

**IN THE HIGH COURT OF LESOTHO**

In the matter between:

**JESSIE RAMAKATANE t/a SPEEDY FIVE**

**Applicant**

and

**LESOTHO BANK (In Liquidation)**

**Respondent**

**For the Applicant : Mr. K. Sello**

**For the Respondent : Mr. P. V. Fischer**

**Judgment**

**Delivered by the Honourable Mr. Justice T. Monpathi  
on the 4<sup>th</sup> day of March 2002**

1. The Respondent Bank submitted that the crisp question which needed to be answered was whether or not the relevant deed was a mortgage bond in the classic sense of the word. Alternatively whether the relevant document (deed) which Respondent contended was a covering bond should be

cancelled upon mere payment of the maximum limit of indebtedness (stated in this case as M150,000.00) notwithstanding that a large sum of money in excess thereof was still due and owing to the Respondent Bank. Respondent contended that there was simply no basis for such claimed or intended cancellation.

2. The Applicant had brought an application for an order whose terms were as follows:
  - (1) Declaring that the Deed of Hypothecation executed by the applicant in favour of the respondent on or about the 20<sup>th</sup> July 1993 covers the principal sum of the loan extended by the respondent to the applicant up to but not exceeding the sum of M15,000.00 and all interest thereon.
  - (2) Directing the Respondent to pay the costs of this application.
  - (3) Granting the Applicant further or alternative relief.

As I observed that the precise reason for the application may not have been apparent from the application itself. It was however for the purpose hereof accepted that Applicant sought to contend that the relevant Deed of Hypothecation

should and must be cancelled by the Respondent once Applicant had tendered and or made payment of the sum of M150,000.00 being the limit of indebtedness in respect of the relevant deed. This was referred to in paragraph 4, 5 and 6 of founding statement as well as in pages 7 and 8 of the Deed of Hypothecation attached to the papers.

3. The Applicant said that; on or about the 20<sup>th</sup> July 1993, he caused to be registered in favour of the Respondent a mortgage bond against his immovable property situate on plot number 13283-331 Maseru Urban Area.
  - 3.1 The bond stated that it is “..... for securing the due payment of the said sum (of M150,000.00) or any portion thereof together with all interest which may be due thereon.”
  - 3.2 The bond further provided that the bond “..... shall be deemed the principal sum of the mortgager indebtedness to the said Bank at any time up to, but not exceeding the sum of M150,000.00 (One Hundred and Fifty Thousand Maloti.”(as Applicant sought to emphasize)
  - 3.3 One special condition of the bond was stated to be: “ (2) That advances

debts or demand made by one accruing to the bank after the date of this Bond shall be deemed to be covered or secured thereby to the extent of and not beyond the said principal sum of M150,000.00 (One Hundred and Fifty Thousand Maloti). (Underlining made where Applicant sought to emphasise) The Applicant was desirous of having the said bond cancelled and replaced by a form of security in the sum of M150,000.00 acceptable to the Respondent. The principle relied on was that:

“The mortgagee is not entitled to retain the mortgaged property as security for another liquid debt of the mortgagor which accrued while the mortgage was in force”.

See Willes **Principles of South African Law**, 8<sup>th</sup> Edition, page 347.

- 4.1 The Respondent refused to accede to the cancellation. It contended that the bond has contained or constituted a covering bond constituting security for all Applicant's debts to the bank which, according to the Respondent, amounted to some M8,322,522.62 (Eight Million Three Hundred and Twenty Two Thousand and Five Hundred and Twenty Two Maloti and Sixty Two Lisente) Is the alter sum included in “a debt that will arise in the future” as envisaged by the bond issue in casu? If the answer be in the affirmative the application ought to fail.

5. Applicant contended that nowhere in its answering affidavit did the Respondent provide any basis in law for its interpretation that “such a bond secures a fluctuating state of indebtedness and give security for whatever is due under a running account with the mortgagee. As Applicant contended the bond clearly stated that it shall serve as security for debts up to M150,000.00 and not beyond. It was submitted that even relying on the Respondent’s answering affidavit reference was made to the bond covering all manner of debts but not exceeding M150,000.00.
  
6. It was submitted furthermore by Applicant that the Respondent cannot refuse to cancel the bond as security for debts other than which the bond was intended to cover. Inasmuch as the amount owed of M8,322,522.62 was covered by other properties it was an untenable stance to seek to hold on the bond in issue in *casu*. That is to say in the Applicant’s own words: “It cannot be said that if a (debtor) has a number of accounts with a bank each covered by its own mortgage as (security) the bank would be entitled to refuse to cancel a bond over the debts which it served as security has been liquidated in full.”
  
7. The last submission by the Applicant as to why the application ought to

succeed was that in any event the validity of the bond in issue was like all mortgages in Lesotho conditional upon the Minister having consented thereto. Without such consent the mortgage bond was in terms of the Land Act 1979 invalid and of no legal effect. It was opposed that there was such consent by the Minister and it was “to the extend of its being “..... for a consideration of M150,000.00 .....” by the applicant.

8. This Court was sought to be persuaded by the Respondent that the following was trite law:

8.1 Firstly, that the term “mortgage” in the normal sense of the word refers to real right of security in an immovable asset which is created by registration in the Deeds Registry pursuant to an agreement between the parties. See **Lawsa Vol.17 para 395.**

8.2 The term “mortgage bond” strictly speaking does however refer to the deed instrument the registration of which brings about the mortgage while the term “hypothec” is today used for a particular type of real security arising *ex lege* and it differs from mortgage, not in the manner of its creation but also in its operation and effect. See again **Lawsa Vol 17 para 393 and 395.**

- 8.3 In banking and conveyancing practice the term “deed of hypothecation” has become established as indicating a particular species of mortgage bond namely the covering bond. See **Barclays National Bank Ltd v Chaldon Investments (Pty) Ltd and Swartzinberg** 1975(2) SA page 350(N) and **Barclays National Bank Ltd v Wollach** 1980(1) SA page 615(C)
- 8.4 A Deed of Hypothecation or “covering bond” is used to indicate instruments which seek to secure “a debt which will arise in the future” or all such debts as may in the future arise between the parties involved and the security as such is given in advance to cover a liability which the parties intend shall be incurred in the future. See **Lawsa** Vol 17 para 464 and **Rooth & Wessels v Benjamin’s Trustees and The Natal Bank Ltd** 1905 TS page 624 and **Barclays Bank v Wollach’s case** (supra). I agreed with respect.
9. As must now be clear, a distinction was sought to be made by the Respondent between what is called the classic mortgage bond, on the one hand, where the indebtedness is complete upon the passing of the bond as opposed to the covering bond, on the other hand, where the obligation secured by the bond has not yet given rise to any indebtedness. What has to be considered now is the acknowledgement clause in the bond. This is

to say that the clause will be differently written in each case as shown below.

10.1 Firstly, in the case of a standard Mortgage Bond where the indebtedness is complete on passing of the bond, such clause usually reads as follows:

**“And then appear to acknowledge his constituent to be lawfully indebted to and on behalf of .....”.**

10.2 In the case of a covering bond such clause will read as follows:

**“And the ..... acknowledged his constituent to be lawfully indebted to and head firmly bound to and on behalf of ...”.**

I was referred to **The Law and Practice of Conveyance in South Africa** 2<sup>nd</sup> Ed (Jones at pages 544-545). What will be discussed hereunder is the way the cause of debt will be set out in each case. It is as follows:

11.1 In the case of the ordinary or classic mortgage bond the cause of debt will be usually set out as follows:



**“..... Being money lent and advance from time to time at the discretion of the mortgage, that being the capital of the actual loan.....”.**

11.2 In the case of a covering board the claim is usually embodied in a clause stating that :

**“It is a condition of the bond that it shall be and — of full force and effect as a continuing covering security for the amount of the capital .....”.**

I was in that respect referred to **Rooth and Wessels** case (supra) at page 624 and **The Law and Practice of Conveyancing in South Africa**, pages 548-549.

12. The Respondent submitted that if regard was had to the following important aspects relating to the deed in question this Court could but conclude that was in fact a covering bond and not otherwise. The aspects were as follows:

12.1 Firstly, where the document in itself it referred to as a deed of hypothecation

which (as said before) used to refer to a covering bond as opposed to a mortgage bond as shown on the cover and the first page of the deed annexed to the proceedings.

- 12.2 Secondly, where as in the instant the acknowledgement clause on the first page contains the words “acknowledge and declared the said ..... to be fairly and lawfully indebted and ..... unto and on behalf of .....”.

The Respondent therefore said, in order to indicate the different nature of the indebtedness in a covering bond, that the document in question is such that it contains an express clause to the effect that it be, declared the condition of the bond to be such that it shall be and remain of full force, virtue and effect as a continuing security and covering bond for each and every sum in this the mortgager “..... may now be or hereinafter become indebted to the said bank from whatever cause arising notwithstanding any fluctuation in the amount or even temporary extension of such indebtedness .....”. (See last paragraph of the page of the bond or page 9 of the record).

This seems to be the correct legal position.

13. The Respondent in its submissions added that consequently authorities

(supra) make it clear that any bond which has been registered in order to secure future advance is a covering bond and in conveyancing practice the term “conveyancing bond” is used in respect of a bond which purports to act as a continuing cover or security in respect of any indebtedness, existing or future, which may at anytime be due to the mortgagee from the mortgager arising from any cause whatsoever or even for that matter specified causes.

In addition, furthermore, such a bond secures a fluctuating state of indebtedness and it gives security for whatever is due under a running account. (My emphasis) I was in this regard referred to **The Law and Practice of Conveyancing in South Africa** (supra) at page 549 and to **Rooth and Wessels** case (supra) at page 625.

14. During argument it had been pointed out by the Applicant’s Counsel that there was an advantage to be derived in having a fixed or expressed sum of money in the bond. The advantage being this that the mortgagee would not be bound beyond such a fixed sum. So would his property be accordingly bound to a fixed sum and not beyond.
15. This Court was dealing with the manifold legal issue of the Respondent’s

rights under an ordinary mortgage if the Court established that the document in dispute was ordinary mortgage. And, on the other hand, the rights of the Respondent under a covering bond if the Court made a finding that the arrangement or kind of security in dispute was a covering bond. The crisp question being that the creditor says: "You owe me for any amount for which this bond is security": And the debtor saying: "No I may owe you any amount but this bond is security for only up to M150,000.00."

16.1 On the factual plane there seemed to be no dispute that the Applicant was still indebted to the Respondent in quite substantial sum in excess of M8 Million.

16.2 What remained to decide was the rights of the Respondent as posed in the last paragraph. If decided in line with Respondent's submission the document in question would be a covering bond with a limit of M150,000.00 for insolvency purposes only and for no other. To repeat as Respondent submitted the only relevance or advantage to be obtained from referring in the covering bond to a fixed or express sum of money, is that the mortgagee may thereby derive preference upon insolvency.

16.3 Non-compliance with stipulation will affect the mortgagees position only

upon insolvency and will not detract from the other rights which the mortgagee derives from such mortgage registered in its favour. And furthermore the covering bond would not be liable to be cancelled at the instance of the Applicant as long as the Applicant remained indebted to the Respondent as presently he is so indebted.

17.1 A covering bond as defined by **The Law and Practice of Conveyancing in South Africa** (supra) at Page 443 is defined in the following terms:

“But in conveyancing practice the terms is used in respect of a bond which purports to act as continuing cover or security in respect of any indebtedness, existing or future, which may at any time be due to the mortgagee from the mortgagor, arising from any cause whatsoever, or from specified causes. Such a bond secures a fluctuating state of indebtedness. It gives security for whatever is due under the running account with the mortgagee.” See also the case of **Rooth v Wessels** case (supra)

The implication of the above quotation is that, an ordinary bond may even be converted by a condition into a covering bond.

17.2 Where Mr. "A" enters into an agreement of loan with "B" Bank for loan of unstated amount of moneys, that would be contract *simplicata*. A mortgage bond is also based on this contractual agreement. (See **Lawsa vol. 17 para 395**)

17.3 Where a mortgage bond is registered in favour of "B" Bank over "D" property of Mr. "A" and the mortgage says: "Not in excess of this amount," then that is a covering bond. This is because one element of a covering bond as outlined by **Willies Mortgages and Pledges** (*supra* at page 54 is that:

"A sum is fixed in the bond as an amount beyond which  
future debts shall not be incurred."

See also: **Gibson 7<sup>th</sup> ed. At page 556 and Cope v Atkinson's Motor Garage Ltd 1931 AD 366**

17.4 A covering bond is an example of a conditional bond. Therefore preference under a covering bond accrues at a date when the debt is incurred, and not at a date when the bond is registered. See **Heydenryck v Mackie, Young & Co's Trustee & the Standard Bank 1906 2 Buch AC 279.**

17.5 The question whether any particular debt is covered by the bond depends on

the wording and construction of the covering clause or the facts of the case. See **Willies Mortgages and Pledges** at page 179. However, the usual terms used to describe the debt/debts in the covering bond are “arising from and being money lent and advanced by the bank to the mortgagor, whether as cash advanced, overdrawn current account.” see **Principles of South African Law** (supra). In the case of COPE (supra) it was held that in the case where the declaration of indebtedness provided that the appearer declared the debtor indebted to the mortgagee in a certain sum

“Arising from and being the amount the debtor hereby guarantees to pay to the mortgagee in respect of the indebtedness upon any just cause of indebtedness whatsoever of R ..... in the event of the said R making a default in respect of any such indebtedness;”

the bond not only guaranteed existing debt of R ..... but also covered debts arising in the future. Therefore the question whether any particular debt is covered by the bond depends on the working and construction of a covering clause or the facts of the case.

- 17.6 A bond may cover both existing and future debts. Such a bond is a covering bond. The following passage was quoted with approval in the case of

**SAJJW v Sheriff & Others** 1955(4) SA 56 at 61-62, from the case of **Rooth v Wessels** (supra); and it is self-explanatory.

“The main difference, it seems to me, between an ordinary and a covering bond, is that in the case of the latter, the full amount of the debt which the bond is intended to cover is not in existence at the date of the execution of the instrument. The pledge or security is given in advance to cover a liability which the parties intend shall only be fully incurred in the future. When that liability has been fully incurred and the moneys contemplated to be paid by the mortgagee to the mortgagor have been supplied, and are included in the amount of the bond then the position of the mortgagee to the mortgagor have been supplied, and are included in the amount of the bond then the position of the mortgagee seems to me to be secured as much under a covering bond as under an ordinary bond.”

18.1 If the preference only arises after the registration of the bond; assuming the bond complies with the basic requirements, to wit,



express intention to secure future debts; a fixed amount beyond which future debts shall not be secured - the remaining question as per facts *in casu* would be whether the debt which equals the value of the mortgaged property, was incurred before or after the bond was registered. If it was after registration of the bond, then this element, together with other ancillary elements - will render the bond a covering bond. But if the debt was registered before the debt was incurred.

18.2 That this is a conditional bond; the condition being a stipulation of a certain (absolute) amount beyond which the security does not cover. In this case the rights of the mortgagee accrue only when the condition is fulfilled i.e payment of the principal debt. See **Willies Mortgages & Pledge** (supra) at p.131.

18.3 The acknowledgement clause clearly stipulates that it covers moneys that are to be advanced after the registration of the bond. The mortgagor concedes that he may even be owing Two Million Maloti, and he could only have been allowed to owe that much because this was a covering bond. Otherwise the mortgagee would have exercised

his rights under the ordinary mortgage bond where debts exceed the amount owed.

18.4 The general principle is that the mortgage is not extinguished unless the whole of the debt has been paid, and property will only be released on payment of the debt.

18.5 To repeat non-compliance with the basic requirements of a covering bond as outlined above will only affect the mortgagee's position upon insolvency and

“Will not detract from other rights which a creditor derives from a mortgage registered in his favour.”

**(Lawsa vol.17 para. 464)**

It is clear therefore that I was unable to exercise my discretion in favour of allowing the application. It must fail with costs.



T. Monapathi  
Judge