

**Statutory regulation of forced sale of the home
in South Africa**

by

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ABSTRACT

The home of a debtor has never enjoyed specific statutory protection against forced sale in the individual debt enforcement and insolvency procedures in South Africa. In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* (2005 (2) SA 140 (CC)) and *Gundwana v Steko Development CC and Others* (2011 (3) SA 608 (CC)), the Constitutional Court recognised that in the individual debt enforcement process execution against a debtor's home, even where it has been mortgaged in favour of a creditor, may constitute an unjustifiable infringement of the right to have access to adequate housing, provided by section 26 of the Constitution. The effect of these decisions is that, in every case in which a creditor seeks to execute against a person's home, a court must consider "all the relevant circumstances" to determine whether execution is justifiable, in terms of section 36 of the Constitution.

The absence of a properly constructed framework, incorporating clear substantive and procedural requirements, within which these recently established principles must be applied, has led to divergent approaches in the courts and a lack of clarity regarding circumstances in which execution against a debtor's home will be permitted. Further, courts have not considered the impact of section 26 and other rights on the position where a debtor's home is realised by the trustee of an insolvent estate in terms of the Insolvency Act 24 of 1936. This has given rise to a number of unanswered questions as well as to a lack of predictability that potentially hold adverse consequences for bond finance, commerce, and the economy generally. The need to balance the competing interests emphasises the necessity for a coherent contextual framework within which forced sale of a debtor's home may occur.

This thesis examines issues surrounding forced sale of a debtor's home in South Africa. It compares the position in other legal systems and suggests mechanisms and an appropriate method, or process, for inclusion in statutory provisions to regulate the forced sale of a debtor's home in both the individual debt enforcement and insolvency procedures in South Africa.

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