limited to instances such as acquisitive prescription. As will be seen later, in the case of a mortgage bond, rights flowing therefrom cannot possibly come about other than by registration.

2.2.3 Purpose and function of registration

The court in *Ridler v Gartner*⁹⁸ did not deal directly with what the purpose and function of registration is. Instead, the matter dealt with an action for the registration of a servitude against the title deeds of the purchaser of property on the ground that the purchaser had knowledge of the existence of the servitude. When giving judgement, Wessels J, at 260, captured the purpose and function of registration as follows:

⁹⁷ [1993] 4 All SA 455 (C).

⁹⁸ 1920 TPD 249

‘[when you are] in the Deeds Office and in the Surveyor-General's Department you have a complete picture of the land of this country *in petto*. You can go to the Deeds Office and to the Surveyor-General's office and from the data there you can tell exactly what you are buying and exactly what is sold.’

The purpose and function of our registration system is thus that people can gather any information relating to rights in land at the deeds office. The court, however, rejected the notion of doctrine of constrictive knowledge by mere registration in a public office. This notion is followed in the Appellate Division case of *Frye's (Pty) Ltd v Ries* mentioned above, in which Hoexter JA, at 583E-F, held that:

‘...registration is intended to protect the real rights of those persons in whose names such rights are registered in the Deeds Office. It is obvious that the Deeds Office is a source of information concerning such rights, but the real function of registration is the protection of the persons in whose names real rights have been registered. Such rights are maintainable against the whole world...’

Our deeds registry system intends to protect people in whose names real rights are registered and as a result the deeds office functions as a source of information concerning real rights.

King J in *Ex Parte Menzies Et Uxor*, at 458-460, expanded further on the purpose and function of registration holding that:

‘[r]egistration... achieves the dual object of vesting the ownership and making a public record thereof. Where, on the other hand, according to the principles of our law, ownership vests in a person without [delivery], it vests without the need for registration. Registration in such a case would be for the nonetheless important purpose of public record alone.’

Registration does not only serve to protect people in whose names real rights are registered, it serves a dual function of both vesting real rights and making public record of those real rights. In this regard, King J held that it is possible for the one function of registration, such as making a public record, to be separate from the other. This would be in instances of registration of title not requiring to be transferred, for example registration of mortgage bonds serving only as public record that land is encumbered.

From the above discussion, it is clear that registration serves to protect people in whose name real rights are registered and thus mere registration of real rights in the deeds office has significant legal consequences. As such, it is important to determine what constitute such rights and how they are different from personal rights that arise from mere agreement.

CHAPTER 3: DEFINING AND DISTINGUISHING BETWEEN PERSONAL RIGHTS AND REAL RIGHTS

When a creditor has an enforceable claim against a debtor in terms of a loan agreement, it will be in a creditor's personal capacity. When a mortgage bond is registered to secure the claim, any rights arising therefrom are in relation to the secured property only. The basis of these rights is, however, in relation to the underlying claim. As such, it is important to differentiate between personal rights and real rights so as to understand the interplay between the two.

3.1 What is meant by Personal and Real Rights?

3.1.1 Personal right

A personal right constitutes a relationship between two or more legal subjects, the basis being an obligation that signifies a legal bond, by which the one is bound to pay some money to the other or to do or not do some act for the benefit of the other.⁹⁹ The one party will have a right to a particular performance and the other party a corresponding duty to render performance.¹⁰⁰ A relationship which confers only a moral right to performance on one party and imposes a reciprocal moral duty to perform is not an obligation.¹⁰¹ Performance forms an object of the obligation¹⁰² and must have economic value. A legal relationship which confers rights and imposes duties with no economic value is consequently not an obligation.¹⁰³

As an obligation is always between two or more legal subjects, is for this reason that a party's right to performance is called a personal right.¹⁰⁴ The close connection with a person distinguishes a personal right from a real right.¹⁰⁵ A personal right is also called a claim, because it entitles the holder to claim that another person shall act in a particular manner.¹⁰⁶ A creditor who has a claim against the debtor for money lent and advanced has a right to compel the debtor to pay the creditor what is due, and the debtor has a legal obligation to pay

⁹⁹ JW Wessels *The Law of Contract in South Africa* 2ed (1951) 3.

¹⁰⁰ S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* 3ed (2007) 2.

¹⁰¹ LCT Harms 'Obligation' *LAWSA* volume 19, 2ed (2006) par 218.

¹⁰² *Ibid.*

¹⁰³ LCG Harms *op cit* (n101) par 219.

¹⁰⁴ LCG Harms *op cit* (n101) par 221.

¹⁰⁵ S van der Merwe *et al op cit* (n100) 3.

¹⁰⁶ *Ibid.*

the creditor what is due.¹⁰⁷ The legal obligation itself does not create real rights, but the legal obligation is the origin of real rights.¹⁰⁸

3.1.2 Real right

A real right primarily constitutes a relationship between a legal subject and a legal object.¹⁰⁹ A real right entails that a person has a right over an object, which can be enforced against the whole world.¹¹⁰ What constitutes a real right is understood in the context of distinguishing it from a personal right. In this regard, different theories have been developed to distinguish between real rights and personal rights.¹¹¹

3.2 Distinguishing Between Personal and Real Rights

Two main theories have been developed concerning the theoretical distinction, namely the classical theory and the personalist theory.¹¹² In terms of the classical theory, a real right is a right of a person in an object, whereas a personal right is a right of a person against another.¹¹³ In the case of a real right the object itself is the object of the right and in the case of a personal right the object is the obligation.¹¹⁴ On the other hand, in terms of the personalist theory a real right is absolute and can be enforced against anybody, whereas a personal right is relative and can be enforced against a specific person only.¹¹⁵

Both the classical and the personalist theory have not provided a simple and consistent solution to distinguishing between personal and real rights.¹¹⁶ The reason is that each case will not necessarily be similar to the previous cases or follow the same logic, but is frequently influenced by considerations of policy.¹¹⁷ One will have to look at decided court cases in determining the distinction between personal and real rights.

¹⁰⁷ JW Wessels op cit (n99) 4.

¹⁰⁸ Ibid.

¹⁰⁹ LCG Harms op cit (n101) par 221.

¹¹⁰ JW Wessels op cit (n99) 3.

¹¹¹ PJ Badenhorst et al op cit (12) 51.

¹¹² CG van der Merwe 'Things' *LAWSA* volume 27, First Reissue (2001) par 233.

¹¹³ CR van der Walt & GJ Pienaar op cit (n67) 28.

¹¹⁴ Ibid.

¹¹⁵ Ibid

¹¹⁶ CR van der Walt & GJ Pienaar op cit (n67) 29.

¹¹⁷ CG van der Merwe op cit (n112) par 233.

3.2.1 Registrability of rights in land at common law

A simple and consistent solution to distinguishing between personal and real rights is by way of determining which rights can be registered and which cannot. Our courts have held that real rights are rights that are enforceable against the whole world.¹¹⁸ Real rights are adequately protected by their registration in the deeds office¹¹⁹ and in terms of common law a land register is used to record those rights and nothing else.¹²⁰ Real rights are therefore distinguishable from personal rights in that only real rights are capable of registration. Should a personal right be erroneously registered in the deeds office, then the registration will not transform it into a real right.¹²¹

The requirement for the registration of real rights at common law thus provides guidance as to what constitute real rights and from there one will look at what makes personal rights not capable of registration. The matter of *Ex Parte Geldenhuys*¹²² determined just that and De Villiers JP, at 163-164, held that:

‘when it is said that “personal rights” cannot be registered..., the reference is not to rights created in favour of a “person”, for such rights may be real rights against the land. The reference is to rights, which are merely binding on the present owner of the land, and which thus do not bind the land... and do not bind the successors in title of the present owner. These are the “personal rights” which are not registrable... One has to look not so much to the right, but to the correlative obligation. If that obligation is a burden upon the land, a subtraction from the dominium, the corresponding right is real and registrable; if it is not such an obligation, but merely an obligation binding on some person or other, the corresponding right is a personal right... and it cannot as a rule be registered.’

It is evident that for every right there is a correlating obligation. One has to look at the obligation and determine whether it places a burden on the land itself, and should it place an obligation that is a burden on the land, then the correlating right is real and registrable. The court in *Lorentz v Melle*¹²³ has indicated that for an obligation to qualify as a burden upon the land, it has to be in relation to the enjoyment of land in the physical sense.¹²⁴ However,

¹¹⁸ *Smith v Farrelly's Trustee* 1904 TS 949 at 958.

¹¹⁹ PJ Badenhorst et al op cit (n12) 67.

¹²⁰ *Hollins v Registrar of Deeds* supra (n61) at 605.

¹²¹ *British South Africa Company Appellant v Bulawayo Municipality Respondent* 1919 AD 84 at 93 Innes CJ held that: ‘[a personal right] does not become a [real right] because it is erroneously placed upon the register.’

¹²² 1926 OPD 144.

¹²³ 1978 (3) SA 1044 (T) at 1052.

¹²⁴ PJ Badenhorst et al op cit (n12) at 62; CR van der Walt & GJ Pienaar op cit (n67) at 33 hold the view that this consideration amounts to a substantial amendment of principle that the obligation must place a burden on the land, and sets a narrow and more restrictive standard for the creation of a limited real rights. They are of the opinion that in effect it means that limited real rights can be created only when they result in a subtraction from

certain obligations that are not a burden on the land, but a burden on a particular person, can result in the registration of the correlating right if the obligations are intimately connected with the obligations that place an obligation on the land.¹²⁵

A right will be personal if a correlating obligation places an obligation that is binding on a particular person. Should, however, a real right be intimately linked with a personal right, then such a right will also be registrable. In certain instances, personal rights by their nature will give rise to real rights and one such instance is when a mortgage bond is to be registered. In *Registrar of Deeds (Transvaal) Appellant v The Ferreira Deep Ltd Respondent*¹²⁶ De Villiers CJ, at 180, held that:

‘[the fact that]...personal rights...are not capable of registration is a truism. The definition of such rights excludes their registration. But that does not apply...to burdens upon land, encumbrances of immovable property...They are personal until registration, when they become real...’

This point will be discussed in greater detail in Chapter 4, but it is sufficient to say here that a creditor only has a personal right to claim registration of a mortgage bond. It is only upon registration that a creditor enjoys real rights against the property of the debtor.

3.2.2 Registrability of rights in land in terms of statute

In terms of section 63(1) of the Deeds Registries Act of 1937, no deed or condition creating or embodying personal rights nor any condition that does not restrict the exercise of any right of ownership in land shall be registrable. However, such conditions are capable of registration provided that deeds containing them are ancillary to a registrable condition or the rights contained in the deed.¹²⁷ This does not allow the registration of personal rights, but merely authorises the registration of the deed that may also contain personal conditions or rights.¹²⁸ It has been held that it would be dangerous and impossible to give an exhaustive definition of the word ‘personal’ mentioned in section 63(1), but it is quite impossible for the word to have had its widest meaning.¹²⁹ Any condition restricting the exercise of a right of ownership in land shall be registered,¹³⁰ but if the right is not absolute but is a relative right to

the owner’s right to the physical use of the property, which is a result that is in conflict with the nature and effect of many traditionally recognised limited real right such as mortgage bonds.

¹²⁵ *Ex Parte Geldenhuys* supra (n122) at 165.

¹²⁶ 1930 AD 169.

¹²⁷ Section 63(1) of the Deeds Registries Act 47 of 1937.

¹²⁸ PJ Badenhorst et al op cit (n12) 69.

¹²⁹ *Ex Parte Zunckel* 1937 NPD 295 at 298.

¹³⁰ *Ex Parte Zunckel* supra (n129) at 299.

an object so that it can only be enforced against a determined individual, then it is a personal right.¹³¹

Section 63(2) of the Deeds Registries Act provides that the provisions of section 63(1) shall not apply with reference to any condition in a mortgage bond. Conditions that do not restrict the exercise of any right of ownership in land embodied in a mortgage bond will not by registration of the mortgage bond convert them into real rights.¹³² In addition to any condition giving rise to real rights in the mortgage bond, any other condition may also be inserted, provided it is not unlawful, illegal or dishonest in that it seeks to disguise the nature of the mortgage bond.¹³³ A registrar of deeds will determine this by examining conditions in a mortgage bond, as one of the duties is to examine all deeds or documents submitted for execution or registration.¹³⁴ However, because of section 63(2), a registrar of deeds is not required to examine any provision in a mortgage bond that is not relevant to the registration of the mortgage bond.¹³⁵

3.2.3 Definition of personal and real rights in terms of statute

There is no clarity as to what constitute personal and real rights in terms of statute. The matter of *Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds*¹³⁶ noted that the Deed Registries Act of 1937 does not define the term personal rights, but defines a 'real right' as any right which becomes a real right upon registration. The court referred to the *Registrar of Deeds v Ferreira Deep Ltd* case, that held that the exclusion of a claim to register personal rights does not apply to personal rights that become real on registration, and used it as authority to decide that the definition of real rights in statute may refer to rights such as those in a mortgage bond that become real on registration.

3.2.4 Intention of the parties to create real rights

Beyond determining whether an obligation places a burden on the land itself, the intention of the parties will also be relevant in deciding whether a right is real or personal. In *Denel (Pty) Ltd v Cape Explosives Works Ltd; Cape Explosives Works Ltd v Denel (Pty) Ltd*¹³⁷ Hertzberg J stated, at 32, that it would be easier to determine if a right is real or personal if a two stage

¹³¹ JW Wessels op cit (n99) 3.

¹³² PJ Badenhorst et al op cit (n12) 69.

¹³³ AS West op cit (n8) at 267.

¹³⁴ Section 3(1)(b) of the Deeds Registries Act 47 of 1937

¹³⁵ AS West 'Deeds' LAWSA volume 7, 2ed (2004) par 185.

¹³⁶ [1953] 1 All SA 75 (O).

¹³⁷ [1998] JOL 4198 (T).

step test is applied. The first step is to determine if the obligation places a burden on the land, and if it is clear that it does not do so, but rather places a burden on a particular person then whole exercise is done. If on the other hand the right in question passes the test and is capable of being a real right, the next leg of the investigation is whether the parties intended for the right to be real. If the parties agree that the right is to be personal and not real then it is not registrable.

This matter went on appeal¹³⁸ and it would appear that the Supreme Court of Appeal accepted this two leg test, although it was not specifically described as such. Streicher JA elaborated on the test when giving judgement, at 12, by holding that to determine whether a particular right or condition is real, two requirements must be satisfied. The one is the principle that the nature of the right must place a burden on the land and the other is that:

‘...[t]he intention of the person who creates the real right must be to bind not only the present owner of the land, but also his successors in title...’

As such, although at common law the determining factor was whether an obligation places a burden on the land, now the requirement will also be whether a person intended for a right to be real.

It is clear that an obligation that places a burden on land, coupled with the intention to create real rights, will result in the formation of real rights capable of registration. A burden that places an obligation on a particular person is regarded as a personal right belonging to the person entitled to performance of the obligation, and by such virtue is excluded from registration. Should a personal right be erroneously registered, it will not be transformed to a real right. Of interest, however, is that in instances of a mortgage bond, a claim for repayment of a loan places an obligation on a debtor and is therefore a personal right of a creditor up until registration when it becomes real. A mortgage bond is unique in that sense and the legal nature of it will be discussed next.

¹³⁸ *Cape Explosive Works Ltd v Denel (Pty) Ltd* [2001] 3 All SA 321 (A).

CHAPTER 4: CRITICAL ANALYSIS OF A MORTGAGE BOND

A claim against a debtor may arise from a contract between the parties, a delict committed by the debtor against the creditor, or unjustified enrichment of the debtor at the expense of the creditor.¹³⁹ Such a claim is personal in nature in that its enforcement is against the debtor in his or her personal capacity only.¹⁴⁰ A creditor can require that the debtor provide security for the due performance of the claim.¹⁴¹ In this regard real security may be provided, which entails an asset belonging to a debtor, or to someone acting on the debtor's behalf, being used as security for the satisfaction of the creditor's claim.¹⁴² This provides limited real rights in the asset of the debtor in favour of the creditor, such rights, by their nature, seeking to convey a benefit with regard to the use and enjoyment of another's asset.¹⁴³ Various kinds of real security are distinguished and the most important distinction is based on the nature of the object of security, i.e. whether movable or immovable property.¹⁴⁴ The real security focused on in this dissertation is of course a mortgage.

4.1 Theoretical Distinction between a "Mortgage" and a "Mortgage Bond"

Broadly speaking, the term "mortgage" is sometimes used to express a legal idea or employed to denote a right over the property of another, which serves to secure an obligation.¹⁴⁵ Strictly speaking, the term is limited to describing, on the one hand, securities over immovable property.¹⁴⁶ It is accepted today that a pledge serves to secure movable or incorporeal property, while a mortgage secures immovable property.¹⁴⁷

On the other hand, the term "mortgage bond", strictly speaking, refers to the deed or an actual document, the registration of which brings about the right of mortgage.¹⁴⁸ A mortgage bond is thus an actual instrument hypothecating immovable property in that it embodies a mortgage in the tangible sense.

¹³⁹ CR van der Walt & GJ Pienaar op cit (n67) 257.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² GF Lube (Revised by TJ Scott) 'Mortgage and Pledge' *LAWSA* volume 17(2), 2ed (2008) par 324.

¹⁴³ GF Lube (Revised by TJ Scott) op cit (n142) par 325.

¹⁴⁴ CR van der Walt & GJ Pienaar op cit (n67) 258.

¹⁴⁵ TJ Scott & S Scott *Wille's Law of Mortgage and Pledge in South Africa* 3ed (1987) 77.

¹⁴⁶ Ibid.

¹⁴⁷ TJ Scott & S Scott op cit (n145) 1.

¹⁴⁸ GF Lube (Revised by TJ Scott) op cit (n142) par 327.

4.1.1 “Mortgage”

A mortgage grants a creditor limited real rights in the immovable property of a debtor as the object of security, until the principal debt has been paid in full.¹⁴⁹ It has been held that:

‘[t]he term mortgage, when used to denote a right, in its comprehensive sense, is a right over the property of another which serves to secure an obligation and, in its restrictive sense, is generally limited to describing securities over immovable property’.¹⁵⁰

There is always an obligation on the one hand and a right on the other. A creditor would have a right and a debtor a corresponding obligation and it would appear that a right and an obligation in this sense are inseparable.¹⁵¹ The corresponding relationship between a right and an obligation is essential to the existence of a mortgage. In the Appellate Division case of *Kilburn Appellant v Estate Kilburn Respondent*,¹⁵² Wessels ACJ, at 506, held that:

‘[i]t is true that you can secure any obligation whether it be present or future, whether it be actually claimable or contingent. The security may be suspended until the obligation arises, but there must always be some obligation even if it be only a natural one to which the security obligation is accessory.’

Thus, there must be an obligation to which the mortgage is accessory and if there is no obligation, there can be no mortgage.¹⁵³ Should there not be an obligation on the part of the debtor giving rise to the right enjoyed by the creditor, a mortgage would fail.¹⁵⁴

The obligation may be incurred in various ways, but the most common in the commercial world is in the context of a loan agreement where a creditor seeks security for repayment of money lent and advanced or credit extended. As we moved with commercial times:

‘[t]he need which was felt on the part of the owners of corporeal property to borrow money or obtain credit without selling their properties and the needs of moneylenders to obtain security for repayment of loans gave rise to the recognition of pledges of movable and mortgages of immovable corporeal properties.’¹⁵⁵

¹⁴⁹ CR van der Walt & GJ Pienaar op cit (n67) 262.

¹⁵⁰ *Ex Parte Mather, NO* [1971] 3 All SA 462 (D) at 467.

¹⁵¹ In *Ex Parte Mather, NO* supra (n150) at 467 van Heerden J held that: ‘...for every right in favour of a [creditor] there is a corresponding obligation on the part of the [debtor].’

¹⁵² 1931 AD 501.

¹⁵³ *Kilburn Appellant v Estate Kilburn Respondent* supra (n152) at 506.

¹⁵⁴ *Klerck NO v Van Zyl and Maritz NNO* [1989] 1 All SA 23 (SE) Kroon J at 33 held that: ‘[i]t follows therefore that the real right created by a mortgage bond is accessory in nature and is dependent for its existence on the existence of the obligation which it secures. If there is no valid principal obligation for the mortgage bond to secure, there can be no valid mortgage bond and no real right of security in the hands of the [creditor].’

¹⁵⁵ *Britz NO v Sniegocki* [1989] 4 All SA 163 (D) at 166.

Terms in a loan agreement are binding between a creditor and a debtor only. If the loan agreement includes an agreement to mortgage, the consequence is that a creditor can claim registration of a mortgage.¹⁵⁶ This creates a personal right to claim registration, but for the mortgage to be effective against third parties without knowledge thereof, registration is essential.¹⁵⁷

4.1.2 “Mortgage bond” – registration

The term mortgage denotes a right, but to physically bring about the right a mortgage bond would have to be registered in the deeds office, as the rights therein are only created upon registration.¹⁵⁸ Leading authority in this regard is the Appellate Division case of *Trustees Estate Chin Appellants v National Bank of South Africa Ltd Respondents*.¹⁵⁹ Giving judgment for the majority, Wessels AJA, at 367, held that registration of a mortgage is essential:

‘...because a [mortgage] bond has only a legal effect if registered and because it dates from the day of its registration that an equitable mortgage is valueless in our law. The priority of a mortgage with us does not date from the mortgage agreement, but from the date of registration, and therefore a registered mortgage of later date is preferred to an unregistered mortgage of earlier date.’

Section 102 of the Deeds Registries Act of 1937 defines a mortgage bond to mean a bond attested by the registrar of deeds specially hypothecating immovable property. Deeds executed or attested by a registrar of deeds shall be deemed to be registered upon the affixing of the registrar’s signature.¹⁶⁰ In terms of section 50(1) of the Deeds Registries Act of 1937, a mortgage bond shall be executed, in the presence of the registrar, by the owner of the immovable property or by a conveyancer duly authorized by the owner. A mortgage bond is, therefore, a deed executed by the owner embodying a mortgage, and once attested by the registrar of deeds, a deed giving real rights to a creditor.

¹⁵⁶ AS West op cit (n8) 259.

¹⁵⁷ *Britz NO v Sniegocki And Others* supra (155) at 167.

¹⁵⁸ Booyesen J in *Britz No v Sniegocki and Others* supra (n155) at 167 stated that: ‘[s]uch...registration creates real rights in the mortgaged...properties. The purpose and effect of such real rights are to furnish security for the secured debt. The dominium in the property remains in the...[debtor].’ The learned judge in this matter used the matter of *Trustees Estate Chin Appellants v National Bank of South Africa Ltd Respondents* 1915 AD 353 as authority in this regard.

¹⁵⁹ 1915 AD 353.

¹⁶⁰ Section 13(1) of the Deeds Registries Act 47 of 1937.

4.2 Limited Real Rights Created in a Registered Mortgage Bond

The real rights formed upon registration are what constitute the real security enjoyed by the creditor. The real rights are, however, limited in that they create restricted direct entitlement towards the property of another, and are enforceable against the debtor and third parties.¹⁶¹

Solom CJ described the limited nature of such rights as when:

‘[a creditor] possesses none of the ordinary rights of ownership, and is incapable of dealing with the property in any way whatsoever. [A creditor’s] rights are limited to securing under order of the [c]ourt a sale of the property for the purpose of satisfying [the] debt.’¹⁶²

The limited real rights flowing immediately upon registration are to secure a court order for the sale of the property, to satisfy a debt. This is but one example and another is given by van Wyk JA in his minority judgement in *Lief, NO v Dettmann*,¹⁶³ where, at 449, he held that the only rights in favour of a creditor are, in respect of the mortgaged property, limited to:

‘...restrain[ing] its alienation and the right to claim a preference in respect of its proceeds on insolvency of the [debtor].’

The rights that a creditor enjoys in the property of the debtor are, although real, limited to the rights in relations to the debt secured by the property and they, as stressed by van Wyk JA at 449, can:

‘...only exist in respect of a debt, existing or future, and it follows that they cannot be divorced from the debt secured by them.’

4.3 Nature of a Mortgage Bond

4.3.1 Movable or immovable property?

The fact that the underlying debt and the limited real rights cannot be separated from each other makes it difficult to determine whether a mortgage bond is in itself movable or immovable property. In *Union Government v Fisher's Executrix*¹⁶⁴ the court was faced with this question, which was relevant because it needed to determine the domicile of an ordinary debt which turned on whether a mortgage bond is movable or immovable property. Wessels

¹⁶¹ CR van der Walt & GJ Pienaar op cit (n67) 226.

¹⁶² *Roodepoort United Main Reef G.M. Co Ltd (In Liquidation) and Another Appellant v Du Toit NO Respondent* 1928 AD 66 at 75.

¹⁶³ [1964] 2 All SA 448 (A).

¹⁶⁴ 1921 TPD 328 .

JP, at 331, held that a right of action, or a claim which a person has against another, cannot be correctly described as a movable, explaining with reference to Old Authorities, that:

‘Johannes Voet...seems to think that...all mortgage bonds ought to be regarded as movable property...A mortgage bond is nothing more or less than a debt. It is true that the mortgagee looks for payment of the debt, not only to the debtor, but to the property behind the debtor, the property that the debtor possesses, but that property is pledged, to him merely as security for the debt... The nature of the principal debt is a movable because it is a claim against the debtor for money, and money is a movable. Being a claim in reference to a movable the right, of action is itself to be regarded as a movable. It cannot make any difference, according to his view, that immovable property has been pledged, because that pledge is a mere accessory, and it would be absurd to say that the accessory has a different nature from that of the principal...’

Although Wessels JP considered the views of Voet, he expressed a different view and believed that if one examines the question fundamentally, in certain instances:

‘...a mortgage bond might well be regarded as a movable, though for other purposes it might be considered as an immovable...Cases may arise where it would be more proper to hold that a mortgage bond is rather of the nature of an immovable than of the nature of a movable...’¹⁶⁵

As such, depending on the circumstances of each case, a mortgage bond may either be regarded as movable or immovable. In *Lief, NO v Dettmann*, Wessels JA¹⁶⁶ stated that the determining factor in classifying a mortgage bond as either movable or immovable may:

‘...be said to depend on whether the purpose in question relates more particularly to the bond as constituting an acknowledgment of debt or as an instrument of title to a real right in the land hypothecated thereby.’¹⁶⁷

If, therefore, a mortgage bond is used in an action for payment of the debt, it will be regarded as movable property. If, however, the mortgage bond is used in show the existence and nature of the right, it will be regarded as immovable property.

4.4 Functions of a Mortgage Bond

A mortgage bond is a unique form of an agreement in that it is executed only by a debtor as the owner of the immovable property. This creates the impression that a mortgage bond cannot function as an agreement. The respondent in *Union Government (Minister of Finance) v Chatwin*¹⁶⁸ argued this point as it was of a view that a mortgage bond is not a contract, but a

¹⁶⁵ *Union Government v Fisher's Executrix* supra (n164) at 331.

¹⁶⁶ Wessels JA in this matter is not the same judge as Wessels JP in the *Union Government* matter.

¹⁶⁷ *Lief, NO v Dettmann* supra (n163) at 456.

¹⁶⁸ 1931 TPD 317.

unilateral document, the primary function of which is to create a security and not to record the contract between the parties. Tindall J was not convinced by this argument and, at 321, held that the fact that a mortgage bond is not signed by a creditor is not decisive, but:

‘[t]he real question is whether the parties intended the bond to record the terms of the loan and the conditions of repayment....[T]he terms of a mortgage bond must be held to be conclusive as to the conditions of repayment. Its object is not merely hypothecation but the settlement of the terms of the loan.’

From this it is clear that a mortgage bond has a dual function. It functions as an instrument of hypothecation and also functions as a record of the terms of the obligation. It is also possible for a mortgage bond to function as an acknowledgment of debt,¹⁶⁹ because a mortgage bond:

‘...as we know it is an...instrument hypothecating landed property...But even if this bond ceased to be a mortgage bond...then the instrument could have had further existence only as an acknowledgment of debt...’¹⁷⁰

As such, a mortgage bond over and beyond functioning as an instrument of hypothecation and as a record of the terms of the loan, it can also function as an acknowledgement of debt.

4.4.1 Requirements for the validity of a mortgage bond

The Appellate Division in *Thienhaus v Metje & Ziegler Ltd*¹⁷¹ examined the statutory requirements for a valid mortgage bond. The majority were of the view that the only statutory requirement is that every mortgage bond must contain a clear description of the property to be hypothecated.¹⁷² It is not a requirement for a mortgage bond to contain the amount, nature or origin of the debt.¹⁷³ An acknowledgement of debt is certainly not a prerequisite for the validity of a mortgage bond.¹⁷⁴ The origin and the prime purpose of the custom of acknowledgement of a debt is the facilitation of obtaining a quick and easy remedy against the mortgagor in case of default.¹⁷⁵ As such, Williamson JA for the majority, at 67-68, held that the real function of a mortgage bond is to:

‘...give notice to the world in general that a particular property of a debtor is the subject of a charge in favour of a particular creditor. The registration in a Deeds Office of the instrument of hypothecation is the means of informing other creditors

¹⁶⁹ *Oliff v Minnie* [1953] 1 All SA 151 (A).

¹⁷⁰ *Oliff v Minnie* supra (n169) at 153.

¹⁷¹ [1965] 3 All SA 63 (A).

¹⁷² *Thienhaus v Metje & Ziegler Ltd* supra (n171) at 66.

¹⁷³ *Thienhaus v Metje & Ziegler Ltd* supra (n171) at 67-68.

¹⁷⁴ *Thienhaus v Metje & Ziegler Ltd* supra (n171) at 67.

¹⁷⁵ *Ibid.*

that [real rights] exist in favour of [a creditor]...The fact that...a [mortgage] bond may be employed for a purpose other than the hypothecation...should not affect the legal operation of that portion of the instrument constituting the hypothecation...[I]n testing its validity as a deed of hypothecation conferring a real right on the [creditor], all content of the [mortgage] bond which is not required in law to effect a proper hypothecation, is in reality surplusage for that purpose.’

Wessels JA had a different view to this, as he is of the opinion that a mortgage bond should contain at least some description of the debt.¹⁷⁶ His reasoning is that having regard to the accessory nature of a mortgage bond, it is impossible for the antecedent agreement to be valid or enforceable without reference to the principal debt.¹⁷⁷ The learned judge opined that it is essential for a mortgage bond to contain a description of the principal debt to which it is accessory.¹⁷⁸ The real rights are formed on the basis of the mortgage bond, which becomes the exclusive document indicating the nature and extent of a creditor’s real rights on registration.¹⁷⁹ If a mortgage bond does not refer to the debt which it is intended to secure, it would not be referring to an important aspect of a creditor’s real rights.¹⁸⁰ Accordingly:

‘[t]he real rights have neither meaning nor legal efficacy except in relation to the debt which it was intended to secure.’¹⁸¹

It is submitted that holding that rights in a mortgage bond have neither meaning nor legal efficacy except in relation to the debt is a correct view, but it does not mean that merely omitting to refer to the principal debt means that the mortgage bond is without legal efficacy. As is pointed out by the majority, registration is notice to the world that a debtor’s property is subject to a mortgage and this is the only point that the world should concern itself with. The details of the principal debt are of a personal nature as between a creditor and a debtor. It is only upon registration that third parties will concern themselves with the details of the principal debt, and even then concern will be in relation to the property itself and nothing else.

¹⁷⁶ *Thienhaus v Metje & Ziegler Ltd* supra (n171) at 79.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Thienhaus v Metje & Ziegler Ltd* supra (n171) at 80.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

4.5 Transferability of Rights Created in a Mortgage Bond

4.5.1 Cession of rights at common law

A mortgage bond can be ceded either out-and-out or ceded as security.¹⁸² Where it is ceded out-and-out, the existing creditor no longer has any interest in the mortgage bond.¹⁸³

However, where a mortgage bond is ceded as security, the existing creditor retains an interest in the mortgage bond and when the creditor pays the debt the cession may be cancelled.¹⁸⁴ It is said that a cession *in securitatem debiti* should be regarded as a pledge of incorporeal property.¹⁸⁵ A debtor can pledge its own right held as a creditor against a third party as security to a new creditor.¹⁸⁶ Van der Walt and Pienaar are of the opinion that the right held as a creditor in this regard is not ceded to a new creditor, but is pledged and cannot be disposed of.¹⁸⁷ As was seen above, a mortgage bond can be seen as corporeal movable embodying incorporeal rights. As such:

‘[a]n incorporeal right is by its nature not susceptible of physical delivery, but the pledgor must do some act to show that he divests himself of that right and vests it in the pledgee for the purpose of his holding it as security....[T]his can be effected...by a cession of the right, and...[is] the equivalent of what would in the case of goods be delivery is in the case of incorporeal rights a cession.’¹⁸⁸

In *Graaff-Reinet Board of Executors Ltd. v Estate Erlank*,¹⁸⁹ Louwrens J, at 46, held that:

‘[i]t is clear from a number of authorities in our law that you can pledge your interest in a mortgage bond, and that the pledgee can sue on it, even if the pledge is not registered. Nor is it necessary for the cessionary to give notice to the debtor in order to vest the right ceded in the cessionary. All the rights of the transferor are extinguished by the transfer, and thenceforth only the transferee, not the transferor, can enforce the claim against an unwilling debtor.’

It would appear then that a pledge of a mortgage bond is effected by delivery, coupled with some agreement to cede. As such, it appears that registration is not required when a mortgage bond is pledged and, as will be seen below, it is difficult to imagine how a mortgage bond can be pledged without also being registered. However, if it is accepted that a cession *in securitatem debiti* is regarded as a pledge of incorporeal property, then whether

¹⁸² AS West op cit (n8) 296.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ TJ Scott & S Scott op cit (n145) 77.

¹⁸⁶ CR van der Walt & GJ Pienaar op cit (n67) 272.

¹⁸⁷ Ibid.

¹⁸⁸ *Smith v Farrelly's Trustee* supra (n118) at 955.

¹⁸⁹ 1933 CPD 41.

registration is not necessary is doubtful. Cession of a mortgage bond is not just a simple case of agreeing to cede a creditor's right.

4.5.2 Cession of rights in terms of statute

Section 3(1)(f)¹⁹⁰ provides that the registrar of deeds shall register out-and-out cessions and cessions made in security of registered mortgage bonds, and register cancellations of cessions made in security. Regulation 39(1)(c) made under the Deeds Registries Act of 1937 provides that the authority for cession of a mortgage bond shall be given by the holder thereof, in the prescribed form. In *Lief, NO v Dettmann* the Appellate Division had determine whether a creditor could lawfully and effectively cede its rights under a mortgage bond by ceding only a portion of its personal right of action to recover the debt, without at the same time ceding real security which it holds in terms of a mortgage bond. Giving judgement for the majority, Wessels JA held that the borrowing of money and the agreement to mortgage creates personal rights¹⁹¹ and once a debtor agrees to mortgage and registers a mortgage bond, it is only then that real rights are created.¹⁹² In this regard:

‘[r]egistration does not affect the principal obligation, which...retains its character as a personal right of action...for the payment of the interest and capital.’¹⁹³

It is against this background that the learned judge arrived at the conclusion that when a mortgage bond is ceded as security two things must happen: firstly the right of action in terms of the principal obligation will have to be transferred to a creditor, and secondly the real right will also have to be conveyed to the creditor.¹⁹⁴ The right of action can be ceded by a cession agreement, but in the event that the right of action is secured the creditor must be placed in possession of the real right,¹⁹⁵ which is done by registration. Wessels JA was of the opinion that cession for security does not mean that the creditor retain its right in the action, but that the creditor's continued right in the action flows from the agreement that the right of action will be ceded back to the creditor upon discharging of the debt.¹⁹⁶

The Appellate Division thus made it clear that cession of a mortgage bond always requires registration in the deeds office. However, this was subsequently not applied in the

¹⁹⁰ Deeds Registries Act 47 of 1937

¹⁹¹ *Lief, NO v Dettmann* supra (n163) at 455.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Lief, NO v Dettmann* supra (n163) at 461.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

Witwatersrand Local Division case of *Lief, NO v Western Credit (Africa) (Pty) Ltd*,¹⁹⁷ relating to a cession of a mortgage bond where a creditor was placed under judicial management before the cession could be registered in the deeds office. Snyman J referred *Lief, NO v Dettmann*, but held that:

‘[f]or the purpose of passing ownership our law makes a clear distinction between the sale of land and the cession of mortgage bonds over land. The former requires registration in the Deeds Registry Office to pass ownership so as to be effective against creditors upon insolvency, while the latter becomes effective upon its execution.’¹⁹⁸

Snyman J was thus of the view that mere cession of a mortgage bond by agreement without registration is sufficient. This judgement was, however, rejected by Smalberger J in *Barclays Western Bank Ltd v Comfy Hotels Ltd*¹⁹⁹ and the Appellate Division ruling of *Lief, NO v Dettmann* was preferred and held to be good in law. Smalberger J held that no authority was given by Snyman J for his reason in arriving at his conclusion, and the need for registration for a cession is still a requirement.²⁰⁰

Thus, a mortgage bond is a unique kind of document serving for different purposes and giving rise to different legal consequences, which come about only on registration. On the one hand there are personal rights, which are transferred to another person by mere execution of a cession agreement, while on the other hand there are real rights, transferred to another person only upon registration of the cession. These rights are, however, dependent on each other and it is with this legal complexity in mind that we examine the power of a practitioner to suspend such rights.

¹⁹⁷ [1966] 1 All SA 121 (W).

¹⁹⁸ *Lief, NO v Western Credit (Africa) (Pty) Ltd* supra (n197) at 128.

¹⁹⁹ [1980] 4 All SA 294 (E).

²⁰⁰ *Barclays Western Bank Ltd V Comfy Hotels Ltd* supra (n199) at 297.

CHAPTER 5: THE EXTENT OF THE BUSINESS RESCUE PRACTITIONER'S POWER TO SUSPEND RIGHTS

The business rescue provisions are some of the most innovative sections of the Companies Act of 2008.²⁰¹ The business rescue process entails that a company is temporarily supervised, there is a temporary moratorium on claims and proceedings against a company and a business rescue plan is developed and implemented.²⁰² The proceedings are initiated either by a resolution of the board of directors of a company²⁰³ or by an application to court by an affected person.²⁰⁴ The effect of business rescue on contracts is that a practitioner may suspend or apply to court to cancel any obligation of a company during such proceedings.

5.1 Effect of Business Rescue on Contracts

5.1.1 Companies Bill, B 61D-2008

On 31 January 2007 Cabinet approved for publication a draft Companies Bill 2007, which was published for comment.²⁰⁵ The revised Companies Bill was introduced to Parliament during June 2008.²⁰⁶ In terms of section 136(2) of the Companies Bill of 2008, it was proposed that:

‘...despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may *cancel or suspend* entirely, partially or conditionally any provision of an agreement to which the company is a party at the commencement of the business rescue period...’ (Emphasis added)

Accordingly, when the Bill was first introduced to Parliament it was intended for a practitioner to have the wide discretion of cancelling or suspending any provision in an agreement. The Bill was approved by Parliament and the President assented to the Companies Act of 2008 on 8 April 2009²⁰⁷ and thus the abovementioned provision was enacted as law, but was not yet in force.

²⁰¹ F Cassim, MF Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2ed (2012) 17.

²⁰² Section 128(1)(b) of the Companies Act 71 of 2008; F Cassim et al op cit (n201) 865.

²⁰³ Section 129(1) of the Companies Act 71 of 2008.

²⁰⁴ Section 131(1) of the Companies Act 71 of 2008; an affected person is defined in section 128(1)(a) to include a shareholder, a creditor, or any trade union of a company or any employee not represented by a trade union.

²⁰⁵ Companies Bill 2008 presentation to the Select Committee on Economic and Foreign Affairs, available at <http://www.thedti.gov.za/parliament/parliament.jsp>, accessed on 20 July 2013.

²⁰⁶ GN 677 GG 31104.

²⁰⁷ GN 421 GG 32121.

5.1.2 Companies Amendment Bill, B40-2010

The Companies Amendment Bill was introduced to Parliament in November 2010²⁰⁸ for the purpose of amending the Companies Act of 2008. In relation section 136, it was intended to amend the provision so that a practitioner may:

‘(a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, ... any obligation of the company that—

(i) arises under an agreement to which the company ... was a party at the commencement of the business rescue ... proceedings; and

(ii) would otherwise become due during those proceedings; or

(b) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any agreement to which the company is a party.’

The reason for the amendment was that certain stakeholders raised concern about the powers of the practitioner, because they believed that a practitioner had an unfettered discretion in the cancellation of contracts.²⁰⁹ It was therefore agreed that a practitioner must submit to court for confirmation of all contracts, including security contracts, which are intended to be cancelled.²¹⁰ The amendments were accepted by Parliament and the President assented²¹¹ to the Companies Amendment Act.²¹²

5.1.3 Current provision on effect of business rescue on contracts

The Companies Act of 2008 came into effect only on 1 May 2011, after substantial amendments.²¹³ Therefore, although the original section 136 was in our statute books when the Act was first signed into law, the provision only came into force in its amended form. As it stands currently, during a company’s business rescue proceedings a practitioner may entirely, partially or conditionally *suspend*, for the duration of the proceedings, any obligation of a company.²¹⁴ The obligation must be that arising under an agreement to which the

²⁰⁸ GN 1014 GG 33695.

²⁰⁹ Memorandum on the objects of the Companies Amendment Bill, 2010 GN 1014 GG 33695.

²¹⁰ Ibid.

²¹¹ GN 370 GG 34243.

²¹² Act 3 of 2011.

²¹³ F Cassim et al op cit (n201) 2.

²¹⁴ Section 136(2)(a) of the Companies Act 71 of 2008.

company was a party at the commencement²¹⁵ and would otherwise become due during the proceedings.²¹⁶

If a provision of an agreement is suspended and it relates to property serving as security granted by the company, that provision will still continue with respect to any proposed disposal.²¹⁷ A practitioner cannot suspend any provision of an employment contract,²¹⁸ or an agreement relating to transactions on exchange or termination and netting, which would have applied had the company been liquidated.²¹⁹

In the event that a practitioner wishes to entirely, partially or conditionally *cancel* any obligation of a company, then such a practitioner must urgently apply to court to do so on any terms that are just and equitable in the circumstances.²²⁰ However, a court may not cancel any provision of an employment contract outside labour laws,²²¹ or an agreement relating to transactions on exchange or termination and netting, which would have applied had the company been liquidated.²²² Any party to an agreement that is affected by the suspension or cancellation of any provision may assert a claim for only damages against the company.²²³

5.2 Comparative Analysis of Section 136 and U.S.C §365

The concept of business rescue is largely modelled on Chapter 11 of the United States of America Bankruptcy Code,²²⁴ which focuses on reorganisation of corporates that are in financial difficulty.²²⁵ By reorganisation, a struggling but otherwise strong business replaces its existing capital structure with a sensible one that better reflects the conditions the business finds itself.²²⁶ In particular, section 136 is modelled on U.S.C §365.²²⁷

²¹⁵ Section 136(2)(a)(i) of the Companies Act 71 of 2008.

²¹⁶ Section 136(2)(a)(ii) of the Companies Act 71 of 2008.

²¹⁷ Section 136(2A)(c) of the Companies Act 71 of 2008.

²¹⁸ Section 136(2A)(a)(i) of the Companies Act 71 of 2008.

²¹⁹ Section 136(2A)(a)(ii) of the Companies Act 71 of 2008.

²²⁰ Section 136(2)(b) of the Companies Act 71 of 2008.

²²¹ Section 136(2A)(b)(i) of the Companies Act 71 of 2008.

²²² Section 136(2A)(b)(ii) of the Companies Act 71 of 2008.

²²³ Section 136(3) of the Companies Act 71 of 2008.

²²⁴ F Cassim et al op cit (n201) 17.

²²⁵ F Cassim et al op cit (n201) 860.

²²⁶ DG Baird *The Elements of Bankruptcy* 5ed (2010) 1.

²²⁷ P Mindlin 'Comparative Analysis of Chapter 6 of the South African Companies Act, NO. 71 of 2008' at 16, available at http://www.thedti.gov.za/business_regulation/presentations/symposium1of6.pdf, accessed on 20 July 2013.

5.2.1 U.S.C §365

When a corporation is under a Chapter 11 reorganisation, a trustee operates the business.²²⁸ However, a debtor in possession shall have all the rights and shall perform all the duties and functions of a trustee, unless a court provides otherwise.²²⁹ A debtor in possession is defined to mean a debtor,²³⁰ which effectively means a company under reorganisation and thus the very company under reorganisation operates the business. Reference to trustee, therefore, means a company under reorganisation. In terms of §365(a), a trustee may assume or reject any executory contracts of the debtor, subject to court approval. An executory contract is a contract whereby a debtor's obligation to a third party is a liability in the debtor's estate, while at the same time a third party's corresponding obligation to the debtor is a claim in the debtor's estate.²³¹ To put it simply, it means a contract that is both an asset and liability in the debtor's estate.²³² It is effectively a contract placing obligations on both parties to perform where neither of the parties has fully performed yet.²³³

If a trustee assumes an executory contract, it must assume the entire contract with all its burdens.²³⁴ As such, it would appear that if a trustee rejects an executory contract it must do so in its entirety with all its advantages.²³⁵ A trustee may assume or assign any executory contract, even if there is a clause in the contract prohibiting assignment.²³⁶ However, a trustee cannot assume or assign an executory contract if the law excuses any party, other than the debtor, to not accept or render performance to any other person other than the debtor²³⁷ and such a party does not consent to the assumption or assignment.²³⁸ This provision speaks of contracts to make loans or extend credit for the benefit of the debtor.²³⁹

The powers of a trustees to assign an executory contract must be read in conjunction with §365(f)(1), which provides that regardless of a clause restricting assignment a trustee can still assign the contract only if the trustee assumes the contract²⁴⁰ and adequate assurance

²²⁸ 11 U.S.C §1108.

²²⁹ 11 U.S.C §1107.

²³⁰ 11 U.S.C §1101(1).

²³¹ DG Baird op cit (n226) 115.

²³² DG Baird op cit (n226) 117.

²³³ P Mindlin op cit (n227) 16.

²³⁴ DG Baird op cit (n226) 135.

²³⁵ P Mindlin op cit (n227) 16.

²³⁶ 11 U.S.C §365(c).

²³⁷ 11 U.S.C §365(c)(1)(A).

²³⁸ 11 U.S.C §365(c)(1)(B).

²³⁹ 11 U.S.C §365(c)(1)(B)(2).

²⁴⁰ 11 U.S.C §365(f)(2)(A).

of future performance by the assignee is provided.²⁴¹ It would appear, therefore, that in order for an executory contract to be assigned, it must first be assumed by the trustee. Assignment of an executory contract that has been assumed by a trustee relieves the estate from any claim arising from breach of the contract occurring after the assignment.²⁴²

If there has been a default in an executory contract, a trustee may still assume such a contract²⁴³ provided the trustee cures the default,²⁴⁴ compensates the other party for any actual pecuniary loss caused by the default²⁴⁵ and provides adequate assurance of future performance.²⁴⁶ Even if the parties agree otherwise, an executory contract may not be terminated or modified solely²⁴⁷ on the basis of the financial condition of a debtor,²⁴⁸ or the commencement of the reorganisation,²⁴⁹ or the appointment of a trustee.²⁵⁰ This provision effectively renders an acceleration clause ineffective.

A trustee may assume or reject an executory contract at any time before confirmation by the court of a reorganisation plan, but a party to the contract can apply to court for an order requiring a trustee to determine a specified time within which to assume or reject the contract.²⁵¹ If an executory contract is rejected, the rejection thereof constitutes a breach.²⁵² It is believed that rejection is not the same as a breach of a contract outside bankruptcy, because rejection of an unfavourable executory contract is akin to abandoning an asset.²⁵³ However, little of consequence turns on this distinction.²⁵⁴

5.2.2 Similarities and differences between section 136 and §365

When a company is under business rescue, only an appointed practitioner is empowered to deal with contracts of a company. Unlike in the United States, a company does not have powers to suspend contracts during business rescue.

²⁴¹ 11 U.S.C §365(f)(2)(B).

²⁴² 11 U.S.C §365(k).

²⁴³ 11 U.S.C §365(b)(1).

²⁴⁴ 11 U.S.C §365(b)(1)(A).

²⁴⁵ 11 U.S.C §365(b)(1)(B).

²⁴⁶ 11 U.S.C §365(b)(1)(C).

²⁴⁷ 11 U.S.C §365(e)(1).

²⁴⁸ 11 U.S.C §365(e)(1)(A).

²⁴⁹ 11 U.S.C §365(e)(1)(B).

²⁵⁰ 11 U.S.C §365(e)(1)(C).

²⁵¹ 11 U.S.C §365(d)(2).

²⁵² 11 U.S.C §365(g).

²⁵³ DG Baird op cit (n226) 117.

²⁵⁴ Ibid.

A practitioner is given powers to *suspend* any obligation of a company arising out of any agreement, except employment agreements and agreements relating to transactions on exchange or termination and netting. A trustee on the other hand is given powers to assume or reject only executory contracts. Should a contract not constitute an executory contract in terms of United States law, then a trustee is not empowered to assume or reject such a contract. Therefore a practitioner has wider scope as to which contracts to suspend, whereas a trustee can only deal with executory contracts.

A practitioner is empowered to suspend entirely, partially or conditionally any obligation in a specific agreement. The ability to ‘partially’ suspend ‘any obligation’ seems to work on the premise that any one agreement has multiple obligations or that in the event that there is only one obligation arising from an agreement, such an obligation can be suspended or cancelled partially while the other bit or bits of the obligation continue. Thus it would appear that a practitioner has unfettered powers to pick and choose which obligation or obligations in one specific agreement to suspend. The powers of a trustee are – although very far reaching – limited to either full assumption or full rejection of an executory contract. A trustee has no discretion in this regard.

A practitioner may only entirely, partially or conditionally *cancel* any obligation arising under an agreement with leave from court. It is due to the extra-judicial nature of the practitioner’s power to *suspend* obligation that this dissertation is focusing on this particular aspect of the power. To the contrary, a trustee may either assume or reject executory contracts, subject to leave from court. Thus in both instances, leave from court has to be obtained. A practitioner only needs leave from our court to cancel any obligation in an agreement, but not to suspend same. Initially it was intended for a practitioner to suspend and cancel an obligation without leave of court, but this was later amended after an outcry from stakeholders stating that such a situation gave practitioners unfettered powers in cancellation.²⁵⁵

Some argue that the amendment of section 136 was a dilution of §365(a).²⁵⁶ Although at first glance it may be seen to be the case, it is submitted that this is not necessarily true since a practitioner still has far wider scope whereas a trustee’s scope has always been

²⁵⁵ Memorandum on the objects of the Companies Amendment Bill, 2010 (n209).

²⁵⁶ J van der Walt ‘In-depth analysis of the business rescue provisions contained in Chapter 6 of the Companies Act No. 71 of 2008 and the Companies Amendment Act No. 3 of 2011’, available at http://www.business-rescue.co.za/legislation/Section-136-Effect-of-business-rescue-on-employees-and-contracts.php#_Uhx12JIwciU, accessed on 20 July 2013.

limited. For one, both assumption and rejection of an executory contract require leave of court. Secondly, it is only a specific kind a contract that a trustee can assume or reject. Lastly, a trustee does not have the discretion on whether to partly assume or reject parts of the executory agreement.

Section 136(2)(a) does not explicitly state the time when a practitioner can suspend any obligation in an agreement. It only provides that a practitioner may suspend any obligation ‘during business rescue proceedings’, which some argue means that any suggested suspension would first have to be included in a business rescue plan and then put to the vote by creditors.²⁵⁷ Furthermore, the section only provides that a practitioner may apply urgently to court to cancel an obligation in an agreement. Again, it is not clear whether this urgent application needs to be done only if the cancellation is provided for in terms of a business rescue plan or whether it can be done immediately. It is submitted that due to the wording section 136(2)(a), which indicates wide discretion enjoyed by a practitioner, it would appear that a practitioner can suspend any obligation in an agreement at any time as the practitioner sees fit. Similarly, a practitioner should be able to apply immediately to court to have an obligation in an agreement cancelled. If a practitioner needs to wait for the adoption of a business rescue plan allowing for cancellation, then the issue of urgency in court would be put to question. To the contrary, §365 specifically states that a trustee may assume or reject an executory contract at any time before confirmation of a plan.

Section 136 is silent on assignment and acceleration clauses in an agreement. This is in contrast to §365, which specifically states that clauses prohibiting assignment do not bar a trustee from assigning the executory contract and that acceleration clauses do not come into effect during reorganisation. In the same vein, §365 does not deal with a provision relating to security whereas section 136 does. It must be noted that despite suspension, a security provision applies during property disposal, but in all other instances the provision will not apply when suspended.

Both section 136 and §365 provide for assertion of a damages claim. In South Africa, one of the elements to prove in cases of a damages claim is of course wrongfulness. It would seem that there would be no wrongfulness when a practitioner is acting within the authority

²⁵⁷ E Levenstein ‘Business Rescue: A Guideline for the South African Banking Sector’, March 2011, available at http://www.companylaw.uct.ac.za/usr/companylaw/downloads/legislation/WLB_2011-03_Cos_Act_business%20rescue_EL.pdf, accessed on 20 July 2013.

provided by legislation.²⁵⁸ Should that be the case, it is left to question whether a court would be able to uphold a damages claim when one of the elements to prove in such a claim is lacking.

5.3 What is Being Entirely, Partially or Conditionally Suspended?

5.3.1 “Obligation” or “Provision”?

The wording of section 136 is somewhat problematic because on the one hand section 136(2)(a) refers to the suspension of ‘any obligation’ arising out of an agreement. On the other hand, section 136(2A) refers to any ‘provision’ in an employment contract, any ‘provision’ in agreements relating to transactions on exchange or termination and netting, and any ‘provision’ in an agreement relating to security. Similarly in terms of the wording, section 136(1) refers to any ‘provision’ in an agreement that does not allow suspension or cancellation of any obligation. So too is the same wording in section 136(3) when referring to asserting a claim for damages as a result of suspension or cancellation of any ‘provision’.

An “obligation” and a “provision” can mean two different things. A “provision” could for instance not place any “obligation” on a company. One wonders then whether a practitioner is empowered to suspend any “provision” which does not place any “obligation” on a company. Admittedly, in many cases there would be no reason why a practitioner would want to suspend a “provision” not placing any “obligation” on a company. It could be that the intended purpose of the wording was to cover instances of partial suspension of an agreement expressing “any obligation” in more than one “provision”.

5.3.2 Personal rights

When a company and a creditor enter into a loan agreement, the obligation that arises is a legal bond which compels a company to perform in the form of repayment of the loan. The legal bond is between a company and a creditor, and in the hands of a creditor the claim for repayment is a personal right. The obligation is the origin of a personal right and, therefore, when a practitioner suspends this obligation, the practitioner is suspending a personal right of a creditor. Practically speaking, a practitioner is empowered to suspend a term in a loan agreement which provides for the repayment of the loan. I would imagine that partial

²⁵⁸ R Moosa ‘Business Rescue: the Challenges’, 6 October 2009, available at <http://www.nortonrosefulbright.com/knowledge/publications/44224/business-rescue-the-challenges>, accessed on 21 July 2013.

suspension would be instances where a practitioner provides that the company will temporarily pay a lesser instalment than that which was originally agreed upon.

5.3.3 Limited real rights

Where a mortgage bond has been registered in favour of a creditor as security for repayment of a loan, the creditor does not only have a personal right against a company to claim repayment but also real rights by virtue of registration. Registration does not change the nature of the underlying personal right. The real rights born out of registration are limited and only relate to the property so as to restrain its alienation, to seek an execution order and claim preference in its proceeds upon its sale in insolvency. However, although these limited real rights in a mortgage bond are separate and distinct from the personal right in a loan agreement, they only exist in respect of the obligation secured and cannot be divorced from each other. In other words, the limited real rights are accessory in nature and if there is no personal right, the limited real rights have no effectiveness or significance. Therefore, it would seem that when a practitioner suspends the personal right, the practitioner is effectively, perhaps by operation of the law, also suspending the limited real rights. The personal right, although suspended, still exists and so it follows that the limited real rights also exist, but the key difference is that limited real rights are registered in the deeds office. Suspension of real rights is quite foreign to our system of law and so it is not clear whether the “suspension” by a practitioner should be regarded as having occurred immediately, or taking legal effect upon the suspension of the underlying obligation, or only upon registration in the deeds office.

5.4 Should there be Registration in the Deeds Office for Noting the “Suspension” of Limited Real Rights?

As section 136 is modelled on §365, it may be useful to first look at the United States registration system and determine whether such a system is similar to our deeds registry system. Having done so, the necessity for registration to note the “suspension” of limited real rights will be explored.

5.4.1 The United States system of registration

In the United States the land registration system is based mainly on private conveyance and the registration of deeds.²⁵⁹ Few lawyers there are familiar with the land title registration system, because such system is rarely used.²⁶⁰ Land recordation is the primary system for documenting legal rights to land.²⁶¹ Serious attempts have been made to introduce title registration, but so far only about fifteen states have enacted the Torrens system.²⁶² However, the registration of title in those states is voluntary and the high primary costs of searching for and establishing title makes registration unusual.²⁶³

The principal motivation for creating the recordation system was to encourage the transfer of titles of land from the public domain to private individuals.²⁶⁴ It provides a public record of land ownership and notice of the existence of certain continuing interests, encumbrances, and claims.²⁶⁵ However, the system does not guarantee the title of the recorded deeds, instead the system invites people to inspect copies of the deeds and draw their own conclusion as to the title.²⁶⁶ To protect an interest in property under the recordation system, a claimant must file a deed describing that interest with the public recorder's office.²⁶⁷ The deed will then be recorded in an alphabetical grantor-grantee index, thus providing notice of that interest to all.²⁶⁸ Whenever an interest in property is transferred, a search is made by undertaking a complex, tedious, and costly search through the grantor-grantee indexes, to ensure that the transferor does indeed possess the interest to be conveyed and to confirm that no outstanding claims exist.²⁶⁹

Title insurance is common in the United States and private companies keep land records of their own.²⁷⁰ Title insurance companies have thus duplicated and are maintaining public land records of the entire country in their own private title banks.²⁷¹ They insure title if

²⁵⁹ G Larsson *Land Registration and Cadastral Systems: Tools for Land Information and Management* 1ed (1991) 52.

²⁶⁰ T Hanstad 'Designing Land Registration Systems for Developing Countries' (1998) volume 13| issue 3 *American University International Law Review* 670.

²⁶¹ Ibid

²⁶² G Larsson op cit (n259) 53.

²⁶³ Ibid

²⁶⁴ G Larsson op cit (n259) 52.

²⁶⁵ T Hanstad op cit (n260) 670.

²⁶⁶ T Hanstad op cit (n260) 671.

²⁶⁷ Ibid.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ G Larsson op cit (n259) 53.

²⁷¹ Ibid

their records indicate that that the title is sound,²⁷² thus assuming the risk of purchasing an impaired title. Therefore, it is the companies, instead of the title system or public officials, who provide the assurance that the title is clear.²⁷³

5.4.2 The difference between the United States recordation system and our registration system

Our system of registration differs fundamentally to that of the United States, because their recordation system is purely a system of registration of deeds. Our system of registration is of course unique in that it possesses characteristics of both registration of title and registration of deeds. One such characteristic in our system leaning towards registration of title is the involvement of the registrar of deeds. In the United States, private companies play a large role in the recordation process as they maintain public land records. Our system of registration is the complete opposite to this, because the office of the registrar of deeds plays a proactive role in our registration process.

The recordation system in the United States does not guarantee that a person in whose name a deed is recorded is the true owner thereof. Our system of registration is such that it also does not guarantee that the land register truly reflects title in land. This, however, is because a person in South Africa can sometimes acquire ownership in land by, for example, acquisitive prescription or marriage in community of property, without the land register reflecting same. The issue here would not be so much that our land register is not a reliable source of determining title, but that the title might have changed by operation of the law without the change being reflected in the land register. In all other instances, our land register is an authoritative source of land title.

A person in the United States protects his or her interest in property by simply filing a deed describing the interest. Our system rests on the principle that only the registered owner or nominee can convey rights in land. The deeds office will not convey rights in land unless it is satisfied that the person intending to convey the real rights is either the registered owner or duly authorised by the registered owner. Accordingly, each owner of land or holder of real rights in land remains as such until registration, or until a court order provides otherwise, or until disposal by operation of the law.

²⁷² Ibid.

²⁷³ T Hanstad op cit (n260) 672.

The recordation of interest in the United States acts as constructive notice to all, and people are then deemed to know of the existence of interest in property when recorded. Our courts have long rejected the application of constructive notice in registration and held that effectiveness of registered title does not rest on constructive knowledge deemed to follow from registration, but on the contrary rests in general on a valid registration itself.

Having regard to these differences in the systems, the United States would appear to not place great emphasis in registration like we do and nothing can be learned with regards to their handling of executory contracts. The differences indicate that the power to suspend limited real rights in South Africa has practical effect than that in the United States.

5.4.3 Necessity for registration to note the “suspension” of limited real rights

As was seen above, ownership of land sometimes occurs by operation of the law and it is for this primary reason our system of registration does not guarantee title. It could be argued that the “suspension” of limited real rights occurs by operation of the law and as such, it would not be necessary to note it in the land register. However, such a stance would further perpetuate the unreliability of our land register as a source of information with regards to registered real right.

At the centre of our registration system is the land registers which the registrar of deeds must keep, whether by means of a computer or in any other manner, such registers containing particulars as are necessary for the purpose of carrying out the provisions of the Deeds Registries Act of 1937 or any other law, and for maintaining an efficient system of registration calculated to afford security of title and ready reference to any registered deed.²⁷⁴ Therefore, the register registrar of deeds is compelled to keep land registers and maintain them with necessary particulars. As such, when registered rights in a mortgage bond are subsequently “suspended”, such information should be recorded in the land register for purposes of maintaining complete records. In this way continuity and completeness of records is always maintained.

The nature and effect of our registration system is centred on the publicity principle, which entails that registration is required for the creation, transfer and termination of all real rights in immovable property. If we accept that a practitioner can suspend limited real rights, then the suspension should only be able to come into force upon registration. A mortgage

²⁷⁴ Section 3(1)(y) of the Deed Registries Act 47 of 1937.

bond has only a legal effect if registered and, it becomes effective from that day. It therefore follows that “suspension” of limited real rights should also only have legal effect if and when it is noted in the deeds office. Simply put, registration of “suspension” of limited real rights by a practitioner should be a requirement. Mere suspension of the underlying obligation seems not to be enough to achieve the objective of suspending any obligation.

The purpose and function of our registration system has a dual objective of vesting ownership in real rights in land and making a public record thereof. The function of vesting of ownership can in certain instances be separated from the other. Thus the objective of making public records could, in other instances, stand on its own as the function of registration. One such instance should be the “suspension” of limited real rights to ensure that public record is always maintained and up to date. Currently, a person can go to the deeds office and have a complete picture of the land of this country and any other encumbrances registered against such land. The full picture would not be complete if the “suspension” of limited real rights is not noted in the deeds office. Such situation would create an incomplete picture of limited real rights in a mortgage bonds being “suspended”, but still registered in the deeds office.

Regulation 39(1) made under the Deed Registries Act of 1937 provides for acts of registration in relation to a mortgage bond, which are: cancellation;²⁷⁵ release of the property or person of a joint debtor;²⁷⁶ noting of a part-payment in respect of the capital due;²⁷⁷ the noting of a reduction of the cover;²⁷⁸ waiver of preference of the security hypothecated in favour of another bond;²⁷⁹ cession;²⁸⁰ cancellation of a cession made as security;²⁸¹ substitution of another person as debtor;²⁸² noting of an agreement varying the terms;²⁸³ and the substitution of other land for the land hypothecated.²⁸⁴ These acts of registration form part of the duties of the registrar in terms of section 3(1) of the Deeds Registries of 1937, for which authorisation must be given by the holder of the mortgage bond in the prescribed signed and witnessed form. These acts of registration are clearly to keep the land register

²⁷⁵ Regulation 39(1)(a).

²⁷⁶ Regulation 39(1)(b).

²⁷⁷ Regulation 39(1)(c).

²⁷⁸ Regulation 39(1)(d).

²⁷⁹ Regulation 39(1)(e).

²⁸⁰ Regulation 39(1)(f).

²⁸¹ Regulation 39(1)(g).

²⁸² Regulation 39(1)(h).

²⁸³ Regulation 39(1)(i).

²⁸⁴ Regulation 39(1)(j).

updated as the mortgage bond is affected. It is, therefore, submitted that the Deeds Registries Act of 1937 ought to be amended so that the “suspension” of limited real rights in a mortgage bond can be included in Regulation 39(1) as one of the acts of registration.

It appears that the listed acts of registration in the Deeds Registries Act of 1937 do not require anything of a practitioner to give effect to his or her power, when limited real rights in a mortgage bonds are affected. The reason for this is simply that there previously had not been any legislation in our law that made it possible for an underlying agreement to be suspended, having the effect on a mortgage bond. In this regard, legislative reform may be necessary to provide some form of certainty when rights in a mortgage bond are affected. Such rights are property of a creditor in terms of private law and their suspension could quite possibly infringe on a creditor’s right to property in terms of the property clause.

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CHAPTER 6: THE RIGHT TO PROPERTY

Our Constitution is the supreme law of the country and the obligations imposed by it must be fulfilled, and law inconsistent with it is invalid.²⁸⁵ As a result, the Companies Act of 2008 and particularly section 136(2)(a) ought to be in line with the Constitution which guarantees that:

‘[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property’.²⁸⁶

As was seen in Chapter 5, the suspension of any obligation by a practitioner could affect both personal and limited real rights of a creditor. It will be seen herein that limited real rights are regarded as property in terms of private law. As such, one must always turn to the property clause to test whether the suspension of those rights constitute an infringement of a creditor’s right to property.

6.1 Application of the Property Clause

The property clause applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.²⁸⁷ Matters arising from the property clause in the Constitution concern the application of the clause to actions between state organs and private parties or to the conduct between private parties only.²⁸⁸ In any event, the property clause will always apply where private parties conduct themselves in a way authorised by law.²⁸⁹ Here we are, therefore, concerned with the application of the property clause in a way authorised by section 136(2)(a).

6.2 Whose Property is Protected?

The protection afforded by the Bill of Rights in the Constitution applies to natural persons.²⁹⁰ However, a juristic person is also entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.²⁹¹ As such, creditors as either natural or juristic persons may not be deprived of property except in terms of law of general application.

²⁸⁵ Section 2 of the Constitution of the Republic of South Africa, 1996.

²⁸⁶ Section 25(1) of the Constitution of the Republic of South Africa, 1996.

²⁸⁷ Section 8(1) of the Constitution of the Republic of South Africa, 1996

²⁸⁸ H Mostert & PJ Badenhorst ‘Property and the Bill of Rights’ (2007) SI 20 *Bill of Rights Compendium* 3FB3.

²⁸⁹ H Mostert & PJ Badenhorst op cit (n288) 3FB3.1.

²⁹⁰ H Mostert & PJ Badenhorst op cit (n288) 3FB3.3.

²⁹¹ Section 8(4) of the Constitution of the Republic of South Africa, 1996.

6.3 The Law of General Application

Law in the context of the property clause includes statutes and its regulations, but could also extend to common law and customary law.²⁹² Furthermore, generally applicable law entails that it must apply generally rather solely to an individual case.²⁹³ There can be no doubt that section 136(2)(a) constitutes a law of general application and so it is now left to determine whether it constitutes an infringement of the property clause by permitting arbitrary deprivation of property. In order to do so one must first determine whether suspended personal and limited real rights constitute property in terms of the property clause; secondly whether the suspension constitutes deprivation; and thirdly, whether that deprivation is arbitrary.²⁹⁴

6.4 What is Regarded as Property in Terms of the Constitution?

The property clause does not define what constitutes property. However, as a starting point it must be noted that, for purposes for the property clause, property is not limited to land.²⁹⁵ It is the task of the courts to determine what defines the constitutional content and scope of property.²⁹⁶ The matter of *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance*²⁹⁷ is an example where the Constitutional Court was faced with this task. This matter dealt with the constitutionality of a provision in the Customs and Excise Act allowing certain goods to be seized, which belonged to someone other than the person liable to the state for customs duty. The matter provides good authority in the interpretation of the property clause in relation to a provision in an Act of Parliament.

In the determination of whether the seizure provision is constitutional, the Constitutional Court had to first determine whether that which was taken away from someone not liable to the state for custom duty amounted to property for the purpose of the property clause. Ackermann J gave the judgement and observed that the property clause embodies a

²⁹² H Mostert & PJ Badenhorst op cit (n288) 3FB7.1.2.

²⁹³ Ibid.

²⁹⁴ These steps were followed in arriving at a decision as to the constitutionality of a challenged provision in the constitutional matter of *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (7) BCLR 702 (CC) and such steps were subsequently accepted and followed in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government & Housing in the Province of Gauteng* 2005 (2) BCLR 150 (CC) .

²⁹⁵ Section 25(4)(b) of the Constitution of the Republic of South Africa, 1996.

²⁹⁶ H Mostert & PJ Badenhorst op cit (n288) 3FB6.

²⁹⁷ 2002 (7) BCLR 702 (CC).

negative protection of property and does not expressly guarantee the right to acquire, hold and dispose of property.²⁹⁸ Furthermore, the property clause has to be seen both as protecting existing private property rights as well as serving public interest, and striking a proportional balance between the two. Ackermann J, at 51, held that for those reasons:

‘[a]t this stage of our constitutional jurisprudence it is...practically impossible to furnish – and judicially unwise to attempt – a comprehensive definition of property for purposes of section 25.’

Specifically in the *First National Bank* matter, the court held that ownership of a corporeal movable lies at the heart of our constitutional concept of property, because of the nature and object of the right.²⁹⁹ The definition of property for constitutional protection in all other instances is thus left open for interpretation, depending on the circumstances of each case. In deliberately leaving open the constitutional definition of property, the court gave the impression that incorporeal property with a distinct economic value may be regarded as property for purposes of constitutional protection.³⁰⁰ Although the definition of property in terms of the Constitution is left open, it would appear that whether our courts will regard rights as property, deserving of constitutional protection, will depend on the nature and the object of the right.

6.4.1 Are suspended personal rights considered property in terms of the Constitution?

In modern South African law, contractual rights to performances are generally not regarded as property rights.³⁰¹ The traditional civil law concept of property is traditionally restricted to real rights with regard to corporeal things, but it would appear that the property clause includes both real and personal rights with regards to both corporeal and incorporeal property.³⁰² The constitutional property concept is a protective shield to a broader variety of interests.³⁰³ The right that a creditor has to claim repayment from a debtor is a claim, which could be an asset that may be of considerable value forming part of a creditor’s estate. Having regard to the nature and the object of the right in this instance, it would appear that the suspended personal right is worthy of constitutional protection.

²⁹⁸ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* supra (n297) at 48.

²⁹⁹ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* supra (n297) at 51.

³⁰⁰ H Mostert & PJ Badenhorst op cit (n288) 3FB6.1.2.

³⁰¹ T Roux & D Davis ‘South African Constitutional Law: The Bill of Rights’ (2013) SI 14 Chapter 20 20.16.

³⁰² CR van der Walt & GJ Pienaar op cit (n67) 307.

³⁰³ H Mostert & PJ Badenhorst op cit (n288) 3FB6.3.

6.4.2 Are suspended limited real rights considered property in terms of the Constitution?

There is absolutely no doubt that limited real rights flowing from a registered mortgage bond are property in terms of private law, and a person in whose name such rights are registered is the owner thereof. The private law concept of ownership may influence the constitutional concept of property, because it may provide a point of departure for an investigation into the scope of protection under the Constitution.³⁰⁴ This means that real rights that are considered property in terms of private law will most likely also be considered property in terms of the Constitution, and this was the case in *Ex Parte Optimal Property Solutions CC*.³⁰⁵ This matter related to an application for removal of a restrictive condition registered against a title deed and in handing down judgment, Binns-Ward AJ, at 19I-J, held that:

‘[p]roperty rights are among the fundamental rights enshrined in chap 2 of the Constitution. A purposive construction of “property” means that it should be read to include any right to, or in property. There is no valid basis to read down the provisions to obtain a more limited meaning of the word.’

As such, it is submitted that limited real rights flowing from a mortgage bond are such rights in immovable property that should be protected in terms of the property clause.

6.5 Deprivation of Property in Terms of the Property Clause.

Once it is determined that a particular interest constitutes property in terms of the Constitution, the next step is to determine deprivation in the context of the property clause.³⁰⁶ The court in *First National Bank* held that the term deprivation is misleading, because it creates the wrong impression that deprivation refers to the taking away of property.³⁰⁷ This may not necessarily be the case, because as Ackermann J, at 57, pointed out:

‘[i]n a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned.’

Evidently, property does not need to be completely taken away; in that any interference with private property may involve deprivation. This gives rise to the question as to what extent of interference is required for there to be sufficient deprivation to offend the property clause. The *First National Bank* matter left this open and subsequently, the matter of

³⁰⁴ H Mostert & PJ Badenhorst op cit (n288) at 3FB6.3.

³⁰⁵ 2003 (2) SA 136 (C).

³⁰⁶ H Mostert & PJ Badenhorst op cit (n288) at 3FB7.

³⁰⁷ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* supra (n297) at 57.

*Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government & Housing in the Province of Gauteng and Others*³⁰⁸ gave us some guidance in this regard. This Constitutional Court matter related to a provision in the Local Government Municipal Systems Act 32 of 2000, which provides that a registrar of deeds may not register transfer of property without a rate clearance certificate. Almost all the parties agreed that the provision does bring about deprivation of property but in spite of this the court still pronounced on the issue of deprivation and, more specifically, the extent of interference that will give rise to deprivation. Yacoob J gave judgement for the majority, and at 32 held that:

‘[w]hether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. It is not necessary in this case to determine precisely what constitutes deprivation. No more need be said than that at the very least, *substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society* would amount to deprivation.’ (Emphasis added)

Therefore, deprivation always takes place when either: property or rights in property are taken away;³⁰⁹ or property or rights in property are significantly interfered with,³¹⁰ or there is a limitation in property or rights in property that goes beyond normal restrictions on property use or enjoyment. All this is a sacrifice that holders of rights in private property may have to make without compensation.³¹¹

6.5.1 Does section 136(2)(a) deprive a creditor of property?

The ability of a practitioner to suspend any obligation in an agreement may significantly interfere or limit rights of a creditor that goes beyond normal restrictions on the use or enjoyment of those rights. The suspension of the personal right to claim repayment significantly interferes or limit these rights, because a creditor cannot, while the personal right is suspended, claim repayment of money lent and advanced. As such and because the personal right is linked to the real rights, a creditor temporarily no longer has use or enjoyment of real security previously afforded to a creditor by mere registration of a mortgage bond. A creditor effectively and temporary has no claim and logically no real security. The suspension of these rights could, therefore, be regarded as temporary

³⁰⁸ 2005 (2) BCLR 150 (CC).

³⁰⁹ *Agri South Africa v Minister for Minerals and Energy* 2013 (7) BCLR 727 (CC) at 48.

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

deprivation of property of a creditor and it is now left to determine whether the temporary nature of the deprivation makes any difference

6.5.2 Temporary deprivation of property

A creditor is not divested of the rights, but is temporarily deprived thereof. The exact extent of deprivation is of course significant interference or limitation that goes beyond normal restrictions on use or enjoyment, but in the instance of suspension it could be argued that the temporary deprivation is not significant in that a creditor does not lose property. The *Mkontwana* matter dealt with a provision that prohibited a registrar of deeds to register transfer of property without a rates clearance certificate, which meant that a person's right to transfer property is temporarily interfered with until such time that a rates clearance certificate is obtained.

O'Regan J concurred with the order of the majority, but gave a very interesting separate judgement that speaks to temporary deprivation of property.³¹² The learned Justice is of the view that the *First National Bank* matter did not hold that deprivation should have a wide ambit.³¹³ She held that the effect of the challenged provision in *First National Bank* was that an owner could be deprived of all rights in a corporeal movable, such loss clearly constituting deprivation.³¹⁴ Accordingly, it was not necessary for the court to consider in any great detail the precise ambit of what would constitute deprivation in circumstances where an interference with property fell short of a loss of ownership.³¹⁵ In *Mkontwana*, the owner was not deprived of ownership by the challenged provision, because only one of the incidents of ownership was being impaired.³¹⁶ She deemed it necessary, therefore, to consider whether an interference with ownership falling short of loss of ownership will fall within the concept of deprivation.³¹⁷ The learned Justice acknowledged that some deprivations of property rights or depriving the holder of a real right could constitute a significant impairment in the interest

³¹² *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government & Housing in the Province of Gauteng* supra (n308) at 77.

³¹³ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government & Housing in the Province of Gauteng* supra (n308) at 86.

³¹⁴ Ibid.

³¹⁵ Ibid.

³¹⁶ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government & Housing in the Province of Gauteng* supra (n308) at 87.

³¹⁷ Ibid.

that the owner or real right holder has in the property, without being divested of the property.³¹⁸ However, at 90, she emphasised that:

‘...there may be limitations on property rights which are either so trivial or are so widely accepted as appropriate in open and democratic societies as not to constitute “deprivations” for the purposes of section 25(1). This is not a matter which I need to decide for the purposes of this case, and it may be left open for further consideration in future.’

Taking her separate judgement into account, one could argue that the suspension of personal and real rights by a practitioner is so “trivial”, that it does not constitute deprivation due to the temporary nature thereof. I am not entirely convinced of this argument and submit that the far reaching implication of suspension of personal rights, and by extension real rights, and the complex nature of the incorporeal rights concerned would not render the suspension trivial. Although the deprivation is temporary, it still does not change the fact that the rights have been insignificantly interfered with. The suspension of the rights means a creditor does not enjoy all the incidents attached to ownership while the suspension is in place. The creditor in this instance might as well be completely divested of the rights. The temporary nature of the deprivation being used in the enquiry to determine deprivation is better suited for corporeal and not incorporeal property. This is because incorporeal property by its nature can only be significantly interfered with or limited in the intangible sense, rendering any interference significant or any limitation going beyond normal restrictions on property use or enjoyment.

However, for now the suspension of rights is one such case which is left open for further consideration when or if section 136(2)(a) is challenged in court. For our current purposes, the suspension of personal and real rights by a practitioner could deprive a creditor of property. The issue as to the temporary nature of the suspension of the rights will play more of an important factor in the determination of whether the deprivation is arbitrary or not.

6.6 Arbitrary Deprivation in Terms of the Property Clause.

Once it is accepted that a person is deprived of property in terms of the Constitution, the next step is to determine whether the deprivation is arbitrary. State interference with private rights

³¹⁸ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government & Housing in the Province of Gauteng* supra (n308) at 89.

in property is unavoidable and such interference may sometimes be permissible, provided that the interference is within the confines of law.³¹⁹ Deprivation of property is allowed only in so far as the deprivation is in accordance with the property clause,³²⁰ which states that deprivation must not be arbitrary.

The matter of *First National Bank* laid the foundation in determining whether deprivation of property is arbitrary. When Ackermann J pronounced on the issue arbitrariness he began by determining what is meant by the term ‘arbitrary’ in section 25(1), holding that the meaning of the word was dependent on its statutory context,³²¹ which is not limited to there being no rational connection between means and ends.³²² It refers to a wider concept and a broader principle that is more demanding than an enquiry into mere rationality.³²³ With this in mind, Ackermann J, at 66, held that:

‘[i]t is important in every case in which section 25(1) is in issue to have regard to the legislative context to which the prohibition against “arbitrary” deprivation has to be applied; and also to the nature and extent of the deprivation. In certain circumstances the legislative deprivation might be such that no more than a rational connection between means and ends would be required, while in others the ends would have to be more compelling to prevent the deprivation from being arbitrary.’

One ought to have a look at the purpose of a particular provision in question to determine the reason for the deprivation. When the reason for the deprivation is known, it can then be determined whether the deprivation is arbitrary. When a challenged provision does not provide sufficient reason for deprivation or is procedurally unfair, then it is arbitrary deprivation.³²⁴

Sufficient reason is the determining factor in deciding whether a challenged provision arbitrary deprives a person of property. Ackermann J, at 100, held that sufficient reason is established by having regard to:

‘(a) ...the relationship between means employed,...namely the deprivation...and ends sought to be achieved, namely the purpose of the law in question.

(b)...[the] complexity of relationships...

³¹⁹ CR van der Walt & GJ Pienaar op cit (n67) 309.

³²⁰ CR van der Walt & GJ Pienaar op cit (n67) 310.

³²¹ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue; First National Bank of SA Limited t/a Wesbank v Minister of Finance* supra (n297) at 63.

³²² *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Service; First National Bank of SA Limited t/a Wesbank v Minister of Finance* supra (n297) at 65.

³²³ Ibid.

³²⁴ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* supra (n297) at 100.

(c)...the relationship between the purpose for the deprivation and the person whose property is affected.

(d)...the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property...'

Generally speaking, where the deprivation in question is ownership of land or a corporeal movable, a more compelling purpose will have to be established, than in the case of incorporeal property.³²⁵ When the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some partial interest of ownership.³²⁶ There may also be circumstances when sufficient reason is established by no more than a mere rational relationship between means and ends,³²⁷ but whether there is sufficient reason for deprivation is a matter to be decided on a case by case basis.³²⁸

From this it is evident that the purpose of the law is important. The deprivation has to link with the purpose of the law in order for there to be 'sufficient' reason to deprive a person of property and if there is no such reason, then the deprivation is arbitrary.

How the Constitutional Court applied the sufficient reason principle is best illustrated by looking at the *First National Bank* and *Mkontwana* matters together, both of which related to challenged provisions that deprived people of property. The challenged provision in *First National Bank* permanently deprived an owner of property so that the state can recover tax owed by someone else other than the owner. On the other hand, the challenged provision in *Mkontwana* temporarily deprived a person from transferring property, while there was outstanding municipality rates charged on the property. The matters differed fundamentally with regards to the connection between the deprivation and the purpose of the law. In the *First National Bank* case, the connection between the purpose of the challenged provision and the property and its owner was far removed and Yacoob J in *Mkontwana* observed this. He held, at 35-35, that:

'[i]f the purpose of the law bears no relation to the property and its owner, the provision is arbitrary. The customs law in issue in the *FNB* case fell into this category. It permitted total deprivation of property even when the customs debt bore no relationship either to the owner or to the property itself. The *FNB* judgment also sets out the approach to be adopted if there is a connection between the purpose of the

³²⁵ Ibid.

³²⁶ Ibid.

³²⁷ Ibid.

³²⁸ Ibid.

deprivation and the property or its owner. In these circumstances, there must be sufficient reason for the deprivation otherwise the deprivation is arbitrary. The nature of the relationship between means and ends that must exist to satisfy the section 25(1) rationality requirement depends on the nature of the affected property and the extent of the deprivation. A mere rational connection between means and ends could be sufficient reason for a minimal deprivation. However, the greater the extent of the deprivation the more compelling the purpose and the closer the relationship between means and ends must be.'

Therefore, the court in *First National Bank* looked at a connection between the purpose of the law and the property or its owner, finding that the purpose bore no relation to either the owner or the property itself and thus the deprivation was arbitrary. In certain instances, there can be a connection between the deprivation and the property or its owner, and as such the arbitrary enquiry will be approached from that perspective. Yacoob J in *Mkontwana*, at 44, held that sufficient reason in instances of connection between the purpose of deprivation and the property or its owner will be determined having regard to:

- '(a) the nature of the property concerned and the extent of the deprivation;
- (b) the nature of the means-ends relationship that is required in the light of the nature and extent of the deprivation; and
- (c) whether the relationship between means and ends accords with what is appropriate in the circumstances and whether it constitutes sufficient reason for the section 25(1) deprivation.'

The Constitutional Court in *Mkontwana* was concerned with the nature of deprivation which was a single incident of ownership and the extent of deprivation which was temporary.

6.6.1 Is the deprivation of property in terms of section 136(2)(a) arbitrary?

6.6.1.1 Purpose of the suspension

The starting point, in determining whether deprivation of property rights of a creditor is arbitrary, is to establish the purpose of the deprivation or rather the purpose for the suspension. The power of a practitioner to suspend any obligation of a company can only be exercised during business rescue proceedings and it follows that the purpose of business rescue is ultimately the purpose of the suspension.

Business rescue constitutes a major theme in the Companies Act of 2008³²⁹ and the purpose of business rescue forms part of the overall purpose of the Act. Section 7(k) of the Act stipulates that its purpose, in relation to business rescue, is to:

‘provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders...’

At first glance, the purpose of the Act in relation to business rescue seems to be for the rescue and recovery of an otherwise financially distressed company for the benefit of all stakeholders. Who these stakeholders are includes creditors, shareholders and employees.³³⁰

There thus appears to be a stakeholder approach, which takes into account public interests. In *Koen and v Wedgewood Village Golf & Country Estate (Pty) Ltd*³³¹ Binns-Ward J, at 14, commented that:

‘It is clear that the legislature has recognised that the liquidation of companies...occasions significant collateral damage, both economically and socially...It is obvious that it is in the public interest that the incidence of such adverse socio-economic consequences should be avoided where...possible. Business rescue is intended to serve that public interest by providing a remedy directed at avoiding...liquidations in cases in which there is a reasonable prospect of salvaging the...company..., or of securing a better return to creditors...’

Section 128(1)(b) of the Companies Act of 2008 defines business rescue to mean proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for:

- (i) the temporary supervision of the company, and of the management of its affairs, business and property;
- (ii) a temporary moratorium on the rights of claimants against the company...; and
- (iii) the development and implementation...of a plan to rescue the company by restructuring its...debt and other liabilities...in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or...results in a better return for the company’s creditors...than would result from the immediate liquidation of the company...’

In *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*,³³² the Supreme Court of Appeal held that a business rescue plan contemplates two objectives: the

³²⁹*Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) at 1.

³³⁰*Employees Solar Spectrum Trading 83 (Pty) Ltd v AFGRI Operations Limited and Solar Spectrum Trading 83 (Pty) Ltd* (NGHC) case no. (6418/2011) (18624/2011) (66226/2011) [2012], unreported at 9.

³³¹ 2012 (2) SA 378 (WCC).

³³² 2013 (4) SA 539 (SCA).

primary one being to facilitate the continued existence of an insolvent company to solvency, and the secondary one to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation.³³³ The achievement of either of the two objectives qualifies as business rescue.³³⁴ Therefore, although section 7(k) implicitly provides that the purpose of business rescue is to rescue and recover financially distressed companies, the facilitation of a better return for creditors or shareholders of the company also forms part of the purpose of business rescue.

6.6.1.2 Connection between the suspension and the purpose of the suspension.

There is a clear connection between the suspension of any obligation during business rescue and the intended purpose. In order to have the desired purpose, the suspension of the obligation has to take place. We have said that if the purpose of a challenged provision bore no relation to either the owner or the property itself, the deprivation is outright arbitrary. With regard to the connection between the purpose and the owner of the property, specifically creditors, the provision is aimed at enabling them to either retain their claim when the company returns to solvency or provide a better return on their claim than they would otherwise have had when the company is placed in liquidation.

The other connective relationship is between the purpose of section 136(2)(a) and the rights themselves. Personal rights in their nature are such that only the holder can enforce them against someone else. As such, personal rights will always be attached to the owner thereof. The purpose of section 136(2)(a) relating to a creditor as the owner will as a consequence relate to the personal rights themselves. On the other hand, the limited real rights flowing from a mortgage bond are in relation to the secured property, but their continued existence depends of the continued existence of the debt which is the basis of the personal rights. Again, therefore, any purpose relating to the secured creditor as the owner will as a consequence relate of the limited real rights themselves. Over and beyond this, the purpose of enabling a creditor to retain the claim or get a better return on the claim on liquidation will be achieved by suspending the very same rights. From that perspective alone there is a connection between the purpose of section 136(2)(a) and the deprivation.

Therefore, having regards to the purpose of section 136(2)(a), it can be seen that its purpose does have relation to both creditors and theirs rights.

³³³ *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* supra (n332) at 23.

³³⁴ *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* supra (n332) at 26.

Where there is a connection between the purpose of the deprivation and the property or its owner, the arbitrary enquiry will be approached from that connective perspective and this is the case here. As such, to establish whether there is sufficient reason for the deprivation, we must look at the nature of the rights and the extent of the suspension. We must then look at the means-ends relationship in the light thereof to determine whether such means-ends relationship is appropriate in the circumstances.

Turning to the nature of the rights – if deprivation affects all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some partial interest of ownership. The nature of the rights in question is that they are incorporeal property. The suspension of the rights temporarily deprives a creditor of all the use and enjoyment of the rights. However, the provision does not seem to bar a creditor from ceding away these rights, and ownership on suspension still rests with the creditor. Whether any person would pay for any suspended rights in a financially distressed company is another issue together. Because the suspension of the rights does not strip a creditor of ownership in those rights, the purpose of the deprivation is less compelling.

As to the extent of deprivation – the greater the extent of deprivation, the more compelling the purpose for deprivation will have to be than when the deprivation is lesser in extent. A practitioner can only suspend the rights without leave of court, so the deprivation is temporary. As was mentioned before, O'Regan J remarked that the temporary nature of deprivation may in future be relevant for the purpose of the deprivation inquiry itself. However, as the law stands the temporary nature of the deprivation is relevant to the arbitrariness inquiry. In this regard, the temporary nature of the suspension could be the decisive factor in determining whether section 136(2)(a) arbitrarily deprives creditors of their rights. Again, because the suspension of the rights is temporary, the purpose of the deprivation is less compelling.

Now we must look at the means-ends relationship in the light of the nature of the rights and extent of the suspension to determine whether such means-ends relationship is appropriate in the circumstances. The means of the deprivation is of course the suspension of the rights. The intended end result of this deprivation, in relation to creditors, is to either retain their claim when the company returns to solvency, or provide a better return on their claim than they would otherwise have had when the company is placed in liquidation. The end result is to benefit creditors to which the very rights may be suspended. The deprivation

is achieved by not completely depriving creditors of ownership in the rights, and moreover the deprivation is temporary. If it were not be for the suspension of these rights, the ability of a company to return to solvency or the ability to provide a better return of claims on insolvency would be less probable. As such, it is submitted that the mean-ends relationship seems to be appropriate in the circumstances.

Having regard to all of the above, it is submitted that the suspension of rights of a creditor is not arbitrary in instances where a practitioner suspends any obligation of a company during business rescue.

6.7 Limitation Clause

Section 36(1) of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic, taking into account all relevant factors.³³⁵ The standard set in the property clause in the determination of the constitutionality of a challenged provision is arbitrariness. While on the other hand, the standard set in the limitation clause is reasonableness and justifiability.³³⁶ This appears to be separate requirements for both the limitation and property clause, and it can be argued that deprivation of property should comply with the requirements of both clauses. In *First National Bank of SA Ackermann J*, at 70, held that he:

‘...cannot support the suggestion...that deprivations may have to comply with both the requirements of section 25 and the general requirements of section 36. If the deprivation is not arbitrary, the section 25(1) right is not limited and the question of justification under section 36 does not arise.’

It is submitted that the suspension of a creditor’s rights by a practitioner is not arbitrary and, therefore, the question of justification under the limitation clause does not arise. If it had been found that the suspension of a creditor’s rights is arbitrary, then perhaps:

‘[i]t might be contended that once the deprivation has been adjudged to be arbitrary, no scope remains for justification under section 36. By its terms, section 36 of the Constitution draws no distinction between any rights in the Bill of Rights...Neither the text nor purpose of section 36 suggests that any right in the Bill of Rights is excluded from limitation under its provisions...It will be assumed, without deciding,

³³⁵ Factors including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

³³⁶ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* supra (n297) at 65.

that an infringement of section 25(1) of the Constitution is subject to the provisions of section 36.³³⁷

It could be that the limitation clause will apply in instances of arbitrary deprivation of property but, because it is submitted that this is not the case here, it is not necessary to consider whether a deprivation which is arbitrary may nevertheless be justified in terms of the limitation clause.³³⁸ Such an inquiry is, in any event, likely to lead to duplication of the enquiries, which may ultimately yield the same results.

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³³⁷ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* supra (n297) at 110.

³³⁸ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government & Housing in the Province of Gauteng* supra (n308) at 125.

CHAPTER 7: CONCLUSION

7.1 Conclusive Remarks of Each Chapter

7.1.1 Chapter 2: Our Deeds Registry System

It was intended in this chapter to get a deep understand of our registration system, so that it can be determined whether a practitioner's power can legally extend to real rights. An understanding of our registration systems indicates that the nature, effect, purpose and function of our registration system entails that registration is required for the creation, transfer and termination of all real rights in immovable property. It therefore logically follows that registration should be required for "suspension" of real rights.

7.1.2 Chapter 3: Defining and Distinguishing between Personal Rights and Real Rights

There are clear differences between rights in a loan agreement and rights in a mortgage bond. A burden that imposes an obligation on a debtor in favour of a creditor is a personal right in the hands of a creditor and a burden that imposes an obligation on land is a real right. Where a mortgage bond is registered, the obligation imposed on the land is born from the obligation imposed by the owner personally. Although this is the case, personal and real rights are separate and distinct from one another. However, such rights depend on each other to exist.

7.1.3 Chapter 4: Critical Analysis of a Mortgage Bond

It has been seen that limited real rights in a mortgage bond vest only on registration, which such rights are ancillary in nature and cannot be separated from the underlying claim. As a result, anything legally affecting the underlying claim has legal effect on the ancillary limited real rights.

7.1.4 Chapter 5: The Extent of the Business Rescue Practitioner's Power to Suspend Rights

A practitioner has the power to suspend personal rights in a loan agreement, such power extending to limited real rights in a mortgage bond. As such and due to the nature of our registration system, the Deeds Registries Act of 1937 should perhaps be amended to include an act of registration to note the suspension of limited real rights.

7.1.5 Chapter 6: The Right to Property

The property clause is clear that no one may be deprived of property, except in terms of the law of general application that does not allow arbitrary deprivation of property. Section 136(2)(a) of the Companies Act of 2008 is a law of general application, which enables a practitioner to suspend rights of a creditor. The rights so suspended appear to be property rights worthy of constitutional protection, and by suspending them a practitioner deprives creditors of their property rights. The deprivation is however not arbitrary, because there is sufficient reason for the deprivation. As such, it would appear that section 136(2)(a) does not offend the property clause.

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