

STATUTORY REGULATION OF FORCED SALE OF THE HOME IN SOUTH AFRICA

CHAPTER 1 INTRODUCTION

"Home is where one starts from."

- From *East Coker* by TS Eliot

1.1 *Background*

The statement "a man's home is his castle" is derived from the *dictum* of Coke CJ in *Semayne's Case*¹ that "the house of everyone is to him as his castle and his fortress". In recent years, empirical studies and theoretical analyses have advanced recognition of the significance of home as a social, economic, psychological, cultural, and emotional phenomenon.² In law, conflict frequently arises between the interests of a debtor and his family members and those of his creditors, especially mortgagees, in the debtor's home. Often, the home is the only valuable asset worth considering, from the perspective of a creditor who will target it specifically. The need to balance the affected parties' interests brings to the fore the necessity for a coherent contextual framework within which forced sale of the home may occur.³

The home of a debtor has never enjoyed specific statutory protection in the form of exemption from forced sale, in the individual debt enforcement and insolvency procedures in South Africa.⁴ However, in 1994, the new constitutional dispensation⁵

¹*Semayne's Case* (1604) 5 Co Rep 91a 91b, 77 ER 194 195, referred to by Fox *Conceptualising Home* 4 n 6.

²According to Fox, these studies, conducted in various social science disciplines, include, *inter alia*, social psychology, sociology, environmental psychology, housing studies and gender studies. Studies have involved specialists such as psychologists, anthropologists, economists, historians, architects and planning researchers, as well as cultural, socio-economic, and socio-political theorists. See Fox *Conceptualising Home* 5.

³Fox *Conceptualising Home* vii-viii, 3ff. See, also, Fox 2002 *J L & Soc* 580.

⁴Although various statutory provisions regulating the individual debt enforcement and insolvency procedures place certain assets beyond the reach of creditors, these do not include the debtor's home.

which introduced a Bill of Rights⁶ brought about significant change to the South African jurisprudence and legal system.⁷ More recently, recognition by the courts of the impact of the right to have access to adequate housing, provided for in section 26 of the Constitution, which forms part of the Bill of Rights, has had a profound effect on developments concerning execution against a debtor's home in the individual debt enforcement process. The combined effect of the Constitutional Court's decisions in *Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others*⁸ and *Gundwana v Steko Development CC and Others*,⁹ is that it is acknowledged that execution against a debtor's home may constitute an unjustifiable infringement of the right to have access to adequate housing. Further, this may occur even where the home has been mortgaged in favour of the creditor. Therefore, in every case in which execution is sought against a person's home, judicial oversight is required to determine whether, in terms of section 36 of the Constitution, execution is justifiable in the circumstances. A court is required to undertake an evaluation, in which it must consider "all the relevant circumstances", to determine whether execution against a person's home should be permitted.

Given that before the decision in *Jaftha v Schoeman*, a creditor's, especially a mortgagee's, right to execution against the debtor's property had been regarded largely as unassailable, these were groundbreaking changes effected by the Constitutional Court in the course of carrying out constitutional imperatives. However, in their wake, there remains a lack of clarity surrounding implementation of the principles, without any properly constructed framework of substantive requirements and procedural rules within

See, for example, s 67 of the Magistrates' Courts Act 32 of 1944, s 39 of the Supreme Court Act 59 of 1959, s 23 and s 82(6) of the Insolvency Act 24 of 1936, and other statutes, such as the Pension Funds Act 24 of 1956, the General Pensions Act 29 of 1979, the Long-Term Insurance Act 52 of 1998 and the Land Reform (Labour Tenants) Act 3 of 1996.

⁵The Constitution of the Republic of South Africa 200 of 1993, referred to as "the interim Constitution", came into operation on 27 April 1994. It was later replaced by the Constitution of the Republic of South Africa 108 of 1996, hereafter referred to as "the Constitution", which came into operation on 4 February 1997.

⁶Contained in Chapter 2 of the Constitution.

⁷Woolman and Swanepoel "Constitutional History" 2-48; Rautenbach and Malherbe *Constitutional law* 316; Devenish "Constitutional Law" *LAWSA* 5(3) 15.

⁸*Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC), hereafter referred to as "*Jaftha v Schoeman*".

⁹*Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC), hereafter referred to as "*Gundwana v Steko*".

which they ought to be applied.¹⁰ The result is that the criteria for the determination of whether, and the precise circumstances in which, execution should be permitted, are unclear. Further, courts have not considered whether realisation of an insolvent debtor's home by the trustee of an insolvent estate in terms of the Insolvency Act 24 of 1936 constitutes a potential infringement of section 26 and other rights.¹¹ This has given rise to a lack of predictability as well as a number of unanswered questions. Elucidation of the position is thus required.

The right to have access to adequate housing is one of the justiciable socio-economic rights included in the Bill of Rights to facilitate the transformation of South African society. The right must therefore be viewed within this broader socio-economic context.¹² Section 26(1) provides that "[e]veryone has the right to have access to adequate housing." Section 26(2) obliges the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right." In *Government of the Republic of South Africa and Others v Grootboom and Others*,¹³ the Constitutional Court stated that section 26(1) and (2) are related and must be read together.¹⁴ The effect is that section 26(2) imposes a qualified positive obligation on the state to devise a comprehensive and workable programme to meet its responsibilities in relation to the provision of housing.¹⁵ The Housing Act 107 of 1997¹⁶ was enacted in furtherance of this obligation. Housing policies are reflected in the National Housing Code, published in terms of the Housing Act,¹⁷ as well as in a number of other official documents and in provincial and local (municipal) housing codes.¹⁸ The Housing Act, the National Housing Code and other documents have been amended on

¹⁰See Van Heerden and Boraine 2006 *De Jure* 319.

¹¹Hereafter referred to as "the Insolvency Act". See Van Heerden, Boraine and Steyn "Perspectives" 228-230, 261; Boraine "The Law of Insolvency and the Bill of Rights" par 4A8 (g); Evans *Critical Analysis* 412-427; Evans "Does an insolvent debtor have a right to adequate housing?".

¹²See Liebenberg *Socio-Economic Rights* Adjudication. See, also, 3.1, below.

¹³*Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), 2000 11 BCLR 1169 (CC), hereafter referred to as "*Grootboom*".

¹⁴*Grootboom* par 34. See also McLean "Housing" 55-9.

¹⁵*Grootboom* pars 21 and 38. Liebenberg "The Interpretation of Socio-Economic Rights" 33-17 states that s 26(2) thus both defines and limits the positive duties on the state.

¹⁶Hereafter referred to as the "Housing Act".

¹⁷The National Housing Code was first published in 2000 and was revised in 2009 to reflect amended housing policies.

¹⁸See 4.2, below.

a number of occasions to reflect changes in housing policy.

The Constitutional Court also recognised in *Grootboom* that at the very least section 26(1) places a negative duty "upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing".¹⁹ This aspect formed the basis of the unjustifiable infringement of the right of each debtor to have access to adequate housing which was identified in *Jaftha v Schoeman*. The court held that in the circumstances execution against the debtors' homes would deprive them of their existing access to adequate housing. This was because, in their financial circumstances, they would never again be in a position to obtain adequate housing, given the rule in the National Housing Code that allowed only a first-time homeowner to be eligible for a state subsidy to acquire a house.

In *Grootboom*, the Constitutional Court acknowledged the negative aspect of the obligation contained in section 26(1) as being further spelt out in section 26(3) which provides that "[n]o one may be evicted from their home ... without an order of court made after considering all the relevant circumstances" and that "[n]o legislation may permit arbitrary evictions."²⁰ Several legislative enactments give effect to section 26(3).²¹ Of particular importance to this study is the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998²² which regulates the eviction of unlawful occupiers from land. Section 4 of this Act provides for a specific procedure to be followed before an unlawful occupier may be evicted. An eviction order must be issued by a court which may grant such an order only if, after having considered all the relevant circumstances, it determines that it is just and equitable to do so. It has been

¹⁹*Grootboom* par 34. Liebenberg "The Interpretation of Socio-Economic Rights" 33-17-33-18 explains that the phrase "preventing and impairing" is broader than the standard international formulation of the duty to "respect" socio-economic rights.

²⁰*Grootboom* par 34. See Liebenberg *Socio-Economic Rights* 270; Liebenberg "The Interpretation of Socio-Economic Rights" 33-20.

²¹These include: the Restitution of Land Rights Act 22 of 1994, the Land Reform (Labour Tenants) Act 3 of 1996; the Interim Protection of Formal Land Rights Act 31 of 1996; the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, commonly referred to as "PIE"; the Extension of Security of Tenure Act 62 of 1997, commonly referred to as "ESTA"; and the Rental Housing Act 50 of 1999.

²²Hereafter referred to as "PIE".

held that PIE applies where occupation was once lawful but has subsequently become unlawful.²³ PIE is therefore applicable where it is sought to evict an erstwhile owner, including a mortgagor, of a home which has been sold in execution at the instance of a creditor or which has been realised by the trustee of his insolvent estate.²⁴

Ordinarily, PIE concerns the rights of a landowner *vis-à-vis* the rights of occupiers. However, in the context of eviction proceedings brought against a debtor after the forced sale of his home, the position is different. Here it is the right of a creditor to execution in order to obtain fulfilment of the debtor's obligations, or the right of a purchaser of property to obtain vacant possession of property of which he has become the owner, *vis-à-vis* the debtor's right to have access to adequate housing which is relevant. In *Gundwana v Steko* and subsequent judgments, connections were made and analogies drawn between the forced sale of a debtor's home and the eviction of a person from his home.²⁵ Although the relationship between execution against a debtor's home and eviction from one's home, and the extent to which "relevant circumstances" are mirrored in each context, may not be entirely clear, considerations applicable in relation to section 26(3) and PIE are apparently pertinent to a study of the treatment of a debtor's home in this "post-Bill of Rights" era.

Thus far, the Constitutional Court has chosen to confine the basis of its reasoning, in matters concerning execution against a debtor's home, to the latter's right to have access to adequate housing. This has meant that reported judgments lack meaningful analysis of the position in terms of the wide range of constitutional rights of all parties concerned where the forced sale of a debtor's home occurs. To the extent that analogies may be drawn between the forced sale of a debtor's home and the eviction of

²³See *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA), [2002] 4 All SA 384 (SCA), referred to at 3.3.1.4 (b), below.

²⁴For discussion of a proposed, but subsequently rejected, statutory amendment to exclude the application of PIE in relation to applications for the eviction of erstwhile lessees, mortgagors and previous owners, see 3.3.1.3 (b), below.

²⁵As is suggested, it is submitted, in *Grootboom* par 34 and *Gundwana v Steko* pars 23, 41, 44 and 46. See also *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 (4) SA 363 (GSJ) par 9; *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP) par 34 and *Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases* 2011 (6) SA 111 (WCC) par 13.

a person from his home, the right to life,²⁶ the right to access to courts²⁷ and the right to equality,²⁸ which have featured in eviction cases, are also relevant. Other constitutional rights potentially affected by the forced sale of a debtor's home include the right to dignity,²⁹ which also underlies persons' contractual rights,³⁰ children's rights³¹ and the right to property.³² In relation to the right to property, before *Jaftha v Schoeman* the forced sale of debtors' homes, whether mortgaged or not, occurred as a matter of course, according to the applicable rules in both the individual and collective debt enforcement processes, without any consideration for debtors' property rights. In *Standard Bank of South Africa Ltd v Saunderson and Others*,³³ decided after *Jaftha v Schoeman*, the Supreme Court of Appeal viewed a mortgage bond as "an indispensable tool for spreading home ownership"³⁴ and regarded a mortgagee's right as being fused into the title of the mortgaged property.³⁵ As explained above, the provisions of PIE apply where a debtor's home has been sold, at the instance of either a creditor or a trustee of the debtor's insolvent estate, but where the debtor has not vacated the property and his eviction is sought. In such a situation, the debtor's property rights would not feature because in the usual course of events he would already have lost ownership by this stage. However, the property rights of the applicant mortgagee, based in its real security rights, or the rights of ownership of the purchaser of the home, would be relevant considerations.

A debtor might endeavour to protect his rights of ownership by avoiding the forced sale of his home. His options would be limited to negotiating with the creditor, or creditors, or the mortgagee of his home, as the case may be, for a variation in the contractual terms pertaining to fulfilment of the obligation. Alternatively, he might seek to rely on available

²⁶S 11 of the Constitution.

²⁷S 34 of the Constitution.

²⁸S 9 of the Constitution.

²⁹S 10 of the Constitution, discussed at 3.3.2, below.

³⁰See 3.3.2, below.

³¹S 28(1)(c) of the Constitution, discussed at 3.3.3, below.

³²S 25 of the Constitution, discussed at 3.3.4, below.

³³*Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA), hereafter referred to as "*Standard Bank v Saunderson*".

³⁴*Standard Bank v Saunderson* par 1.

³⁵*Standard Bank v Saunderson* par 2.

statutory consumer debt relief measures. Administration in terms of section 74 of the Magistrates' Courts Act 32 of 1944³⁶ is unlikely to pose a realistic solution given the fact that it is limited to debt not exceeding an amount of R50 000. However, the debt review process provided for by the National Credit Act 34 of 2005,³⁷ with the possibility of court-authorized debt restructuring, potentially provides an avenue for over-indebted homeowners to avoid execution against their homes. The stated purpose of the NCA is, *inter alia*, to promote and advance the social and economic welfare of South Africans. It is intended to protect consumers by, *inter alia*, "providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements" and "a consistent and harmonised system of debt restructuring, enforcement and judgment which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements".³⁸ However, the interpretation and practical implementation of the provisions of the NCA have been fraught with difficulties and controversy which have reduced the effectiveness of its debt relief mechanisms as a solution. It should also be borne in mind that they were not devised specifically as a means to avert the forced sale of a debtor's home.

The global economic crises followed close on the heels of the coming into operation of the NCA. Emergency measures along the lines of those recently implemented in other countries in response to the mortgage and home foreclosure crises³⁹ have not been implemented in South Africa. However, while it may be acknowledged that South Africa has not experienced a home foreclosure crisis of the same magnitude as has occurred in some foreign jurisdictions, the recessions have had a significant impact. Thus, solutions found abroad may nevertheless provide useful pointers for optimal treatment of an overburdened debtor's home in the South African context.

The forced sale of a debtor's home most often involves a contractual relationship between the creditor and the debtor. From a creditor's perspective, application of what

³⁶ Hereafter referred to as the "Magistrates' Courts Act".

³⁷ Hereafter referred to, interchangeably, as "the National Credit Act" and "the NCA", as deemed appropriate.

³⁸ See s 3 of the NCA.

³⁹ See Chapter 7, below.

is regarded as "the first premise of contract law"⁴⁰ – *pacta sunt servanda* – is fundamental to the conduct of business as is the ability to rely on and realise security rights acquired in a debtor's mortgaged home. Likewise, as indicated in *Standard Bank v Saunderson*, mentioned above, a homeowner's interest in being able to access credit ought not to be jeopardised. Therefore, it is in the interests of all concerned to have clarity in relation to the circumstances in which execution may occur against a debtor's home when lenders are deciding whether to finance either the purchase of immovable property, or business ventures, against security provided in the form of a mortgage passed over the potential debtor's home. As regards a mortgagee's real security rights, a clearer indication is required of how the property rights of a homeowner and a mortgagee ought to be evaluated and balanced in this context.

Thus, issues surrounding individual and broader property, commercial and economic interests enter the arena. To have greater clarity would inevitably instil confidence in the legal system and would go a long way to ensuring that commerce, generally, and our country's economic interests are not undermined. On the other hand, highly emotive issues surrounding housing and the concept of home complicate matters. For the debtor, his family members, and other dependants, the loss of their home may have considerable consequences. It is "a sensitive matter" to frame legislation permitting interference with contractual principles expressed in the maxim *pacta sunt servanda*.⁴¹ However, in the absence of clearly established substantive and procedural criteria for execution against a person's home, debtors in default, often uneducated, illiterate and, as laypersons, will most likely be ignorant as to how best to proceed. In addition, the prohibitive cost of litigation, particularly in the high court, will effectively exclude or at least deter many debtors from pursuing matters.⁴² It is submitted that the *ad hoc* treatment of the issues, in the process of which defendants are expected to take the initiative and to litigate, tends to undermine ordinary persons' access to justice. Another disadvantage is that the case-by-case development of the law tends to become an inordinately protracted and, sometimes, unsatisfactory process.

⁴⁰Hu and Westbrook 2007 *Colum L R* 1321 1389.

⁴¹See Rajak and Henning 1999 *SALJ* 262 273.

⁴²See considerations expressed in the judgment in *FirstRand Bank v Maleke* par 6.

Viewing the casuistic development of this area of the law, thus far, reveals that it resulted in discrepancies between the applicable statutory provisions in the magistrates' courts and in the high courts, respectively, which in turn created jurisdictional issues. This was because creditors frequently chose to approach the high court where, immediately after the decision in *Jaftha v Schoeman*, judicial oversight was not yet required, to obtain default judgment and orders declaring debtors' mortgaged homes specially executable. Controversy also surrounded whether, and if so, in what circumstances, a mortgaged home would be protected from execution. This was because in *Jaftha v Schoeman*, the Constitutional Court had stated that, where the home had been mortgaged in favour of the creditor, "execution should ordinarily be permitted where there has not been an abuse of court procedure."⁴³ Divergent approaches emerged in the various branches of the high court after which the Supreme Court of Appeal, in *Standard Bank v Saunderson*, settled a number of controversial issues.

However, it was still unclear when execution against a mortgaged home might amount to an unjustifiable infringement of the debtor's section 26 rights. Notably, during this period, in *ABSA Bank Ltd v Ntsane and Another*⁴⁴ and *FirstRand Bank Limited v Maleke; FirstRand Bank Limited v Motingoe and Another; Peoples Mortgage Ltd v Mofokeng and Another; FirstRand Bank Limited v Mudlaudzi*,⁴⁵ the courts refused to permit the sale in execution by a mortgagee of the debtor's home. In *ABSA v Ntsane*, the court held that executing against a debtor's home to obtain satisfaction of a mortgage debt where the arrears amounted to a trifling R18,46 constituted an abuse of the court process. In *FirstRand Bank v Maleke*, the court regarded it as being more appropriate for the recently introduced debt relief measures provided by the NCA to be explored as an alternative before execution was permitted against the defendants' homes.

⁴³ *Jaftha v Schoeman* par 58.

⁴⁴ *ABSA Bank Ltd v Ntsane and Another* 2007 (3) SA 554 (T), hereafter referred to as "*ABSA v Ntsane*".

⁴⁵ *FirstRand Bank Limited v Maleke; FirstRand Bank Limited v Motingoe and Another; Peoples Mortgage Ltd v Mofokeng and Another; FirstRand Bank Limited v Mudlaudzi* 2010 (1) SA 143 (GSJ), hereafter referred to as "*FirstRand Bank v Maleke*".

More than six years after *Jaftha v Schoeman*, the Constitutional Court, in *Gundwana v Steko*, corrected aspects of *Standard Bank v Saunderson* and confirmed that, as already required by the amended rule 46(1) of the Uniform Rules of Court,⁴⁶ judicial oversight is necessary in every case in which execution is sought against a person's home. The court stated that this includes where the home has been mortgaged in favour of the creditor. What is more, it held that it is for a court to determine whether each matter is "of the *Jaftha*-kind".⁴⁷ This decision has had significant practical implications for the courts. The high court and the Supreme Court of Appeal have interpreted and applied the decision, in *Gundwana v Steko*, in *Nedbank Ltd v Fraser and Four Other Cases*,⁴⁸ *FirstRand Bank Ltd v Folscher and Another, and Similar Matters*,⁴⁹ *Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases*,⁵⁰ and *Mkhize v Umvoti Municipality*.⁵¹ These judgments reveal continuing divergent approaches in the various courts. In the circumstances, a lack of clarity remains, particularly with regard to the application and practical implementation of the requirements as set out by the Constitutional Court in its judgment. For example, the concept of "an abuse of the court process" appears to have been extended beyond that which was probably originally intended by the Constitutional Court in *Jaftha v Schoeman*. This leads to a number of unanswered questions. One may acknowledge the wisdom of the Constitutional Court's desire, expressed in *Jaftha v Schoeman*⁵² and endorsed in judgments such as *FirstRand Bank v Folscher*⁵³ and *Standard Bank v Bekker*,⁵⁴ to maintain flexibility in the considerations to be taken into account by a court

⁴⁶Made by the Rules Board for Courts of Law under s 6 of the Rules Board for Courts of Law Act 107 of 1985, with approval of the Minister for Justice and Constitutional Development, hereafter referred to as the "High Court Rules".

⁴⁷*Gundwana v Steko* par 43. Cf *Standard Bank v Bekker* par 28.

⁴⁸*Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 (4) SA 363 (GSJ), hereafter referred to as "*Nedbank v Fraser*".

⁴⁹*FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP), hereafter referred to as "*FirstRand Bank v Folscher*".

⁵⁰*Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases* 2011 (6) SA 111 (WCC), hereafter referred to as "*Standard Bank v Bekker*".

⁵¹*Mkhize v Umvoti Municipality* 2012 (1) SA 1 (SCA). (This judgment was delivered on 30 September 2011.)

⁵²*Jaftha v Schoeman* par 53.

⁵³*FirstRand Bank v Folscher* par 17.

⁵⁴*Standard Bank v Bekker* par 10.

in deciding whether execution would be justifiable. However, there is an overriding need for clarity and certainty. More precisely defined criteria are needed for judicial officers, practitioners, financial institutions, advice centre staff and lay persons, including creditors, and the debtors and their families, to be able to anticipate the circumstances in which execution against a home, including a mortgaged one, will be permitted.

The right to have access to adequate housing has not arisen, thus far, in any insolvency case in which an application has been brought for the sequestration of the estate of the debtor. It is anticipated that it may be only a matter of time before this occurs.⁵⁵ It is also anticipated that the same sort of evaluation which is required in the individual debt enforcement process ought to be applied in the insolvency, or collective debt enforcement, process. It is submitted that there is a need for comprehensive enunciation of appropriate principles, policies, and processes to be applied whenever the forced sale of a debtor's home is sought both in the ordinary execution and in the insolvency procedures.

A cursory glance at other legal systems shows that there are two broad approaches to treatment of a debtor's home.⁵⁶ Some countries, such as the United States of America, apply a statutory homestead exemption.⁵⁷ Others, such as England and Wales, have various legislative provisions which apply in both individual debt collection and bankruptcy processes, and in relation to a mortgaged home, to ensure that the interests of the debtor and his dependants are considered. Recent developments and reform initiatives in countries such as Scotland, Ireland, and member states of the European Community also indicate greater emphasis being placed on regard for a consumer debtor's home.⁵⁸ These and other comparative aspects will be dealt with in more detail in Chapter 7.

⁵⁵This anticipation is shared by a number of authors including: Evans *Critical Analysis* 412-427; Boraine "The Law of Insolvency and the Bill of Rights" par 4A8 (g); Evans "Does an insolvent debtor have a right to adequate housing?"; Els 2011 *De Rebus* (October) 21; Van Heerden, Boraine and Steyn "Perspectives" 260, 265.

⁵⁶See Chapter 7, below. See, also, INSOL International *Consumer Debt Report II* November 2011 4-6.

⁵⁷See 7.2, below.

⁵⁸See 7.6, 7.7 and 7.8, below, as well as references to treatment of a debtor's home and housing needs in INSOL International *Consumer Debt Report II* November 2011 5, 11, 17.

The relevant statutory provisions in jurisdictions abroad generally reflect a variety of purposes which have been identified as including, *inter alia*, to:⁵⁹

- provide greater legal certainty and predictability;
- comply with constitutional imperatives;
- provide adequate housing, security of tenure, or shelter for the debtor, his children, family members and other dependants;
- avoid a drain on the state's resources;
- preserve the dignity of the debtor, his children, family members and other dependants;
- protect the debtor's family members from the consequences of impoverishment;
- make "good citizens" of the debtor, his children, family members and other dependants;
- preserve the debtor's family's "wealth";
- protect the spouse, or surviving spouse, of the debtor;
- protect the debtor's children and other dependants;
- promote the concept of "family"; and
- promote gender equality.

It is posited that valuable information may be gleaned from mechanisms available in comparative legal systems with a view to considering the introduction of legislative provisions, along similar lines, but which are appropriate for South Africa.

Redirecting one's focus closer to home, it should be borne in mind that section 7(2) of the Constitution obliges the state to "respect, protect, promote and fulfil the rights in the Bill of Rights". These include both the positive and negative aspects of the right to have access to adequate housing, protected by section 26 of the Constitution. Section 26(2)

⁵⁹See Resnick 1978 *Rutgers L Rev* 615 621; Fox *Conceptualising Home*; Goodman 1993 *J Am Hist* 470; Morantz 2006 *Leg Hist Rev* 1; Boraine, Kruger and Evans "Policy Considerations" 637 663ff.

obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. In the circumstances, it is proposed that the enactment in South Africa of appropriate legislative provisions to protect the debtor and his dependants against the forced sale of their home, or at least the consequences of it, would not only be in keeping with international developments, but would also accord with constitutional imperatives. It would also uphold sound humanitarian, social, and economic values and, it is anticipated, expand access to justice. Most importantly, it is hoped, it would provide greater legal certainty and predictability.

1.2 Research statement

Legal certainty requires the enactment of appropriate legislative provisions to regulate the forced sale of a person's home in both the individual debt enforcement process and the insolvency process in South Africa. Legislation should contain criteria to be met for forced sale to be permitted in order to facilitate the balancing of the interests of, on the one hand, the debtor and his family and/or dependants and, on the other, of the creditor, and, in the broader context, of commerce, generally.

1.3 Research objectives and methodology

The objectives and methodology of this study are as follows.

- To consider the contextual and legal framework within which forced sale of a debtor's home occurs in the individual debt enforcement and insolvency processes in South Africa.
- To analyse the relevant reported judgments with a view to clarifying the parameters within which, according to established precedent, the home has been protected in the execution process as well as to identify the principles and policies that form the basis of these decisions.
- To analyse and compare the position in other jurisdictions that provide for statutory regulation of forced sale of the home with a view to drawing guidance

regarding the possible inclusion of appropriately modified provisions and mechanisms into our legal system.

- To suggest factors and considerations and an appropriate method or procedure for adoption in the formulation of appropriate legislative provisions containing substantive and procedural requirements regulating forced sale of a debtor's home in both the individual debt enforcement and insolvency processes.

1.4 Delineations and limitations

This work is subject to the following delineations, limitations, and qualifications.

- This thesis considers the situation where the debtor is the owner of his home.
- In this thesis, it is assumed that it is desirable for concurrence, as far as possible, in the classes of assets which are excluded from sale in execution in the individual debt enforcement process and excluded from an insolvent estate.⁶⁰
- This work is intended neither to be a study of, nor to canvass, economic theory or finance, nor the financial implications of bankers' lending practices.

1.5 Terminology

For the sake of convenience and uniformity, unless specifically indicated otherwise, in this thesis "he" connotes "he or she" and "his" connotes "his or her". Further, unless specifically indicated otherwise, an insolvent will be referred to as "he" and the insolvent's spouse or co-habiting partner will be referred to as "she".

In this thesis, by the "individual debt enforcement process" is meant the ordinary civil process by which a creditor institutes action against a debtor. The "collective debt enforcement process", or the "collective debt collection process" – a term universally employed by authors and commentators,⁶¹ connotes the insolvency process. In a sense, the terms "collective debt enforcement" and "collective debt collection" may each

⁶⁰See Evans 2010 SA *Merc LJ* 465 477 who submits that harmonisation in this respect is essential.

⁶¹See, for example, Bertelsmann *et al Mars* 2; Fletcher *Law of Insolvency* 9; Ferriell and Janger *Understanding Bankruptcy* Chapter 1.

be regarded as something of a misnomer, in South Africa, in light of the decision in *Investec Bank Ltd and Another v Mutemeri and Another*.⁶² In that case, it was held that sequestration, in terms of the Insolvency Act, does not amount to "enforcement" of a credit agreement in legal proceedings, for the purposes of section 88(3) of the NCA.⁶³ Be that as it may, in this thesis, these terms will nevertheless be employed in discussion of the insolvency process which results in the liquidation of a debtor's assets.

In some jurisdictions, insolvency is referred to as bankruptcy. As Fletcher explains, traditionally, in England, the term "insolvency" referred to the factual condition of being insolvent, whereas the term "bankruptcy" referred to the legal condition or status of a debtor who had been declared insolvent through the required, formal process. However, Fletcher also states that the distinction between the technical meanings of these two terms has become obscured by popular usage.⁶⁴ In this thesis, unless the context specifically indicates otherwise, "insolvency" and "bankruptcy" are treated as equivalent terms.⁶⁵

In South African law, mortgage connotes the hypothecation of immovable property by registration of a mortgage bond in compliance with the Deeds Registries Act 47 of 1937 as amended.

In relation to the NCA, "debt rearrangement" and "debt restructuring" are used interchangeably.⁶⁶

⁶²*Investec Bank Ltd and Another v Mutemeri and Another* 2010 (1) SA 265 (GSJ), hereafter referred to as "*Investec v Mutemeri*".

⁶³See 4.5.4 and 6.10.2, below.

⁶⁴See Fletcher *Law of Insolvency* 6-7.

⁶⁵However, the different meanings and senses of these terms must be appreciated. See, for example, the meaning of bankruptcy as explained by Rajak "Culture of Bankruptcy" 3-5 and the nuanced meanings of "insolvency" and "bankruptcy", respectively, which emerge from the passage quoted by Rajak, at 13.

⁶⁶Cf Vessio 2009 *TSAR* 274 284 n 67.

1.6 Reference techniques

In this thesis, the style employed is similar to that applied in the *Potchefstroom Electronic Law Journal*, supplemented by *The Oxford Standard for Citation of Legal Authorities* (OSCOLA). Full details of sources of reference are not included in the text of the footnotes but may be found in the bibliography.

Given the increased tendency for secondary sources, including academic and practitioners' commentary, media reports, as well as codes, policies and practice manuals, to be accessible electronically via the internet, it was decided not to differentiate in the bibliography between secondary sources referred to in hard copy and those accessed via internet websites. Only sources specifically mentioned in the footnotes have been included in the bibliography.

Given the case-driven nature of the development of this area of the law, in certain chapters there are numerous references, in the footnotes, to many different cases and paragraph numbers in judgments, with cross-references to judicial comment in relation to other judgments. In order to avoid confusion, the decision was made to specify the case name and relevant paragraph numbers in each footnote. Therefore, terms such as "*ibid*" and "*idem*" are not employed in the footnotes. This has resulted in repetition of case names, and other references, in successive footnotes. However, it is hoped that, overall, this will be more convenient for the reader.

In Juta's *South African Law Reports*, Lexis Nexis' *All South African Law Reports* and the "saflii" electronic database of decided cases there has been a lack of consistency in the citation of the names of FirstRand Bank Ltd and the Standard Bank of South Africa Ltd. In this thesis, as a rule, references reflect the spelling of the party's name as it appears in the relevant law report.

The Renaming of High Courts Act 30 of 2008 came into operation on 1 March 2009.⁶⁷ As a result, the high courts were renamed. In this thesis, each high court division will be referred to by the name which it bore at the time of the occurrences under discussion. Specific case references reflect the name of the court as it appeared in the relevant law report at the time of reporting.

The South African Law Reform Commission used to be called the South African Law Commission. In this thesis, it will consistently be referred to by its current name – the South African Law Reform Commission – or, where appropriate, "the Commission".

In March 2003, the Insolvency and Business Recovery Bill was approved by Cabinet, but it was never tabled in Parliament and, therefore, is not a public document. In 2010, a modified version of it, adapted to conform to subsequent developments and changes in the law, was compiled. As it is not a public document, this more recent, modified version of the Insolvency and Business Recovery Bill will be referred to, in this thesis, as "the unofficial working draft of a proposed Insolvency and Business Recovery Bill".⁶⁸

1.7 Overview of chapters

This thesis is divided into eight chapters, including this one which provides introductory background to the thesis topic. Chapter 2 consists of a historical overview of aspects of Roman and Roman-Dutch law relating to individual and collective debt enforcement procedures and principles relating to mortgage and foreclosure, in the event of breach, to the extent that they impacted on a debtor's home. Some historical aspects of the English law, which also formed roots of South African law, are referred to in Chapter 7 which also covers the current position in England and Wales.

⁶⁷ See GG 31948 of 23 February 2009.

⁶⁸ A copy of the latest version of this document is on file with the author and is available, upon request, from Mr MB Cronje, of the Department of Justice and Constitutional Development, who was the researcher responsible for the South African Law Reform Commission's review into the law of insolvency, completed in 2000.

Chapter 3 focuses on the Constitution and, more specifically, the Bill of Rights. It deals with constitutional implications for the forced sale of a debtor's home. Its aim is to provide the necessary background to constitutional aspects, for the analysis, in Chapter 5, of the main cases concerning the sale in execution of a person's home, as well as for the consideration, in Chapter 6, of constitutional implications for the sale of an insolvent person's home by the trustee of the insolvent estate. In Chapter 3 the application of the Bill of Rights, the limitation of rights, and the interpretation of the Bill of Rights and other legislation are considered and discussed. The focus is on the right to have access to adequate housing, as protected by section 26 of the Constitution, within its broader context as a socio-economic right. This chapter also considers relevant provisions of PIE and the implications, for execution against a debtor's home, of aspects of certain judgments in eviction cases. Chapter 3 also contains brief discussion of constitutional aspects of private law contractual and property rights as well as other rights which are relevant to the forced sale of a debtor's home.

Chapter 4 outlines, with minimal commentary, aspects of law and policy which are relevant to the sale in execution of a debtor's home in the individual debt enforcement process. The main aim is to obviate the need for detailed explanation, within the analysis of the reported cases which will be presented in the following chapter, of applicable common law principles and statutory provisions. These will include basic substantive and procedural requirements for a creditor to obtain judgment and for the execution of a debtor's assets, taking into account exempt assets as well as national housing policy and its implementation. Some aspects of the law discussed also have a bearing on cases which will be discussed in Chapter 6.

Numerous amendments, both to the relevant statutory law and to applicable policy, have occurred during the course of this specific doctoral study. These include the coming into operation of the National Credit Act, the revision of the National Housing Code, the amendment of rules 45 and 46 of the High Court Rules, and the amendment of the Magistrates' Courts Act and the Magistrates' Courts Rules. Now there is also an

unofficial working draft of a proposed Insolvency and Business Recovery Bill.⁶⁹ These changes have taken place over a number of years, contemporaneously with *ad hoc* developments which have unfolded, including the creation of new precedent upon the delivery of each judgment, spanning from *Jaftha v Schoeman* to, most recently, *Standard Bank v Bekker*, *Mkhize v Umvoti Municipality* (SCA) and *Blue Moonlight Properties* (CC). Naturally, a dynamic and, it is submitted, unavoidable interconnectedness is discernible between the amendments in applicable law and policy and the developments in which courts, through their judgments, have provided protection for a debtor's home. This has constituted a challenge as far as concerns presentation of the material in an optimally logical, sequential order. After careful consideration, the decision is first to present, in Chapter 4, aspects of law and policy including recent amendments. Thereafter, Chapter 5 will deal with the relevant judgments. While this may create a sense of having to travel back and forth, in relation to chronological developments, it is hoped that the combined effect of Chapters 3, 4 and 5 will be to explain the current position as coherently as is practicable.

Chapter 5 provides an account and analysis of the main, relevant, reported judgments, from *Jaftha v Schoeman* onwards, to *Gundwana v Steko* and its interpretation and application in *Nedbank v Fraser*, *FirstRand Bank v Folscher*, *Standard Bank v Bekker* and *Mkhize v Umvoti Municipality* (SCA). It identifies issues that contribute to the current uncertainty in relation to the circumstances in which execution against a person's home constitutes an unjustifiable infringement of the rights of the debtor and his dependants. It discusses commentators' published views on the subject and makes suggestions for substantive and procedural reform.

Chapter 6 deals with the position in insolvency law in terms of which the home of the insolvent, often the most valuable asset in his estate, must be realised together with all the other assets in the insolvent estate for the benefit of the creditors. It touches on recent cases concerning the interface between the National Credit Act and the Insolvency Act and it considers the potential implications of recent developments,

⁶⁹See 1.6, above.

canvassed in Chapter 5, in the individual debt enforcement process for insolvency law and process. More specifically, Chapter 6 considers the need, from a constitutional perspective, for clear policies to be formulated in relation to treatment of an insolvent debtor's home and for judicial oversight to be specifically focused upon the impact of the realisation of the insolvent's home on his and his dependants' section 26, section 28, and other rights. It also considers the desirability of the introduction of some form of statutory provision geared towards averting, or postponing, realisation, where appropriate, or even exempting it, or to some extent the proceeds of its sale, from the insolvent estate.

Chapter 7 consists of comparative analysis with a view to identifying aspects of the law applicable in foreign jurisdictions that could be the basis for recommendations for appropriate reform of the law, and amendments to approach and policy, in South Africa. This chapter covers aspects of the position in the United States of America, Canada and New Zealand each of which has a long tradition of protection of the debtor's home against creditors. This chapter will deal with the position in England and Wales, as well as in Scotland and Ireland. The current position in Europe will be touched on very briefly.

Chapter 8 contains conclusions and recommendations, poses suggestions for reform, and proposes legislative intervention to regulate the forced sale of a person's home in both the individual debt enforcement and insolvency processes in South Africa.

I have endeavoured to state the law as at 31 December 2011. Cases in which judgments were delivered on or before 31 December 2011 and which appeared in the official 2012 law reports before completion of this manuscript are referred to using their 2012 citations.