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The development of a policy regarding homestead protection in South African law within the ambit of a comparative study on the U.S, England and Wales and South African law.

by

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## SUMMARY

In 2005 the Constitutional Court was faced with a challenge on the infringement of section 26 of the Constitution which provides for the right to housing, in sales in execution. The court had to determine whether selling a debtor's home for a trifling debt would be justifiable. However, the decision of the court brought about many questions if such a similar case was to be brought under insolvency law. The South African system provides little or no protection for debtors who may find themselves in a situation where they are unable to pay their debts and stand to lose their homes. The court provided guidelines that should be taken when a home of the debtor is to be sold thus preventing a blanket ban. The approach taken by the courts ensure that both the debtor and creditors interests are taken into account in order to reach a just and equitable decision. Many factors have to be considered such as interests of children, creditors and any other dependants in the case of one facing sequestration and the possibility of the home being sold.

However, South African law does not provide for formal protection of the debtor's home unlike in other jurisdictions such as the United States of America and England. These jurisdictions have either provided for exemption or protection laws through legislation in which such laws provide for a debtor's fresh start. International human rights also have to be taken into account thus the need for updated legislation that conform to the values entrenched in the Constitution. The English system developed its legislation to provide for home protection through case law, a similar approach of which could be taken by South Africa to bring the insolvency law up to date.

There is need for our insolvency legislation to provide for clearer guidelines that enable a debtor to have a fresh start in life at the same time ensuring that creditors' rights are not infringed on. The English system aims to provide for such balance as it provides for protection for a limited duration of time unless if the value of the home is of a low value then it is exempt. The South African courts have also considered the creditor's interests were the home is subject to security as there is reluctance on providing that such property be exempt or protected. The sanctity of a contract has to be honoured.

# Chapter 1: Introduction

## 1.1 Introduction

In terms South African law there are possibilities of a debtor's home being sold in execution or being realized in insolvency to satisfy the creditors' claim. In recent years cases have been brought before the Constitutional Court to challenge the validity or the justification of depriving a debtor his or her right to housing in order to satisfy the creditor's claim. In particular the *Jaftha v Schoeman and others; Van Rooyen v Stoltz*<sup>1</sup> case gave rise to a lot of concerns with regard to family home protection law which may have an effect in insolvency, although it initially dealt with the impact of housing rights on the procedure to execute against residential property.<sup>2</sup> The appellants were unemployed, poverty stricken people who had few assets. The houses that they lived in had been acquired through state subsidies and if such homes were to be sold then they would be disqualified from acquiring future homes.

The Constitutional Court had to deal with the question on whether it would be justifiable to sell a defaulting debtor's home thereby removing their existing right to housing to satisfy a trifling debt. The Constitutional Court held that there was judicial oversight and held that section 66(1)(a) of Magistrates' Court Act<sup>3</sup> with regard to warrant of sale is invalid therefore unconstitutional. In a note it was however remarked that where a judgment debtor willingly offers his house as security, a sale in execution should ordinarily be permitted.<sup>4</sup> Certain guidelines were relevant for the court to reach its decision and as such *Jaftha* may have created a precedent for similar cases that may follow. Our current insolvency legislation does not provide for when the family home could be protected to debtors in need of such protection.

In a society where there is a constant credit granting, there is a need to afford protection to the debtors who may find themselves in unfortunate situations of

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<sup>1</sup> 2005 (2) SA 140 (CC) (hereafter the "*Jaftha*" case).

<sup>2</sup> Van der Merwe "Case Review" 2006 *Economic and Social Rights in South Africa* 26.

<sup>3</sup> 32 of 1944.

<sup>4</sup> Steenkamp "Removing the immovable" 2006 *De Rebus* 13.

being unable to pay off their debts. Failure to provide protection may hinder the ability of a debtor and his dependants to continue with a normal life. As such exemption and exclusionary laws can provide the much needed assistance to these debtors. In particular, homestead exemption or protection law can provide a shield for families that they need not worry about the misfortunes that the breadwinner may suffer which could leave the family destructed.<sup>5</sup>

Currently in the United States, a Federal Act<sup>6</sup> commonly referred to as the *Bankruptcy Code* regulates the law of insolvency. Chapter 7 and 13 of the *Bankruptcy Code* regulates bankruptcy and a payout plan for individual debtors respectively.<sup>7</sup> However, most states have their own rules with regard to exempt property. States such as Florida and Texas enacted own laws that had liberal principles in favour of the debtor.<sup>8</sup> However, this position changed with the introduction of *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*<sup>9</sup> which puts a cap on the amount or value of property that may be exempt as there was abuse of the exemption laws. According to Evans<sup>10</sup> *BAPCPA* introduced various provisions which restricted the use of various methods of asset protection and moving from one state to another in search of advantageous exemptions. This made it made it difficult for one to establish domicile for pre-bankruptcy exemption planning.<sup>11</sup>

### 1.1.1 Why exemption laws?

According to Evans<sup>12</sup> the idea of exempting property hinges on socio-economic and human rights requirements aspiring to give a debtor a “fresh start” in life, with help of assets that do not form part of the estate and

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<sup>5</sup> Goodman “The emergence of homestead exemption in the United States: Accommodation & Resistance to Market Revolution” 1993 *The Journal of American History* 471.

<sup>6</sup> *Bankruptcy Reform Act of 1978* (hereafter the “*Bankruptcy Code*”).

<sup>7</sup> Evans *A critical analysis of problem areas in respect of assets of the insolvent estates of individuals* (LLD Thesis 2008 UP) 156.

<sup>8</sup> Van Heerdan and Boraine “Reading procedure and substance into the basic right to tenure” 2006 *De Jure* 350.

<sup>9</sup> Hereafter “*BAPCPA*”.

<sup>10</sup> Evans 158.

<sup>11</sup> *Ibid.*

<sup>12</sup> Evans “Some thoughts on excluded and exempt property in Insolvency law” 2008 *De Jure* 256.

consequently avoid welfare burden being carried by the state. Duns<sup>13</sup> is also of the opinion that if too much force is applied on the debtor to repay creditors then there would be an increase on state dependence, therefore a balance should be met by providing laws that conforms with non-insolvency laws. Most bankruptcy systems make provision for certain property to be excluded or exempt from the insolvent estate in order to leave the debtor with essential property so that they go on with their life.<sup>14</sup>

My study will include different aspects relating to exemption laws in South Africa and jurisdictions that have already implemented the family home exemption or protection policy. In as much the *Jaftha*<sup>15</sup> case provided that selling of the homestead to satisfy the creditor's claim is unconstitutional, uncertainty still exists as to who would qualify for such exemption, the time limits if any, remedies for the creditor, in which instances it would be justifiable to sell a debtor's home etc. Van Heerdan and Boraine<sup>16</sup> submit that lack of a coherent approach in dealing with exemptions could lead to further confusion and more costly litigation to clarify a number of these issues.

## 1.2 Problem statement

The current insolvency legislation<sup>17</sup> is not up to date with modern values such as the protection of family home giving effect to the provisions of the Constitution which guarantees the right to adequate housing.<sup>18</sup> In an article by Evans<sup>19</sup> it is reiterated that there is a lack of consistent policy in respect of various issues amongst them being excluded and exempt policies. The South African Law Commission Report<sup>20</sup> has been drafted with an aim of reforming the insolvency legislation but is still falling short in certain aspects. The present exemptions are insufficient for a person to support him or herself and

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<sup>13</sup> Duns *Insolvency: Law and Policy* (2002) 204.

<sup>14</sup> Van Heerdan, Boraine and Steyn "Perspectives on protecting the home in South African insolvency law" (unpublished note, on file with author) 272.

<sup>15</sup> See fn 1.

<sup>16</sup> Van Heerdan and Boraine 2006 *De Jure* 352.

<sup>17</sup> Insolvency Act 24 of 1936 (hereafter the "Insolvency Act").

<sup>18</sup> The Constitution of the Republic of South Africa 1996, s 26.

<sup>19</sup> Evans 2008 *De Jure* 257.

<sup>20</sup> South African Law Commission *Report on the Review of the Law of Insolvency* Project 63(2000), hereafter "SALRC".



dependants as the policies that regulate these exemptions have not been fully developed.<sup>21</sup>

### 1.3 Research Questions

In this study, certain questions will be relevant in a bid to finding solutions. The following questions are therefore relevant:

- a. Is it justifiable to deprive the debtor of his homestead to satisfy the creditors' claim in terms of the Constitution?
  - i. Who would qualify for homestead exemption?
  - ii. Would there be increased burden on the State?
  - iii. What type of property should qualify as exempt?
- b. What are the possible implications of having exemption laws implemented with respect to securities held by mortgage holders?
- c. Are there any implications on the debtor's spouse, children and other dependant's if such exemption is not allowed?
- d. How have other jurisdictions implemented policies on protecting the homestead?

### 1.4 Objectives

My objectives with this study are to:

- a. Provide suggestions that could help in giving the debtor a "fresh start" in life with the help of assets that do not form part of the estate as well as to avoid welfare burden being carried by the state and society.<sup>22</sup>
- b. Investigate and find possible remedies that would be adapted into our insolvency law that balances the interests of the debtor and creditor without leaving much of an economic strain on either party.

### 1.5 Thesis statement

The development of a policy regarding homestead protection in South African law within the ambit of a comparative study on the U.S, England and Wales and South Africa law.

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<sup>21</sup> Evans 2008 *De Jure* 262.

<sup>22</sup> Evans 2008 *De Jure* 257.

## 1.6 Delineations and Limitations

My study will mainly focus on exemption or exclusionary laws with regards to the homestead. This can be controversial due to the fact that immovable property is the most priced possession in an insolvent estate thus weighing up interests can be very challenging. A study into England and Wales laws in this matter is relevant as it had a similar situation to South Africa mainly that their homestead exemption was first afforded protection by precedent until it was introduced in legislation.<sup>23</sup> This could provide a good basis in which South Africa could be inspired by what England achieved.

This research will also deal with the position in the United States of America due to the fact that it was the first country to introduce homestead exemption. As mentioned earlier,<sup>24</sup> different states have their own exemption laws and as such Texas and Florida laws will form part of this study.

## 1.7 Chapter overview

This dissertation will include the following chapters:

- a. Chapter 1: Introduction
  
- b. Chapter 2: Various aspects pertaining to exempt assets in South African law.
  - i. The philosophy behind sequestration or insolvency.
  - ii. History and development of the insolvency law with reference to the Draft Insolvency Bill.
  - iii. South African insolvency law focusing on exemption and exclusion and exclusionary laws.
  - iv. Position regarding secured creditors.
  
- c. Chapter 3: Comparative study of the United States of America

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<sup>23</sup> Van Heerdan, Boraine and Steyn (unpublished note, on file with author) 305.

<sup>24</sup> Para 1.1 above.



- i. The position in the U.S on their regime policy of exempt or excluded property with emphasis on the *Bankruptcy Code* and *BAPCPA*.
  - ii. An in-depth look at on individual states that has enacted their own exemption laws.
- d. Chapter 4: Comparative study of England and Wales
- i. The position in England and Wales with regards to how they govern their homestead protection policy.
  - ii. Whom it aims to protect and duration.
- e. Chapter 5: The *Jaftha* judgment and subsequent cases on the right to adequate housing
- i. An analysis on how courts determine in what instances it would and would not be justifiable to sale a debtor's home to satisfy a claim.
- f. Chapter 6: Conclusion and Recommendations
- i. Findings will be based on chapters 4 and 5 and the possible implementation to suit the South African society.
  - ii. An overview of all the chapters and findings.

## Chapter 2: Various aspects pertaining to exempt assets in South Africa

### 2.1 Introduction

The law of insolvency is an important aspect in any society where credit granting may take place between natural or juristic persons. A situation may arise in which a debtor is unable to meet financial obligations for various reasons such as economic hardship, over-indebtedness, mismanagement of finances etc. Fletcher<sup>25</sup> defines insolvency as a debtor's ultimate inability to meet financial commitments therefore becoming impossible to meet liabilities at the time they become due and enforceable. Various processes may be used by creditors in a bid to recover debts where there is default by a debtor. A legal test is used to determine insolvency by assessing whether the debtor's liabilities, fairly estimated exceed his assets fairly valued.<sup>26</sup>

The matter relating to the distribution of assets becomes of particular importance as creditors aim to recover their investments whilst debtors strive to remain with something that will enable them to continue with their livelihood. In most instances immovable property is the most valuable asset in a person's estate and as such creditors favour having a security interest over it. According to Steenkamp<sup>27</sup> the fact that movable property can be removed, immovable property is preferred by creditors as security because it can be easily ascertained due to its geographical fixation and great value.

In this chapter I am going to look at the historical background relating to the exemption of assets and how far legislation has been developed in a bid to be in line with current human rights issues, for example, the right to shelter. The most relevant provision I will deal with (which forms part of the basis for the study) is contained in section 26(1) of the Constitution which states that;

*“Everyone has the right to have adequate housing”*

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<sup>25</sup> Fletcher *The Law of Insolvency* (1990) 1.

<sup>26</sup> Sharrock *Hockly's Insolvency law* (2006) 3.

<sup>27</sup> Steenkamp “Removing the Immovable” 2006 *De Rebus* 12.

And section 26(3) states;

*“No one may be evicted from their home, or have their home demolished without an order of court made after considering all relevant circumstances. No legislation may permit arbitrary evictions.”*

It is important to note that South African law is influenced by Roman-Dutch and English law. The English law mainly influenced the mercantile law and in turn our insolvency law.<sup>28</sup> Legislation, common law and case law form part of the sources of South African law. Case law plays an integral role as it often develops our statutory and common law as well as setting precedents for lower courts. Our insolvency law is regulated by the Insolvency Act<sup>29</sup> which is the currently the main source.

## **2.2 Historical overview**

The *praetor* in Roman law introduced execution against the debtor's property in 167 or 104 BC thereby removing the physical difficulty that had been suffered by the debtor.<sup>30</sup> Such relief allowed the debtor to make a *cessio bonorum* i.e. surrender his estate to creditors therefore exempting him from arrest.<sup>31</sup> The surrendering of the estate did not however absolve the debtor from his debts. It was during this period when exemption of certain property was recognised so as to enable the debtor to keep as much as was necessary for his subsistence. Due to the influence of Roman law in our system The Ordinance of Amsterdam of 1777 was indicated as the basis of insolvency law. However, the first complete insolvency legislation was Ordinance 64 of 1829 which was introduced into the former Cape Colony under English influence.<sup>32</sup>

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<sup>28</sup> Boraine, Kruger and Evans “Policy considerations regarding exempt property: A South African-Canadian comparison” 2008 *Annual Review of Insolvency Law* 640.

<sup>29</sup> 34 of 1936 (hereafter “Insolvency Act”).

<sup>30</sup> Bertelsmann *et.al Mars: The Law of Insolvency* (2008) 6.

<sup>31</sup> *Ibid.*

<sup>32</sup> Nagel *Commercial Law* (2006) 402.

This Ordinance was passed to achieve due collection, administration and distribution of the insolvent estate.<sup>33</sup> If an order for sequestration was passed it would mean that the estate would include all present and future estate, movable and immovable, personal and real property and every right, title and interest in any property which belonged or was due to the insolvent at the date of sequestration.<sup>34</sup> The ordinance provided for exemption in terms of section 59 in which by the third meeting the trustee was expected to know the state of affairs of the estate, this was necessary as the creditors had to decide on a way forward.<sup>35</sup> The creditors would decide on whether the insolvent should have temporary care of the assets and what part of the insolvent's wearing apparel, bedding, household furniture and tools of trade would be retained for use.<sup>36</sup>

Ordinance 6 of 1843 was later introduced in which further development took place with regards to exemption of assets. Section 49 provided for hire, wages or reward of the insolvent debtor's work to be excluded.<sup>37</sup> Damages (and assets acquired with such money) paid as a result of personal injury were also excluded from the estate.<sup>38</sup> However, any assets acquired through the insolvent's labour after sequestration but before rehabilitation would form part of the estate. Section 98 made provision for exempt assets similar to those considered by the creditors under Ordinance 64 of 1829.<sup>39</sup> A further provision was introduced which allowed the Master or trustee to allow a moderate allowance to be paid to the insolvent, out of the assets of estate as payment for looking after the estate.<sup>40</sup>

The Transvaal Insolvency Act of 1895 further provided in section 28 that the insolvent could sue for wages or reward for work done including pension and

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<sup>33</sup> Evans *A critical analysis of problem areas in respect of assets of insolvent estates of individual* 2008 (LLD Thesis 2008 UP) 50.

<sup>34</sup> *Idem* 51.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Evans 53.

<sup>38</sup> *Ibid.*

<sup>39</sup> See *fn* 32 above.

<sup>40</sup> Evans 54.

damages and as such these amounts did not form part of the estate.<sup>41</sup> Certain policies taken at least two years before granting of sequestration order were exempt. The Insolvency Act<sup>42</sup> further extended policies that could be regarded as exempt assets to include life insurance policies.

Due to the change of time in society and with the concern of human rights adjustments are needed to conform to modern times and values. For many years there has been an attempt to alter the current insolvency legislation and one of the issues that need to be taken cognisance of is the international development regarding the family home exemption or protection with a view of providing a “fresh start” for the debtor.

### **2.3 Exemptions in individual execution**

Individual creditors may demand payment from a defaulting debtor, in which failure to respond by the debtor, a creditor can issue summons for payment of a liquid amount. If the matter is not defended the creditor may request default judgment against the debtor including an order against immovable property if there was insufficient movable property to satisfy the claim.<sup>43</sup>

The *Jaftha v Schoeman and others; Van Rooyen v Stoltz*<sup>44</sup> case became relevant in individual execution, as a sale in execution was sought against the debtor’s immovable property (family home) in order to satisfy a claim for a trifling debt. In this case the creditor sought to have the defendants’ home sold in terms of section 66(1)(a) and section 67 of the Magistrates’ Court Act<sup>45</sup> for recovery of her money in which she had lent to the defendant. The Constitutional Court had to deal with the constitutionality of these provisions.

Certain assets are exempt from attachment or execution in terms of individual debt collection and are provided for in section 67 of the Magistrates’ Court

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<sup>41</sup> Evans 56.

<sup>42</sup> 32 of 1916.

<sup>43</sup> Deosaran “Implications for sales in execution” 2005 *De Rebus* 39.

<sup>44</sup> 2005 (2) SA 140 (CC).

<sup>45</sup> 32 of 1944 (hereafter “Magistrates’ Court Act”); see Van Heerdan, Boraine and Steyn “Perspectives on protecting the family home in South African Insolvency law” (unpublished note, on file with author) 272.

Act. These assets may include, necessary beds and furniture, bedding, wearing apparel of the execution debtor and of his family, stock, tools of trade and agricultural implements of a farmer in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the Government Gazette.<sup>46</sup> The court also has discretion in exceptional circumstances and on such conditions as it may determine to increase the amounts determined by the Minister in certain instances.<sup>47</sup>

## 2.4 Exemptions in insolvency law

Currently as a general rule movable and immovable property of the debtor located within South Africa forms part of the debtors' insolvent estate.<sup>48</sup> However different exemptions and exclusions have been put in place with regard to which property forms part of the estate and that which belongs to the debtor to assist him in financial recovery. A further distinction is made between the property acquired before sequestration and that which is acquired after sequestration but before rehabilitation. These statutory exemptions or exclusions are as follows;

### 2.4.1 Property that may be excluded;

- a) Immovable property outside South Africa if sequestered in South Africa.<sup>49</sup>
- b) Movable property outside South Africa where debtor is not sequestered by a court located in an area where the debtor is domiciled.<sup>50</sup>
- c) The Land and Agricultural Development Bank Act<sup>51</sup> have exceptional statutory rights that enable it to attach and sell certain property of a farmer outside insolvency.

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<sup>46</sup> Section 67 a-g of Insolvency Act.

<sup>47</sup> *Ibid.*

<sup>48</sup> Evans "Some thoughts on excluded and exempt property in South Africa Insolvency law" 2008 *De Jure* 257.

<sup>49</sup> *Idem* 258.

<sup>50</sup> *Ibid.*

<sup>51</sup> 15 of 2002, s 40; see also Evans 2008 *De Jure* 258.





- d) Property given as security by a farmer when the state has assisted the insolvent in terms of the Agricultural Credit Act<sup>52</sup> to enable him to buy movable property.
- e) A limited amount of benefit payable in terms of certain life insurance policies where the life insurance policy has existed for at least 3 years at time of sequestration.<sup>53</sup>
- f) Property that is protected by section 12 of Trust Property Control Act, section 69 and 78 of Attorneys Act and section 4(5) of Financial Institutions Act, held in trust in his capacity as trustee.<sup>54</sup>

2.4.2 *Assets acquired after sequestration that may be excluded or exempt from the estate;*

- a) Pension received may be retained.<sup>55</sup>
- b) Any benefit payable in terms of the Unemployment Insurance Act<sup>56</sup>, Occupational Injuries and Diseases Act or Occupational Diseases in Mines and Works Act.<sup>57</sup>
- c) Compensation received for loss or damage by reason of defamation or personal injury.<sup>58</sup>
- d) Right to legacy or an inheritance where the insolvent repudiates the legacy or inheritance.<sup>59</sup>
- e) Debtor's salary or wages insofar as it is necessary to support himself and his dependants. Income that is illegally obtained is however not excluded.<sup>60</sup>

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<sup>52</sup> 28 of 1966.

<sup>53</sup> Evans 2008 *De jure* 258-259.

<sup>54</sup> *Ibid.*

<sup>55</sup> It was held in *Foït v First Rand bank Bpk* 2002 (5) SA 149 (T) that protection afforded by that section applied only where the insolvent receives the relevant benefit after date of sequestration.

<sup>56</sup> 63 of 2001.

<sup>57</sup> 78 of 1973.

<sup>58</sup> S 23 (8) of Insolvency Act; see also Evans 2008 *De Jure* 260.

<sup>59</sup> Evans 2008 *De Jure* 260.

<sup>60</sup> See Boraine, Kruger and Evans "Policy considerations regarding exempt property: A South African-Canadian comparison" 2008 *Annual Review of Insolvency Law* 655 where the trustee is however entitled to surplus which in the opinion of the Master is not necessary for the support of the insolvent and his or her dependants. In turn property acquired with money in which one was entitled to recover is excluded.

From the above listed assets that may be exempt or excluded, there are attempts to help the debtor become economically active. However, certain exemptions such as bedding could be rendered useless as they are dependant on the existence of other property such as having a place to reside. This is not to say that residential property should be exempted from ones' estate or execution but for a debtor to be able to continue with life as normal as possible then the exempt property should complement each other. Obviously all circumstances have to be dealt with on a case by case basis.

## 2.5 Developments in reference to the Draft Bill

The Insolvency Act has now been in use for more than 70 years though there have been various attempts to introduce a new Act. In 1987 the South African Law Commission (now SALRC) commenced an investigation of the law of insolvency and as such a project committee was instructed to conduct a review.<sup>61</sup> The Review of Law of Insolvency: Draft Insolvency Bill and Explanatory memorandum<sup>62</sup> was introduced and published for comment in 1996. Some of the aspects that the draft bill looked at were issues such as the "advantage to creditors"<sup>63</sup> requirement when applying for sequestration of one's estate. This principle remained unchanged when sequestration is sought for the benefit for creditors as a group.<sup>64</sup> In an article by Evans<sup>65</sup> it was further stated that whether an application is made by a creditor or debtor the courts may make an order for sequestration if satisfied that formalities have been complied with as well a reason to believe that sequestration will be to the "advantage of the creditors".

The "advantage to creditors" principle can be seen as an impediment to consumer debtors who want to get a "fresh start" as creditors want to recover as much of their investment as possible. From the creditors' point of view, this

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<sup>61</sup> Boraine "Insolvency law reform: An update" 1999 *De rebus* 66.

<sup>62</sup> Working paper 66, project 63 1996.

<sup>63</sup> See clauses 7(1)(b) and 8(1)(c) of Draft Bill.

<sup>64</sup> See Boraine 1999 *De Rebus* 66 as the reason for retaining this provision is to encourage creditors to participate in the administration of an insolvent estate. The first meeting of creditors is held before the final order is issued and as such the liquidator's report must show there is an advantage to creditors.

<sup>65</sup> Evans, Loubser and Van der Linde "Aspects of the draft insolvency bill" 1999 *SA Mercantile law Journal* 210.

notion is justifiable as they are carrying on a business and would want to obtain as much profit as possible. If this was not so then many creditors would be reluctant on granting credit if their interests were to be undermined. However, in 2000 a report on the review of the law of insolvency by SALRC provided that a debtor should be afforded an opportunity to a “fresh start” if such debtor acts honestly and assist in the winding up of the estate.<sup>66</sup>

Although the South African insolvency law contain certain exemptions of property from the insolvent estate, the system does not acknowledge any formal family home exemption.<sup>67</sup> Van Heerdan, Boraine and Steyn<sup>68</sup> remark that providing some form of family home exemption is a policy issue which means that one has to weigh up interests of creditors’ to obtain payments of their debts as opposed to the insolvent’s right to have a roof over their head. However, Evans<sup>69</sup> points out that exemption policy should not become freely available such that such exemptions would end up making the procedure of sequestration and collective enforcement worthless. He further states that the effectiveness of exemption of a dwelling place would be based on putting in place pre-sequestration exemption of such assets in execution law.<sup>70</sup>

## **2.6 Creditors secured by a Mortgage bond**

The granting of security to secure a debt has been a practice that has been in existence for centuries. There are many types of security that are used but for this discussion the focus will be on mortgages as it is the most affected type of security pertaining to immovable property. Creditors prefer having this type of security as it can be considered to be the most valuable asset in a person’s estate. This type of security is sought often by banks who lend out huge amounts to debtors.

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<sup>66</sup> Para 4.6 of SALRC *Report on the review of law of insolvency* (2000).

<sup>67</sup> Van Heerdan, Boraine and Steyn (Unpublished note, on file with author) 272.

<sup>68</sup> *Ibid.*

<sup>69</sup> Evans 2008 *De Jure* 263.

<sup>70</sup> *Idem* 262.

Mortgage was derived from the English law and has been in common use in South Africa for more than a century.<sup>71</sup> When one is said to have a mortgage bond, it is a right one has in over the immovable property of another which serves to secure an obligation.<sup>72</sup> However, ownership is not surrendered but merely enables the debtor to make use of the property whilst paying back whatever that had been loaned to him or her.

Mortgage may have its origin in three sets of circumstances mainly contract, by operation of law or judicial attachment (in execution of a judgement).<sup>73</sup> If the mortgagor (debtor) is to default in payment then the mortgagee (creditor) is entitled to have property sold and obtain payment of his debt out of the proceeds of the sale.<sup>74</sup> Likewise if default judgment is obtained against a mortgagor then the mortgagee is entitled to have the encumbered property sold in execution and recover the amount due.<sup>75</sup>

## 2.7 Impact of Jaftha case on section 26

The *Jaftha* case has caused some confusion among bondholders who wanted to take legal action against defaulting debtors who had mortgaged their homes as security for the money advanced to them.<sup>76</sup> The right to adequate housing conferred by section 26 of the Constitution which arose in the *Jaftha* case was also raised in subsequent cases that followed.

According to High Court Rule 31(5)(a) the Registrar has the power to grant an order declaring immovable property executable. This case was taken on appeal in which the Supreme Court of Appeal<sup>77</sup> had to consider the question whether a mortgagee infringed a mortgagor's right to adequate housing in section 26(1) of the Constitution when applying for an order declaring bonded immovable property executable following default by the mortgagor.<sup>78</sup> The SCA

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<sup>71</sup> Scott T.J and Scott S. *Willie's Law of Mortgage and Pledge in South Africa* (1987) 2.

<sup>72</sup> *Idem* 4.

<sup>73</sup> *Idem* 5.

<sup>74</sup> *Ibid.*

<sup>75</sup> Scott T.J and Scott S 231.

<sup>76</sup> Kelly-Louw "The right of access to adequate housing" 2007 *Juta's Business law* 36.

<sup>77</sup> Hereafter the "SCA".

<sup>78</sup> Bortz, Trudgen, Bouwemeester "The right of mortgagees and other legal matters" 2006 *SA Banker* 10.

in the *Standard Bank of South Africa Limited v Saunderson*<sup>79</sup> however pointed out that a court *quo* had misinterpreted the *Jafftha*. It made a distinction in that the creditor in *Jafftha* had not been a mortgagee with rights over the property arising from an agreement with the owner. Bortz<sup>80</sup> however points out that in case the property owners had willingly bonded their properties to the bank in order to obtain capital.

What becomes of importance in these cases is the distinction between debtors who enter into contracts and willingly mortgage their houses and those whose houses are sold in execution. It has been remarked in *Jafftha* that where a judgement debtor willingly offers his house as security, a sale in execution should ordinarily be permitted.<sup>81</sup> I do agree with the remark made by the judge in this instance as the sanctity of the contract should be given effect to. When parties enter into a contract, some form of agreement would have been reached and parties should honour such. In another instance the interest of creditors should also not be undermined as they do stand to lose out. It was further pointed out that a debtor who had participated in a commercial transaction and willingly utilised their immovable property as security, put it at risk, as it is well known practise that failure to pay amounts to sale of the immovable property.<sup>82</sup>

## 2.8 Conclusion

The development of exemption of assets has been a gradual process over the years seeing that provisions to exclude more assets out of the estate were increased between 1829 and 1936.<sup>83</sup> Certain assets were considered necessary to be excluded so as to ease the burden on the debtor and his family. Some compassion could be seen from creditors in which there was consideration of paying the debtor for taking care of the estate after a sequestration order has been issued.<sup>84</sup>

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<sup>79</sup> 2006 2 SA SCA.

<sup>80</sup> *Ibid.*

<sup>81</sup> Steenkamp 2006 *De Rebus* 13.

<sup>82</sup> Van Heerdan and Borraine "Reading procedure and substance into the basic right to tenure" 2006 *De Jure* 339.

<sup>83</sup> See para 2.2 above.

<sup>84</sup> *Ibid.*

However, in as much as there has been some development that has taken place, interests of the creditors are still regarded important in our insolvency system. This can be seen from this chapter that the development of homestead protection or exemption still has a long way to go before it can be provided for in legislation.<sup>85</sup> There seems to be some confusion surrounding the interpretation of the *Jaftha* case, especially with regard to mortgage holders.<sup>86</sup> The failure by legislation to regulate this problem will mean that there will be many uncertainties. An attempt to remedy any situation similar to that of *Jaftha* is however at present through the guidelines used by the court.<sup>87</sup> This is a starting point for many in an attempt to protect their right to housing but there is a need for further development with regard to such issues.

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<sup>85</sup> See para 2.5 above.

<sup>86</sup> See para 2.6 above.

<sup>87</sup> Discussed in detail in para 5.2.1.3 below.

## Chapter 3: Comparative study on homestead exemption law: United States of America

### 3.1 Introduction

In the U.S. bankruptcy is governed by federal law although states are also given the right to adopt bankruptcy law exemptions.<sup>88</sup> The American bankruptcy operates as a system that tries to protect a creditor's rights acquired in terms of non-bankruptcy law but takes into consideration social goals that should protect vulnerable debtors, workers and the community in general.<sup>89</sup> The aim of bankruptcy is to manage the economic strain and preserve whatever assets that may be available for parties involved.<sup>90</sup> Bankruptcy requires that claims be made collectively with emphasis on treating all creditors' equally rather than advancing interests of an individual creditor.<sup>91</sup> This aims at ensuring that there is equal distribution of assets amongst creditors.

In an effort of maintaining a balance between creditors and debtor's interests, a policy of exempting assets was introduced. Laws were adopted that governed such policy and has been going under immense reform especially with regards to homestead exemption.<sup>92</sup> The exemption laws entitle an individual debtor to certain property exemption which may allow the debtor to survive bankruptcy and can obtain a "fresh start" from these exemptions.<sup>93</sup>

However, some debtors over the years have taken advantage of some exemption laws in order to avoid or escape liability for paying their debts. The abuse of the provisions relating to exempt assets led to an increase in the number of cases that filed for bankruptcy thereby creating the need for more effective legislation. In 2005 *BAPCPA* was introduced to prevent abuse. A

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<sup>88</sup> Fay, Hurst and White "Household bankruptcy decision" 2002 *The American Economic Review* 706.

<sup>89</sup> Evans *A critical analysis of problem areas in respect of assets of the insolvent estates of individuals* (LLD Thesis 2008 UP) 145-146.

<sup>90</sup> *Ibid.*

<sup>91</sup> Epstein and Nickles *Principles of bankruptcy law* (2007) 3.

<sup>92</sup> *Ibid.*

<sup>93</sup> Evans 173.

more detailed discussion on how *BAPCPA* operates will be dealt with later in this chapter.

### 3.2 Development of the Bankruptcy Act of 1898

The punitive characteristics taken by creditors in order to recover debts resulted in the granting of powers to congress to enact uniform laws on the subject of bankruptcies.<sup>94</sup> The *Bankruptcy Act of 1898* was the first permanent bankruptcy law in response to the individual actions that were being taken by creditors.<sup>95</sup> In 1978 Congress eventually enacted the *Bankruptcy Reform Act of 1978*<sup>96</sup> despite severe criticisms from groups of creditors who found its provisions to be too generous.<sup>97</sup> The creditors were concerned about the overall effect of its provisions on the willingness of consumers who had taken loans, to repay their debts due to the fact that debtors received better protection.<sup>98</sup>

The *Bankruptcy Code* was however a product of constant law reform which ended up replacing the severely amended 1898 Act.<sup>99</sup> The *Bankruptcy Code* became effective on October 1, 1979 and is divided into different chapters providing for different provisions. Chapters 7 and 13 procedures are used in relation to personal bankruptcy in which the debtor has an option to choose under which chapter to bring an application.<sup>100</sup> Different advantages ensue in these chapters and as such the application of these chapters depends on whether one has a regular income or not.

### 3.3 The regulation of exemption laws in the U.S.

Asset exemption laws are mostly applicable to individuals and such exemptions are provided for in the *Bankruptcy Code*, relevant state law, depending on one's domicile, and non-bankruptcy federal law.<sup>101</sup> Section 522

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<sup>94</sup> Baird *The elements of bankruptcy* (1993) 4.

<sup>95</sup> Albergotti *Understanding bankruptcy in the US: A handbook of law and practice* (1992) 1.

<sup>96</sup> Hereafter "*Bankruptcy Code*".

<sup>97</sup> Albergotti 1.

<sup>98</sup> Ferriell and Janger *Understanding Bankruptcy* (2007) 138.

<sup>99</sup> Baird 4.

<sup>100</sup> Fay, Hurst and White 2002 *The American Economic Review* 706.

<sup>101</sup> Evans 173.



of the *Bankruptcy Code* can be utilised by an individual debtor who brings an application under chapter 7, 11, and 13 to rely on its exemption provisions.<sup>102</sup> However exemptions provided for by federal law can be ignored with a preference of using state exemptions if they are more favourable to the debtor. This was made possible by the enactment of section 522(b)(1) by congress which authorised individual states to specify that provisions of section 522(d) will not apply to their state and its individuals.<sup>103</sup> When a state has opted out of the federal exemptions the laws of that state will become applicable.<sup>104</sup> Thus if a state has not opted out then the federal exemptions apply. In particular the enactment of different homestead exemption by a state differs from each and every state as the enactment of such policy may be based on different historical experiences and values.<sup>105</sup> Although certain assets are exempt on the date of bankruptcy they form part of the estate even though they will be handed back.<sup>106</sup> The reason for such a process is to avoid preliminary disputes over what is or is not included in the estate.

### 3.3.1 Chapter 7 petition

Under a Chapter 7 petition unsecured debts are discharged, i.e. debtors are not obliged to use any of their future earnings to repay their debt but should give up all their assets that exceed a fixed exemption level to the trustee.<sup>107</sup> A large number of cases under this chapter are referred to as the “no asset” cases i.e. nothing remains for creditors after the debtors exemptions are set aside.<sup>108</sup> For a debtor to be able to rely on the application of Chapter 7, a further criterion is set out. In terms of section 707(b)(2)<sup>109</sup> the “means test” is used to determine what kind of a debtor is eligible, whilst putting a limitation for consumers who make more than most and have enough disposable income to make significant repayments to their creditors. Baird<sup>110</sup> is of the

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<sup>102</sup> Hertz “Bankruptcy Code Exemption: Notes on the effect of State law” 1980 *Am. Banker. L.J.* 340.

<sup>103</sup> Hertz 1980 *Am. Banker. L.J.* 339; see also Epstein and Nickles 54.

<sup>104</sup> *Ibid.*

<sup>105</sup> Hertz 1980 *Am. Banker. L.J.* 340.

<sup>106</sup> *Idem* 339.

<sup>107</sup> Fay, Hurst and White 2002 *The American Economic Review* 706.

<sup>108</sup> Howard and Zinman *Bankruptcy Overview: Issues, law and policy* (2002) 15.

<sup>109</sup> *Bankruptcy Code*; see also Baird at 37 on the explanation of the “means test” i.e. the judge determines whether one makes enough to be subject to “means testing”.

<sup>110</sup> Baird 50.

opinion that if a debtor can pay a creditor back by selling a large house that they own and move into a more modest house then they should not be allowed to take advantage of a Chapter 7 application.

If it is found according to the “means test”<sup>111</sup> that the assets that the debtor possesses are less than the stipulated exemption then they are not obliged to repay anything to the creditors.<sup>112</sup> The Chapter 7 application is most appealing to debtors who have assets that are less than their state's exemption as its provisions may allow them to completely avoid repaying their debts.<sup>113</sup> The exempt property designated in these provisions cannot be accessed by creditors to satisfy debts through judicial collection efforts as a the three pronged purpose for providing the exemption is to afford;

- a) protection to the debtor;
- b) protection of the family of the debtor; and
- c) protection of society.<sup>114</sup>

### 3.3.2 Chapter 13 petition

Contrary to a Chapter 7 petition is Chapter 13 that is intended for debtors who earn a regular income. This Chapter is referred to as a “wage earner” Chapter.<sup>115</sup> Debtors who file for an application under this Chapter do not have to give up any assets but enter into a repayment plan to repay a portion of their debts from future income under the supervision of courts, usually over a period of 3 – 5 years.<sup>116</sup> The advantages of relying on this Chapter however is mostly felt by debtors who own homes and are in arrears on mortgage payments because it offers more time for repayment and a last chance to sort out things before being declared bankrupt.<sup>117</sup> It is also advantageous as a

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<sup>111</sup> See Baird 37, in which the according to the “means test” a judge determines whether one is earning enough income by testing the debtor's current monthly income multiplied by 12 and comparing it against the median family income of others in the same state.

<sup>112</sup> Fay, Hurst and White 2002 *The American Economic Review* 706.

<sup>113</sup> *Idem* 707.

<sup>114</sup> Epstein and Nickles 53.

<sup>115</sup> Howard and Zinman 15.

<sup>116</sup> Fay, Hurst and White 2002 *The American Economic Review* 707.

<sup>117</sup> *Ibid.*

debtor is allowed to keep most of his assets and at the same time discharge a greater number of debts.<sup>118</sup>

### 3.3.3 *Bankruptcy Code – federal exemption*

In most societies credit granting is part of everyday life for many. However there are many honest, decent individuals who through carelessness and bad luck end up owing their creditors more than they can ever repay.<sup>119</sup> As such exemptions are therefore intended to prevent a debtor from becoming financially ruined but to provide an opportunity for a “fresh start”. Ahern III<sup>120</sup> is of the view that the purpose of granting exemptions is to protect the public from the burdens of supporting a destitute family.

As mentioned earlier, in cases where the state has not “opted out”, the provisions of the *Bankruptcy Code* will be applicable. The principle of giving states the option to “opt out” of the provisions of the *Bankruptcy Code* was not welcomed easily. It was challenged on the basis that exemption policies should not be removed from bankruptcy policy makers but towards a variety of state legislation.<sup>121</sup> However despite this over two-thirds of states chose to “opt out” of the federal scheme.<sup>122</sup> The *Bankruptcy Code* provides for a maximum limit on residential property. The maximum exemption currently stands at US \$20 220 but is balanced together with all other limits on the debtor’s uniform federal exemption rights which is increased every three years to reflect inflation.<sup>123</sup>

When an individual debtor files for bankruptcy they do not have to appear in court, a creditor does not object and the court clerk is the only one who ever sees the file.<sup>124</sup> The system provides huge benefits to an honest but unfortunate debtor who may have run into bad luck with his finances at the

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<sup>118</sup> Baird *Elements of bankruptcy* (2006) 56.

<sup>119</sup> Baird (2006) 34.

<sup>120</sup> Ahern III, “Homestead and other exemptions under the bankruptcy abuse prevention and consumer protection Act: Observations on “asset protection” after 2005” 2005 *13 Am. Bankr. Inst. L. Rev.* 587.

<sup>121</sup> *Ibid.*

<sup>122</sup> Howard and Zinman 24.

<sup>123</sup> Ferriell and Janger 430.

<sup>124</sup> Baird (2006) 34.

same time imposing a small cost on creditors. However in terms of section 707(b)<sup>125</sup> bankruptcy judges are allowed to refuse an application of a debtor which has a potential of granting him a “fresh start”, if there was an abuse of the bankruptcy process, as debtors are supposed to disclose the whereabouts of all assets and submit to questioning.<sup>126</sup> The abuse of this process was very high prior to 2005 as debtors would move to states with favourable exemptions just before filing for bankruptcy. Individuals seeking to obtain a “fresh start” are obliged to turn over to creditors all assets other than wedding rings, clothes and similar types of property that they would be unable to reach under bankruptcy law.<sup>127</sup>

Certain mechanisms have been put in place for a debtor to obtain a “fresh start” in terms of section 727. Discharge is only granted to individuals and not corporations, however it is only those individuals who have not defrauded their creditors or have otherwise abused the process.<sup>128</sup> Section 727(a)(2) & (a)(3) imposes sanctions on debtors who transfer property with the intent to defraud creditors or fails to keep financial records and thereby make it impossible for creditors to know the state of affairs of the debtor.<sup>129</sup> Failure to comply to provide the whereabouts of all assets within a certain time limit then results in the dismissal of the application for bankruptcy.

### 3.4 Introduction of *BAPCPA* in 2005

Due to the abuse of the system whereby individuals would move to states with more favourable exemption before filing for bankruptcy, the *Bankruptcy Code* needed to be amended to provide for stricter provisions. In 2005 the introduction of *BAPCPA* took place in which major emphasis was on the restriction of moving from state to state for favourable exemptions and other tools of asset protection.<sup>130</sup> Pre-bankruptcy planning became very difficult for individuals especially with regards to homestead exemptions as *BAPCPA*

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<sup>125</sup> *Bankruptcy Code of 2005*.

<sup>126</sup> Baird (2006) 35.

<sup>127</sup> *Ibid.*

<sup>128</sup> Baird (2006) 41.

<sup>129</sup> *Idem* 42.

<sup>130</sup> Ahern III 2005 13 *Am. Bankr. Inst. L. Rev.* 586.

made it difficult to establish domicile.<sup>131</sup> The new rules under *BAPCPA* enlarged the time frame in which an individual could rely on state exemptions before filing for Bankruptcy. The period in which an individual should have resided or has been domiciled in a particular state was extended to 730 days.<sup>132</sup> If the domicile was not continuous, i.e. the debtor changed domiciles several times during the 730 day period, then the applicable law is determined by place where the debtors domicile was located for the 180 day period preceding the 730 day period or where the debtors domicile was located for a longer portion of the 180 day period than any other place.<sup>133</sup> According to Ferriell<sup>134</sup> the new stricter provisions contributed to a decline in bankruptcy filings.

### 3.5 Homestead exemption in different states

The origins of homestead exemption in states can be dated as far back as 1819 where debtors secured short term *moratoria* on debts which temporarily protected their property and postponed their obligations to creditors.<sup>135</sup> Due to the increase of risks on one's possession and freedom the demands for limiting the creditor rights escalated, resulting in a response by states enacting legislation that abolished debtor's imprisonment and exempted seizure for personal property.<sup>136</sup> Homestead exemption intended to offer permanent security relief from difficult times, and targeted families as the main beneficiary of state control and also gave women new property rights.<sup>137</sup>

State law determines the nature and extent of debtor's value of a property when the petition is filed whereas federal law determines whether those interests are property thus acquired by debtor's estate.<sup>138</sup> Prior to *BAPCPA* the applicable state law was that of the state where the debtor was domiciled 180 days immediately prior to the date of filing the petition or state where the

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<sup>131</sup> *Ibid.*

<sup>132</sup> *Idem* 540.

<sup>133</sup> *Ibid.*

<sup>134</sup> Ferriell and Janger 142.

<sup>135</sup> Goodman "The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to Market Revolution, 1840-1880" 1993 *The Journal of American History* 476.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> Ferriell and Janger 227.

debtor resided for the greater part of the 180 days.<sup>139</sup> Debtors took advantage of the loopholes that were in the system in various ways, for example, paying cash for houses in states with unlimited homestead exemption and moving to such states 180 days before filing for bankruptcy.<sup>140</sup> This was all done with the sole intent of using those unlimited exemptions and setting up trusts so that the creditors would not reach the assets.

### 3.5.1 Examples of state homestead exemption laws

#### 3.5.1.1 Texas and Florida

Texas was the first state to enact a homestead exemption in its state constitution when it gained its independence.<sup>141</sup> For more than 155 years through numerous generations, Texans have adamantly supported the principle that the fundamental need for shelter justifies the strict constitutional protection of homes from creditors in all but a few situations.<sup>142</sup> In early times pioneers came to Texas homeless, with very few belongings thus after suffering and fighting for freedom and independence they made sure that the laws of the New Republic would reflect their values, priorities and experiences.<sup>143</sup>

The policy beyond such protection emanated from the Spanish and Mexican influence which had a concept of exempting property in the case of unpaid debts.<sup>144</sup> Such exemptions aimed at protecting families from homelessness during difficult times whilst at the same time preserving the values of the pioneers who went through hardships in a fight for independence. Providing for exemption in particular homestead exemption served as valuable protection to Texan citizens from dishonest creditors who would use all legal and illegal means to take the debtors homes.<sup>145</sup> Gonzalez<sup>146</sup> believes that there is no

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<sup>139</sup> Evans 177.

<sup>140</sup> Ahern III 2005 *13 Am. Bankr. Inst. L. Rev* 590.

<sup>141</sup> Coveny "Saying goodbye to Texas homestead protection: One step toward economic efficiency with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" 2007 *Hous.L.Rev* 443.

<sup>142</sup> Gonzalez "The Texas homestead: The last Bulwark of Liberty" 1995 *St. Mary's L.J.* 339.

<sup>143</sup> *Idem* 342.

<sup>144</sup> See Goodman 1993 *The Journal of American History* 477, on the discussion of how the provision of homestead exemption was to encourage settlers into the territory.

<sup>145</sup> Gonzalez 1995 *St. Mary's L.J.* 344.

better protection for consumers than the maintaining of the homestead freedom.

Texas is one of the few states that have not “opted out” of the federal provisions but offers its citizens a choice to rely on the federal provisions or state law. The citizens are however unlikely to use federal provisions as their state law has more favourable provisions thus it becomes insignificant whether they have “opted out” or not.<sup>147</sup> Prior to 2005 there was unlimited value on homestead exemption in the sense that it depended on the size of the lot or acre whether it was a rural or urban homestead. Debtors from these states who chose to rely on the state exemptions could retain extremely valuable pieces of property.<sup>148</sup> This was problematic because for debtors who owned large pieces of land had an unfair advantage which could end up prejudicing the creditors right to claim back the money lent.

According to Coveny<sup>149</sup> the liberal exemption that Texas provided for was described as being “extravagant”. However were a debtor does not own residential property they were unable to take advantage of homestead exemption but could only apply for half of the amount of the homestead exemption if that amount remains unused to other property.<sup>150</sup>

Just like Texas, Florida also provided for an unlimited homestead exemption. The policy behind the homestead exemption in Florida was mainly to protect families from misfortune hence the laws are applied liberally in favour of the debtor.<sup>151</sup> To qualify for homestead exemption in Florida certain requirements have to be met mainly; the acreage limitation, residency and ownership

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<sup>146</sup> *Ibid.*

<sup>147</sup> See Coveny 2007 *Hous.L.Rev* 442-444, in order for one to rely on the exemptions, the requirement of residency has to be met. Residency was acquired by buying and designating a homestead in Texas.

<sup>148</sup> Howard and Zinman (2002) 24.

<sup>149</sup> Coveny 2007 *Hous.L.Rev* 444.

<sup>150</sup> Howard and Zinman (2002) 24.

<sup>151</sup> Nelson and Packman “Florida’s unlimited homestead exemption does have some limits” (2003) *Florida Bar Journal* 61.

requirements.<sup>152</sup> The courts in Florida have applied the homestead exemption laws liberally so that the families will have shelter and will not be reduced to total destitute. The courts' interpretation of such laws reveals that the purpose of the law is to promote the stability and welfare of the state by securing to the homeowner a home so that the home owner may live beyond the reach of financial disaster.<sup>153</sup>

Due to the liberal approach that Florida laws provided for, it was subject to abuse. Nelson *et al*<sup>154</sup> is of the opinion that homestead laws should not be a tool for fraudulent debtors or be used as a tool for escaping honest debts but rather they are intended to be a shield against letting a debtor fall into financial disaster. However as mentioned above this abuse has been limited by *BAPCPA* provisions which have put a cap as to when and to what extent a debtor can rely on such exemptions.

### **3.6 Effect of exemptions on Mortgage holders**

Section 506 of the *Bankruptcy Code* addresses the rights of a creditor who has property perfected by a security interest. When one obtains credit and freely agrees to provide security for that debt, such an agreement should be honoured. Hence exemption laws in property cannot undermine a valid consensual security interest in that exempt property.<sup>155</sup> Bankruptcy's fundamental policy decision is that property rights created under non-bankruptcy law will be respected in bankruptcy unless a particular policy regime requires a different outcome.<sup>156</sup> The secured creditor will receive the value of its secured claim but not necessarily get the secured property itself thus giving such a creditor priority in claim.<sup>157</sup> If a blanket exemption policy is to be provided to govern even the instances where the debtor has willingly

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<sup>152</sup> *Ibid.* To meet the acreage requirements, protection is generally limited to the extent of one-half acre if the residency is within a municipality. Residence is determined by having an actual residence as well as the intent to reside in Florida permanently.

<sup>153</sup> *Ibid.*

<sup>154</sup> *Idem* 41.

<sup>155</sup> Evans 173.

<sup>156</sup> Howard and Zinman (2002) 43.

<sup>157</sup> *Ibid.*



given property for security, creditors would be reluctant to lend money as they bear a huge risk of not recovering their investments.

### 3.7 Creditor versus Debtor concerns

In instances where an individual has been declared bankrupt creditors seek to maximise the recovery of the money they lend to debtors as much as possible. At the same time debtors fight not to lose all their assets but strive to keep them so that they remain economically active individuals. This puts strain on both parties. Bankruptcy laws in the U.S. promote the debtors' opportunity for financial revival by:

- a) Sheltering debtors from the fear and reality of inescapable debt;
- b) Ending the ongoing efforts of collection agents; and
- c) Sheltering certain property to give the debtor some form of capital from which to rebuild his financial life.<sup>158</sup>

In most instances the granting of credit is through contract law and as such trading becomes beneficial to both parties while reducing the risk of unscrupulous behaviour.<sup>159</sup> The freedom to enter into a contract must always be weighed up against public policy goals by factors such as:

- a) Preventing the individual from becoming dependant on the state in case of difficulties;
- b) Encouraging a sense of independence that operates as the foundation of a democracy;
- c) Encouraging democracy.<sup>160</sup>

Thus if entering into such contracts could pose a threat to society then other means of helping the debtor should be used or more care should be taken into the circumstances of the debtor before extending such credit.

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<sup>158</sup> Coveny 2007 *Hous.L.Rev* 435.

<sup>159</sup> *Idem* 450.

<sup>160</sup> *Idem* 451.

Prior to the enactment of the *Bankruptcy Code*, a question as to whether the unlimited exemption is necessary was examined. By having unlimited exemptions law two goals were sought i.e. the need to encourage contract compliance and the other granting a debtor a “fresh start” that enables them to lead a productive life.<sup>161</sup> The vast difference in exemption laws from state to state put debtors in an unequal footing as for example, a Texan could be provided with an exemption of a homestead worth millions yet a debtor in e.g. Illinois has an exemption of only \$7500.<sup>162</sup> If anything the unlimited exemption left individuals at a disadvantage as the cost of obtaining credit was higher due to the fact that there exists a greater risk for the creditor who could fail to recover all his money. This imbalance needed to be rectified as there was no justifiable reason in allowing debtors to remove millions of dollars in assets from the reach of creditors to secure that individual’s “fresh start”.<sup>163</sup>

The enactment of the *BAPCPA* also brought about vast changes to the states that had unlimited homestead exemptions including Texas. The reform brought about a reduction in homestead exemption to the value of \$125 000 hence superseding state law.<sup>164</sup> Creditors were in favour of this provision as it meant to them that any amount that is in excess of \$125 000 was available to creditors.<sup>165</sup> Another advantage that emanated from this was that the cost of credit reduced significantly as the risk of not getting paid in cases of bankruptcy was reduced.<sup>166</sup>

On the other hand this new provision was not favourable to others in particular new purchasers of homes. Individuals who would have lived in their homestead for less than the 40 month period and have more than \$125 000 in value in their homes then had to make use of federal law.<sup>167</sup> Those who have

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<sup>161</sup> See Coveny 2007 *Hous.L.Rev* 461 for a detailed discussion on how there should be an incentive to comply with the provisions of the contract rather than relying on bankruptcy which could end up being costly.

<sup>162</sup> *Idem* 463.

<sup>163</sup> *Ibid.*

<sup>164</sup> S 522 (p) of *BAPCPA*; see also Baird 50.

<sup>165</sup> *Ibid.*

<sup>166</sup> See Coveny 2007 *Hous.L.Rev* 464-466, the new exemption is only applicable to property that has been owned for less than 40 months.

<sup>167</sup> *Idem* 466.

lived in their homesteads for over the forty month period were not affected as they could still utilize the state exemption limits or the full exemption. Though *BAPCPA* tried to limit the exemption, debtors who have lived on their properties still have access to unlimited exemptions which may be more than necessary for them to obtain a “fresh start”.

### 3.8 Conclusion

The U.S. system affords protection to debtors in the form of exemption of assets though some limitations are put in place as to who will qualify for exemption and to what extent it will apply. The introduction of *BAPCPA* managed to give creditors the confidence that whatever is over and above the limited amount will be available for distribution.<sup>168</sup> This also would give them confidence in continuing with their businesses.

What is admirable is the determination of which type of debtor qualifies to have their debts be totally discharged and debtors who can enter into a repayment plan.<sup>169</sup> Both creditor and debtor may have numerous advantages stemming from this. A debtor who has no source of income can be given a chance to start afresh if all debts are discharged whilst creditors’ stand to recover more from the debtor who enters into a repayment plan than they would in bankruptcy. A debtor who makes use of Chapter 13 application will manage to keep their possessions.<sup>170</sup>

There are some provisions that may be considered by South Africa in a bid to put in place a homestead exemption policy though it may take time as we still have a pro-creditor system and moving from such a regime maybe challenging. An introduction of new policies will have to suit our own society based on historical aspects, the Constitution and other human rights issues. Care should be taken in formulating these policies so as to avoid the challenges that were experienced before the introduction of *BAPCPA*.

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<sup>168</sup> See para 3.7 above.

<sup>169</sup> See paras 3.3;3.3.1 and 3.3.2 on a discussion of the “means test”.

<sup>170</sup> See para 3.3.2.

## Chapter 4: England and Wales

### 4.1 Introduction

In England and Wales a bankrupt's estate will include all property that belongs to or that is vested in the bankrupt at the commencement of bankruptcy unless specifically excluded by statute or at common law.<sup>171</sup> The policy of exempting assets has been in practice for many years as it is believed that the bankrupt should not be deprived of certain assets that are essential for the maintenance of himself and his dependants. Some of the assets that may be exempted are those that are necessary for personal use and some that are necessary for the basic domestic need of the family. Different types of property that is exempt is found in statutes, however the debtor's home does not fall into the category of exempt assets but the trustee may need permission of the court to sell it.<sup>172</sup> It therefore forms part of the estate.

### 4.2 Historical background

In early days insolvency law was an individualistic procedure as execution could be taken against the assets of insolvent traders.<sup>173</sup> Imprisonment of a debtor who had defaulted in payments was not known in English law and only became permissible when introduced by the *Statute of Merchants in 1283*.<sup>174</sup> This remedy was only available to traders. Execution against the debtor's property was consequently limited to personal property and the profits or rents of real property. This remained in force for a long time and execution against a debtor's land became possible only in the nineteenth century.<sup>175</sup>

However to protect or improve the position of the debtor the idea of exempting assets of the debtor was introduced. This was done through the *Bankruptcy Statute of Queen Anne*<sup>176</sup> which provided that bankrupts' could exempt property in exchange for giving the balance and a complete discharge of

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<sup>171</sup> Tolmie *Corporate and Personal insolvency law* (2003) 295.

<sup>172</sup> *Ibid.*

<sup>173</sup> See Evans *A critical analysis of problem areas in respect of assets of the insolvent estates of individuals* (LLD Thesis 2008 UP) 83, this process was only applicable to insolvent traders.

<sup>174</sup> *Idem* at 86 for a detailed discussion on the statutes that provided remedies for merchant creditors.

<sup>175</sup> Evans 85.

<sup>176</sup> 4 & 5 c4 (1705).

liability for his debts.<sup>177</sup> From this point onwards various statutes were introduced and necessary amendments were made. Currently in England the most important statute to consider with regard to exempt assets is the *Insolvency Act of 1986*.<sup>178</sup> A more detailed discussion of how this came about follows.

#### 4.3 Development of the family home protection

In 1977 a Review Committee on Insolvency and Law and Practice was established.<sup>179</sup> It comprehensively dealt with reform in insolvency law and as such considered providing clarity on the family home protection amongst other issues. Evans<sup>180</sup> reiterated in his thesis that insolvency proceedings are aimed at distributing the debtor's assets in favour of the creditors as well as to assist the debtor to achieve rehabilitation so as to resume a position as a productive member of society hence the need for exempt property. The *Cork Report*<sup>181</sup> considered the position of the family home as an asset that could be exempt from the debtor's property. The Committee considered issues such as the shortage in domestic accommodation, as well as the high expense of housing as factors for formulating policy in respect of exempting the family home from an insolvent estate.<sup>182</sup>

The suggestion made was that the new *Insolvency Act* should give the court specific power to postpone a trustee's right of possession and sale of the family home. In support for the proposal, the Cork Committee in this regard made the point that the bankrupt's home is frequently the major asset of a consumer bankrupt and as such eviction from the family home could be a disaster not only for the bankrupt but also for the dependants.<sup>183</sup> Hence other factors that have to be taken into account in this regard are the welfare of

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<sup>177</sup> *Idem* 92.

<sup>178</sup> Hereafter the "*Insolvency Act*"

<sup>179</sup> *Cork Insolvency law and Practice Report of the Review Committee* (1982) 1 (hereafter the "*Cork Report*"); Evans 97.

<sup>180</sup> Evans 99.

<sup>181</sup> *Cork Report* 255.

<sup>182</sup> *Cork Report* 255; Evans 100.

<sup>183</sup> *Cork Report* 255; Tolmie 297.

children or other dependants e.g. the elderly, whether such family home is jointly owned and security rights that may be attached to such property.

The courts were also responsible for the development of the family home protection. In *Bendall v Mc Whirter*<sup>184</sup> the Court of Appeal refused to allow the eviction of a wife and children from the family home in order for the trustee to sell the house.<sup>185</sup> From then on there was a constant battle in the courts as the rights of creditors were favoured though the courts could use their choice to refuse the sale of these homes.<sup>186</sup>

#### 4.3.1 *The family home*

In a consideration of whether the family home could form part of the exempt assets the *Cork Report*<sup>187</sup> considered what would constitute a family home. It defined family home as “a dwelling in which there is or are living;

- a. The debtor and his wife,
- b. The debtor or his wife with a dependent child or children,
- c. The debtor’s wife,
- d. The debtor and a dependant parent of the debtor or his wife who has been living there as part of the family home on the basis of a long-term arrangement.”<sup>188</sup>

Prior to the *Insolvency Act* if debtors jointly owned the family home, courts had a discretion on whether to order the sale of property as well as a determination between favouring and denying the spouse’s occupational rights as against the trustee.<sup>189</sup> This prompted the *Cork Report* to propose a revised measure concerning the conflicting interests as it suggested delaying the enforcement of creditors’ rights but not cancelling them.<sup>190</sup> According to the *Insolvency Act*, provisions that relate to the family home are found in sections 336 to 338 which provide for the rights of occupation by the bankrupt,

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<sup>184</sup> [1952] Q.B 466 CA.

<sup>185</sup> Van Heerdan, Boraine and Steyn “Perspectives on protecting the family home in South African Insolvency law (unpublished note, on file with author) 277.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Cork Report* 256; Evans 100.

<sup>188</sup> *Ibid.*

<sup>189</sup> Evans 113.

<sup>190</sup> *Idem* 114; *Cork Report* 255.

bankrupt's spouse, interests of creditors and payments that are made in respect of premises that are occupied. The effect that these provisions have is that they allow for the postponement of that sale of that home for up to a year from the date in which it vested in the trustee.<sup>191</sup> However special provision is made for debtor's who have homes that are of a low value. According to Fletcher<sup>192</sup> if the value of selling the home is small compared to the difficulty that would be experienced by the debtor then such property should not form part of the estate. Such special exemption is provided for in the *Enterprise Act, 2002* of which the current value is at 1000 pounds.<sup>193</sup>

#### 4.3.2 Factors taken into account by the courts

The *Insolvency Act* considers two different factors when dealing with the family home i.e. whether the bankrupt is the sole owner of the property and whether such property is jointly owned. If the bankrupt is the sole owner, the spouse can acquire statutory rights of occupation under the *Family Law Act, 1996* that creates an interest in the bankrupt's estate.<sup>194</sup> An order to evict such a spouse from the premises can be made by an application to court for an order it seems just and equitable.<sup>195</sup> The factors that the court considers are:

- a. "The interests of bankrupt's creditors", which will depend on the financial position of the creditor i.e. if the creditor is a small business then a delay in payment, will have a serious impact compared to a creditor who is a financial institution.<sup>196</sup>
- b. "The conduct of a spouse in so far as contributing to the bankruptcy", for example, if the spouse continued to live an extravagant lifestyle.<sup>197</sup>
- c. "Needs and financial resources of the spouse or former spouse", such as a consideration as to whether there is availability of alternative accommodation either rented or purchased.<sup>198</sup>

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<sup>191</sup> *Ibid.*

<sup>192</sup> Fletcher *The Law of Insolvency* (2009) 238.

<sup>193</sup> *Idem* 238, sec 261(3).

<sup>194</sup> Sealy *Annotated Guide to the Insolvency Legislation* (2008) 360 sec 336(1) of *Insolvency Act* on the rights of occupation of the bankrupt's spouse.

<sup>195</sup> See Evans 115, sec 336(4) of *Insolvency Act of 1986*.

<sup>196</sup> Schofield & Middleton (eds) (2003) *Debt and insolvency on family breakdown: Jordan publishing limited Debt and Insolvency on family breakdown* (2003) 107.

<sup>197</sup> *Ibid.*



- d. “*The needs of any children*”, though they are not of paramount importance.<sup>199</sup>
- e. “*Any other circumstances other than the needs of the bankrupt*”, for example, if the bankrupt is living with elderly relatives, if the spouse made constructive efforts to prevent financial ruin etc<sup>200</sup>.

If such an application is made after one year since the property has vested in the trustee, the interests of creditors take precedence over all matters unless if there are special circumstances that arise.<sup>201</sup> Such onus will bear on the bankrupt's family to demonstrate exactly how those circumstances are exceptional. The courts may delay the order for possession or sale of the house depending on the circumstances. The duration of the delay varies and could be made for three years or in the event of there being a terminally ill person then until the death of such.

A delay in the sale of the home may also be prolonged in terms of section 337(2) of the *Insolvency Act*. It provides that a person under the age of 18 living with the bankrupt has a right to occupy such dwelling, as the bankrupt has a right not to be evicted from his home if he is in occupation together with such a person.<sup>202</sup> Such children do not have to be natural children of the bankrupt but must have been living with him at the time when a bankruptcy petition was presented.<sup>203</sup> However, if the bankrupt does not have any spouse or children living with him then he has no rights to remain in the property.<sup>204</sup> During such “period of grace” as it is referred to as, the parties are prepared to giving up their home and also allows the trustee time to prepare for eviction and sale of the home.<sup>205</sup>

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<sup>198</sup> *Ibid.*

<sup>199</sup> *Idem* 108 in a case of *Re Bailey* [1977] 1 WLR 278, the courts refused to postpone a sale of the home when the bankrupt argued that it would disrupt the child's education if they were to move.

<sup>200</sup> *Ibid.*

<sup>201</sup> See Evans 115 and Schofield *et.al* (eds) 109 on what may be considered as exceptional circumstances.

<sup>202</sup> Frieze *Personal Insolvency: Law in Practice* (2004) 139.

<sup>203</sup> Schofield *et.al* (eds) 115.

<sup>204</sup> *Ibid.*

<sup>205</sup> Evans 115.



In the second scenario whereby the home is jointly owned by the spouses the *Insolvency Act* provides that the trustee must apply for an order allowing him to sell the property as the solvent spouse's beneficial interest attaches to the proceeds of the sale.<sup>206</sup> The spouses share will be calculated together with other expenses that may have been incurred such as repairs and improvements. As mentioned above with regard to a situation where the bankrupt has children living with him, such factors will also be taken into consideration here if the solvent spouse is in occupation of the home.

#### 4.3.3 *Enterprise Act of 2002*

The *Enterprise Act of 2002*<sup>207</sup> introduced new provisions that regulated the effect if the bankrupt's interest in a dwelling. The *Enterprise Act* gave effect to the provisions of the *Insolvency Act* and provided that if at the date of bankruptcy the home was the sole or principal residence of the bankrupt, spouse or former spouse then at the expiry of three years the property will re-vest in the bankrupt.<sup>208</sup> This would come about if the trustee has failed to take action during the three year period.<sup>209</sup> Such a provision was intended to rectify an abusive procedure that existed whereby the trustee would not take any immediate action in respect of the home but would only do so years later when the bankrupt has been discharged of his debts.<sup>210</sup>

#### 4.4 Criticisms of family home protection

In the proposals that were made by the *Cork Report*<sup>211</sup> i.e. to give courts a wide discretion on delaying the sale of property, it aimed to achieve balance between the bankrupt's family and at the same time respect for creditor's rights. It was suggested that a way of reaching this would be to provide that the home becomes an exempt asset within section 283(2) of the *Insolvency Act* thus meaning it would be subject to section 308 and the trustee would be entitled to claim the excess value of the property if it exceeded the cost of a

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<sup>206</sup> Evans 116.

<sup>207</sup> Hereafter the "*Enterprise Act*".

<sup>208</sup> Schofield *et al* (eds) 118, sec 283 A (2) of *Insolvency Act of 1986*.

<sup>209</sup> Evans 117, taking action may mean realising the bankrupt's interest, applying an order for possession, entering into an agreement with the bankrupt to pay the trustee a certain amount of money.

<sup>210</sup> *Ibid.*

<sup>211</sup> *Cork Report* 255.

reasonable replacement.<sup>212</sup> However this did not fall through. Some of the arguments against the protection of the home in English law include the assumption that creditors would not lend money if more effective remedies were extended to the home occupiers.<sup>213</sup> Fox<sup>214</sup> is of the view that in as much this may be so, creditors are in the business of lending money thus the risk of a debtor defaulting in payment is inherent to the business. The issue of the home being labelled family home is also of concern as the courts are more inclined to delay a sale if a debtor has a family compared to an individual as occupier.

In England there exists a tendency to treat the family home with a higher degree of immunity compared to other properties and as such brings about inequalities amongst the debtors themselves.<sup>215</sup> It is suggested that there should be a development of more systematic approach to which the home should be treated as a special type of property to which occupiers develop a special attachment irrespective of their status.<sup>216</sup>

#### 4.5 Conclusion

The development of the exemption of assets in England went through radical changes. Consequently family home protection also emanated through the *Cork Report* which was important for the formation of the *Insolvency Act*.<sup>217</sup> This Act provides for guidelines in which a court may protect a debtor's home for a period of time taking into account certain factors such as interests of creditors, needs of children, spouse etc.<sup>218</sup> The factors can be considered reasonable as they give one a chance to find sufficient time to find an alternative home. However if a family home is below a certain value then such home will not be subject to attachment<sup>219</sup>. This provision can be seen as an advantage to both the debtor and society as the chances of over burdening

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<sup>212</sup> Tolmie 298.

<sup>213</sup> Fox "Creditors and the concept of 'family home': a functional analysis" *Legal studies* 25 (2) 223.

<sup>214</sup> *Ibid.*

<sup>215</sup> *Idem* 207.

<sup>216</sup> *Ibid.*

<sup>217</sup> Para 4.3 above.

<sup>218</sup> Para 4.3.2 above.

<sup>219</sup> Para 4.3.1 above.

society is limited. The cost of selling such a person's home will be far less compared to the impact that it would have on society if it were to be sold.<sup>220</sup>

What can also be admired from the English system is their definition of a family home.<sup>221</sup> In providing for this definition it puts a limit on what type of immovable property is protected. This has however been criticised as it creates inequalities among debtors themselves.<sup>222</sup> In as much as there were criticisms against family home protection as it was feared that financial institutions would be reluctant to lend money it seems as if the system is working as protection is only for a certain period.

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<sup>220</sup> *Ibid.*

<sup>221</sup> Para 4.3.1 above.

<sup>222</sup> Para 4.4 above.

## Chapter 5: The Jaftha judgment and subsequent cases on the right to adequate housing

### 5.1 Introduction

As seen from previous chapters, property is of significant importance to both the creditor and debtor in a credit oriented society. Different interests have to be balanced or be weighed against each other i.e. the creditor's right to obtain satisfaction of the debt and the right of the debtor not to be deprived of his or her property especially residential property thus infringing on a right to adequate housing.<sup>223</sup> In previous chapters<sup>224</sup> we have seen how other jurisdictions have created policies that aim at satisfying these interests. In the U.S. there is provision for total or partial exemption of the assets thus whatever exceeds the stipulated amount will be available for distribution by creditors. In England and Wales the position is different. The family home is protected for a limited duration of time after having considered all relevant circumstances.

Currently in South Africa protection or exemption of the family home has only been considered in sales in execution. Our insolvency law does not provide for such protection but whether the decision will have any effect in insolvency is still of interest. In this chapter I will thus look at the developments that took place in the protection of the home with regards to sales in execution according to the Magistrates' Court rules as well as the High Court.

### 5.2 Development of family home protection in the Magistrates Court

As mentioned in chapter one above section 26 of the Constitution<sup>225</sup> is a socio economic right that guarantees the right to adequate housing. The right to housing and security of tenure as well as other legislative enactments that give effect to the rights in section 26 must be measured against considerations of social, economic and historical fairness and equity in view of

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<sup>223</sup> Steenkamp "Removing the immovable" 2006 *De Rebus* 13, a consideration that the Constitutional Court took in the *Jaftha* case.

<sup>224</sup> Chapter 3 and 4 above.

<sup>225</sup> The Constitution of the Republic of South Africa of 1996 (hereafter the "Constitution").

the political history of South Africa.<sup>226</sup> Unfortunately South Africa's social security system provides for minimum support for the poor in respect of family home protection from execution compared to first world countries.<sup>227</sup> The Constitutional Court<sup>228</sup> was faced with this challenge in the *Jafftha v Schoeman and others; Van Rooyen v Stoltz and others*<sup>229</sup> in which sales in executions for the family home could be allowed without the courts having determined whether such sales would be justifiable.

### 5.2.1 *Jafftha and Van Rooyen case*

#### 5.2.1.1 Factual background

In this case Ms Jafftha was a poor, ill and unemployed lady who had obtained a state subsidised house through the post-apartheid Reconstruction and Development Programme (RDP). She had two children that she took care of and lived with. In 1998 she borrowed R250 from Ms Skaarnek (creditor) and this amount was to be repaid in instalments. Some of the amount was repaid by Ms Jafftha but not all thus prompting the creditor to take the matter to the lawyers. Due to Ms Jafftha's poor health, she was hospitalised at some point and upon release she discovered that her home was to be sold in execution in order to satisfy her debts that had escalated due to interest and costs. She could not afford to pay these amounts in order to prevent her home from being sold.

Likewise in the *Van Rooyen* case Ms Van Rooyen was a widowed unemployed mother of three. She acquired her home through inheritance as the husband had obtained it through state subsidy. She incurred a debt of R190 when she purchased vegetables on credit from Ms Goliath (creditor). She was unable to repay the debt and the creditor instituted an action against her in the Magistrates Court. Due to the fact that the debt had escalated to

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<sup>226</sup> Van Heerdan and Boraine "Reading procedure and substance into the basic right to security of tenure" 2006 *De Jure* 321.

<sup>227</sup> Van Heerdan, Boraine and Steyn (unpublished note, on file with author) 273.

<sup>228</sup> Hereafter the "CC".

<sup>229</sup> 2005 2 SA 140 (CC).

include interest and costs, she failed to pay and her home was subsequently to be sold in execution.

#### 5.2.1.2 Issues on appeal to the CC

In both these cases, a plea was made in the High Court to set aside the sales in execution and sought to have interdicts to stop the creditors from evicting them from their homes. Consequently these cases also went to the CC to challenge the validity of section 66(1)(a) and 67.<sup>230</sup> The debt recovery process in the Magistrates Court did not involve interference by courts as the clerk of the court could consent to the sale of immovable property.<sup>231</sup> The appellants' (to the CC) argument was based on section 26 of the Constitution in which they contended that both the state and private parties had a duty not to interfere without any justification with any person's existing access to adequate housing. In *Jaftha*, this was considered to be a negative obligation i.e. a right operates horizontally therefore private parties are obliged not to interfere unjustifiably with this right.<sup>232</sup>

Only section 66 was found to be unconstitutional and the CC remedied it by reading in provisions that a court will need to decide in cases dealing with the sale of immovable property. In reaching its decision certain factors and considerations were taken into account by the CC. Section 39(1) of the Constitution was considered as it requires courts to consider international law when interpreting the Bill of Rights hence judge Mokgoro specifically included Article 11(1) of the International Covenant on Economic, Social and Cultural Rights Committee.<sup>233</sup> This section reads:

*"The states parties to the present covenant recognise the right to adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living*

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<sup>230</sup> Magistrates' Court Act 32 of 44, which provides for the sale in execution of immovable property in the absence of sufficient movable property in order to satisfy a debt and some exempt movable property from being sold in execution, respectively.

<sup>231</sup> Van Heerdan and Boraine 2006 *De Jure* 324, in this they also contended that the debtor was a recipient of state- subsidised housing and was barred from receiving such assistance in future if she lost the house in pursuant to a sale in execution.

<sup>232</sup> Van der Merwe "Case review" 2006 *Economic and Social Rights in S.A* 27.

<sup>233</sup> Steyn "Safe as houses- balancing mortgagee's security interest with a homeowner's security of tenure" 2007 *Law, Democracy and development* 103.



*conditions. The state parties will take appropriate steps to ensure the realization of this right, recognising to this effect the essential importance of international co-operation based on free consent.*<sup>234</sup>

The CC noted the emphasis made about Article 11(1) that the right to housing should not be interpreted restrictively but should be viewed as the right to live somewhere in security, peace and dignity.<sup>235</sup> Judge Mokgoro stated that the committee's focus on security of tenure goes beyond ownership in that all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.<sup>236</sup> Judge Mokgoro further noted that the international concept of adequate housing and its main aim to provide security of tenure reinforce the notion of adequate housing provided for in section 26 of the Constitution, in which its purpose was to create a new dispensation in which the state was to strive to provide access to adequate housing.<sup>237</sup>

The CC after having considered Article 11(1) then looked at the South African position with regard to the matter before them. It was contended that the aim for providing the right to have adequate housing and not to be evicted without just cause marked an intention to reject the historical legislation.<sup>238</sup> This legislation was harsh and was used to remove people from their land and homes by force and also intimidated and harassed them with senseless evictions rendering them homeless.<sup>239</sup> Thus the CC read section 26 as a whole thus the state could not interfere with these rights unless it was justifiable to do so.<sup>240</sup>

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<sup>234</sup>Quote at para 24 of the judgment in *Jaftha* case; see also Steyn 2007 *Law, Democracy and development* 103.

<sup>235</sup> *Ibid.*

<sup>236</sup> *Idem* 103-104.

<sup>237</sup> *Ibid.*

<sup>238</sup> Van Heerdan and Boraine 2006 *De Jure* 326.

<sup>239</sup> *Ibid.*

<sup>240</sup> *Ibid.*

### 5.2.1.3 Factors considered by the CC

In reaching its decision on the constitutionality of section 66 and whether it would be justifiable to have a sale in execution of immovable property for a trifling debt, the courts considered and formulated certain factors. These factors were mere guidelines and not exhaustive thus each case had to be looked at on a case by case basis. These were:

- *Circumstances in which the debt had been incurred;*
- *Attempts made by the debtor to pay the debt off;*
- *Financial situation of the parties;*
- *Amount of the debt;*
- *If the debtor was employed or had a source of income to pay the debt;*
- *Any other factor.*<sup>241</sup>

The effect of these factors on the judgement was not to impose a “blanket ban” prohibition on execution of immovable property but served to confirm that a court will need to oversee execution against immovable property as required by section 26(3) of the Constitution.<sup>242</sup> In doing so, these factors and other can be used as guidelines in determining whether it would be justifiable. Van Heerdan and Boraines<sup>243</sup> commentary on the judgment was that it did not limit what immovable property was in this instance hence it included business premises, a holiday home or vacant land. The CC may have created a problem by not defining what type of immovable property may be protected as section 26 will not affect commercial property owners. The courts will have to

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<sup>241</sup> *Jaftha* at 13 A-B, see also Van Heerdan and Boraine 2006 *De Jure* 333 in which any other factor could be that of an instance where children are involved and have a right to basic shelter i.e. sec 28(1) (c). In this case there were children involved. This point was also raised in the *Campus Law clinic, University of KwaZulu-Natal v Standard Bank Ltd* 2006 (6) SA 103 (CC) in which they said the child’s best interests are of paramount importance and as such the courts who are upper guardians of minors should give effect to these interests.

<sup>242</sup> See Deosaran “Implications for sales in execution” 2005 *De Jure* 39; Van Loggerenberg “Emoluments attachment orders: sales in execution” 2005 *De Rebus* 27 who also shares this view about the practical effect of this judgment.

<sup>243</sup> Van Heerdan, Boraine and Steyn (unpublished note, on file with author) 293.



exercise its discretion based on these factors on any immovable property even where the right to tenure is not affected.<sup>244</sup>

In *Mkize v Umvoti Municipality and others*<sup>245</sup> the court had to determine whether the sale in execution of immovable property should be declared void and whether there was an infringement of section 26 of the Constitution where the debtor did not reside at the property. Mr Mkhize resided on another property. An argument on behalf of Mr Mkhize before the court was based on the outcome of *Jaftha* case in which he alleged that a sale in execution of immovable property is void. It was held that section 26(1) had not been infringed in this case as there was no infringement on the right to access of adequate housing.<sup>246</sup> It was emphasised that *Jaftha* case intended to protect indigent debtors who would stand to lose all if they are to be deprived of the right to adequate housing.<sup>247</sup> The remedy taken by the CC that there was judicial oversight in section 66(1)(a) of the Magistrates court did not mean that each and every sale in execution of immovable property was invalid.<sup>248</sup> As such an infringement on section 26 should be construed as applying to the debtor's home and not merely residential property.

### **5.3 Effect of the *Jaftha* judgment on secured immovable property**

In most instances when credit is granted to a debtor the creditor seeks to have some form of security in order to ensure that their investments will be recovered. The most appealing form of security is immovable property due to its geographical fixation and in most instances, is the most valuable asset in a debtors' estate. Without providing for some security it may become impossible for many to live a normal life as most people rely on credit in order to purchase houses.

In reference to the *Jaftha* case, which is distinguishable under this heading as there was no form of security, the judgment also had an effect in cases where

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<sup>244</sup> *Ibid.*

<sup>245</sup> 2010 (4) SA 509 (KZP), (hereafter "*Mkhize*" case).

<sup>246</sup> At 515 G-H of judgment.

<sup>247</sup> At 521 F-G of judgment.

<sup>248</sup> At 519 H-I of judgment.

immovable property was subject to a mortgage bond. Section 66(1)(a) of the Magistrates' Court was analogous to High Court rule 45(1) of the Uniform rules thus the right to adequate housing had to be considered in similar cases. Deosaran<sup>249</sup> is of the view that there is a wrong view on whether *Jaftha* applies in cases falling under this heading as the fact that property is mortgaged can be considered to be one of the "other factors" in deciding whether a sale can be permitted.

The *Standard Bank v Snyders and others*<sup>250</sup> case dealt with a sale in execution of immovable property subject to a mortgage bond in the High Court. In light of the judgment in *Jaftha*, the court had to consider amongst other issues, whether the defendants should be notified in summons of their rights under section 26(3) when there is a judgment sought against the execution of immovable property.<sup>251</sup> This was as a result of the fact that since the court had to consider all relevant circumstances or factors section 26(3) had thus created important rights for defaulting debtors.<sup>252</sup> This meant that debtors now had an onus to prove or show that orders for execution would infringe on section 26(1).<sup>253</sup> It was mentioned that the mere fact bonded property was residential was not enough to conclude that there would be an infringement of section 26(1).<sup>254</sup> If the debtor proves that there would be an infringement the creditor would have to justify the granting of such an order.

The effect of the *Jaftha* judgment in this matter was that there was a limitation on the application of the above mentioned factors in houses subject to security as a sale in execution could be permitted if the procedure of the court has not been abused as the sole fact that the bonded property was residential was not enough to found conclusion that there was an infringement of section 26(1).<sup>255</sup> If this was not the case an unfair advantage would arise were debtors would keep unnecessary or luxurious properties at a great

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<sup>249</sup> Deosaran "Case note: Implications for sales in execution" 2005 *De Rebus* 40.

<sup>250</sup> [2006] 2 All SA 537 (C).

<sup>251</sup> Van Heerdan and Boraine 2006 *De Jure* 337.

<sup>252</sup> *Ibid.*

<sup>253</sup> Kelly-Louw "The right of access to adequate housing" 2007 *Juta's Business Law* 38.

<sup>254</sup> *Ibid.*

<sup>255</sup> Kelly-Louw 2007 *Juta's Business Law* 38.

disadvantage of the creditor yet they had willingly provided such properties for creditors.

In *Nedbank Ltd v Mortison*<sup>256</sup> another High Court case involving commercial property that was subject to a mortgage bond, it was mentioned that not all immovable property subject to a bond was utilised as residential but that commercial property was frequently hypothecated and as such section 26 would not be applicable. The court held that the default judgment in cases dealing with such property is a limitation of an owner's property rights, which is reasonable and justifiable in terms of section 36(1) of the Constitution.<sup>257</sup> The limitation was justifiable as *Jaftha* did not intend to totally prohibit the sale of immovable property (or family home) but to it had to consider whether one would be deprived of *adequate housing* (my own emphasis).<sup>258</sup>

It was further held that where a debtor had participated in a commercial transaction and had willingly utilised their immovable property as security, they had put it at risk.<sup>259</sup> It had been long practice that the consequence of a debtor failing to pay their debt then the creditor was entitled to have the property sold and recover proceeds of the amount due.<sup>260</sup> The CC's *obiter dictum* in *Jaftha* was also referred to by this court, which stated that where a judgement debtor willingly offered his house (in this instance commercial property) as security for a debt, a sale in execution should ordinarily be permitted.<sup>261</sup>

The Supreme Court of Appeal thus took a two stage approach in *Standard Bank Ltd v Saunderson and two others*<sup>262</sup> case to determine whether there would be an infringement of a constitutional right. Firstly, there had to be a demonstration of an infringement of the constitutional right and secondly, that

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<sup>256</sup> 2005 (6) SA 462 (W) (Hereafter the "Nedbank" case).

<sup>257</sup> Smith and Van Nierkerk "Execution against immovable property: Negotiating the tightrope of s 26" 2010 *De Rebus* 32.

<sup>258</sup> See Van der Merwe 2006 *Economic and Social Rights in S.A* 27, in a discussion of the Saunderson case.

<sup>259</sup> Van Heerdan and Boraine 2006 *De Jure* 339.

<sup>260</sup> *Ibid.*

<sup>261</sup> Steenkamp 2006 *De Rebus* 14.

<sup>262</sup> 2006 (2) SA 264 (SCA).

if there is such infringement it is justifiable. Thus where there is no evidence to show any infringement immovable property could be sold even if it is residential property as long as there is no infringement.

#### 5.4 Impact of children's rights on family home

Section 28(1)(c) of the Constitution provides for a right to shelter for children. In terms of common law parents also have a duty, amongst other things, to provide shelter for their children.<sup>263</sup> Evans<sup>264</sup> considered the possible infringement of this right in debt collection where a debtor's home is sold in execution to satisfy a debt. In *Government of the Republic of South Africa v Grootboom*<sup>265</sup> it was held that section 28(1) does not impose a duty on the state to provide shelter on demand to children or their parents.

It is suggested by Evans<sup>266</sup> that in case of children who may be affected by the sale of a family home, the courts should look to promote the best interests of a child. What may be in the best interests of a child depends on each and every case in which case a court should exercise its discretion. When all factors have been taken into consideration, interests of both the creditor and debtor should be kept in mind.<sup>267</sup> According to Stander and Horsten<sup>268</sup> the Insolvency Act should have a provision that stipulates that the insolvent estate should have a duty to pay fair and reasonable maintenance of the child or children. Such an amount should be considered after having considered all circumstances and may an amount for tertiary education.<sup>269</sup> By analogy where children's rights are affected in the sale of the home then the insolvent estate should be able to cater for the needs of these children. It may be desirable to consider postponement of a sale of the family home whilst giving the debtor sufficient time to find alternative accommodation.<sup>270</sup>

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<sup>263</sup> Evans 424.

<sup>264</sup> *Idem* 425.

<sup>265</sup> 2001 (1) SA 46 (CC); See Evans 425.

<sup>266</sup> Evans 426.

<sup>267</sup> *Idem* 427.

<sup>268</sup> Stander L and Horsten DA "Die reg van die onderhoudsbehoefige kind kragtens artikel" 2008 *TSAR* 221.

<sup>269</sup> *Ibid.*

<sup>270</sup> Evans 427.

## 5.5 Effect of above judgments in insolvency

In insolvency, the law exists primarily for the benefit of creditors due to the “advantage of creditors” principle and accordingly a court will not sequestrate a debtors’ estate unless this is shown.<sup>271</sup> Insolvency does not only provide a proper way of dividing the assets to creditors but also affects the debtor personally by restricting the capacity and freedom to enter into contracts.<sup>272</sup> The law of insolvency has its principles with regard as to how assets are realised and which type of assets that may be realised. Estate assets may be realized by the trustee but may not realize certain assets which are exempt such as wearing apparel, tools and other essential means of subsistence.<sup>273</sup> However, the Master may in certain circumstances determine that only a portion of this may be kept by the insolvent for own use.

The realization of immovable property is governed by special rules. Immovable property subject to security is generally realized by the trustee in accordance with the directions of creditors given at the second meeting or by public auction or tender.<sup>274</sup> If there is a further real right on the immovable property then the manner in which the property is sold is affected by priority preference of competing rights.<sup>275</sup>

Van Heerdan, Borraine and Steyn<sup>276</sup> discussed certain exemption policy considerations in which they stated that providing some form of protection for the home is a matter of policy in which interests of creditors and debtors’ i.e. to obtain payment of their debts and a right to have a roof over one’s head respectively have to be weighed up. The authors further noted Resnick’s<sup>277</sup> view on the purposes in which exemption of assets should serve. The following purposes are:

- a. To provide a debtor with property for physical survival;

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<sup>271</sup> Sharrock R. *Hockly’s Insolvency law* (2006) 4.

<sup>272</sup> *Idem* 5.

<sup>273</sup> Refer to Chapter 1 of this study for a more detailed discussion of exempt assets not available for distribution.

<sup>274</sup> Sharrock 165.

<sup>275</sup> *Ibid* e.g. real rights include fideicommissum, usufruct, right of lessee etc.

<sup>276</sup> Van Heerdan, Borraine and Steyn (unpublished- file with authors) 274.

<sup>277</sup> *Idem* 275.

- b. To protect the dignity and the cultural and religious identity of the debtor;
- c. To rehabilitate the debtor financially;
- d. Protect the debtor's family from poverty;
- e. To shift the burden of providing the debtor and his family with minimal financial support from the society to the debtor's creditors.

From the study of different family home exemption policies from various jurisdictions, a number of issues were considered which were deemed to be relevant by Van Heerdan, Borraine and Steyn.<sup>278</sup> These included:

- a. The protected family home must be the primary residence of the insolvent debtor;
- b. Type of person it aims to protect;
- c. Type of dependants who qualify to fall under such exemption if any;
- d. A need to decide if the whole home should be protected or only a part of it ;
- e. Whether there should be a condition that should be attached to the exemption or protection;
- f. Whether such exemption should arise automatically;
- g. A need to devise a simple, inexpensive and easily accessible procedure.

From what is outlined above, South African insolvency law has not yet considered the prospects of protecting the family home from creditors either for a short term or completely exempting it from the estate. Many developments took place in civil procedure mainly the rules of the courts as mentioned above. The question still remains whether the factors that were considered in the *Jaftha* case will have an effect in insolvency remains to be answered as well as the development of such protection into legislation. The

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<sup>278</sup> *Idem* 276.

right to security of tenure as envisaged by section 26 of the Constitution is never considered in insolvency as part of the sequestration process as it is not a formal statutory requirement.<sup>279</sup>

Various suggestions have been made by authors with respect to the protection of the family home in insolvency to suit the South African system. Van Heerdan, Borraine and Steyn<sup>280</sup> have made suggestions in that the concept of a family home ought to be determined i.e. providing in legislation the definition of what a family home is. Cognisance should also be taken for such definition to include spouses, cohabiting partners in same sex relationships, children and other dependants of the debtor. Further the authors considered the issue whether there should be total exemption or partial protection.<sup>281</sup> There is much criticism on totally exempting the family home in that it would be put out of reach of creditors completely which in turn end up disadvantaging the creditor as they might stand to lose greatly. The down side too this is that creditors would lose confidence in granting credit and could result in a huge mess for the economy as a whole.

The authors suggested that this problem maybe remedied by providing for protection for a limited period of one year after commencement of insolvency to afford the insolvent and his family a roof over their heads to give them sufficient time to find alternative accommodation.<sup>282</sup> It is further suggested that this period may be extended or shortened depending on the circumstances that may arise in which it would be considered justifiable to do so without prejudicing the other parties.

## 5.6 Conclusion

The issue regarding the family home protection has not been completely dealt with even though the CC provided certain guidelines that could be used to

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<sup>279</sup> *Idem* 305.

<sup>280</sup> *Idem* 306.

<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid.*, however the authors are of the view that such protection should not be automatic but one should make an application to court as many insolvents still have the earning capacity and can thus afford to find alternative accommodation.

determine whether a sale in execution would be permissible.<sup>283</sup> A number of fundamental issues have to be looked at in deciding when such protection of the family home should be afforded. It may be difficult to completely exempt the property in all instances as the circumstances of each and every debtor varies. However even though there are still some concerns the position in sales in execution has been made clearer due to *Jaftha* case.<sup>284</sup> There is court intervention when one seeks to execute against immovable property. Guidelines have been given as to when it might be unjustifiable especially if the debt is of a little amount and if there are children involved in which granting an order could cause undue hardship on the debtor.

From what may be seen above there seems to be a tendency by courts to readily allow a sale in execution of secured property they are of the view that agreements should be honoured. However, this is not to say that all secured residential property will be sold if there are compelling circumstances that should prevent such a sale then the court has to make a just decision.<sup>285</sup> A greater onus is placed on debtors with secured properties that there would be an infringement of section 26 if the residential property is sold in execution.

In instances where there is a possibility of infringing on children's rights, this factor has to be taken into account before allowing for such an order.<sup>286</sup> The best interests of the child should be looked at. Following the English approach of postponing the sale of a family home may be ideal in such an instance.<sup>287</sup>

In insolvency such a situation has not yet arisen and some guidelines that have been provided by different authors<sup>288</sup> may be used in creating policies that would not end up depriving the debtor of adequate housing. The *Jaftha* case can be said to have provided a first step in putting in place Legislation that would give a better indication of what may be done if the right to adequate housing is threatened in insolvency.

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<sup>283</sup> Para 5.2.1.3 above.

<sup>284</sup> *Ibid.*

<sup>285</sup> Para 5.3 above.

<sup>286</sup> Para 5.4 above.

<sup>287</sup> Chapter 4, para 4.3.2 above.

<sup>288</sup> Van Heerden, Borraine and Steyn, para 5.5 above.



## Chapter 6: Conclusion and Recommendation

### 6.1 Introduction

The development of either a homestead exemption or protection in South African law has not yet developed fully especially in insolvency law. As seen in chapter 2 and 5 of this study, protection of immovable property has so far been developed in individual debt collecting procedures through the *Jaftha*<sup>289</sup> case. The possibility of having such a policy implemented in insolvency law may be met with some criticism. The “advantage to creditors” principle required when a sequestration order is sought may prove to be an impediment to having homestead exemption or protection.<sup>290</sup> In most instances the home is usually the most valuable asset in an estate thus if exemption law with regard to this property is passed, the interests of creditors will be compromised.

However from the comparison done in Chapter 3 and 4 between the U.S and England and Wales, certain provisions can be useful in developing homestead protection in our law. The U.S. bankruptcy system is a federal issue and as such it provides for homestead exemption up to a limited amount.<sup>291</sup> Any amount in excess will be available for distribution for creditors. The amount that is exempt can provide a “fresh start” for debtors in which they could move into a more affordable house. The English approach in dealing with the family home leaves a lot to be desired. The *Cork Report* which was responsible for legislation reform managed to bring about changes.<sup>292</sup> Our insolvency law can be reformed based on policies that have been implemented in other foreign jurisdictions to suit the South African society. I therefore make some recommendations below.

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<sup>289</sup> See para 2.3 above.

<sup>290</sup> See para 2.5 above on the discussion of the development of insolvency law according to the Draft Bill.

<sup>291</sup> Refer to para 3.7 above.

<sup>292</sup> See para 4.3 above, in which many factors were considered in creating this policy.

## 6.2 Definition of family home

If legislation is relating to the family home protection or exemption is enacted Van Heerdan, Boraine and Steyn<sup>293</sup> suggest that such legislation should define what a family home is. This would give a clearer picture as due to the *Jaftha* case the courts did not narrow it down hence it currently includes even luxury homes and commercial property. I am of the view that the definition could prevent abuse of such legislation by debtors who would aim to avoid repaying their debts when they have millions worth in immovable property that does not interfere with their right to tenure relating to the family home.

## 6.3 Type of debtor eligible

The circumstances of each and every debtor who would qualify for such protection of the family home should also be considered. Legislation should provide for a basic guideline of the type of people who could qualify for such protection. By doing so it will lessen the burden on the courts on trying to determine who is eligible. Failure to provide such guideline then each and every debtor may want to prevent the sale of their homes even where it would not be justifiable to do so. The principle provided for in England which provides that if a family home is of a certain value then such property is exempt from the estate may also help to determine eligible debtors.<sup>294</sup>

Other guidelines that were taken by the CC also come into play here as when aims to determine what kind of a debtor we would be looking at their financial situation cannot be ignored.<sup>295</sup> One has to look at the circumstance that gave rise to the incurrence of the debt and whether one has a regular income or not. In cases of married spouses then the circumstances of the solvent spouse have to be considered. If such spouse can take care of the family then it may not be desirable to afford protection for that family at the expense of the creditors.

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<sup>293</sup> Refer to para 5.5; Van Heerdan, Boraine and Steyn (unpublished note, file with authors) 306.

<sup>294</sup> Para 4.3.1 above.

<sup>295</sup> The factors that were considered in the *Jaftha* case; see para 5.2.1.3 above.

#### **6.4 Whether the family home should be totally exempt or partially protected**

In the U.S. federal law has put in place measures that the family home be exempt up to a certain amount and as such this amount varies from time to time. In England and Wales the family home is protected for certain period of time i.e. a year and depending on the change of circumstances it can be lengthened or shortened.<sup>296</sup> This approach in my view is more favourable as a debtor is given a chance to find alternatives at the same time creditor's claim is merely postponed but at the end of the day they stand to recover something. In England they then make a special exemption for debtors who are extremely hopeless in that if the house is of a certain value it is totally exempt. This would be similar to *Jaftha* circumstances where state subsidised houses should not be attached. Authors Van Heerdan and Boraine suggest that there should be a creation of a limited exempt category of immovable property, for example state-subsidised houses.<sup>297</sup> Though the U.S provision for exemption may be more favourable for debtor one has to bear the interests of creditors as well.

#### **6.5 Homestead that is subject to security**

There is much reluctance on ruling in favour of a debtor who willing provided security of their homes when obtaining a loan. The sanctity if a contract should be respected. However if there are circumstances that this should be overridden then depending on the discretion of the courts such a debtor can qualify for such protection.<sup>298</sup>

#### **6.6 Judicial interference**

If it is submitted that the family home should be protected, the courts should have the final say after having had taken into considerations e.g. guidelines followed in *Jaftha* case. In insolvency usually the trustee does what the creditors would have told him to do however under the supervision of the Master. In my opinion leaving such powers to the trustee when it comes to

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<sup>296</sup> See para 4.3 above.

<sup>297</sup> Van Heerdan and Boraine 2006 De Jure 352.

<sup>298</sup> See discussion of other various cases that followed after *Jaftha*; para 5.3 above.

family home protection, goes back to the same problem that was in section 66 of the Magistrates Court were the Clerk could grant an order for sale of immovable property. According to Van Heerdan, Boraine and Steyn<sup>299</sup> they suggest that either the trustee or Master be awarded powers to decide on who gets a right to family home protection. If they reject then the courts may be approached. If this procedure is followed costs are minimised for the debtor. Even though I disagree on allowing the trustee and Master having such powers, it would yield economic benefit from a cost point of view.

### **6.7 Final conclusion**

In conclusion I recommend that the South African Law Reform Commission in its bid in trying to reform the insolvency legislation also considers the possibility of introducing family home protection to honest and needy debtors. By so doing we will be keeping in line with the modern times in a bid to uplift the goals that we have set as a nation through the constitution. Evans submits that the English approach is more appropriate in South Africa as touches on policies of both welfare and humanity.<sup>300</sup> Based on the history of South Africa these are important considerations. Above all it will keep the family structure together which in turn ensures a generation of productive members of society.

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<sup>299</sup> Van Heerdan, Boraine and Steyn (unpublished note, on file with authors) 308.

<sup>300</sup> Evans 475.

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