

# Corporate & Commercial ALERT

25 OCTOBER 2023



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INCORPORATING  
KIETI LAW LLP, KENYA

## IN THIS ISSUE

### Immediate execution in respect of security over movables is still alive and well

The legality of immediate execution over movables, without the involvement of the courts, has recently been reconfirmed by our courts.



FOR MORE  
INSIGHT INTO  
OUR EXPERTISE  
AND SERVICES

## Immediate execution in respect of security over movables is still alive and well

The concept of *parate executie* or immediate execution is the right of a creditor to realise the security provided to it without first obtaining the permission of the courts.

This controversial principle has been the centre of much attention (and of course of particular interest to lenders and the like) in recent years as it has come under judicial scrutiny for potentially infringing section 34 of the Constitution of the Republic of South Africa, 1996, as was the position in *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd* [2001]. In its decision in *Bock v Duburoro Investments (Pty) Ltd* [2004], however, the Supreme Court of Appeal indicated that it viewed the *Findevco* decision as wrong in so far as it regarded *parate executie* clauses in pledges of movables as unconstitutional. Since the debtor may seek the protection of the court at any stage of the proceedings where the creditor takes *parate execution* of a movable, and if the debtor can show that the creditor acted in a manner which prejudiced him in his rights, the creditor cannot be said to be the judge in its own case.

This legal principle was brought to the fore again this year, in the case of *Vantage Goldfields SA (Pty) Ltd & Another v Arqomanzi (Pty) Ltd and Others* [2023]. While the constitutionality was not questioned this time, other interesting facts about the principle were confirmed.

The facts of the case relevant for current purposes are that the rights to certain loan claims were ceded in *securitatem debiti* to a bank by the appellants as security for funding received by the debtor. The cession agreements entitled the bank, upon any breach which was not remedied, to sell or otherwise realise such security. The loan claims were eventually sold by the bank to a third party during a breach scenario in an effort to realise the security it held, noting that the sale of the loan claims was only conducted after due notice of demand was provided to the appellants and the necessary remedy periods had lapsed.



The graphic features a gold diagonal stripe across a grey background. At the top left, it reads 'The LEGAL 500 EMEA'. Below this, the text 'Corporate, Commercial/M&A 2023 Rankings' is displayed in a bold, orange font. Further down, several key findings are listed in a smaller, black font, including 'Corporate & Commercial practice is ranked in Tier 1.', 'CDH Kenya's Corporate & Commercial practice is ranked in Tier 3.', 'Leading Individuals: Willem Jacobs | David Pinnock', 'Recommended Lawyers: Vivien Chaplin | Peter Hesselting, Justine Krige | Sammy Ndolo, David Thompson | Roxanna Valayathum, Njeri Wagacha', 'Next Generation Lawyers: Justine Krige', and 'Hall of Fame: Ian Hayes'.

**The LEGAL 500**  
EMEA

**Corporate, Commercial/M&A  
2023 Rankings**

**Corporate & Commercial practice is ranked in Tier 1.**

**CDH Kenya's Corporate & Commercial practice is ranked in Tier 3.**

**Leading Individuals:**  
Willem Jacobs | David Pinnock

**Recommended Lawyers:**  
Vivien Chaplin | Peter Hesselting  
Justine Krige | Sammy Ndolo  
David Thompson | Roxanna Valayathum  
Njeri Wagacha

**Next Generation Lawyers:**  
Justine Krige

**Hall of Fame:**  
Ian Hayes

## Immediate execution in respect of security over movables is still alive and well

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The appellants claimed, amongst other things, that the sale of the loan claims were invalid because they caused prejudice and in particular that the operation of the *parate executie* clause in the cessions *in securitatem debiti* agreements caused them unacceptable hardship.

The court confirmed that the *parate executie* principle permits a cessionary, upon the cedent's default, to realise the ceded property, without following any judicial procedure. It went further to say that in the *Bock* case the court reaffirmed the common law rule that *parate executie* is valid as long as it is not enforced in a manner that is against public policy. In the case at hand, the bank was entitled to realise its security when the appellants failed to remedy the breach they were duly notified about. The court also held that the process of realisation of security would often result in a change of the identity of the creditor but that is neither unexpected, nor prejudicial.

The court went further to cite the *Bock* case, stating that a debtor may, when the creditor seeks to invoke the *parate executie* clause in an agreement, "seek the protection of the court if, upon any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights". The appellants, despite being notified by the bank, did not act or take any steps to prevent the sales or have them declared invalid.

The *parate executie* principle is something that is closely monitored by financiers and finance lawyers alike as it is so widely and heavily relied upon as a means of realising security and any judgement in relation thereto will always be of interest. Through the recent *Vantage* case, we are once again reminded that the *parate executie* principle in respect of security over movables is still alive and well in South Africa.

**Kirti Middleton and Jess Reid**



Cliffe Dekker Hofmeyr

### 2023 RESULTS

**Chambers Global 2021 - 2023**  
ranked our Corporate & Commercial practice in  
**Band 1:** Corporate/M&A and in  
**Band 2** Capital Markets: Debt and Capital  
Markets: Equity.

**Ian Hayes** ranked by  
**Chambers Global 2022 - 2023**  
in **Band 1:** Corporate/M&A.

**David Pinnock** ranked by  
**Chambers Global 2022 - 2023** in **Band 1:**  
Corporate/M&A: Private Equity.

**Peter Hesseling** ranked by  
**Chambers Global 2022 - 2023**  
in **Band 2:** Corporate/M&A and in  
**Band 3** Capital Markets: Equity for **2023**.

**Willem Jacobs** ranked by  
**Chambers Global 2022 - 2023** in **Band 2:**  
Corporate/M&A and in **Band 3:**  
Corporate/M&A: Private Equity.

**Sammy Ndolo** ranked by  
**Chambers Global 2021 - 2023** in  
**Band 4:** Corporate/M&A.

**David Thompson** ranked by  
**Chambers Global 2022 - 2023** in  
**Band 4:** Corporate/M&A.

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**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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