

CHAPTER 3

CONSTITUTIONAL IMPACT AND IMPLICATIONS

Every homeless person is in need of housing and this means that every step taken in relation to a potentially homeless person must also be reasonable if it is to comply with section 26(2).

- *Per* Yacoob J in *51 Olivia Road (CC)* par 17

3.1 Introduction

The Constitution, containing a Bill of Rights, brought about significant changes to our jurisprudence and legal system.¹ It was in *Jaftha v Schoeman* that the Constitutional Court signalled the existence of constitutional implications for the sale in execution of a debtor's home in the individual debt enforcement process. It held that the sale in execution of a debtor's home may unjustifiably infringe his right to have access to adequate housing, protected by section 26(1) of the Constitution. It held, in relation to the process in the magistrates' courts,² that only a court may order execution against a debtor's home and that judicial oversight is required to determine whether, in terms of section 36 of the Constitution, execution is justifiable in the circumstances. Prior to *Jaftha v Schoeman*, in both the magistrates' courts and the high court the applicable rules and procedures did not require judicial oversight at the execution stage. In certain circumstances the magistrate's court execution process permitted a warrant of execution to be issued by the clerk of the court and, in the high court, the registrar could issue a writ of attachment against the assets of the judgment debtor without any court supervision.³ This was the position in relation to movable and immovable assets. Further, the right of a mortgagee to an order declaring specially executable property

¹Woolman and Swanepoel "Constitutional History" 2-48; Rautenbach and Malherbe *Constitutional law* 316; Devenish "Constitutional Law" *LAWSA* 5(3) 15.

²*Jaftha v Schoeman* concerned s 66(1)(a) of the Magistrates' Courts Act.

³See 4.4.3.3 and 4.4.4.3, below.

which had been validly mortgaged, regardless of whether it was the home of the mortgagor, was viewed largely as unassailable.⁴

Subsequent cases concerning execution against mortgaged property, which will be dealt with in Chapter 5, raised further complex issues. These included the balancing in terms of section 36 of the Constitution, *inter alia*, property, or real security, and housing rights in a contractual context. Here, common law principles including sanctity of contract, as expressed by the maxim *pacta sunt servanda*, and broader economic and other societal interests must also be considered. In *Gundwana v Steko*, a matter dealing with execution in the high court process, the Constitutional Court clarified the position that judicial oversight is required in every matter in which it is sought to execute against a person's home. This includes the situation where the home has been mortgaged in favour of the creditor. Therefore, the position has changed since the "pre-Bill of Rights" era in which execution could be levied against the home of a judgment debtor without any judicial oversight. Now, execution against the home of a person should not be permitted without prior court intervention.⁵

However, no clear framework of substantive and procedural criteria exist within which the required judicial evaluation must occur. Highly emotive issues surrounding housing, and the concept of home, complicate matters. 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.⁶ The forced sale of a debtor's home usually involves a contractual relationship between the creditor and the debtor⁷ and, where the home has been mortgaged, the real security rights of the creditor. This means that

⁴See 4.3.1 and 4.3.3, below.

⁵These comments follow those made by Van Heerden and Boraine 2006 *De Jure* 330 after *Jaftha v Schoeman*.

⁶See Liebenberg *Socio-Economic Rights*. Recent socio-economic rights cases have concerned evictions from both state and private land, involving the right to have access to adequate housing, the right to have access to health care services (provided for in s 27(1)(a) of the Constitution), and the right to have access to water (provided for in s 27(1)(b) of the Constitution) and to toilets and sanitation.

⁷Although it should be noted that this is not always the case. An example of a delictual claim which led to the judgment upon which the sale in execution was based, see *Menqa and Another v Markom and Others* 2008 (2) SA 120 (SCA), discussed at 4.4.3.7 and 5.5.3.2, below.

issues surrounding individual and broader commercial and economic interests enter the arena.

In addition to the right to have access to adequate housing, other constitutional rights potentially affected by the forced sale of a debtor's home include the right to dignity,⁸ children's rights⁹ and the right to property.¹⁰ In *Gundwana v Steko* and subsequent judgments, connections have been made and analogies drawn between the forced sale of a debtor's home and the eviction of a person from his home.¹¹ To this extent, constitutional rights which have featured in eviction cases including the right to life,¹² the right to access to courts,¹³ and the right to equality¹⁴ may also be pertinent. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE),¹⁵ which regulates the eviction of unlawful occupiers from land, is also significant because it has been held to apply where occupation was once lawful but has subsequently become unlawful. PIE is therefore applicable where it is sought to evict an erstwhile owner of a home who has not vacated it after its sale in execution at the instance of a creditor or its realisation by the trustee of his insolvent estate in terms of the Insolvency Act.¹⁶ 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, are not entirely clear. However, considerations applicable, in relation to section 26(3) of the Constitution and to PIE, are evidently pertinent to a study of the treatment of a debtor's home in this "post-Bill of Rights" era.

This chapter deals with the impact of the Bill of Rights on the forced sale of a debtor's home. Its aim is to provide the necessary background for the analysis, in Chapter 5, of

⁸S 10 of the Constitution.

⁹S 28(1)(c) of the Constitution.

¹⁰S 25 of the Constitution.

¹¹As is suggested, it is submitted, in *Grootboom* par 34 and *Gundwana v Steko* pars 23, 41, 44, 46. See also *Nedbank v Fraser* par 9; *FirstRand Bank v Folscher* par 34 and *Standard Bank v Bekker* par 13.

¹²S 11 of the Constitution.

¹³S 34 of the Constitution.

¹⁴S 9 of the Constitution.

¹⁵This Act is also mentioned in 1.1, above. In this manuscript, it is referred to as "PIE".

¹⁶See *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, and *ABSA Bank Ltd v Murray and Another* 2004 (2) SA 15 (C), referred to at 3.3.1.4 (a), 3.3.1.4 (b), 3.4, 6.3.2 and 6.6.3, below.

the main cases concerning the sale in execution of a person's home and the consideration, in Chapter 6, of constitutional implications for the realisation of an insolvent person's home by the trustee of the insolvent estate. This chapter is therefore intended to shed light on the subject of treatment of a debtor's home, specifically from a constitutional, or human rights, perspective. Chapter 4 will canvass various other aspects of law and policy which have a bearing on the topic. Thereafter, Chapter 5 will contain analysis of the relevant reported judgments in the individual debt enforcement process and Chapter 6 will deal with treatment of a debtor's home in the insolvency context.

In this chapter, 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 placed 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 aspects of eviction cases as well as the relevant provisions of PIE. It also deals briefly with select aspects of private law contractual and property rights.

3.2 Application, interpretation and limitation of rights

3.2.1 Application

Section 7(1) provides that the Bill of Rights "is a cornerstone of democracy in South Africa ... [which] enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom".¹⁷ Section 7(2) provides that the state is obliged to "respect, protect, promote and fulfil the rights in the Bill of Rights."¹⁸ Section 8(1) provides that "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state." In terms of section 8(2), it also "binds a natural or a juristic person if, and to the extent that, it is applicable,

¹⁷See Cheadle, Davis and Haysom *South African Constitutional Law* 2.1 and 3.1.

¹⁸See Rautenbach and Malherbe *Constitutional law* 325; O'Regan 1999 *ESR Review* 2.

taking into account the nature of the right and the nature of any duty imposed by the right." Section 8(3) prescribes a mechanism¹⁹ for application of the Bill of Rights to private persons in terms of which a court must first consider whether there is legislation which gives adequate effect to the right in question. If not, the court must consider whether an existing common-law rule gives effect to the right. If the common law is deficient, the court is obliged to develop it to give effect to the right and it may at the same time develop rules to limit the right but subject to the limitation clause contained in section 36(1).²⁰

Section 39(2) provides that, when interpreting any *legislation* and when developing the common law, a court "must promote the spirit, purport and objects of the Bill of Rights." Thus, provision is made for the indirect application of the Bill of Rights to the law or, as otherwise expressed, a value-based interpretational approach.²¹ Each right is regarded as having specific values which led to their being enshrined in the Constitution and these also "determine the right's sphere of protected activity."²² This means that even where the Constitution does not have direct application "the values and principles encapsulated in section 39(2)" should clearly influence how the matter will be

¹⁹Liebenberg *Socio-Economic Rights* 331, 334-335 describes s 8(3)(a) and (b) as providing courts with "the tools to develop rules which seek to synthesise and achieve the best reconciliation possible between competing rights and values which may be at stake in a particular case." Cheadle, Davis and Haysom *South African Constitutional Law* 3.1.3 refer to this mechanism as "the South African Constitution's special genius."

²⁰See discussion of s 36 at 3.2.3, below. On application, generally, see, also, Rautenbach "Introduction to the Bill of Rights" pars 1A30-1A37.

²¹According to which the content and scope of the rights enshrined in the Bill of Rights are determined in light of the five fundamental values which "animate the entire constitutional enterprise: openness, democracy, human dignity, freedom and equality"; see Rautenbach "Introduction to the Bill of Rights" par 1A19; Woolman and Botha "Limitations" 34-17-34-18. See also Currie and de Waal *Bill of Rights Handbook* 159, 161; Devenish *Commentary* 598ff, 621; Cheadle, Davis and Haysom *South African Constitutional Law* 33.1-33.3; Woolman 2007 *SALJ* 762; Liebenberg *Socio-Economic Rights* 325; Du Plessis "Interpretation" 32-1ff, 32-127; Rautenbach "Fundamental Rights" *LAWSA* 10(1) pars 284, 286. See, also, *Barkhuizen v Napier* 2007 (5) SA 323 (CC) as well as remarks by the court, and arguments put forward, in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC), hereafter referred to as "*Everfresh v Shoprite Checkers*", pars 1, 13, 16, 22-25, 30-34, in the majority judgment, and pars 48, 61, 64. (This judgment was delivered on 17 November 2011.)

²²Woolman and Botha "Limitations" 34-17. See also Liebenberg *Socio-Economic Rights* 324, where it is stated that s 39(2) "requires courts to go beyond an exclusive focus on particular substantive rights and to consider how the general ethos and purposes of the Bill of Rights can be actively promoted in the interpretation of legislation and the development of the common law or customary law." She also submits, at 335, that s 39(2) refutes development of the common law according to "a narrow, formalistic construction of the relevant rights in the Bill of Rights."

resolved.²³

3.2.2 Interpretation

Section 39(1)(a) requires a court when interpreting the Bill of Rights "to promote the values that underlie an open and democratic society based on human dignity, equality and freedom."²⁴ The duty to *promote* emphasises that "transformative constitutionalism" and "a socially interconnected and embodied concept of humanity" are envisaged.²⁵ Significant, in this context, is the concept of *ubuntu* which is recognised as being one of the values that section 39(1) requires to be promoted.²⁶ In *S v Makwanyane*,²⁷ Mokgoro J associated *ubuntu* with concepts such as "humanity" and "menswaardigheid" ("human dignity")²⁸ and Langa J described *ubuntu* as capturing, conceptually:²⁹

... a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

In *Port Elizabeth Municipality v Various Occupiers*, Sachs J stated:³⁰

²³Devenish *Commentary* 621. Rautenbach "Fundamental Rights" *LAWSA* 10(1) par 317 explains that s 8(3) "is routinely applied by invoking the provisions of s 39(2) of the Constitution."

²⁴In terms of s 39(1)(a) and (b), a court must also consider international law and it may consider foreign law. In terms of s 39(3), "[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill." On interpretation of the Bill of Rights, see Rautenbach "Introduction to the Bill of Rights" par 1A9.

²⁵Liebenberg *Socio-Economic Rights* 98-99.

²⁶See Du Plessis "Interpretation" 32-130; Bennett 2011 *PELJ* 30; *Everfresh v Shoprite Checkers* pars 23 and 61. On *ubuntu*, see also English 1996 *SAJHR*, Mokgoro 1998 *PELJ*, Kroeze 2002 *Stell LR*, Cornell 2004 *SAPL* and Pieterse "Traditional African Jurisprudence".

²⁷*S v Makwanyane* 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665 (CC), 1995 (3) SA 391 (CC), hereafter referred to as "*S v Makwanyane*", pars 130-131, 223-227, 237, 307-313, 516.

²⁸*S v Makwanyane* par 308. See, also, Rautenbach "Introduction to the Bill of Rights" par 1A11.

²⁹*S v Makwanyane* par 224. Mahomed DP also refers to *ubuntu* in his judgment at 263.

³⁰*Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC), hereafter referred to as "*Port Elizabeth Municipality*", par 37 (footnotes omitted), cited by Liebenberg *Socio-Economic Rights* 99. See also Rautenbach "Fundamental Rights" *LAWSA* 10(1) par 286.

The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

It is submitted that, at least on the level of the emphasis on communality and human interdependence, parallels are discernible between *ubuntu* and elements of the concepts of *amicitia* and patronage in Roman society.³¹ Similarities have also been suggested between *ubuntu* and the role played by "institutions of Roman-Dutch law" such as unjustified enrichment, public policy, good faith, the *exceptio doli generalis* and the concept of *arbitrium boni viri*.³²

3.2.3 Limitation of rights

Constitutional rights are not absolute.³³ Section 36 provides:

- (1) 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 society based on human dignity, equality and freedom, taking into account all relevant 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.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Thus, section 36 of the Constitution provides a matrix, or template, for courts assessing the constitutional validity of a law. It also provides the analytical framework within which legislation should be drafted, considered and debated by the legislature.³⁴ The factors

³¹See 2.2.6, above.

³²Bennett 2011 *PELJ* 49-51 has also drawn parallels between, *inter alia*, *ubuntu* and equity, in English law, referred to at 7.5.3.1, below, and *ubuntu* and the *exceptio doli generalis*, in Roman-Dutch law. See, also, *Everfresh v Shoprite Checkers* par 64.

³³See Rautenbach "Introduction to the Bill of Rights" pars 1A43-1A52; Woolman and Botha "Limitations" 34-1.

³⁴Cheadle, Davis and Haysom *South African Constitutional Law* Chapter 30; Woolman and Botha "Limitations" 34-2; Rautenbach and Malherbe *Constitutional law* 348.

listed in section 36(1) are not the only matters to be considered and courts are not precluded from taking any other relevant factor into account. Further, the factors have not been formulated as criteria or tests. No weight has been attached to any factor and neither has any order of consideration been prescribed.³⁵

For the limitation of a right to be valid, it must be limited by "law of general application".³⁶ This includes legislation, subordinate legislation, the common law (both private law and public law rules) and customary law.³⁷ Policies, practices and programmes do not generally constitute laws of general application.³⁸ To be of general application the law must be sufficiently accessible and precise for those who are affected by it to be able to ascertain the extent of their rights and obligations in order to conduct themselves accordingly.³⁹ It must also apply impersonally, equally to all and not arbitrarily.⁴⁰ The limitation must be authorised by a law.⁴¹

The courts adopt a two-stage analysis to determine the constitutional validity of a law. It must first be established whether the law infringes⁴² the right in question and, if so, whether the infringement can be justified as a reasonable limitation of the right

³⁵Rautenbach "Fundamental Rights" *LAWSA* 10(1) par 322.

³⁶S 36(1). See Woolman and Botha "Limitations" 34-47-34-67; Rautenbach *LAWSA* 10(1) "Fundamental Rights" *LAWSA* 10(1) par 320.

³⁷This follows the wide interpretation of the meaning of "law" elsewhere in the Bill of Rights. See *Larbi-Odam v MEC for Education (North-West Province)* 1998 (1) SA 745 (CC); *Du Plessis v De Klerk* 1996 (3) SA 850 (CC); Cheadle, Davis and Haysom *South African Constitutional Law* 30.4.1. Rautenbach and Malherbe *Constitutional law* 345 also mention "legal rules developed by the courts". See, also, Rautenbach "Introduction to the Bill of Rights" par 1A45.

³⁸Liebenberg *Socio-Economic Rights* 94 refers to Currie and De Waal *Bill of Rights Handbook* 169. Cf Woolman and Botha "Limitations" 34-53, who cite Brand "Food" *Constitutional Law of South Africa* Chapter 56C.

³⁹Woolman and Botha "Limitations" 34-49; Currie and De Waal *Bill of Rights Handbook* 169 refer to *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 par 47.

⁴⁰*S v Makwanyane*; Woolman and Botha "Limitations" 34-48; Cheadle, Davis and Haysom *South African Constitutional Law* 30.4.1; Currie and De Waal *Bill of Rights Handbook* 169.

⁴¹Cheadle, Davis and Haysom *South African Constitutional Law* 30.4.1; Rautenbach and Malherbe *Constitutional law* 345. Where the law authorises an administrator to exercise a discretionary power which effectively limits rights, as long as the legislation stipulates guidelines for the proper exercise of such discretion, the limitation will be regarded as one "by law of general application". See *Premier of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC) par 41; *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) par 82; *Dawood v Minister of Home Affairs* 2000 (3) SA 936, 2000 (8) BCLR 837; *Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC) par 41.

⁴²Or impairs or limits: see Woolman and Botha "Limitations" 34-3 to 34-4; Currie and De Waal *Bill of Rights Handbook* 164.

according to the criteria set out in section 36(1).⁴³ This two-stage process is clearly apparent in the judgments in *Grootboom* and *Jaftha v Schoeman*. Commentators criticise South African courts for often confusing the analysis required at each stage of the enquiry.⁴⁴ Woolman and Botha doubt "whether the benefits of a more flexible test outweigh the potential for confusion with respect to its application by lower courts and its use as a standard by state and private actors". They favour having "clearly articulated rules" rather than allowing courts to follow a casuistic approach.⁴⁵

Turning to the factors which section 36(1) requires to be taken into account, as regards the "nature of the right", in *Jaftha v Schoeman*, Mokgoro J emphasised the link between the right to dignity, the right to have access to adequate housing and the right of access to courts as being vitally important to our constitutional democracy.⁴⁶ In relation to the "importance of the purpose of the limitation", the importance of a law's purpose must be measured against the values in an open and democratic society based on human dignity, equality and freedom including *ubuntu*⁴⁷ and reconciliation.⁴⁸ In *Jaftha v Schoeman*, debt recovery was regarded as sufficiently important to justify a limitation on the right to have access to adequate housing.⁴⁹ However, it is arguable whether "administrative convenience" or "the saving of costs", from a creditor's perspective, may be a purpose which justifies a limitation.⁵⁰

⁴³See Cheadle, Davis and Haysom *South African Constitutional Law* 30.2-30.4; Currie and De Waal *Bill of Rights Handbook* 164ff; Woolman and Botha "Limitations" 34-6-34-8 and, for a comprehensive discussion and critique of the position, 34-67-34-136.

⁴⁴See my related criticism of the analysis in the judgment in *ABSA v Ntsane* at 5.5.2.3, and my comment, in relation to *FirstRand Bank v Folscher*, at 5.6.4.2 (e), below. See Woolman and Botha "Limitations" 34-19-34-27, 34-31-34-42; Roux "Property" ch 46.

⁴⁵Woolman and Botha "Limitations" 34-15-34-16. Cf Sunstein *One Case at a Time*. Neither do Woolman and Botha agree with a "jurisprudence of avoidance" as suggested by Currie 1999 *SAJHR* 138.

⁴⁶Woolman and Botha "Limitations" 34-71ff, with reference to *Jaftha v Schoeman* pars 19, 24, 27 and 39, and, with reference to *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 pars 4, 32, and 42. They state that the right to life and the right to human dignity are "central to the society envisaged by the Constitution and only compelling justification should be advanced for their limitation".

⁴⁷See 3.2.2, above.

⁴⁸Cheadle, Davis and Haysom *South African Constitutional Law* 30.4.4. See also *S v Makwanyane* par 185.

⁴⁹Woolman and Botha "Limitations" 34-76ff, with reference to *Jaftha v Schoeman* pars 37-42.

⁵⁰Woolman and Botha "Limitations" 34-77; Rautenbach "Fundamental Rights" *LAWSA* 10(1) par 324. In *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420, hereafter referred to as "*Chief Lesapo*", pars 23-24, the Constitutional Court regarded the saving of time and costs in the recovery of movable property, which had been provided as security for a loan, as a legitimate

Consideration of "the nature and extent of the limitation" is fundamental to balancing and proportionality because the "more invasive the infringement, the more powerful the justification must be."⁵¹ A court may consider factors such as:⁵² whether the limitation affects the "core" values underlying the right; the actual impact of the limitation on those affected by it;⁵³ the social position of the individuals or group concerned, that is, whether the limitation has a disproportionate impact upon vulnerable persons;⁵⁴ whether the limitation is temporary or permanent; and whether the limitation is narrowly tailored to achieve its objective. The last-mentioned consideration overlaps with the final factor which section 36(1) requires to be considered, namely, that the courts must assess the relationship between the limitation and its purpose and whether there are less restrictive means available to achieve the same purpose.⁵⁵ In *Jaftha v Schoeman*, the sale in execution of people's homes for trifling debts without judicial oversight was regarded as a "severe limitation" of the right to have access to adequate housing.⁵⁶ Indigent persons were seen as most vulnerable to the consequences of a sale in execution of their home.⁵⁷ Because the National Housing Code would render the appellants ineligible ever again to receive housing assistance if their homes were sold in execution, the permanence of their resultant homelessness was regarded as inevitable.⁵⁸

objective, but also emphasised "the importance of the public interest served by the need for justiciable disputes to be settled by a court of law."

⁵¹ *S v Manamela (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 par 69.

⁵² Woolman and Botha "Limitations" 34-79-34-82.

⁵³ For example, in *Chief Lesapo* par 25, the limitation of a debtor's right to access to courts was regarded as "extremely prejudicial" to his interests and unjustifiable because "a debtor may be unfairly deprived of ... his livelihood".

⁵⁴ For example, in *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* 1995 (4) SA 631 (CC), hereafter referred to as "*Coetzee v Government*" pars 8, 66-67, poor persons and the unemployed were regarded as most vulnerable to imprisonment for judgment debts.

⁵⁵ For example, in *Coetzee v Government*, this factor led the court to regard as unconstitutional legislation which authorised the imprisonment of judgment debtors. The legislation was viewed as overly broad in its application, not only to debtors who wilfully refused to pay, but also to debtors who were unable to pay. See Woolman and Botha "Limitations" 34-82, 34-84-34-86, with reference to *Coetzee v Government* pars 13-14 and 32; Rautenbach "Fundamental Rights" *LAWSA* 10(1) pars 326-327; Cheadle, Davis and Haysom *South African Constitutional Law* 30.4.7.

⁵⁶ *Jaftha v Schoeman* par 39.

⁵⁷ *Jaftha v Schoeman* pars 39 and 43.

⁵⁸ *Jaftha v Schoeman* pars 35, 40, and 50. See Woolman and Botha "Limitations" 34-81-34-82.

Assessment of proportionality and the balancing of rights may appear to be relatively straightforward. However, their application presents a number of difficulties.⁵⁹ It is not a "sequential exercise"⁶⁰ nor a "mechanical enquiry" but one that is "fluid" and "nuanced". In the process, the importance of the purpose of the infringing law must be balanced against the rationality and extent of the invasion of the right bearing in mind that a particular right or freedom may have different values in various contexts.⁶¹ Commentators have expressed concern that the terminology employed often confuses non-specialists and that the subjective influences of judges on the process and the outcome often result unavoidably in an over-cautious, casuistic, incrementalist⁶² approach which hinders transformation.⁶³ Woolman and Botha advocate a more structured, rigorous, sequential enquiry which will make it easier not only for "social actors" to anticipate what would constitute justifiable limitations but also will be easier for the lower courts to apply.⁶⁴ It is submitted that these comments are particularly apposite in relation to cases concerning the sale in execution of persons' homes. This is so particularly considering the confusion which followed *Jaftha v Schoeman* and the questions which arise regarding the interpretation and practical implementation of the precedent established in *Gundwana v Steko* and more recent decisions.⁶⁵

⁵⁹Woolman and Botha "Limitations" 34-87-34-88; Rautenbach and Malherbe *Constitutional law* 350-354.

⁶⁰Cheadle, Davis and Haysom *South African Constitutional Law* 30.4.2.

⁶¹Woolman and Botha "Limitations" 34-94-34-95. The authors describe it as "the 'head-to-head' comparison of competing rights, values or interests": sometimes, a right, interest or value, will simply "outweigh" another, while, in other instances, a balance will be struck between competing rights or interests, with no right being required "to pay the ultimate price." See also *Port Elizabeth Municipality* par 23 on the balancing of rights in the application of PIE.

⁶²Woolman and Botha refer, *inter alia*, to van der Walt 1995 SAJHR 169; van der Walt 2000 SALJ 259.

⁶³Woolman and Botha "Limitations" 34-100-34-101.

⁶⁴Woolman and Botha "Limitations" 34-94-34-106 refer to Roach and Budlender who, they say, suggest "that many state actors are either incapable of understanding rules generated by the Constitutional Court (as they are currently constructed) or are wilfully ignoring them". Van der Walt *Constitutional Property Law* 2011 526 observes that the shift towards a contextualised, non-hierarchical balancing process, in eviction matters, as directed by the Constitutional Court, in *Port Elizabeth Municipality*, could make matters "quite complicated".

⁶⁵ Such as *Nedbank v Fraser*; *FirstRand Bank Ltd v Folscher and another and several other similar matters* 2011 (4) SA 314 (GNP) and *Mkhize v Umvoti Municipality* (SCA), discussed at 5.6.7, below.

Highly emotive issues surround housing and the concept of home. These contribute to the complexity of the matter which was to some extent conveyed by Jajbhay J who stated:⁶⁶

Housing forms an indispensable part of ensuring human dignity. "Adequate housing" encompasses more than just the four walls of a room and roof over one's head. Housing is essential for normal healthy living. It fulfils deep-seated psychological needs for privacy and personal space; physical needs for security and protection from inclement weather; and social needs for basic gathering points where important relationships are forged and nurtured. In many societies a house also serves an important function as an economic centre where essential commercial activities are performed.

It is submitted that legislative provisions should spell out the process to be followed, the information required and factors which ought to be taken into account in balancing parties' interests to determine whether execution should be permitted against a person's home in any given circumstances. This might assist not only debtors and creditors but also advice centre and court administrative personnel as well as practitioners and judicial officers, including magistrates and judges.

3.3 *Rights potentially affected by the sale in execution of a debtor's home*

3.3.1 The right to have access to adequate housing

3.3.1.1 Background

Section 26 provides:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

⁶⁶*City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (1) SA 78 (W), 2006 (6) BCLR 728 (W) par 49.

The Constitutional Court interpreted and applied section 26 for the first time in *Grootboom*, a case which concerned the eviction of a community from private land which had been earmarked for low-cost housing.⁶⁷ The court stated that subsections (1) and (2) of section 26 are related and must be read together.⁶⁸ 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.⁶⁹ Further, 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".⁷⁰ The court also recognised the negative aspect of the obligation contained in section 26(1) to be further spelt out in section 26(3) which prohibits arbitrary evictions.⁷¹

In *Jaftha v Schoeman*, the Constitutional Court regarded as unconstitutional the sale in execution of two indigent debtors' homes in respect of trifling debts in circumstances where it would render each debtor homeless. The court extended the reasoning applied in *Grootboom* and held that private persons had a duty not to interfere with existing access to adequate housing. In the process of balancing and proportionality assessment, the court acknowledged the importance of debt recovery. However, it found that section 66(1)(a) of the Magistrates' Courts Act, as it was then worded, was unconstitutional in that it was overbroad and permitted execution against debtors' homes in instances where there was no proportionality between the interests of the creditor and of the debtor. It was contended on behalf of the appellants that section 67 of the Magistrates' Courts Act, which exempts certain assets from execution, was unconstitutional for its failure to exempt a debtor's home below a certain threshold value. However, the Constitutional Court rejected this argument. It recognised the

⁶⁷ See Liebenberg "The Interpretation of Socio-Economic Rights" 33-17; Rautenbach "Introduction to the Bill of Rights" par 1A74.

⁶⁸ *Grootboom* par 34. See also McLean "Housing" 55-9.

⁶⁹ *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.

⁷⁰ *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.

⁷¹ *Grootboom* par 34. See Liebenberg *Socio-Economic Rights* 270; Liebenberg "The Interpretation of Socio-Economic Rights" 33-20.

importance to poor people of being able to use their home as security to obtain finance and the importance to creditors of recovering debts. It therefore regarded as relevant the circumstances in which the debt arose, particularly where a judgment debtor provided his house as security for a debt.⁷² In the circumstances, it confirmed that, in the absence of judicial oversight, the sale in execution of each debtor's home amounted to an unjustifiable infringement of her right to have access to adequate housing.⁷³ It also stated that there was a need to find "creative alternatives" which allow for debt recovery but which use the sale in execution of a debtor's home "only as a last resort".⁷⁴

The right to have access to adequate housing formed the basis of the court's decision, in each of *ABSA v Ntsane* and *FirstRand Bank v Maleke*, to refuse to grant an order declaring mortgaged property specially executable even though the mortgagor was in default. In *Gundwana v Steko*, a case emanating from the high court and in which the home had been mortgaged, the Constitutional Court held that judicial oversight, in the course of which a court must consider all the relevant circumstances, is required in every case in which it is sought to execute against a person's home.⁷⁵ It also stated that where it is sought to execute against immovable property "[s]ome preceding enquiry is necessary to determine whether the facts of a particular matter are of the *Jaftha*-kind".⁷⁶

⁷²See *Jaftha v Schoeman* pars 51 and 58. Liebenberg *Socio-Economic Rights* 215ff. Van der Walt *Constitutional Property Law* 2005 361 n 294 states that the reference, in the judgment, to the origin of the debt indicates that debt incurred recklessly or irresponsibly could be treated differently from debt incurred for living expenses, especially when the debtor has attempted, and is still willing to make every effort, to pay the debt.

⁷³See *Jaftha v Schoeman* pars 34, 39, 40 and 44.

⁷⁴*Jaftha v Schoeman* par 59. Liebenberg *Socio-Economic Rights* 217-218 observes that the European Court of Human Rights applied a similar approach in *Connors v United Kingdom* 2005 40 EHRR 189 par 85. She also comments that *Jaftha v Schoeman* signifies a transformative approach to a legal process which used to cater only for a creditor's interest in enforcing a claim against a debtor and which now regards as an important consideration the interests of poor people, in the protection of their homes. Van der Walt *Constitutional Property Law* 2005 361-362 submits that the decision, in *Jaftha v Schoeman*, "treats poverty, debt and homelessness as different aspects of one larger socio-economic problem ... [so] that eviction and sale in execution cases have to be adjudicated with due regard for the history and the social and economic background of the affected persons."

⁷⁵*Gundwana v Steko* pars 41 and 49. Rule 46(1) of the Uniform Rules of Court, applicable in the High Court, had already been amended effectively to provide that only a court, and not a registrar, could grant a writ of execution against the judgment debtor's primary residence and only after considering all of the relevant circumstances. For discussion of the amended rule 46(1), see 4.4.4.3, below.

⁷⁶*Gundwana v Steko* par 43. It would seem, it is submitted, that, in *Mkhize v Umvoti Municipality* (SCA) par 19, the Supreme Court of Appeal interpreted the effect of the judgment, in *Gundwana v Steko*, to be

3.3.1.2 The right to have access to adequate housing as a socio-economic right

The right to have access to adequate housing is one of the justiciable socio-economic rights contained in the Bill of Rights.⁷⁷ This necessitates a complex process of balancing a variety of other competing interests such as property rights and contractual rights.⁷⁸ It has also raised issues surrounding the "separation of powers" doctrine and reservations have been expressed regarding the competence of the judiciary, without specialised expertise, to make decisions which affect social and economic policy.⁷⁹ Liebenberg observes that the courts' frequently narrow interpretation of socio-economic rights and their imposition of little or no accountability on private institutions limit democratic transformation.⁸⁰ She advocates an alternative, dynamic model of the separation of powers doctrine in terms of which courts play a nuanced, innovative role in matters concerning socio-economic rights and consistently prompt the legislative and executive branches of government to devise appropriate comprehensive, participatory social programmes and to enact specific legislation where appropriate.⁸¹

Traditionally, civil and political rights, also referred to as "first generation" rights,⁸² have been regarded as imposing on the state duties of restraint and non-interference with people's liberties. These are the so-called "negative obligations". On the other hand, socio-economic, or "second generation", rights impose positive obligations on the state to do as much as it is able to secure for all members of society a basic set of social goods such as education, health care, food, water, shelter, access to land and

that it is for a court to hold such preceding enquiry in order to determine whether s 26(1) rights will be affected by a sale in execution.

⁷⁷ See Liebenberg "Adjudicating Social Rights" 75-77; Langford "The Justiciability of Social Rights" 3-45.

⁷⁸ These rights would include, where applicable, the real security rights of a creditor. See Liebenberg *Socio-Economic Rights* 21; Liebenberg "The Interpretation of Socio-Economic Rights" 33-61.

⁷⁹ Liebenberg *Socio-Economic Rights* 63-64, 66-71.

⁸⁰ Liebenberg *Socio-Economic Rights* 37-39.

⁸¹ Liebenberg *Socio-Economic Rights* 71; see also 70, 75-76.

⁸² Such as the rights to equality, freedom, property, freedom of speech and freedom of assembly and association.

housing.⁸³ These are referred to as "*qualified* rights" because the state is required to take reasonable legislative and other measures *within its available resources* to achieve the progressive realisation of each of these rights.

The positive and negative aspects of the right to have access to adequate housing are evident in the judgment in *Grootboom*. As mentioned above,⁸⁴ the Constitutional Court affirmed that section 26(2) imposed on the state a positive duty to adopt comprehensive programmes "capable of facilitating the realisation" of the right to have access to adequate housing.⁸⁵ In this regard, the court stated:⁸⁶

... accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.

The court also recognised that section 26(1) imposes a negative obligation upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.⁸⁷ The court referred extensively to, and endorsed, the views of the United Nations Committee on Economic, Social and Cultural Rights. These included that the state has an implicit duty to avoid "retrogressive measures"⁸⁸ and that "measures that have the effect of reducing pre-existing levels of access to socio-economic rights are prima facie incompatible with the Covenant and require justification by the State".⁸⁹ Thus, an argument has been put forward that law or conduct which leads to a decline, as opposed to progressive improvement, in living and housing

⁸³Currie and De Waal *Bill of Rights Handbook* 567; Liebenberg *Socio-Economic Rights* 54 and the works cited there.

⁸⁴See 3.3.1.1, above.

⁸⁵*Grootboom* par 41.

⁸⁶*Grootboom* par 45.

⁸⁷*Grootboom* par 34. In *Jaftha v Schoeman* pars 31-34, the Constitutional Court elaborated on this negative obligation which it regarded as unqualified to the extent that the state's resources were not necessarily in issue. See also *Minister of Health v Treatment Action Campaign* 2005 (5) SA 721 (CC), in which the negative duty to refrain from preventing or impairing the socio-economic rights was "developed". See Liebenberg *Socio-Economic Rights* 270; Liebenberg "The Interpretation of Socio-Economic Rights" 33-20. See also comments by van der Walt *Constitutional Property Law* 2005 359.

⁸⁸Liebenberg "The Interpretation of Socio-Economic Rights" 33-43, with reference to *Grootboom* par 45.

⁸⁹Liebenberg "The Interpretation of Socio-Economic Rights" 33-43. This is a reference to the International Covenant on Economic, Social and Cultural Rights.

conditions may be regarded as a breach of the negative aspect of the right to have access to adequate housing.⁹⁰

Liebenberg criticises the effects of the distinction between the positive and negative aspects of the right. She points out that positive duties imposed by socio-economic rights are subject to "reasonableness review" whereas negative duties imposed by socio-economic rights are subject to the limitation clause, in section 36 of the Constitution. This means that "claims by people who lack access to socio-economic rights ... [are subjected] to a less stringent review standard than those involving a deprivation of existing access". This, Liebenberg submits, cannot be justified in principle. She describes the distinction between the positive and negative aspects of the right as being somewhat arbitrary because infringements of socio-economic rights involve "a complex matrix of positive conduct and omissions". She argues that the state's duty "not to deprive people unjustifiably of access to housing ... is inextricably linked with the duty of relevant organs of State to take positive measures to provide alternative accommodation to those who face homelessness as a result of an eviction."⁹¹ She advocates "a more transformative approach which transcends formalistic distinctions and dichotomies between negative and positive duties and which is attuned to the substantive values and interests at stake in particular cases."⁹² It is submitted that these arguments are equally apposite in cases where forced sale of persons' homes would render them homeless.

Further, the positive duty which section 7(2) of the Constitution imposes on the state "to protect" the socio-economic rights of persons means that the state is under an obligation to devise and enforce legislative and other measures to ensure that private

⁹⁰Currie and De Waal *Bill of Rights Handbook* 572. See also Rautenbach and Malherbe *Constitutional law* 386.

⁹¹See Liebenberg *Socio-Economic Rights* 56-58, 87, 163, 199-203 and 219. Liebenberg makes the point that establishing appropriate institutional machinery, training public officials, monitoring mechanisms, and establishing and maintaining judicial and quasi-judicial accountability mechanisms, all require positive measures and an intensive investment of resources. She also refers to Koch "Dichotomies, trichotomies or waves of duties?" 2005 *HRLR* 81 92 who illustrates how, in particular situations, non-interference may require highly "positive" measures, such as the purchase of alternative property instead of expropriation. See also van der Walt *Constitutional Property Law* 2005 362.

⁹²Liebenberg *Socio-Economic Rights* 220 and 54-59.

parties do not prevent or impair vulnerable groups' enjoyment of access to socio-economic rights.⁹³ Section 39(2) of the Constitution imposes a duty on courts, in the absence of specific legislation regulating the position, to develop the common law to give effect to the underlying purposes and values of the Bill of Rights. However, commentators point out that development of the common law is inhibited by the fact that it occurs on a case-by-case basis⁹⁴ involving only "incremental", "interstitial" changes⁹⁵ and without fully facilitating greater equity and social justice in socio-economic relations.⁹⁶ As Liebenberg explains, traditionally, "[t]he legislature is seen as the appropriate institution ... to bring about any far-reaching changes in the doctrinal structure and normative content of the common law"⁹⁷ and our courts have also adopted the approach that no dramatic change is required to the common law in which foundational constitutional values are already inherent.⁹⁸

It is submitted that an argument may be made not only from a theoretical constitutional, but also from a practical, perspective for the enactment of appropriate legislation regulating the forced sale of a debtor's home, instead of it being left to the courts to develop the common law on a case-by-case basis.⁹⁹ For example, the enactment and application of the Promotion of Access to Information Act 2000 and the Promotion of

⁹³Liebenberg *Socio-Economic Rights* 332, with reference to *Grootboom* par 35. As Liebenberg points out, the advantage of legislation is that it has legitimacy based on the notion that the preceding "broad and inclusive deliberation and participation ... enable legislatures to craft balanced and comprehensive schemes which take into account and attempt to reconcile diverging rights and interests." See also *Grootboom* par 40 in relation to the possible need for the state to put in place national framework legislation. See also Liebenberg "The Interpretation of Socio-Economic Rights" 33-22 and 33-58-33-59; van der Walt *Constitutional Property Law* 2005 441-444 who discusses the emergence of arguments based upon s 7(2) of the Constitution.

⁹⁴Liebenberg *Socio-Economic Rights* 340, with reference also to *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 10 BCLR 995 (CC) par 55: "We have previously cautioned against overzealous judicial reform Not only must the common law be developed in a way which meets the s 39(2) objectives, but it must be done in a way most appropriate for the development of the common law within its own paradigm."

⁹⁵Van der Walt *Constitutional Property Law* 2005 8; van der Walt *Property in the Margins* 218.

⁹⁶Liebenberg *Socio-Economic Rights* 336 highlights the interrelationship between socio-economic rights and equality, a founding constitutional value, in terms of s 1 and s 7(1), and a substantive right in s 9 of the Constitution, defined in s 9(2) to include "the full and equal enjoyment of all rights and freedoms".

⁹⁷Liebenberg *Socio-Economic Rights* 340. See also van der Walt *Property in the Margins* 215-216.

⁹⁸Liebenberg *Socio-Economic Rights* 340 and 358; Bhana and Pieterse 2005 SALJ 865 876-884. Pearmain 2006 *THRHR* 287 and Pearmain 2006 *THRHR* 466. See also *Barkhuizen v Napier* 2007 (5) SA 323 (CC), hereafter referred to as "*Barkhuizen v Napier*".

⁹⁹Similar submissions were made in Steyn "*Grootboom's reach*".

Administrative Justice Act 2000 clearly enhanced the adjudication process in matters concerning, and the level of protection of rights conferred by, sections 32 and 33 of the Constitution.¹⁰⁰ It may be conceded that the Constitution expressly required the enactment of national legislation in order to give effect to section 32 and section 33 rights¹⁰¹ whereas this was not the case in relation to section 26 rights. However, it is nevertheless submitted that the duty which section 26(2) imposes on the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of section 26(1) rights requires it, in the circumstances, to enact appropriate legislation. This should be done with the purpose of providing clarity in relation to substantive and procedural requirements in order that practitioners, administrative officials and judicial officers might ensure that matters involving debtors' section 26(1) rights are properly adjudicated.

3.3.1.3 The right to have access to adequate housing and its impact on private law

It may be stated with reference to judgments in *Afrox Healthcare Bpk v Strydom*,¹⁰² *Brisley v Drotsky*¹⁰³ and, more recently, *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd*,¹⁰⁴ that thus far socio-economic rights have had minimal impact on the law of contract. Liebenberg submits that the strong protection of "vested private property rights" and freedom of contract, expressed in the doctrine *pacta sunt servanda*, has been reinforced by reference, for example, to values found in aspects of the property clause and to freedom and dignity as foundational constitutional values.¹⁰⁵

¹⁰⁰See, generally, Currie and De Waal *Bill of Rights Handbook* 641ff, 683ff; Cheadle, Davis and Haysom *South African Constitutional Law* Chapters 26 and 27.

¹⁰¹See ss 32(2) and 33(3) of the Constitution.

¹⁰²*Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA), hereafter referred to as "*Afrox v Strydom*". This case concerned the right to have access to health care services in the context of the law of contract.

¹⁰³*Brisley v Drotsky* 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 (SCA). See, particularly, *Brisley v Drotsky* pars 88, 91 (citing s 1(a) and (b) of the Constitution) and 94, where Cameron JA stated that contractual freedom, "shorn of its excesses, informs the constitutional value of dignity" and that the constitutional values of dignity, equality, and freedom "require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint".

¹⁰⁴*Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA), hereafter referred to as "*Maphango v Aengus*".

¹⁰⁵Liebenberg *Socio-Economic Rights* 341, with reference to Cameron JA's concurring judgment in *Brisley v Drotsky*, and 367, with reference to *Napier v Barkhuizen* 2006 (4) SA 1 (SCA), 2006 (9) BCLR 1011 (SCA), hereafter referred to as "*Napier v Barkhuizen*", par 13. Liebenberg, at 361, points out that, in

In relation to execution against mortgaged property, where the issue is usually whether a contractual term such as a clause providing for the sale in execution or an acceleration clause may be enforced, aspects of the decision in *Barkhuizen v Napier* are pertinent. In that case, the majority of the Constitutional Court held, *per* Ngcobo J, that a section of the Constitution could not be directly applied to a contractual term, using section 8(2) and (3),¹⁰⁶ and neither could a contractual term be tested by applying the limitation clause in section 36 as it was not "a law of general application". Ngcobo J stated that a constitutional challenge to a contractual term would ordinarily entail determination of whether the term was contrary to public policy which is now "deeply rooted in our Constitution and the values which underlie it."¹⁰⁷ He also stated, with reference to the judgment of the court *a quo*, that the doctrine *pacta sunt servanda* is not "a sacred cow that should trump all other considerations" but that its application is "subject to constitutional control".¹⁰⁸

However, Liebenberg views the majority of the court in *Barkhuizen v Napier*, as apparently regarding the principle of *pacta sunt servanda* "as having presumptive force

Brisley v Drotzky, in deciding whether the non-variation clause in the lease was contrary to public policy, the court gave no consideration to the tenant's right to have access to adequate housing, but confined itself to the question of the possible impact of s 26(3) on the granting of an eviction order. Van der Walt *Constitutional Property Law* 2005 440, with reference to Roux 2004 SALJ 466, explains how, in *Brisley v Drotzky* and *Afrox v Strydom*, the Supreme Court of Appeal failed to develop the common law because it regarded itself as not having explicit statutory discretion to amend existing private law rights. He cites the eviction part of the decision, in *Brisley v Drotzky*, as illustrating this. See also Botha 2004 SAJHR 249-283; van der Walt *Property in the Margins* 42-46. See also, *Maphango v Aengus*, where the Supreme Court of Appeal held that a lessee has no security of tenure beyond the period of the lease and, therefore, termination of a lease in accordance with the terms of the parties' agreement, does not infringe the s 26(1) rights of the lessee.

¹⁰⁶ *Barkhuizen v Napier* pars 23-30.

¹⁰⁷ *Barkhuizen v Napier* pars 28-30. According to Liebenberg *Socio-Economic Rights* 368-369, the court viewed section 39(2) "as the conduit for interpreting (and where necessary developing) common-law doctrines such as public policy so as to be consonant with the rights and values of the Constitution." See similar submissions, in relation to *Brisley v Drotzky* and *Afrox v Strydom*, by van der Walt *Constitutional Property Law* 2005 438-439, with reference to Lubbe 2004 SALJ 395 398, 401 and 404; *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); *Brisley v Drotzky* par 91; *Afrox v Strydom* par 18. For a more recent Supreme Court of Appeal judgment involving *pacta sunt servanda*, public policy and the Constitution, see *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC* 2011 (3) SA 511 (SCA), hereafter referred to as "*African Dawn Property v Dreams Travel*".

¹⁰⁸ *Barkhuizen v Napier* par 15, with reference to *Napier v Barkhuizen*.

as a normative standard" with its basis in "the founding constitutional values".¹⁰⁹ She argues that engagement with constitutional values such as social justice and the content and implications of socio-economic rights is required in contractual disputes.¹¹⁰ She maintains that in light of the courts' reluctance "to undertake a more robust evaluation of the fairness of contractual provisions in the light of constitutional rights and values, legislative intervention has become critical."¹¹¹

3.3.1.4 The right to have access to adequate housing in eviction cases

(a) Analogies between eviction from and execution against the home

Section 26(3) of the Constitution provides that no one may be evicted from their home without an order of court made after considering all the relevant circumstances. Likewise, in terms of *Jaftha v Schoeman*¹¹² and *Gundwana v Steko*,¹¹³ only a court may grant an order for execution against a person's home after considering all the relevant circumstances.¹¹⁴

¹⁰⁹Liebenberg *Socio-Economic Rights* 371-372, quoting from *Barkhuizen v Napier* par 57 and with reference to Bhana 2008 SAJHR 300-317. See also similar comments made in relation to *Brisley v Drotzky* and *Afrox v Strydom* by van der Walt *Constitutional Property Law* 2005 439 with reference to Botha 2004 SAJHR 249-283; Lubbe 2004 SALJ 415.

¹¹⁰Liebenberg *Socio-Economic Rights* 360-361. See also 364ff for criticism of the Supreme Court of Appeal's decision, in *Afrox v Strydom*, for not expressing the rationale behind preferring the doctrine of *pacta sunt servanda* above the right to access to health care. Cf 366 where Liebenberg commends the court's approach, in *Mphango v Sithole* 2007 (6) SA 578 (W), for taking into account the realities that poor tenants could not always afford to effect repairs to leased premises themselves and thereafter claim remission of rent, and that the shortage of accommodation for poor people in Gauteng often left them "at the mercy of slum landlords if they wish[ed] to avoid homelessness." (par 47). Liebenberg states that the court thus "affirmed that the exercise of the discretion to award specific performance should be informed by constitutional rights, including the right of access to adequate housing." See also van der Walt *Constitutional Property Law* 2005 440 who detects "signs of uncertainty and hesitation, and even hostility, towards the idea that central principles and institutions of the common law might have to be changed (even perhaps dramatically) in order to promote the spirit, purport and objects of the Constitution". It is submitted that similar comments may be made in relation to the approach which the Supreme Court of Appeal adopted, in *Maphango v Aengus*, that a lessee cannot rely on an infringement of his s 26(1) right when a lessor has terminated the lease.

¹¹¹Liebenberg *Socio-Economic Rights* 374.

¹¹²See *Jaftha v Schoeman* pars 44, 55.

¹¹³*Gundwana v Steko* pars 40 and 57, with reference to *Jaftha v Schoeman* par 55 and rule 46(1) of the Uniform Rules of Court, confirmed that judicial oversight, including consideration of all the relevant circumstances, was also required in the High Court process.

¹¹⁴The phrase "all the relevant circumstances" is used in s 26(3) of the Constitution and ss 4(6) and 4(7) of PIE. It also formed part of the words which were required, in *Jaftha v Schoeman* par 44, to be read into

In eviction cases, courts must balance the owner's property interests, the occupier's housing interests, and the broader, apparently conflicting, public interest in upholding property rights and the secure tenure of housing. Where occupation was originally acquired in terms of an agreement with the owner, contractual rights are also relevant. When deciding whether to allow execution against a person's home, the court must carry out a proportionality assessment in which it balances the various interests. It must consider, for example, the right of the debtor to have access to adequate housing¹¹⁵ and the right of the creditor to satisfaction of his contractual claim and, where the home has been mortgaged, the mortgagee's real security rights. Also to be considered are broader social and economic interests reflected in the desirability and importance of holding persons to their contractual undertakings and property-related interests in the security of a mortgage bond.¹¹⁶ The latter include the interests of property owners and investors, generally, as well as the interests of debtors who own homes to maintain their eligibility to access mortgage finance.¹¹⁷

Where a court, having considered all the relevant circumstances, does grant an order for execution against the home and it is sold in execution, a debtor, including an erstwhile mortgagor, may refuse to vacate it. In this situation the new owner, or the mortgagee, will have to apply for an eviction order and the principles and considerations, as mentioned above, in relation to evictions, will be applicable. It is clear from the judgments in *Gundwana v Steko*, *Nedbank v Fraser*, *FirstRand Bank v Folscher* and *Standard Bank v Bekker* that clear analogies may be drawn between the eviction of a person from his home and execution against a debtor's home.¹¹⁸ It is submitted that, although what would constitute "relevant circumstances" in each

s 66(1)(a) of the Magistrates' Courts Act. Further, rule 46(1) of the Uniform Rules of Court requires a court to consider all the relevant circumstances where execution is sought against a judgment debtor's primary residence. Rule 46(1) is discussed at 4.4.4.3, below.

¹¹⁵And, conceivably, the debtor's property rights, for discussion of which, see van der Walt *Constitutional Property Law* 2011 181-189. See also 3.3.4, below.

¹¹⁶See *Jaftha v Schoeman* pars 37-38, 40-42, 51 and 53; *Standard Bank v Saunderson* pars 12-13, 18.

¹¹⁷See *Jaftha v Schoeman* par 58.

¹¹⁸See *Gundwana v Steko* pars 23, 25, 41, 44 and 46; *Nedbank v Fraser* par 9; *FirstRand Bank v Folscher* par 34 and *Standard Bank v Bekker* par 13.

scenario might be different, there will be a measure of overlap.

In *Brisley v Drotsky*, the Supreme Court of Appeal held that, for the purposes of section 26(3), only *legally* relevant circumstances could be taken into account and these did not include the personal circumstances of the lessee facing eviction.¹¹⁹ On the other hand, in *ABSA Bank Ltd v Murray and Another*,¹²⁰ where eviction proceedings were brought in terms of PIE against the erstwhile mortgagors of the home, the court took into account the personal circumstances of the insolvent spouses when it determined that it would be just and equitable to grant an eviction order. Now it is clear from the Constitutional Court's judgments in *Port Elizabeth Municipality and Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others*,¹²¹ that "relevant circumstances" are not confined to legal grounds justifying an eviction under the common law.¹²² It is submitted this would also be the position in cases where an execution order is sought against a debtor's home. The nature of the evaluation, as it is explained in *Gundwana v Steko*, tends to suggest that personal circumstances of the debtor should also be considered.¹²³

Further analogous features will be canvassed below, in the course of considering PIE

¹¹⁹*Brisley v Drotsky* pars 41-45. The Supreme Court of Appeal expressly rejected Liebenberg's earlier submissions in this regard. The court pointed out, at par 43, that the position was different to cases where legislation, such as ESTA or PIE, "expressly limited the common-law rights of an owner through conferring on the court a discretion to grant an eviction order subject to considerations of justice and equity". It may be noted, however, that Olivier JA, in a concurring judgment, stated that "all relevant circumstances" included "considerations of humanity" before ordering the eviction of tenants after the termination of their lease and that, where appropriate, reasonableness and fairness allowed "a court at least to suspend the execution of an eviction order for a reasonable period." *Brisley v Drotsky* par 87. See Liebenberg *Socio-Economic Rights* 348; Liebenberg "The Interpretation of Socio-Economic Rights" 33-60, with reference to *Grootboom* pars 52, 88-90, for her preferred construction of "all relevant circumstances".

¹²⁰*ABSA Bank Ltd v Murray and Another* 2004 (2) SA 15 (C), hereafter referred to as "*ABSA v Murray*". This case is discussed in 6.3.2, below.

¹²¹*Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC), 2008 (9) BCLR 475 (CC), hereafter referred to as "*51 Olivia Road (CC)*".

¹²²See Liebenberg *Socio-Economic Rights* 277-278, with reference to *Brisley v Drotsky* pars 38 and 42, *Port Elizabeth Municipality* par 32 and *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (6) SA 417 (SCA), 2007 (6) BCLR 643 (SCA) pars 40-41. See also van der Walt *Property in the Margins* 157-158.

¹²³See *Gundwana v Steko* pars 43, 49 and 50.

and other aspects of eviction cases.¹²⁴

(b) The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act

PIE was enacted to protect both constitutional housing and property rights.¹²⁵ Section 4 of PIE requires that before a court grants an eviction order it must be of the opinion "that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women."¹²⁶ Thus, an occupier who has received an eviction notice from the owner¹²⁷ is not obliged immediately to vacate the property but is entitled to "hold over" until a court has determined whether it is just and equitable to grant the eviction order.¹²⁸ A court will often render an eviction order just and equitable by postponing its execution in order to afford the occupier the opportunity to arrange alternative accommodation.¹²⁹

In *Ndlovu v Ngcobo; Bekker and Another v Jika*,¹³⁰ the majority of the Supreme Court of Appeal held that PIE applied to persons who had acquired occupation lawfully but whose occupation had become unlawful. This would include a lessee, after the lawful termination of a lease, and an erstwhile mortgagor, pursuant to the calling up of a mortgage bond.¹³¹ The court recognised such persons as belonging to a vulnerable

¹²⁴This discussion of PIE reiterates largely the discussion in Steyn 2007 *Law Dem Dev* 101 115ff.

¹²⁵Liebenberg *Socio-Economic Rights* 271 n 17 points out that the preamble of PIE refers to the content of both s 25(1) and s 26(3) of the Constitution.

¹²⁶S 4(6). This subsection applies where the unlawful occupier has been in occupation for less than six months.

¹²⁷S 4(2)-(5) contains notice requirements.

¹²⁸It also means that eviction of a person from his home may not occur as a result of an administrative decision alone, without a court order, nor may a clerk of the Magistrate's Court, or the registrar of the High Court, issue an eviction order in an application for default judgment. See Currie and De Waal *Bill of Rights Handbook* 588.

¹²⁹See, for example, *ABSA v Murray* par 48. The court postponed the execution of the eviction order for six weeks, having taken into account that the erstwhile mortgagors had been aware for more than a year of the bank's intention to evict them and they had already had a considerable period of time to prepare to vacate their home.

¹³⁰*Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA), [2002] 4 All SA 384 (SCA), hereafter referred to as "*Ndlovu v Ngcobo*".

¹³¹Thus overruling *ABSA Bank Ltd v Amod* [1999] 2 All SA 423 (W). See van der Walt *Constitutional Property Law* 2005 328 and other cases cited there. The facts, in *Gundwana v Steko*, provide an illustration of the application of PIE to an erstwhile mortgagor whose home was sold in execution. In the circumstances, the Constitutional Court referred the eviction case to the Magistrate's Court, pending a decision by the High Court as to the validity of the sale in execution.

class of occupiers.¹³² The court emphasised that PIE had to be interpreted in such a way as to promote "the spirit, purport and objects" of section 26(3).¹³³ It may be noted that a subsequently proposed Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill, that sought explicitly to exclude from the application of PIE occupiers of property who are erstwhile lessees or mortgagors and previous owners, was rejected in 2008.¹³⁴

Where the occupier has been in occupation for more than six months, the court must also consider whether land has been made available or can reasonably be made available by a municipality or other organ of state for the relocation of the unlawful occupier. It may be noted that an exception to this rule applies "where the land is sold in a sale in execution pursuant to a mortgage".¹³⁵ It is unclear whether this exception was intended to apply only in respect of the court's duty to consider whether alternative land has been made available, or whether its effect is to relieve the court entirely of the duty to consider the rights and needs of the elderly, children, disabled persons and households headed by women. In *Ndlovu v Ngcobo*, the Supreme Court of Appeal adopted the latter interpretation.¹³⁶ However, it is submitted that, as explained by Binns-Ward AJ in *ABSA v Murray*,¹³⁷ the former interpretation is more logical. It also avoids the anomalies which would otherwise arise if the housing interests of persons, who

¹³² *Ndlovu v Ngcobo* pars 16-17. Van der Walt *Constitutional Property Law* 2005 423 states that Harms JA pointed out that the vulnerability of certain categories of persons – including tenants of urban housing – may well have been a concern when parliament promulgated PIE.

¹³³ *Ndlovu v Ngcobo* par 16.

¹³⁴ The Draft Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill was first drafted in 2003. It sought explicitly to exclude from the application of PIE occupiers of property who are erstwhile lessees or mortgagors and previous owners. In 2006, a revised version was approved by Cabinet and published for comment in GN 1851 in GG 29501 of 22 December 2006. Following widespread consultation and discussion, it was again revised and redrafted as a proposed Bill B8-2008 and an explanatory summary was published in GG 30459 of 16 November 2007. This Bill was rejected by the Portfolio Committee on Housing on 6 August 2008. If the proposed amendment were ever to be revived and if it were to become law, it would significantly alter the position where a purchaser of immovable property, sold either in execution or by the trustee of an insolvent estate, seeks to evict an erstwhile mortgagor or owner of the property. Even though it might be argued that the Legislature did not originally intend the provisions of PIE to apply to a mortgagor or previous owner of the property, the practical effect is that such an amendment would deprive such persons of the protective measures afforded by PIE that until now they have enjoyed in light of the decision in *Ndlovu v Ngcobo*. If this were to occur, it is submitted that there would be all the more reason for the need for a court to conduct a thorough evaluation of the personal circumstances, including the housing situation, of a debtor and his family and dependants before his home may be executed against or sold in the course of realisation of the assets of an insolvent estate.

¹³⁵ S 4(7).

¹³⁶ *Ndlovu v Ngcobo* par 17.

¹³⁷ This case is discussed in 6.3.2, below.

occupy the property through the erstwhile mortgagor or the erstwhile lessee of mortgaged property, were to be ignored.¹³⁸ It would also be in keeping with "the spirit, purport and objects" of section 26(3).¹³⁹

In *Port Elizabeth Municipality*, the Constitutional Court held that PIE had to be interpreted and applied within a "defined and carefully calibrated constitutional matrix"¹⁴⁰ which recognises that "property rights are not absolute, but incorporate the important social dimension of promoting the public interest".¹⁴¹ As expressed by Sachs J:¹⁴²

... The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation ... The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.

The court stated that eviction could occur even if it would result in the loss of a person's home, and no alternative accommodation was to be provided. However, it also stated that a court "should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme".¹⁴³

In similar vein it is submitted that it may be appropriate for a court to postpone the forced sale of a debtor's home so that alternative accommodation arrangements may be made. A court could justify its order on section 172 of the Constitution which permits a court deciding a constitutional matter to "make any order that is just and equitable". It may be noted that, in *Standard Bank v Sanderson*, the Supreme Court of Appeal anticipated that a court might delay execution where there is a real prospect that the

¹³⁸See *ABSA v Murray* pars 24-26, with reference to *Ndlovu v Ngcobo* pars 7-11.

¹³⁹*Ndlovu v Ngcobo* par 16.

¹⁴⁰*Port Elizabeth Municipality* par 14. See Liebenberg *Socio-Economic Rights* 273-274; van der Walt *Constitutional Property Law* 2005 424.

¹⁴¹Liebenberg *Socio-Economic Rights* 274, with reference to *Port Elizabeth Municipality* par 16.

¹⁴²*Port Elizabeth Municipality* par 23. See Liebenberg *Socio-Economic Rights* 274-275.

¹⁴³*Port Elizabeth Municipality* par 28. See Liebenberg *Socio-Economic Rights* 275-276.

debt might yet be paid.¹⁴⁴ In view of the fact that the object of execution would be to obtain payment of the debt out of the proceeds of the sale, it is submitted that execution could just as well be delayed to allow a debtor, including a mortgagor, a reasonable period of time to secure alternative accommodation.

(c) The state's duty to provide housing

Another development in eviction cases has been for the court to direct, where appropriate, that the relevant organs of state provide housing for occupiers who would be rendered homeless by the eviction.¹⁴⁵ *Blue Moonlight Properties 39 (Pty) Limited v The Occupiers of Saratoga Avenue*¹⁴⁶ concerned the eviction from private land of persons who had been employed at a factory business which had operated there and who, or whose relatives, had initially lived there in terms of lease agreements. The applicant had purchased the property for the purposes of investment. The court took into account that the applicant had been deprived of its entitlement to use and develop its property and had been unable to realise any benefit from its investment for five years. It granted the eviction order but decided that it would be just and equitable to postpone the execution of it for a period of almost two months in order for alternative accommodation arrangements to be made.¹⁴⁷ The court further declared the City of Johannesburg's emergency housing programme to be unconstitutional to the extent that it discriminated against persons facing eviction from privately owned land by excluding

¹⁴⁴ *Standard Bank v Saunderson* par 20.

¹⁴⁵ See *City of Cape Town v Hoosain NO and Others* (WCHCCT) case no 10334/2011 (21 October 2011).

¹⁴⁶ *Blue Moonlight Properties 39 (Pty) Limited v The Occupiers of Saratoga Avenue* 2009 (1) SA 470 (W), 2009 (3) BCLR 329 (W), hereafter referred to as "*Blue Moonlight Properties* (WLD)". This case, which came before Masipa J, was postponed *sine die*, and a later judgment in the matter, *per* Spilg J, is reported as [2010] JOL 25031 (GSJ), hereafter referred to as "*Blue Moonlight Properties* (GSJ)". The judgment, on appeal to the Supreme Court of Appeal against the decision, in *Blue Moonlight Properties* (GSJ), is reported as *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2011 (4) SA 337 (SCA), hereafter referred to as "*Blue Moonlight Properties* (SCA)". The appeal to the Constitutional Court is reported as *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) BCLR 150 (CC), hereafter referred to as "*Blue Moonlight Properties* (CC)". (Judgment was delivered, in *Blue Moonlight Properties* (CC), on 1 December 2011.)

¹⁴⁷ *Blue Moonlight Properties* (GSJ) pars 162, 191, 193.

them from eligibility for housing relief including temporary emergency accommodation.¹⁴⁸

In an appeal by the City of Johannesburg, the Supreme Court of Appeal confirmed the eviction order and gave the occupiers a period of two months after the date of its judgment to vacate the property.¹⁴⁹ The appeal court held that the City of Johannesburg was obliged to provide for the progressive realisation of the right of access to adequate housing within its area of jurisdiction in accordance with the provisions of the Housing Act or the National Housing Code.¹⁵⁰ The court considered that the City of Johannesburg was able, within its available resources, to meet the needs of the occupiers.¹⁵¹ It confirmed the order for the City of Johannesburg to provide temporary emergency accommodation to specific occupiers whose names appeared in a particular document contained in the court papers, and those persons occupying through them, until they could participate in a permanent housing programme.¹⁵² The Supreme Court of Appeal confirmed the declaration that the City of Johannesburg's emergency housing programme was unconstitutional, in terms of section 9(1) of the Constitution, on the basis that it discriminated against one category of persons who were "desperately poor and ... in a crisis".¹⁵³ This decision was confirmed by the Constitutional Court which gave the occupants a period of four and a half months to vacate the property and the City of Johannesburg a period of four months to provide accommodation to those who needed it.¹⁵⁴

It is submitted that the argument may be raised that where a debtor and his family will be rendered homeless, execution against his home should be permitted only where

¹⁴⁸ *Blue Moonlight Properties* (GSJ) pars 144-145, 151 and 154, 196 subpar 4. The court held that the housing programme offended occupiers', and private property owners', rights to equality.

¹⁴⁹ *Blue Moonlight Properties* (SCA) pars 77.5.1, 77.5.2.

¹⁵⁰ *Blue Moonlight Properties* (SCA) pars 42-48.

¹⁵¹ *Blue Moonlight Properties* (SCA) pars 49-53.

¹⁵² *Blue Moonlight Properties* (SCA) par 77.5.4.

¹⁵³ *Blue Moonlight Properties* (SCA) par 59. This aspect of the decision is discussed at 3.3.5, below.

¹⁵⁴ *Blue Moonlight Properties* (CC) par 104.

alternative accommodation is provided by the state in the exercise of its duty under section 26(2) of the Constitution.¹⁵⁵

(d) "Meaningful engagement"

Whether "meaningful engagement" has occurred between the interested parties, has become an important consideration in eviction cases.¹⁵⁶ The positive effect of this is well illustrated by the outcome in *51 Olivia Road (CC)*.¹⁵⁷ This case concerned an application by the Johannesburg City Council for the eviction, in terms of the National Building Regulations and Building Standards Act 103 of 1977 as part of its Inner City Regeneration Strategy, of a large number of impoverished residents in allegedly unsafe buildings in the inner city of Johannesburg. The high court recognised that the respondents were too poor to secure alternative accommodation¹⁵⁸ and, if evicted, would be far worse off than in their current accommodation.¹⁵⁹ It issued an interdict prohibiting the City of Johannesburg from evicting the occupiers pending the implementation of an appropriate programme to accommodate them, as required by

¹⁵⁵Temporary, emergency accommodation could, ultimately, be replaced by low-rent, leased accommodation, as provided for in the Social Housing Programme, the Institutional Housing Subsidy Programme and the Community Residential Units Programme, explained in *Simplified Guide Part B: Overview of the Current National Housing Programmes* pars 5, 6 and 7, referred to at 4.2.1, below. For a similar submission, in relation to erstwhile lessees, see Maass and van der Walt 2011 SALJ 436 450 who state that "low income households should be accommodated by the state as far as possible with the aim to combat an increase in homelessness".

¹⁵⁶Van der Walt *Property in the Margins* 158. The author states, at 156, that, in *51 Olivia Road (CC)* par 30, the Constitutional Court emphasised that "meaningful engagement should in future cases like this take place prior to litigation unless it is impossible for some compelling reason." In relation to court-supervised engagement, see *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC); 2011 7 BCLR 723 (CC). Parallel developments have taken place in cases involving other socio-economic rights, such as, for example, the right to an education, in *Governing Body of the Juma Masjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC), where, ultimately, the Constitutional Court granted the eviction order only because, instead of reaching an agreement with the trustees of the property on which the school was situated, the Member of the Executive Council for Education succeeded in making alternative arrangements for the schooling of the affected children. For discussion of this case, see van der Walt "Constitutional property law" 2011 (2) JQR par 2.1.

¹⁵⁷The decision of the high court, *per* Jajbhay J, is reported as *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (1) SA 78 (W), 2006 (6) BCLR 728 (W), hereafter referred to as "*51 Olivia Road (WLD)*". The decision of the Supreme Court of Appeal is reported as *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (6) SA 417 (SCA), 2007 (6) BCLR 643 (SCA), [2007] 2 All SA 459 (SCA), hereafter referred to as "*51 Olivia Road (SCA)*".

¹⁵⁸*51 Olivia Road (WLD)* pars 22, 47.

¹⁵⁹*51 Olivia Road (WLD)* par 57.

Grootboom, and the provision of suitable alternative accommodation.¹⁶⁰ On appeal, the Supreme Court of Appeal held that the City of Johannesburg was entitled to the eviction order¹⁶¹ but because eviction would leave at least some of the respondents without shelter or the resources to secure it, this would trigger the obligation recognised in *Grootboom* to put in place a programme to provide emergency shelter.¹⁶² It therefore ordered the City of Johannesburg to provide temporary accommodation to those evicted persons who were desperately in need of housing assistance.¹⁶³ In an appeal by the occupiers against this decision, within two days of hearing argument in the matter the Constitutional Court issued an interim order, *inter alia*, requiring the City and occupiers to:¹⁶⁴

engage with each other meaningfully ... in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.

A settlement agreement was subsequently reached.¹⁶⁵

In *Port Elizabeth Municipality*, Sachs J stated that courts are required to "infuse elements of grace and compassion into the formal structures of the law" and "to balance competing interests in a principled way".¹⁶⁶ The court held that individualised consideration of people's accommodation needs was required so as to treat everyone

¹⁶⁰ *51 Olivia Road* (WLD) pars 3-4 of the order.

¹⁶¹ *51 Olivia Road* (SCA) par 78. At par 40, it adopted its earlier interpretation of s 26(3), in *Brisley v Drotzky*, that the only "relevant circumstances" to be taken into account are those which are "legally relevant".

¹⁶² *51 Olivia Road* (SCA) pars 5, 47, 76-77.

¹⁶³ *51 Olivia Road* (SCA) par 5; order par 2.1. The court specified that it be waterproof and provide access to basic sanitation, water and refuse services. In addition, in pars 2.3 and 2.4, the court ordered the parties to consult before the location of accommodation was decided upon and it ordered the City to serve on the respondents' attorneys of record and the *amici curiae*, and to file with the registrar, a compliance certificate within four months of the order.

¹⁶⁴ *51 Olivia Road* (CC) par 5; interim order par 1.

¹⁶⁵ For details of the settlement agreement reached as an outcome of the engagement, see Liebenberg *Socio-Economic Rights* 296.

¹⁶⁶ *Port Elizabeth Municipality* par 37, referred to by Liebenberg *Socio-Economic Rights* 350.

with dignity, "care and concern"¹⁶⁷ by holding proper, participative discussions¹⁶⁸ and, where appropriate, making genuine attempts at mediation.¹⁶⁹ Sachs J stated:¹⁷⁰

In a society founded on human dignity, equality and freedom it cannot be presupposed that the greatest good for the many can be achieved at the cost of intolerable hardship for the few, particularly if by a reasonable application of judicial and administrative statecraft such human distress could be avoided.

The decision in *Port Elizabeth Municipality* also established that a court should devise steps to ensure that all relevant information is available to it and that it may adopt an inquisitorial approach, by going beyond the papers placed before it, to establish facts to enable it have regard to "all the relevant circumstances."¹⁷¹ The court stated that one of the "relevant circumstances" was whether there had been an attempt at mediation.¹⁷² It refused to grant the eviction order in the absence of detailed information regarding the circumstances of the occupiers and any meaningful attempt by the parties to mediate and engage in an effort to reach mutually acceptable solutions.¹⁷³

On the other hand, in *Jackpersad NO and Others v Mitha and Others*,¹⁷⁴ applying the reasoning in *Ndlovu v Ngcobo*, the high court adopted the approach that it was for the occupiers to place before the court information about circumstances which were relevant to the exercise of its discretion.¹⁷⁵ Following *Port Elizabeth Municipality*, the court recognised that it was obliged to have regard to the interests and circumstances of

¹⁶⁷ *Port Elizabeth Municipality* par 29, with reference to *Grootboom* par 44. See Liebenberg *Socio-Economic Rights* 276.

¹⁶⁸ *Port Elizabeth Municipality* par 30. Liebenberg *Socio-Economic Rights* 278 states that the need is for "face-to-face engagement" with "equality of voice" for all concerned.

¹⁶⁹ *Port Elizabeth Municipality* pars 39-47. See Liebenberg *Socio-Economic Rights* 276-277 who states that this "reinforces the right of people who face the loss of their home to be heard and have their views taken into account." See also van der Walt *Constitutional Property Law* 2011 521ff.

¹⁷⁰ *Port Elizabeth Municipality* par 29.

¹⁷¹ *Port Elizabeth Municipality* par 32, referred to by Liebenberg *Socio-Economic Rights* 278 who cites, as an example of this, the judgment of Bertelsmann J in *Ritama Investments v Unlawful Occupiers of Erf 62 Wynberg* [2007] JOL 18960 (T). See also van der Walt *Constitutional Property Law* 2011 524.

¹⁷² *Port Elizabeth Municipality* par 45.

¹⁷³ *Port Elizabeth Municipality* pars 58, 59 and 61.

¹⁷⁴ *Jackpersad NO and Others v Mitha and Others* 2008 (4) SA 522 (D), hereafter referred to as "*Jackpersad v Mitha*".

¹⁷⁵ *Jackpersad v Mitha* 528, 531. In this case, the owner of a building had terminated the leases of sixteen lessees, and had given them three months' notice to vacate the property, in order for the building to be demolished so that a neighbouring hospital could be extended. The lessees contended that their eviction would not be just and equitable; see *Jackpersad v Mitha* 524-525, 528-529.

the occupiers, as well as to other broader considerations of fairness and other constitutional values, in order to achieve a just balance between the conflicting interests of the owner and the occupiers. It took into account not only that the applicants had a commercial interest in demolishing the building so that they could extend the neighbouring hospital without delay, but also that the extension of the hospital would be in the broader public interest.¹⁷⁶ The court also considered the personal circumstances of the occupiers including their period of occupation of the building and that most of them were elderly and some were in poor health.¹⁷⁷ The court was not in possession of any information about their financial position or their ability to acquire alternative accommodation but it adopted the approach that this information lay in their exclusive knowledge and that they had chosen not to disclose it to the court.¹⁷⁸ In the result, the court decided that it was just and equitable to grant the eviction order the execution of which it ordered to be delayed for a period of three and a half months.¹⁷⁹

It is submitted that this approach is in stark contrast to that adopted in *51 Olivia Road (CC)* and, more recently, by the Supreme Court of Appeal in *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele*¹⁸⁰ and by the Western Cape High Court in *City of Cape Town v Hoosain NO and Others*.¹⁸¹ In *Shulana Court* (SCA), the high court had granted an eviction order by default judgment against the former lessees¹⁸² who appealed against a refusal by the court *a quo* to grant rescission of judgment. The Supreme Court of Appeal held that the high court had failed to comply with its constitutional obligations. This was because it had granted the eviction order with insufficient information about the personal circumstances of the occupiers and the availability of alternative accommodation. This meant that it had not considered "all the

¹⁷⁶The basis was that it would increase the services which the hospital could provide and that it would create employment for the construction workers, in the short term, and for nursing staff, in the long term; see *Jackpersad v Mitha* 529.

¹⁷⁷*Jackpersad v Mitha* 530.

¹⁷⁸*Jackpersad v Mitha* 530-531.

¹⁷⁹*Jackpersad v Mitha* 534-535.

¹⁸⁰*Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] 4 All SA 54 (SCA), hereafter referred to as "*Shulana Court* (SCA)".

¹⁸¹*City of Cape Town v Hoosain NO and Others* WCHCCT case no 10334/2011 (21 October 2011).

¹⁸²The erstwhile lessees had been in occupation for a number of years. They failed to vacate the premises after the termination of their oral lease agreements by the owner, who intended to renovate the dilapidated buildings.

relevant circumstances" as required by sections 4(6) and 4(7) of PIE.¹⁸³ The Supreme Court of Appeal stated that it was clear, from the scant information that was available to the court *a quo*, that there was a real prospect that eviction would result in homelessness for the poor occupiers. The appeal court stated that it "ought to have been proactive and ... [to] have taken steps to ensure that it was appraised of all relevant information in order to enable it to make a just and equitable decision."¹⁸⁴ It further explained that section 4 of PIE imposed a new, "complex, and constitutionally ordained"¹⁸⁵ role on the courts. This required them "to go beyond ... [their] normal functions, and to engage in active judicial management",¹⁸⁶ to be "innovative", in some instances "to depart from the conventional approach,"¹⁸⁷ and to use their powers to investigate, call for further evidence or make special protective orders.¹⁸⁸

It is submitted that it would be appropriate, in cases where execution against a debtor's home is sought, for courts also to include "elements of grace and compassion" in the balancing of the competing interests. This could occur by taking into account people's accommodation needs and insisting that everyone is treated with dignity and that proper, participative discussions are held and, where appropriate, that genuine attempts at mediation are made. It may be noted that, in *ABSA v Ntsane*, Bertelsmann J departed from the conventional approach and commendably, it is submitted, engaged in active judicial management to ascertain as much as possible of the relevant detail. The court expressed the view that an arbitration process should be available to which a court could refer parties in appropriate circumstances.¹⁸⁹ It is submitted that compulsory mediation would go a long way to achieving the objectives, espoused by the Constitutional Court in *Jaftha v Schoeman and Gundwana v Steko*. These are that

¹⁸³ *Shulana Court* (SCA) par 10. The Supreme Court of Appeal referred, in this regard, to *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd* [2009] 4 All SA 410 (SCA), hereafter referred to as "*Shorts Retreat*", pars 5-6; *Transnet t/a Spoornet v Informal Settlers of Good Hope* [2001] 4 All SA 516 (W); *Ritama Investments v Unlawful Occupiers of Erf 62 Wynberg* [2007] JOL 18960 (T); *Cashbuild (South Africa)(Pty) Ltd v Scott* 2001 1 SA 332 (T).

¹⁸⁴ *Shulana Court* (SCA) par 15.

¹⁸⁵ *Shulana Court* (SCA) par 12, quoting from *Port Elizabeth Municipality* par 13.

¹⁸⁶ *Shulana Court* (SCA) par 12, quoting from *Port Elizabeth Municipality* par 36.

¹⁸⁷ *Shulana Court* (SCA) par 12, quoting from *Shorts Retreat* par 14.

¹⁸⁸ *Shulana Court* (SCA) par 12.

¹⁸⁹ *ABSA v Ntsane* par 98. This case is discussed at 5.5.2, below.

execution against a person's home should occur only as a last resort and that the drastic consequences of persons losing their homes should be avoided by judicial consideration of alternative ways of obtaining satisfaction of the debt.¹⁹⁰

3.3.2 Section 10: Human dignity

In terms of section 10, everyone has inherent dignity and the right to have their dignity respected and protected. The right to dignity is seriously regarded in our jurisprudence¹⁹¹ and the infringement of human dignity will be justifiable only if the limitation in question constitutes the "best method" to protect "the human dignity of others or another interest which is constitutionally accorded similarly singular status".¹⁹² Dignity is also linked to the concept of *ubuntu*.¹⁹³

The right to human dignity constitutes the basis for the protection of all other rights and for this reason, an infringement of human dignity usually occurs within the context of the infringement of other rights.¹⁹⁴ Thus, the right to dignity is inherent in the concept of security of tenure and the right to have access to adequate housing.¹⁹⁵ Execution against a debtor's home may infringe the dignity of the debtor as well as of all persons who are dependent on him such as children, elderly persons and other family members or persons residing with him.¹⁹⁶

Our courts, including the Constitutional Court, have affirmed that the right to dignity also forms the basis of freedom of contract and sanctity of contract, embodied in the

¹⁹⁰ *Gundwana v Steko* pars 53, 54.

¹⁹¹ See, generally, Woolman "Dignity" ch 36; Liebenberg 2005 SAJHR 1.

¹⁹² Rautenbach and Malherbe *Constitutional law* 364-365.

¹⁹³ As discussed at 3.2.2, above. See *S v Makwanyane* pars 224-225; Woolman "Dignity" 36-3 and the works cited there; *51 Olivia Road* (WLD) pars 62-64.

¹⁹⁴ *S v Makwanyane* pars 44, 144 and 328-329; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) par 35. See also Rautenbach "Fundamental Rights" *LAWSA* 10(1) par 333; Rautenbach and Malherbe *Constitutional law* 364ff who refer to *Coetzee v Government* par 10.

¹⁹⁵ See *Grootboom* pars 2, 23, 44 and 83; *Jafftha v Schoeman* pars 21, 24 and 27; *51 Olivia Road* (WLD) par 30. In relation to the relationship between the right to dignity and socio-economic rights, see Woolman "Dignity" 36-58ff; Liebenberg 2005 SAJHR 11-12. See also *Port Elizabeth Municipality* pars 10, 12, 15, 17, 18, 29 and 41-42; *Blue Moonlight Properties* (GSJ) pars 114, 117 and 118; *Blue Moonlight Properties* (SCA) par 67.

¹⁹⁶ *Jafftha v Schoeman* pars 20-21; *ABSA v Ntsane* par 82.

principle *pacta sunt servanda*,¹⁹⁷ which was received into the South African common law via the Roman-Dutch law. This implicates the right to human dignity in a situation where a mortgagee seeks to enforce the terms of the mortgage agreement by executing against the mortgaged property. In relation to the constitutionality of contractual clauses that limit a person's rights, Rautenbach states that "the common law and statutory law that authorise and regulate the conclusion of the contract concerned constitute the law of general application, or more particularly, the outcome of action that was executed in terms of the law of general application."¹⁹⁸ He submits that the court overlooked this in *Barkhuizen v Napier*.¹⁹⁹

3.3.3 Section 28: Children's rights

Section 28 provides for specific rights, applicable to children,²⁰⁰ in addition to the other rights contained in the Bill of Rights. Section 28(1)(b) provides that every child has a right to "family care or parental care"; section 28(1)(c) provides that every child has a right to shelter; and section 28(2) provides that "[a] child's best interests are of paramount importance in every matter concerning the child". The reach of section 28(2) is viewed as extending beyond the rights enumerated in section 28(1) and creating a self-standing right that is independent of those specified in section 28(1).²⁰¹ Thus, whenever a child is dependent upon the debtor and lives in the debtor's home, these rights must be considered.²⁰²

Our courts approach the right to "family care or parental care"²⁰³ from a child-centred perspective.²⁰⁴ For example, where a court was deciding whether to deport a person,²⁰⁵

¹⁹⁷ *Brisley v Drotzky* pars 94-95; *Afrox v Strydom* par 23; *Standard Bank v Saunderson*; *Napier v Barkhuizen* pars 7, 13; *Barkhuizen v Napier* pars 11-15, 24-26, 28, 30 and 57; *Breedenkamp v Standard Bank* par 37; *African Dawn Property Finance v Dreams Travel* pars 15-16; *Woolman* 2007 SALJ 762, 763.

¹⁹⁸ Rautenbach "Introduction to the Bill of Rights" par 1A45. See, also, 3.2.3, above.

¹⁹⁹ See Rautenbach "Introduction to the Bill of Rights" par 1A45, with reference also to Vos 2011 TSAR 287.

²⁰⁰ S 28(3) defines a child as a person under the age of 18 years.

²⁰¹ Friedman, Pantazis and Skelton "Children's Rights" 47-41-47-42.

²⁰² *Grootboom* 76-78. Liebenberg *Socio-Economic Rights* 232ff.

²⁰³ This may be said to fulfil, to some extent, the "right to family life". In *Ex Parte Chairperson of the Constitutional Assembly In Re Certification of the Constitution of the Republic of South Africa Act, 1996*

it considered this right.²⁰⁶ Also, where a custodial sentence was being considered for a criminal offender who was a primary caregiver,²⁰⁷ the Constitutional Court stated that section 28(1)(b), read with section 28(2), required the court "to make best efforts to avoid, where possible, any breakdown of family life or parental care".²⁰⁸ There is controversy as to what is meant by "shelter", in section 28(1)(c).²⁰⁹ However, it is clear, from *Grootboom*, that a child's right to shelter will be dependent on the availability of state resources.²¹⁰ Further, it seems that the state has an indirect duty to create the necessary "legal and administrative infrastructure" for the maintenance of children and their protection from neglect or degradation.²¹¹

Section 28(2) is treated as reiterating the common law concept of the best interests of the child which is applied by the high court as upper guardian of every minor child.²¹² The Constitutional Court has applied this concept to adopt the view that the child's right to proper parental care, provided by section 28(1)(b), imposes an obligation on the state to create the necessary environment for parents to provide proper parental care.²¹³ The "best interests" criteria also arise when a court determines the ambit of another right in the Bill of Rights or when assessing whether the limitation of another right is justified.²¹⁴

1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), the court found that the non-inclusion of the "right to family life" in the final Constitution allowed for flexibility in the recognition of different family forms in a diverse society. See Friedman, Pantazis and Skelton "Children's Rights" 47-8, with reference to Sloth-Nielsen "Children" *The South African Constitution: The Bill of Rights* Davis and Cheadle (eds) 2nd ed 2006 511.

²⁰⁴For example, see *Heystek v Heystek* 2002 (2) SA 754 (T) 757C-D, [2002] 2 All SA 401 (T); *Fv F* 2006 (3) SA 42 (SCA), [2006] 1 All SA 571 (SCA) and *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC), hereafter referred to as "*S v M*".

²⁰⁵In terms of the Aliens Control Act 96 of 1991.

²⁰⁶*Patel v Minister of Home Affairs* 2000 2 SA 343 (D) 350E-F. See Friedman, Pantazis and Skelton "Children's Rights" 47-8.

²⁰⁷*S v M*. See also, more recently, *S v S* 2011 (2) SACR 88 (CC), 2011 (7) BCLR 740 (CC).

²⁰⁸*S v M* par 20.

²⁰⁹See *Grootboom* par 73. Cf *Grootboom v Oostenburg Municipality* 2000 (3) BCLR 277 (C) 293A. See Friedman, Pantazis and Skelton "Children's Rights" 47-10ff.

²¹⁰See *Grootboom* par 74. See Friedman, Pantazis and Skelton "Children's Rights" 47-10-47-18; De Vos 1997 SAJHR 67, 87-88, 93.

²¹¹Liebenberg *Socio-Economic Rights* 241, with reference to *Grootboom* par 78.

²¹²Friedman, Pantazis and Skelton "Children's Rights" 47-40.

²¹³*Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) pars 24-25. See Friedman, Pantazis and Skelton "Children's Rights" 47-41.

²¹⁴For example, in *Hay v B* 2003 (3) SA 492 (W), the court read the child's right to life, together with the right to have the child's best interests considered, as paramount to the parents' right to freedom of religion. See Friedman, Pantazis and Skelton "Children's Rights" 47-41.

As the Constitutional Court has explained, "[c]hild law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case" and "the courts are essentially guarding the best interests of a child, not simply settling a dispute between litigants".²¹⁵ On the other hand, children's best interests may validly be limited as they are not absolute.²¹⁶ In *S v M*, the Constitutional Court stated:²¹⁷

The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely the interests of children who may be concerned.

None of the reported judgments concerning execution against a debtor's home, in the individual debt enforcement process, has dealt specifically with children's rights.²¹⁸ It is submitted that the above considerations, including the impact of homelessness on family life, should be applied when deciding whether to authorise the forced sale of the home of a debtor who has minor children who live with him or who are dependent on him.²¹⁹

3.3.4 Section 25: Property

The reported judgments have not specifically addressed the impact of sale in execution of a debtor's home upon the property rights of the parties involved but reference has been made in a number of cases to a possible infringement of section 25 in this context.²²⁰ Section 25(1) provides that "[n]o one may be deprived of property except in

²¹⁵ *AD v DW (Centre for Child Law, Amicus Curiae)* 2008 (3) SA 183 (CC) par 55. See Friedman, Pantazis and Skelton "Children's Rights" 47-43.

²¹⁶ *S v M* pars 25-26.

²¹⁷ *S v M* par 42.

²¹⁸ Although arguments by the *amici curiae*, in *Standard Bank v Saunderson*, and, on appeal, in *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank Ltd and Another* 2006 (6) SA 103 (CC), included submissions relating to children's rights, these were not alluded to in the reported judgments. Copies of the heads of argument are on file with the author.

²¹⁹ In relation to children's rights in their parent's insolvency, see Stander and Horsten 2008 TSAR 203, discussed in Chapter 6, below.

²²⁰ For example, in *Jaftha v Schoeman*, argument based on s 25 was presented to the Constitutional Court but Mokgoro J found it unnecessary to address it; see 5.2.3, below. In *Standard Bank v*

terms of law of general application, and no law may permit arbitrary deprivation of property." It provides protection against the deprivation of property by state actors and by private actors when exercising statutory rights.²²¹ "Deprivation" of property entails any limitation in respect of acquisition and use of, and control over, property.²²² Since the decision in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance*,²²³ it is clear that every law that deprives a person of property must satisfy the requirements of section 25(1). This means the deprivation must occur in terms of law of general application and the law must not be arbitrary.²²⁴ This qualification overlaps with the general limitation clause. Therefore, in order to determine whether any deprivation is arbitrary, the court takes into account all the factors mentioned in section 36(1).²²⁵

The Bill of Rights does not define property²²⁶ and, in *FNB*, the Constitutional Court viewed it as "practically impossible and judicially unwise" to attempt a comprehensive

Saunderson, the *amici curiae* referred, in their arguments, to, *inter alia*, s 25. Although s 25 was not canvassed in the judgment, Cameron JA did state, at par 2, that a "mortgage bond ... curtails the right of property at its root, and penetrates the rights of ownership, for the bond-holder's rights are fused into the title itself". In *Gundwana v Steko* par 51, the Constitutional Court found it unnecessary, in view of its stance in relation to the effect of s 26 of the Constitution, to deal with the argument, advanced by counsel for the applicant, that the right to property is also implicated when immovable property is declared specially executable.

²²¹Roux "Property" 46-6. See van der Walt *Constitutional Property Law* 2011 57ff on the horizontality of s 25. In relation to the debate whether it extends protection against a person acting in terms of the common law, see Roux "Property" 46-6 who refers to van der Walt *The Constitutional Property Clause* 106 and De Waal, Currie and Erasmus *The Bill of Rights Handbook* 4th ed 2001 412; van der Walt *Constitutional Property Law* 2011 63-66.

²²²*First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* pars 58, 100. See further Rautenbach and Malherbe *Constitutional law* 384; van der Walt *Constitutional Property Law* 2011 Chapter 4. See also Mostert and Badenhorst "Property and the Bill of Rights".

²²³*First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 4 SA 768 (CC) (hereafter referred to as "*FNB*"). For discussion of this case, see Roux "Property" 46-20.

²²⁴Roux "Property" 46-20-46-21 states that this means that the focus of the s 25(1) inquiry will fall on a law rather than any other type of state action and that administrative action that deprives a person of property without being authorised by a law of general application will be reviewable under the Promotion of Administrative Justice Act 3 of 2000 and, possibly, also under s 33 of the Constitution.

²²⁵*FNB* par 100. See Rautenbach and Malherbe *Constitutional law* 384 who criticise the judgment in *FNB* in relation to the difference, and overlap, between "arbitrariness" in s 25 and "proportionality" in the limitation clause. See also van der Walt *Constitutional Property Law* 2011 73ff.

²²⁶Except for providing, in s 25(4)(b), that it is not limited to land.

definition of property.²²⁷ However, not only the debtor's rights of ownership come under consideration in relation to section 25 but also the security rights of a mortgagee²²⁸ and, possibly, the right of a judgment creditor in respect of an unsecured claim.²²⁹ Although an argument may be raised for a debtor's housing rights to be regarded as a form of property, this would seem unlikely to succeed, given the protection expressly afforded by section 26.²³⁰ Section 25(4) provides that, for the purposes of this section, "the public interest includes the nation's commitment to land reform"²³¹ and that "property is not limited to land".²³² Section 25(5) places a general duty upon the state to take reasonable legislative and other measures within its available resources "to foster conditions which enable citizens to gain access to land on an equitable basis".²³³ Section 25(6) places a specific duty upon the state to provide, in legislation, for security of tenure or comparable redress for "[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices."²³⁴

Thus, section 25 may be viewed as consisting of two parts: the first, protecting existing property rights; and the second, authorising and mandating property law reform including aspects of land reform and security of tenure.²³⁵ Van der Walt explains how this has brought about a close relationship between section 25 and section 26 of the

²²⁷ *FNB* par 51. The court referred to *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) par 72 where it was stated that "no universally recognised formulation of the right to property exists". See also Roux "Property" 46-10.

²²⁸ Van der Walt *Constitutional Property Law* 2011 140; Roux "Property" 46-13.

²²⁹ By virtue of a *pignus judiciale*; see 2.2.5.1, above. See, further, van der Walt *Constitutional Property Law* 2011 151, 160, 188.

²³⁰ See van der Walt *Constitutional Property Law* 2011 127, 138, 143, 168, 183, 188-189 who also submits that socio-economic or "new property" interests are unlikely to be protected or adjudicated in terms of the property clause). See also Roux "Property" 46-15-46-17.

²³¹ S 25(4)(a).

²³² S 25(4)(b).

²³³ Examples are the Land Reform (Labour Tenants) Act 3 of 1996 and the Communal Property Associations Act 28 of 1996. See also van der Walt *Constitutional Property Law* 2011 21.

²³⁴ An example of legislation envisaged in s 25(6) is the Land Reform (Labour Tenants) Act 3 of 1996, the Extension of Tenure Act 62 of 1997, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 18 of 1998 (PIE) and the Interim Protection of Informal Land Rights Act 31 of 1996. See van der Walt *Constitutional Property Law* 2011 21; Rautenbach and Malherbe *Constitutional law* 385; Rautenbach "Fundamental Rights" *LAWSA* 10(1) par 348 who points out, with reference to *Grootboom* par 42, that reasonable legislative measures must be supported by appropriate, well-directed policies and programmes implemented by the executive.

²³⁵ See van der Walt *Constitutional Property Law* 2011 12.

Constitution.²³⁶ As discussed above,²³⁷ section 26(3) and the provisions of PIE place limitations on rights of ownership by permitting the owner to evict unlawful occupiers only in accordance with substantive and procedural restrictions that take into account the personal, social and economic circumstances of the occupiers.²³⁸ Van der Walt explains how the decision in a number of the leading cases decided on the basis of section 26, including *Port Elizabeth Municipality* and *Jaftha v Schoeman*, are capable of explanation and justification in terms of section 25(1).²³⁹ With reference to *Port Elizabeth Municipality*, he states that, in "the historical and constitutional context, the protection of property rights and the protection of a person's home are equally important ... [and it is therefore] necessary to establish an appropriate constitutional relationship between section 25 ... [and] section 26 ...".²⁴⁰

The question may be raised whether the judgment in *Shulana Court (SCA)*²⁴¹ effectively imposes an additional burden upon the owner of property by requiring a court to ensure, before it may grant an eviction order, that it is apprised of the personal circumstances of all of the occupiers, and details of alternative accommodation available to them. The reality is that it will be up to the owner to obtain, and to present, the required, detailed, information to place the court in a position to consider granting an eviction order. Concern has been expressed that the effect of this decision will have wider, adverse

²³⁶Van der Walt *Constitutional Property Law* 2011 30, 54-55, 521ff. See *Port Elizabeth Municipality* par 19.

²³⁷See 3.3.1.4 (b), above.

²³⁸Van der Walt *Constitutional Property Law* 2011 521ff. See *Ndlovu v Ngcobo; Port Elizabeth Municipality; President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC), hereafter referred to as "Modderklip (CC)"; *Shorts Retreat; Residents of Joe Slovo Community, Western Cape v Thubelisha Homes, Minister for Housing and Minister of Local Government and Housing, Western Cape (Centre on Housing Rights and Evictions and Community Law Centre, University of the Western Cape as amici curiae)* [2009] ZACC 16, 2009 (9) BCLR 847 (CC); *51 Olivia Road (CC)*; *Blue Moonlight Properties (GSJ); Shulana Court (SCA)*.

²³⁹See van der Walt *Constitutional Property Law* 2005 161; van der Walt *Constitutional Property Law* 2011 521.

²⁴⁰Van der Walt *Constitutional Property Law* 2011 297, with reference to *Port Elizabeth Municipality* pars 19, 23. Van der Walt *Constitutional Property Law* 2005 161-162 observes that, in *Port Elizabeth Municipality*, the Constitutional Court emphasised that the rights of ownership and the interests of unlawful occupiers must be balanced in an individualised, non-hierarchical, context-sensitive manner and that, in *51 Olivia Road (WLD)* par 30, the high court pointed out, with reference, in turn, to *Jaftha v Schoeman* par 30, that eviction is not simply a matter of property but also one of dignity and poverty. See also van der Walt *Property in the Margins* 159-160; van der Walt *Constitutional Property Law* 2011 521ff.

²⁴¹See 3.3.1.4 (d), above.

implications for investment in, and the value of, property in South Africa.²⁴² A measure of controversy²⁴³ has emerged since similar concerns were expressed, in a more recent judgment, by Willis J who stated:²⁴⁴

... [financial institutions] and others in comparable situations such as banks will have to ponder the security of a mortgage bond – hitherto considered as "good as gold" provided there was a comfortable positive margin between the value of the property and the amount lent.

...

... [O]ne does not make housing more widely available by rendering the ownership of property which is let to tenants a serious economic hazard. ... Why buy or build housing to let to tenants, if the fundamental link between tenancy and the payment of rentals to landlords is undermined? Why invest in property if there is a serious risk that the "investment" will be worthless?

Referring to *Grootboom* and *Port Elizabeth Municipality*, Willis J concluded that, ultimately, an eviction order is the only legal remedy effectively available for the unlawful occupation of property and, although exercised with compassion, grace and an awareness of human dignity, the making of the order, even if it were to be postponed, is unavoidable.²⁴⁵ Willis J further expressed concern about a single judge ordering the government to provide alternative accommodation and stressed the need for clarity.²⁴⁶

Van der Walt presents a more rational, it is submitted, account of a shift from a rights-based perspective to one which considers the need for social and economic justice. He does, however, recognise that the rights paradigm still dominates "the rhetoric, logic and doctrine of the law" and, in this sense, "still exercises a stabilising effect that can inhibit

²⁴² See Kok 2010 *Realestateweb* (1 April 2010) http://www.residential-property.co.za/1743_news_Court-ruling-could-have-dire-consequences-for-property-owners.html [date of use 15 March 2012].

²⁴³ See Motala "Sorting one judge's opinion from the law of the land" *Sunday Times* South Africa (15 May 2010) <http://www.timeslive.co.za/sundaytimes/article451180.ece/Sorting-one-judges-opinion-from-the-law-of-the-land> [date of use 15 March 2012], who comments that "it is not the function of a judge to evaluate economic success or to legislate his or her economic world view. This is a policy decision that falls on the democratically elected organs of government." Cf Grootes "Analysis: Property rights in SA, not to be messed with" *The Daily Maverick* South Africa (11 May 2010) <http://dailymaverick.co.za/article/2010-05-11-analysis-property-rights-in-sa-not-to-be-messed-with> [date of use 15 March 2012], who sees some truth in it the remarks of Willis J.

²⁴⁴ *Emfuleni Local Municipality v Builders Advancement Services* CC 2010 (4) SA 133 (GSJ), hereafter referred to as "*Emfuleni v Builders Advancement Services*", pars 14-15 and 19, with footnotes omitted.

²⁴⁵ *Emfuleni v Builders Advancement Services* par 28.

²⁴⁶ *Emfuleni v Builders Advancement Services* par 28-31.

reforms of the property regime."²⁴⁷ He observes that "stability ... creates trust and encourages investment of resources and effort in the acquisition, development and useful exploitation of property".²⁴⁸ It is submitted that the desired stability would be more easily achieved if clearer analysis were provided of the substantive and procedural requirements and the specific criteria to be applied by a court in the process of balancing property, including real security and housing rights, in cases where execution against a person's home is sought. With reference, *inter alia*, to "the principles regulating sale in execution of a home", van der Walt has urged that a re-evaluation of the common law should be conducted.²⁴⁹ He anticipates that "[n]ew legislation may be required to bring about the necessary reforms and changes in some areas." It is my submission that this is surely one of them.

3.3.5 *The right to life, the right to equality, and the right of access to courts*

Section 11 of the Constitution provides that "[e]veryone has the right to life". This encompasses a broad conception of "life".²⁵⁰ Read with the state's duty, in terms of section 7(2) of the Constitution, to "respect, protect, promote and fulfil the rights in the Bill of Rights", the right to life imposes upon the state "a duty to create conditions to enable all persons to enjoy the right".²⁵¹ This includes "material means and access to social goods" necessary for the enjoyment of life.²⁵² Therefore, the state is under a duty to satisfy the socio-economic dimensions of the right to life²⁵³ which may be viewed as overlapping with, or affirming, its obligations in terms of section 26 of the Constitution.

In *51 Olivia Road (WLD)*, homelessness was stated to have "a very wide reach ... [in that it] affects the very quality of a person's life, dignity and a person's freedom and

²⁴⁷Van der Walt *Property in the Margins* 160-161.

²⁴⁸Van der Walt *Property in the Margins* 215.

²⁴⁹Van der Walt *Constitutional Property Law* 2011 528.

²⁵⁰See, generally, Pieterse "Life" ch 39. In *S v Makwanyane* par 326, O'Regan J explained it as, *inter alia*, "the right to live as a human being, to be part of a broader community, to share in the experience of humanity."

²⁵¹*Per* Sachs J in *S v Makwanyane* par 353.

²⁵²Pieterse "Life" 39-17.

²⁵³See Pieterse "Life" 39-17 n 5.

security."²⁵⁴ The court regarded eviction of the occupiers as potentially affecting their right to life as they would lose their informal employment in the inner city, if they were relocated, and this would mean the loss of their livelihood, their right to dignity and "perhaps even their right to life ... [as t]o work means to eat and consequently to live."²⁵⁵ On appeal, in the same matter, the Constitutional Court held that the City of Johannesburg had an obligation to fulfil the objectives mentioned in the preamble to the Constitution to "[i]mprove the quality of life of all citizens and free the potential of each person" and, in terms of section 7(2) of the Constitution, to respect, protect, promote and fulfil the rights in the Bill of Rights. In the circumstances, it identified the right to human dignity and the right to life as the most important of these rights. Thus, a municipality's ejection of persons from their homes without meaningful engagement was regarded as conduct which was "broadly at odds with the spirit and purpose of the constitutional obligations" taken together.²⁵⁶

Section 9(1) of the Constitution provides that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law". The right to equality featured in *Blue Moonlight Properties* (SCA) where the Supreme Court of Appeal declared that the City of Johannesburg's housing programme was unconstitutional in light of section 9(1). This was because it provided temporary emergency accommodation only to "persons evicted from privately-owned unsafe buildings by the City itself, acting in terms of s 12(6) of the National Building Regulations and Building Standards Act, and [not to] those evicted from privately-owned buildings (which are not necessarily, but could be, dangerous buildings) by private landowners."²⁵⁷ The Supreme Court of Appeal reasoned that the policy was inflexible because it included one "category" of evicted persons while excluding entirely another "category" where both were "desperately poor and ... in a crisis ... without concerning itself with any other personal circumstances of those to be evicted."²⁵⁸ The court found this inflexibility to be irrational and arbitrary,

²⁵⁴ *51 Olivia Road* (WLD) par 1.

²⁵⁵ *51 Olivia Road* (WLD) par 64.

²⁵⁶ *51 Olivia Road* (CC) par 16.

²⁵⁷ *Blue Moonlight Properties* (SCA) par 57.

²⁵⁸ *Blue Moonlight Properties* (SCA) par 59.

thus rendering the policy unconstitutional.²⁵⁹ This finding was confirmed by the Constitutional Court.²⁶⁰

It is submitted that, arguably, a housing policy which restricts state housing assistance to first-time homeowners²⁶¹ in like manner infringes the right to equality by ignoring the housing needs of debtors, including erstwhile mortgagees, whose homes have been sold in execution and who are "desperately poor and find themselves in a crisis". It is submitted that this may also found the contention that an equivalent level of statutory protection ought to be available to a debtor whose home is sold in execution, regardless of whether or not he "holds over". The argument could possibly be extended even further to submit that, for similar reasons, there should not be different treatment in insolvency.

Section 34 of the Constitution provides that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair, public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." Courts have stated that section 34 protects the public interest in the prevention of self-help.²⁶² However, because section 34 primarily protects the private interests which a person wishes to assert in disputes, matters concerning section 34 rights usually involve issues concerning the violation of other constitutional rights.²⁶³ Section 34 applies horizontally to the extent that private persons are under a duty not to interfere with the exercise of another's access to courts.

²⁵⁹ *Blue Moonlight Properties* (SCA) par 56-66.

²⁶⁰ *Blue Moonlight Properties* (CC) pars 84-95.

²⁶¹ For discussion of the National Housing Code, see 4.2, below.

²⁶² *Chief Lesapo* pars 18, 20; *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa*; *Sheard v Land and Agricultural Bank of South Africa* 2000 (3) SA 626 (CC), 2000 (8) BCLR 876 (CC) par 6; *Modderklip* (CC) par 45. See Rautenbach and Malherbe *Constitutional law* 391; Brickhill and Friedman "Access to Courts" ch 59.

²⁶³ Rautenbach and Malherbe *Constitutional law* 391-392. See, for example, the statement, in *FirstRand Bank v Folscher* par 14, that "[t]he protection afforded to owners and occupiers of their dwellings in section 26 is rooted in section 34 of the Constitution". *FirstRand Bank v Folscher* is discussed at 5.6.4, below.

The state is under a positive duty to establish courts and other tribunals or forums and to provide for their proper functioning as well as to provide legislative frameworks and procedures and the infrastructure for execution of court orders.²⁶⁴ This is illustrated by *Modderklip* (CC), where the Constitutional Court based its decision on the rule of law²⁶⁵ and the resultant duty of the state to provide the necessary mechanisms for citizens to resolve disputes that arise between them, as well as its corollary reflected in the right of access to courts provided for in section 34.²⁶⁶ It concluded that the duty on the state is to provide "effective relief".²⁶⁷ In the context of forced sale of a debtor's home, it is submitted that the rule of law and section 34 may found an argument to support a call for legislation to create the necessary infrastructure and co-ordinated mechanisms. This would be to provide effective relief for mortgagees, in the enforcement of their real security rights, and debtors, including mortgagors, in protection of their existing access to adequate housing.

Because there are limits to state resources, "access to courts" is not interpreted to include "access to justice". As Currie and De Waal state, "[t]his is unfortunate, since the biggest single impediment to access to justice is the prohibitive cost of litigation."²⁶⁸ Ironically, an argument, based on access to courts, that only a court should decide whether a debtor's, including a mortgagor's, home may be sold in execution, surely means increased cost to the litigants. It is submitted that a more pressing issue, in this context, is access to justice, well illustrated, it is submitted, by the facts of cases such as *January v Standard Bank of South Africa Ltd*,²⁶⁹ *FirstRand Bank Ltd v Meyer*,²⁷⁰ and

²⁶⁴Rautenbach "Fundamental Rights" *LAWSA* 10(1) par 355: Rautenbach and Malherbe *Constitutional law* 392. See *Modderklip* (CC) par 41.

²⁶⁵S 1(c) of the Constitution refers to the "[s]upremacy of the constitution and the rule of law" as some of the values that are foundational to our constitutional order.

²⁶⁶*Modderklip* (CC) pars 39-51. See van der Walt *Constitutional Property Law* 2005 369 who, at the time of writing, identified new initiatives emerging via arguments based on the state's duty to provide suitable and efficient remedies for the enforcement and protection of rights as set out in s 34.

²⁶⁷*Modderklip* (CC) par 51.

²⁶⁸Currie and de Waal *Bill of Rights Handbook* 708-709. For a media article on the prohibitive cost of litigation, see Jooste "Cost bars public access" *Financial Mail* South Africa (2 March 2011) <http://www.fm.co.za/Article.aspx?id=136035> [date of use 15 March 2012].

²⁶⁹*January v Standard Bank of South Africa Ltd* (2235/2008) [2010] ZAECGHC 6 (28 January 2010), discussed at 5.5.4.7, below.

²⁷⁰*FirstRand Bank Ltd v Meyer* ECPE Case no 3483/10 [2011] (17 March 2011), discussed at 5.5.4.6, below.

Gundwana v Steko.²⁷¹ It is submitted that a clear, streamlined, process is required so that judicial oversight and the balancing of the various rights by courts occur with optimal efficiency and effectiveness in every case with minimal cost to all concerned parties.

3.4 Conclusion

The Constitution, with its Bill of Rights, brought about significant changes to our jurisprudence and legal system. The permeating effect of the Constitution is evident in the provisions which regulate its application. Section 8(1) provides that the Bill of Rights "applies to all law, and binds the legislature, the executive, the judiciary and all organs of state." In terms of section 8(2), the Bill of Rights also "binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."²⁷² In *Jaftha v Schoeman*, the right of a person not to be deprived of existing access to adequate housing was held to bind private persons.²⁷³ In terms of section 8(3), where no legislation, or existing common-law rule, applies to give adequate effect to a right or where a common law rule is deficient, the court is obliged to develop the common law to give effect to the right. Further, section 39(2) provides that, when interpreting any legislation and when developing the common law, a court "must promote the spirit, purport and objects of the Bill of Rights." This means that, even where the Constitution does not have direct application, "the values and principles encapsulated in section 39(2)" should clearly influence how the matter will be resolved.²⁷⁴

Section 39(1)(a) requires a court, when interpreting the Bill of Rights, "to promote the values that underlie an open and democratic society based on human dignity, equality and freedom." The duty to *promote* emphasises that "transformative constitutionalism" and "a socially interconnected and embodied concept of humanity" are envisaged. The

²⁷¹For discussion of which, see 5.6, below.

²⁷²See 3.2.1, above.

²⁷³See 3.3.1.2, above.

²⁷⁴See 3.2.1, above.

Constitutional Court has recognised the significance of *ubuntu*, in this context, as one of the values that section 39(1) requires to be promoted.²⁷⁵

The Constitution has impacted fundamentally on the position in relation to the sale in execution of a debtor's home in the individual debt enforcement process. The combined effect of the judgments in *Jaftha v Schoeman* and in *Gundwana v Steko* is that the Constitutional Court recognised that the sale in execution of a debtor's home, including where it has been mortgaged in favour of the creditor,²⁷⁶ may unjustifiably infringe his right to have access to adequate housing, protected by section 26(1) of the Constitution. It held that judicial oversight is required in every matter in which it is sought to execute against a person's home in order to determine whether, in terms of section 36 of the Constitution, execution is justifiable in the circumstances.²⁷⁷

The right to have access to adequate housing must be viewed in its broader context as a justiciable socio-economic right. Section 26(2) of the Constitution provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of every person's right to have access to adequate housing, recognised in section 26(1). In *Grootboom*, the Constitutional Court held that this imposed on the state a qualified, positive obligation to devise comprehensive programmes capable of facilitating the realisation of the right. It envisaged that, over time, the state should lower legal, administrative, operational and financial hurdles so that housing is made more accessible not only to a larger number but also to a wider range of people as time progresses. It also held that section 26(1) places a negative duty on the state and private persons to desist from preventing or impairing the right of access to adequate housing.²⁷⁸

"Progressive realisation" of the right to have access to adequate housing logically entails not only providing currently homeless persons with access to adequate housing

²⁷⁵See 3.2.2, above.

²⁷⁶See 3.3.1.1, above.

²⁷⁷See 3.2.3 and 3.3.1.1, above.

²⁷⁸See 3.3.1.2, above.

but also minimising the number of people who become homeless. "Progressive realisation" should be viewed as entailing the minimisation of the number of homeowners who lose ownership and, in the process, their existing access to housing, bearing in mind also that, should they be rendered homeless, they will increase the burden on the state by requiring it to provide for their housing needs. As acknowledged in *Ndlovu v Ngcobo*, even erstwhile mortgagors are vulnerable to homelessness if they lose their home through forced sale.²⁷⁹ "Retrogressive measures" in the form of law or conduct which leads to a decline in living and housing conditions may be regarded as a breach of the negative duty to desist from preventing or impairing the right of access to adequate housing.²⁸⁰

The state also has a duty, in terms of section 7(2) of the Constitution, to "respect, protect, promote and fulfil" the rights in the Bill of Rights.²⁸¹ Besides the debtor's right to have access to adequate housing, other constitutional rights potentially affected by the forced sale of a debtor's home include his and his dependants' right to dignity,²⁸² the rights of any children who reside with him²⁸³ and the right to property.²⁸⁴ In *Gundwana v Steko* and subsequent high court judgments, connections have been made and analogies drawn between the forced sale of a debtor's home and the eviction of a person from his home.²⁸⁵ Therefore, constitutional rights which have featured in eviction cases, including the right to life, the right to access to courts and the right to equality,²⁸⁶ may also be pertinent. However, constitutional rights are not absolute.²⁸⁷ This is obvious, for example, when one considers the competing rights of persons other than the debtor and his family, in the context of execution against the home. The forced sale of a debtor's home usually involves a contractual relationship between the creditor and the debtor, and, where the home has been mortgaged, the real security rights of the

²⁷⁹ See 3.3.1.4 (b), above.

²⁸⁰ See 3.3.1.2, above.

²⁸¹ See 3.2.1, above.

²⁸² See 3.3.2, above.

²⁸³ See 3.3.3, above.

²⁸⁴ See 3.3.4, above.

²⁸⁵ See 3.3.1.4, above.

²⁸⁶ See 3.3.5, above.

²⁸⁷ See 3.2.3, above.

creditor. Thus the creditor's rights to dignity, inherent in his right to enforce a contract, as recognised in the common law maxim *pacta sunt servanda*, and property rights, may be infringed.²⁸⁸ These are at direct variance with the debtor's and his dependants' rights. Where the refusal to permit execution against debtors' homes is perceived as a failure to uphold contractual, or real security, rights, this has the potential to affect broader, commercial, economic and even property interests of individuals.²⁸⁹ On the other hand, allowing execution against debtors' homes in circumstances where they are thereby rendered homeless places a burden on the state and, indirectly, society.²⁹⁰ Housing, and the concept of home, are highly emotive issues, but, on the other hand, so are commercial and financial interests, property and capital investments. It is within this context that a court must carry out the balancing exercise which is required by section 36(1) of the Constitution. This is to determine whether, in the particular circumstances of the case, execution against a debtor's home would be an infringement of the debtor's right to have access to adequate housing which is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.²⁹¹

Constitutional limitation analysis and proportionality assessment entail a complicated, nuanced, two-stage process. The arbitrary nature of the positive-negative obligations dichotomy, in relation to socio-economic rights, and the fact that positive duties imposed by such rights are subject to "reasonableness review" whereas the negative duties are subject to the limitation clause, in section 36 of the Constitution, further complicates matters.²⁹² Commentators have noted that, in practice, reported judgments often reflect confusion, as far as the applicable terminology is concerned, with resultant incorrect application of the criteria and required process. One cannot anticipate such a sophisticated level of constitutional and limitation analysis and expertise from lower

²⁸⁸See 3.3.1.3, 3.3.2 and 3.3.4, above.

²⁸⁹See 3.3.1.4 (a), above.

²⁹⁰See 3.3.3.1 and 3.3.1.2, above.

²⁹¹See 3.2.3, above.

²⁹²See 3.2.3 and 3.3.1.2, above.

courts, practitioners, creditors, debtors, or advice centre staff who do not necessarily have specialised constitutional litigation knowledge and skills.²⁹³

A right may be limited only in terms of law of general application and, to have this quality, the law must be sufficiently accessible and precise for those who are affected by it to be able to ascertain the extent of their rights and obligations in order to conduct themselves accordingly. Commentators have called for a more structured, rigorous, sequential enquiry and clearly articulated rules to facilitate everyone's anticipation of what limitations would or would not pass constitutional muster and their understanding of how to adapt their actions accordingly. It would also facilitate the application of limitation analysis by the lower courts.²⁹⁴

Another concern which has been expressed is that outcomes often reflect unavoidable, subjective influences of judicial officers. Further, the courts' often over-cautious, casuistic, incrementalist approach stifles the transformative potential of the Constitution.²⁹⁵ In the absence of legislation, section 39(2) of the Constitution requires a court to interpret and develop the common law in such a way as to promote the spirit, purport and objects of the Bill of Rights. However, development of the common law is slow due to its casuistic occurrence and an apparent reluctance on the part of the judiciary to develop contract law and property law principles more liberally in favour of constitutional values. It is therefore submitted, along with a number of academic commentators, that there is a need for the enactment of specific legislation to regulate the forced sale of a debtor's home.²⁹⁶

Analogies may be drawn between eviction cases and cases in which execution is sought against a person's home. Developments and solutions achieved, as reflected in reported judgments in eviction cases, provide useful pointers for approaches which may

²⁹³ See 3.3.1.2, above.

²⁹⁴ See 3.2.3 and 3.3.1.2, above.

²⁹⁵ See 3.2.3 and 3.3.1.2, above.

²⁹⁶ See 3.2.3, 3.3.1.2, 3.3.1.3 and 3.3.4, above.

be followed in cases where the forced sale of a person's home is in issue.²⁹⁷ PIE, a statute containing substantive and procedural requirements, was enacted specifically to regulate evictions of persons from their homes.²⁹⁸ Examination of reported judgments in eviction cases provides valuable insights into the courts' construction of "relevant circumstances", for the purposes of section 26(3) of the Constitution and section 4 of PIE.

In *Brisley v Drotzky*, the Supreme Court of Appeal held that, for the purposes of section 26(3) of the Constitution, only *legally* relevant circumstances could be taken into account and these did not include the personal circumstances of the lessee facing eviction.²⁹⁹ Now it is clear, from the Constitutional Court's judgments, in *Port Elizabeth Municipality* and *51 Olivia Road (CC)*, that "relevant circumstances" are not confined to legal grounds justifying an eviction under the common law. It is submitted this would also be the position in cases where an execution order is sought against a debtor's home. The explanation, in *Gundwana v Steko*, of the nature of the evaluation which is required tends to suggest that personal circumstances of the debtor should also be considered.³⁰⁰

A clear development has been that courts commonly require parties to engage meaningfully with one another before they are prepared to adjudicate upon an application for eviction. An example of this may be seen in *Port Elizabeth Municipality* where the Constitutional Court regarded as a "relevant circumstance" that there had been no attempt at mediation. Reported judgments also reflect that courts have granted interim orders directing that "meaningful engagement" should take place. This has been done with a view to achieving a balanced, mutually satisfactory resolution of conflicting rights and interests. This is reminiscent of the recommendation of Bertelsmann J, in *ABSA v Ntsane*, that banks should be required to submit to an arbitration process, where appropriate, before they may approach a court for an order for execution against

²⁹⁷ See 3.3.1.4, above.

²⁹⁸ See 3.3.1.4 (b), above.

²⁹⁹ See 3.3.1.4 (a), above.

³⁰⁰ See 3.3.1.4 (a), above, with reference to *Gundwana v Steko* pars 43, 49 and 50, also discussed at 5.6.2, below.

a person's home.³⁰¹ The introduction of a requirement of "meaningful engagement", or a compulsory mediation process, would provide an avenue for achieving the position, as espoused by Mokgoro J in *Jafftha v Schoeman*, that execution against a person's home should occur only as a last resort.³⁰²

The Constitutional Court's decision in *Port Elizabeth Municipality* also establishes precedent for a court to devise steps to ensure that all relevant information is available to it and to adopt an inquisitorial approach, going beyond the papers placed before it, to establish facts to enable it have regard to "all the relevant circumstances." A similar approach was adopted in *51 Olivia Road (CC)* and in *Shulana Court (SCA)*. Notably, in *Shulana Court (SCA)*, the Supreme Court of Appeal held that the court *a quo* had failed to comply with its constitutional obligations by granting an eviction order with insufficient information about the personal circumstances of the occupiers, and the availability of alternative accommodation, for it to have considered "all the relevant circumstances", as required by sections 4(6) and 4(7) of PIE. The Supreme Court of Appeal stated that the scant information that was available to the court *a quo* made it clear that there was a real prospect that eviction would result in homelessness for the poor occupiers. The appeal court stated that the court *a quo* should have proactively taken steps to ascertain all relevant information in order to enable it to make a just and equitable decision. The Supreme Court of Appeal stated that section 4 of PIE imposed a new, "complex, and constitutionally ordained" role on the courts which required them "to go beyond ... [their] normal functions, and to engage in active judicial management", to be "innovative", in some instances "to depart from the conventional approach," and to use their powers to investigate, call for further evidence or make special protective orders.³⁰³ This, too, is reminiscent of the approach adopted by Bertelsmann J in *ABSA v Ntsane*.³⁰⁴

In line with the Constitutional Court's direction, in eviction cases, for elements of grace and compassion to be infused into the formal structures of the law, courts have stated

³⁰¹ See 3.3.1.4 (d), with reference to *ABSA v Ntsane*, also discussed at 5.5.2, below.

³⁰² See 3.3.1.4 (d), above.

³⁰³ See 3.3.1.4 (d), above.

³⁰⁴ See 3.3.1.4 (d), above, with reference to *ABSA v Ntsane*, also discussed at 5.5.2, below.

that what is required is individualised consideration of occupiers' personal circumstances, including their accommodation needs, treating everyone with dignity, care and concern.³⁰⁵ For example, in *ABSA v Murray*, the court took into consideration the personal circumstances of the erstwhile mortgagors who were "holding over" after their home had been sold to the mortgagee in a public auction held at the instance of the trustee of their insolvent estate. As also occurred in *ABSA v Murray*, courts are prepared to postpone the execution of the eviction order for a period of time which is reasonable in the circumstances, in order to render the granting of the eviction order just and equitable. In the same vein, it is submitted that it may be appropriate for a court to postpone the forced sale of a debtor's home in order for arrangements to be made for alternative accommodation. It may be noted that in *Standard Bank v Saunderson* it was anticipated that a court might delay execution where there is a real prospect that the debt might yet be paid.³⁰⁶ In light of the fact that the object of execution would be to obtain payment of the debt out of the proceeds of the sale, it is submitted that execution could just as well be delayed to allow a debtor, including an erstwhile mortgagor, a reasonable period in which to arrange alternative accommodation. As things stand, a court could justify an order postponing a sale in execution on the basis that it is just and equitable in terms of section 172(1)(b) of the Constitution.³⁰⁷

Where appropriate, courts have postponed the execution of eviction orders pending the provision of accommodation by the relevant organ of state, as occurred in *Blue Moonlight Properties*. In this case, the Supreme Court of Appeal granted the occupiers a period of two months to vacate the property and confirmed the order of the court *a quo* for the municipality to provide temporary emergency accommodation to specific occupiers identified in the court papers, and those persons occupying through them, until they could participate in a permanent housing programme. Further, it confirmed the declaration that the municipality's emergency housing programme was unconstitutional, in terms of section 9(1) of the Constitution, on the basis that it was discriminatory for providing temporary emergency accommodation only to persons evicted from privately-

³⁰⁵See 3.3.1.4 (d), above.

³⁰⁶See 3.3.1.4 (b), above.

³⁰⁷See 3.3.1.4 (b), above.

owned unsafe buildings by the municipality itself, and not to persons evicted from privately-owned buildings by private landowners. The court regarded the policy as inflexible, irrational and arbitrary because it included one category of desperately poor, evicted persons who found themselves in a crisis while entirely excluding another without concerning itself with any other personal circumstances of those to be evicted. The decision was confirmed by the Constitutional Court which granted the occupants a period of four and a half months to vacate the property and granted the City of Johannesburg a period of four months to provide accommodation to those who needed it.³⁰⁸

This raises the issue whether, in all matters concerning the forced sale of a debtor's home, the court ought to enquire into the personal housing needs of debtors, including erstwhile mortgagors, and insolvent debtors, when assets are being liquidated in terms of the Insolvency Act, lest the process should otherwise also be regarded as discriminatory. These debtors could very well be desperately poor and "in a crisis" and vulnerable to homelessness. Further, if the forced sale of the home would affect any children, their interests must be regarded as being of paramount importance, in terms of section 28(2) of the Constitution. Children's rights are an issue which require attention, not yet having featured in any of the reported judgments concerning execution against a debtor's home in the individual debt enforcement process. The state ought also to be regarded as being under a duty, albeit qualified, to provide temporary housing to debtors and their families, in such circumstances, pending their inclusion in a formal housing programme.³⁰⁹

In the result, it is submitted that there is a need for clear substantive and procedural requirements to be applied uniformly in cases where the forced sale of the home of a debtor, including an erstwhile mortgagor or an insolvent person, is sought. Ideally, there should be meaningful engagement between the parties and, if no settlement can be reached, factors to be taken into account by a court should be explicit. There should be

³⁰⁸See 3.3.1.4 (c), above.

³⁰⁹See 3.3.1.4 (c), above.

clear guidelines as to how a court should exercise its discretion in balancing the various parties' constitutional rights with the view to allowing the forced sale of the home only as a last resort. Where sale of the home is unavoidable, and its effect would be to render homeless the debtor and his family and other dependants, the state should provide accommodation, albeit temporary, pending their integration into formal housing programmes or the making of more permanent arrangements.

It is submitted that it is already clear, from this chapter, that legislative intervention may be required. The advantages of special legislation are evident in relation to the Promotion of Access to Information Act 2000 and the Promotion of Administrative Justice Act 2000 which enhanced the adjudication process in matters concerning, and the level of protection of rights conferred by, sections 32 and 33 of the Constitution.³¹⁰ It is submitted that the duty which section 26(2) imposes on the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of section 26(1) rights requires it, in the circumstances, to enact appropriate legislation. Uniform statutory regulation of treatment of the home of a debtor would provide greater clarity in relation to substantive and procedural requirements in order that practitioners, administrative officials and judicial officers might ensure that matters involving debtors' section 26(1) rights are properly adjudicated. It would also promote our constitutional values and a commitment to transformation and "a socially interconnected and embodied concept of humanity" as reflected in *ubuntu*. The recognition of such a duty would in all likelihood necessitate a change to the policy currently reflected in the National Housing Code. This will be considered in the next chapter along with other aspects of law and policy relevant to an understanding of the reported judgments and the general position pertaining to execution against a person's home.

³¹⁰See 3.3.1.2, above.