

Company amalgamations and a lender's security under a mortgage bond

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Given the language of Sections 116(7)(a) and 116(8) of the Companies Act any registered mortgage bond in favour of a third-party lender (such as a Bank) and in existence prior to the amalgamation date cannot be transferred by endorsement in terms of Section 3(1)(v) of the Deeds Registries Act as that mortgage bond is not the **"property"** of the amalgamating company and instead is the **"property"** of the third-party lender. A mortgage bond can only afford real security to the third-party lender **if prior to the amalgamation date** a substitution of debtor or a new mortgage bond is registered in favour of the third-party lender.

Section 116 of the Companies Act 71 of 2008 ("the Companies Act") regulates the merger and amalgamation of companies and the consequences thereof.

More particularly –

- Section 116(7)(a) of the Companies Act states that –

"(7) When an amalgamation or merger agreement has been implemented

*(a) **the property of each amalgamating or merging company** becomes the property of the newly amalgamated, or surviving merged, company or companies;*

.....

in accordance with the provisions of the amalgamation or merger agreement, or any other relevant agreement, but in any case subject to the requirement that each amalgamated or merged company must satisfy the solvency and liquidity test, and subject to subsection (8), if it is applicable."

and

*"(8) If, as a consequence of an amalgamation or merger, any property that is registered in terms of any public regulation is to be **transferred** from an amalgamating or merging company to an amalgamated or merged company, a copy of the amalgamation or merger agreement, together with a copy of the filed notice of amalgamation or merger, **constitutes sufficient evidence for the keeper of the relevant property registry to effect a transfer of the registration of that property.**"*

In turn, Section 3(1)(v) of the Deeds Registries Act 47 of 1937 ("Deeds Registries Act") provides that "[t]he registrar shall, **subject to the provisions of this Act** make, in connection with the registration of any deed or other document, or **in compliance with the requirements of any law**, such endorsements on any registered deed or other document as may be necessary to give effect to such registration or to the objects of such law".

In the writer's opinion –

- Section 116(7)(a) of the Companies Act has the effect of creating the amalgamation notice filed with the Companies and Intellectual Property Commission (CIPC) as the *causa* for the registration of transfer of immovable property, which when read with Section 116(8) of the Companies Act and Section 3(1)(v) of the Deeds Registries Act means that the Registrar of Deeds is permitted by virtue of a simple application filed with the Registrar of Deeds to **endorse** such transfer of immovable property ("endorse" or "endorsement") in terms of Section 3(1)(v) of the Deeds Registries Act instead of requiring a full transfer by way of the usual power of attorney and deed of transfer. However, the endorsement process does not exclude the requirement for a transfer duty receipt or exemption certificate in terms of the Transfer Duty Act 40 of 1949 ("Transfer Duty Act"). Nor does the endorsement exclude the requirement for a clearance certificate in terms of Section 118 of the Local Government: Municipal Systems Act 32 of 2000 ("Municipal Systems Act");
- Section 116(7)(b) of the Companies Act has the effect that the amalgamated company becomes liable for the *"obligations"* of the amalgamating company. The *"obligations"* referred to therein are nothing other than the **personal** obligations under the contract (for example, a loan

agreement or guarantee) which is the *causa* for the security (ie. the mortgage bond);

- The word "property" as referred to in Section 116(8) of the Companies Act can only be interpreted to mean immovable property owned by the amalgamating company and any mortgage bond registered in favour of an amalgamating company. A mortgage bond registered over immovable property of an amalgamating company in favour of a third-party lender (such as, for example, a bank) is certainly not the "property" of the amalgamating company, but instead is the "property" of the third-party lender.
- Sections 116(7)(a) and 116(8) of the Companies Act read with Section 3(1)(v) of the Deeds Registries Act authorizes the Registrar to deal with the transfer of "**property**" which is owned by the amalgamating property by way of endorsement. It does not authorize the Registrar to endorse a third-party mortgage bond.

Unfortunately, in Chief Registrar's Circular ("CRC") No 28 of 2013, the Chief Registrar of Deeds ("**Chief Registrar**") adopted the view and practice that mortgage bonds registered in favour of third-party lenders were included in the word "**property**" and could be simply endorsed without the need for either (i) the cancellation of the existing bond and registration of a new bond; or (ii) the substitution of the debtor under the existing bond. In addition, the Chief Registrar registered the endorsement transfer of immovable property without requiring a transfer duty receipt or exemption certificate and without requiring a clearance certificate.

Thus, the Chief Registrar effectively ignored the provisions of the Transfer Duty Act and the Municipal Systems Act. Section 116 of the Company's Act does not override the Transfer Duty Act and nor does it override the Municipal Systems Act.

During 2022, the writer acting on behalf of a bank, made an appeal to the Registrar of Deeds at Pretoria against its practice of the endorsement of third-party mortgage bonds as described above on the basis that because of this practice the bank's security under the particular mortgage bonds would effectively be nullified and lost.

The Registrar of Deeds at Pretoria ruled against the appeal. As a consequence, the writer, acting on behalf of the particular bank, made an appeal to the Chief Registrar of Deeds against the ruling made by the Registrar of Deeds at Pretoria.

The Chief Registrar of Deeds on the appeal, and advised by its internal lawyers, concluded that its prior practice of (i) endorsement of third-party mortgage bonds was incorrect on the basis that a mortgage bond in favour of a third-party lender is not the "property" of the amalgamating company, and that they are the "property" of the third-party lender; and (ii) the endorsement of a transfer of immovable property requires a transfer duty receipt or exemption certificate as well as a clearance certificate.

As a result the Chief Registrar of Deeds repealed CRC 28 of 2013 and issued CRC 1 of 2022 in its place.

In the writer's opinion, when amalgamation agreements are drafted, the draftsman should include a condition precedent in that agreement to the effect that prior to the amalgamation date the amalgamating and amalgamated company will either (i) cancel the existing bond and register a new bond; or (ii) register a substitution of the debtor under the existing bond in terms of Section 57 of the Deeds Registries Act.

Banks need to ensure that their security under a mortgage bond is properly preserved prior to giving consent to an amalgamation being effected by any borrower company.

It may be just a matter of time when mortgage bonds "endorsed" by the Deeds Registries in terms of Section 3(1)(v) of the Deeds Registries Act, and the since repealed CRC 28 of 2013, will be challenged by creditors of the amalgamated company.



@werksmans