

CHAPTER 4

LAW AND POLICY RELEVANT TO THE PROTECTION OF A DEBTOR'S HOME IN THE INDIVIDUAL DEBT ENFORCEMENT PROCESS

Even when laws have been written down, they ought not always to remain unaltered.

- Aristotle *Politics* II.1269^{a9}

4.1 Introduction

This chapter sets out aspects of law and policy relevant to the sale in execution of a debtor's home in the individual debt enforcement process. This is done mainly with a view to depicting the context within which issues have arisen in, and out of, the reported judgments which will be dealt with in Chapters 5 and 6. Knowledge of the relevant laws, and the policies which they reflect, to some extent explain the developments which have occurred through the cases. On the other hand, aspects of the courts' decisions and the reasoning behind them explain certain changes subsequently brought about to statutory provisions as well as the introduction of new legislation and rules of practice. It is submitted that they also expose aspects of law and policy which ought to be questioned, reviewed and amended.

In this chapter, pertinent aspects of housing law and policy are discussed, followed by coverage of specific, private law principles of contract law and the nature and effect of mortgage. Thereafter, relevant provisions contained in the Magistrates' Courts Act, the Magistrates' Courts Rules,¹ the Supreme Court Act 59 of 1959,² the Uniform Rules of Court, and the NCA, are set out. These reflect the basic requirements for a creditor to obtain a judgment and the position in relation to execution against a judgment debtor's

¹Made by the Rules Board for Courts of Law under s 6 of the Rules Board for Courts of Law Act 107 of 1985, with the approval of the Minister for Justice and Constitutional Development, hereafter referred to as the "Magistrates' Courts Rules".

²Hereafter referred to as the "Supreme Court Act".

assets, taking into account exempt assets. Administration orders under section 74 of the Magistrates' Courts Act are also considered as a debt relief mechanism. With consumer protection as an objective, the NCA introduced substantive and procedural requirements for the enforcement of credit agreements as well as a new debt relief mechanism for consumer debtors with respect to obligations arising out of credit agreements. The implications of the provisions of the NCA for a debtor's home and, more particularly, in relation to mortgage obligations, are considered. Finally, the potential impact of the Consumer Protection Act 68 of 2008 is touched on.

4.2 Housing law and policy

4.2.1 Statutory housing law and policy

As mentioned in Chapter 3,³ section 26(2) of the Constitution imposes a duty on the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of everyone's right to have access to adequate housing, provided for in section 26(1). In *Grootboom*, the Constitutional Court affirmed that section 26(2) imposed a positive duty upon the state to adopt comprehensive programmes "capable of facilitating the realisation" of this right.⁴ The court further stated that this required "legal, administrative, operational and financial hurdles ... [to] be examined and, where possible, lowered over time" and that housing was required to be "made more accessible not only to a larger number of people but to a wider range of people as time progresses".⁵ Thus housing law entails far more than "simply providing shelter" but also "creating sustainable, integrated housing settlements, generating wealth through asset creation ... [and, f]or the very poor or indigent, ... social welfare and access to basic services". It also comprises "a complex network of law, policy,

³See 3.3.1.1, above.

⁴*Grootboom* par 41. See, also, 3.3.1.1 and 3.3.1.2, above.

⁵*Grootboom* par 45. See, also, 3.3.1.1 and 3.3.1.2, above.

social welfare, politics, international law, macro-economic planning, co-operative government and finance".⁶

South African housing law and policies⁷ are contained mainly in the Housing White Paper,⁸ the Housing Act and the National Housing Code.⁹ Fundamental, also, was the Reconstruction and Development Programme¹⁰ which was replaced in September 2004 by "Breaking New Ground", an amended "comprehensive plan for the creation of sustainable human settlements".¹¹ In 2009, the Department of Housing was renamed the Department of Human Settlements,¹² the Social Housing Act 16 of 2008 and the Housing Development Agency Act 23 of 2008 came into operation and the National Housing Code 2009 was issued to accord with the Breaking New Ground policy.¹³ The *National Development Plan: Vision for 2030*, compiled by the National Planning Commission and made public on 11 November 2011, envisages even more enhanced human settlements initiatives.¹⁴

⁶McLean "Housing" 55-1. See also *Strategic Statement by the Department of Housing Settlements* <http://www.dhs.gov.za/Content/The%20Department/Strategic%20Statement.htm>, [date of use 15 March 2012], hereafter referred to as "*Strategic Statement*".

⁷For a succinct review of South African housing law and policies, see *Blue Moonlight Properties* (SCA) pars 26-40. For a comprehensive review, see Tissington "A Resource Guide to Housing in South Africa 1994 – 2010: Legislation, Policy, Programmes and Practice" (February 2011) http://www.escri-net.org/usr_doc/SERI_A_Resource_Guide_to_Housing_in_South_Africa_Feb11.pdf [date of use 15 March 2012], hereafter referred to as "Tissington 'Resource Guide'".

⁸Produced by the government, in December 1994, setting out South Africa's first universal housing strategy. See McLean "Housing" 55-2-55-3.

⁹The National Housing Code is published by the Minister of Human Settlements in terms of s 4(2)(a) of the Housing Act 107 of 1997. The Housing Act provides "general principles" for housing development and the National Housing Code contains national housing policy which binds provincial and local spheres of government. The original National Housing Code was published in 2000. A revised National Housing Code was issued in 2009. See <http://www.dhs.gov.za> [date of use 15 March 2012].

¹⁰Commonly referred to as the "RDP". The Growth, Employment and Redistribution Strategy, and the Urban and Rural Development Frameworks were also important, as well as various other white papers and legislation on local government and the public service. See McLean "Housing" 55-3.

¹¹See *Strategic Statement*.

¹²For background to this development, see http://www.gcis.gov.za/resource_centre/sa_info/pocketguide/2009/019_human_settlements.pdf [date of use 15 March 2012].

¹³See the National Housing Code 2009. For programmes not covered in the National Housing Code 2009, the National Housing Code 2000 still applies.

¹⁴*The National Development Plan: Vision for 2030* (11 November 2011), hereafter referred to as the "*National Development Plan*" <http://www.npconline.co.za/medialib/downloads/home/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf> [date of use 15 March 2012].

The priorities of Breaking New Ground are stated to be, *inter alia*, to provide and accelerate delivery of housing within the context of sustainable human settlements, to provide quality housing in order to turn homes into assets and to create a single, efficient, formal housing market.¹⁵ The Department of Human Settlements has extended the national housing subsidy scheme by increasing the threshold income for a person to qualify for a subsidy. It has also introduced a "credit-linked subsidy", in collaboration with financial institutions, in order to promote access to mortgage finance. Further, it has encouraged the financial services sector to develop "new housing finance products" including "affordable fixed rate mortgages".¹⁶ It has recognised the need for affordable rental housing for poor, as well as low to middle income, households. It has also initiated and implemented various programmes to facilitate the provision and regulation of rental housing. The Department of Human Settlements has set 2014/2015 as its goal for the eradication or upgrading of all informal settlements.¹⁷ The *National Development Plan* supports a shift away from the focus on "capital subsidy" towards low-rent accommodation and it supports the upgrading of informal settlements.¹⁸ Of some concern, it is submitted, is that it also conveys expressly that "[n]ew approaches are needed, with individuals and communities taking more responsibility for providing their own shelter."¹⁹ The effect and significance of this is presently unclear but it is hoped that this is *not* an indication that the state is trying to shift away from itself the duty of providing access to adequate housing, as recognised by the Constitutional Court, in *Grootboom*.

Fundamental to the decision in *Jaftha v Schoeman* was the fact that, in terms of the National Housing Code 2000, only a person who was a first-time property owner and who had not previously benefited from government funding for housing was eligible for a housing subsidy.²⁰ This meant that the sale in execution of the appellants' homes would

¹⁵See *Strategic Statement*.

¹⁶See *Strategic Statement*.

¹⁷See *Strategic Statement*.

¹⁸See *National Development Plan* 243ff.

¹⁹See *National Development Plan* 255.

²⁰See the National Housing Code of 2000, which was effective at that time, Part 3 Chapter 2 par 2.2(e) and (f), respectively.

render them ineligible ever again to receive state housing assistance.²¹ In the circumstances, the court held that the sale in execution of the homes of the appellants amounted to a breach of the negative duty which rested on the state and private individuals not to infringe their existing access to adequate housing.²² In terms of the amended National Housing Code 2009, the position remains that a person may not receive a state housing subsidy more than once.²³ A survey of the available programmes reveals that the position of a person who loses his home through forced sale has not improved or changed significantly. In the Integrated Residential Development Programme and in the Individual Subsidy Programme, because such a person has previously owned fixed property, he will qualify only for a vacant serviced site.²⁴ It is only in the Informal Settlement Upgrading Programme that applications from persons who previously owned or currently own a residential property and previously received state housing assistance, will be considered on a case by case basis.²⁵ It would seem, however, that it might be possible for a previous homeowner to receive housing support in the form of low-rent leased accommodation.²⁶

Therefore, it appears that, at best, a person who has lost his home through forced sale is eligible to receive assistance from the state only in the form of a vacant serviced site or, if he has by force of circumstance relocated to an informal settlement, he may benefit from state assistance to upgrade it. His other option would be to hire rented accommodation which, it is submitted, would in any event have been an option at the time of the decision in *Jaftha v Schoeman*. There may also now be potential accessibility, through state agencies, to low-rent leased accommodation.

²¹ *Jaftha v Schoeman* par 39.

²² *Jaftha v Schoeman* par 34.

²³ See *A Simplified Guide to the National Housing Code* <http://www.dhs.gov.za> [date of use 15 March 2012], hereafter referred to as "*Simplified Guide*", Part C par 2.10.

²⁴ See *Simplified Guide* Part B pars 1.1 and 8.2.

²⁵ See *Simplified Guide* Part B pars 2.2 and 4.2. The Emergency Housing Assistance Programme, described at par 4.1, would apparently be inapplicable in this context as it covers persons who lose their homes during the upgrading of informal settlements, or as a result of disasters, such as fires and storms.

²⁶ See details regarding the Social Housing Programme, the Institutional Housing Subsidy Programme and the Community Residential Units Programme in *Simplified Guide* Part B pars 5, 6 and 7.

4.2.2 Sale of a state-subsidised home

Amendments to the Housing Act, in 2001,²⁷ included the insertion of new sections 10A and 10B²⁸ to deal with the sale of state-subsidised houses. This was done in an effort to curb the escalating private sale of houses by recipients of housing subsidies, often for substantially lower prices than the amounts of the original subsidy investment made by the government.²⁹

The effect of section 10A is that a person cannot sell his state-subsidised house in a private sale, within eight years of having acquired the property, without first offering it to the provincial housing department. If the latter accepts the offer,³⁰ the seller will not receive any purchase price for it but will be eligible to receive a state subsidy in the future. When he vacates the property, the provincial housing department will be deemed the owner of the property and may apply to the Registrar of Deeds to have the title deed reflect that it is the owner.

The effect of section 10B is that, in the event of a forced sale by a creditor, including a mortgagee,³¹ the property must first be offered to the provincial housing department at a price not exceeding the amount of the original government subsidy which was provided. Neither the creditor, nor any other person, may obtain transfer of the property into his name unless he can provide the Registrar of Deeds with a certificate from the head of department reflecting that this requirement has been met. In the event of forced sale, the debtor will never again be eligible for a housing subsidy. In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*,³² the high court referred to section 10B of the Housing Act as placing "restrictions on the involuntary sale by 'successors in title' or 'creditors in law' of any person who is the recipient of State-aided housing ... [which] brought about a truncation of judgment creditors' entitlement to execute against

²⁷By the Housing Amendment Act 4 of 2001.

²⁸Inserted by ss 7 and 8, respectively, of the Housing Amendment Act 4 of 2001.

²⁹See *Memorandum on the objects of the Housing Amendment Bill 2006* par 2.3 published in GG 29502 of 22 December 2006.

³⁰Presumably, as this is not expressly stated in the Housing Act.

³¹Only a credit-linked subsidy is excluded; see s 10B(1) of the Housing Act.

³²*Jaftha v Schoeman; Van Rooyen v Stoltz* 2003 10 BCLR 1149 (C).

immovables".³³ However, no mention is made of section 10B in the judgment of the Constitutional Court.

The Housing Amendment Bill, published for comment in 2006,³⁴ seeks to merge sections 10A and 10B and to create a clear pre-emptive right in favour of the provincial housing department.³⁵ It seeks to prescribe a clear process to be followed³⁶ in any voluntary sale by the beneficiary of the subsidy, and in any sale by "successors in title or creditors in law", within five years of the acquisition of the property.³⁷ Significantly, it also proposes a new subsection which will have the effect that the provisions will not apply to a mortgagee exercising its rights under a mortgage bond passed over the property, upon default by the mortgagor.³⁸ Presumably, the thinking behind this proposal is that a mortgagee's rights should not be undermined lest this would lead to a reduction in the provision of finance and access to credit for owners of state-subsidised homes. The importance to poor homeowners of being able to use their houses to access credit was emphasised by the Constitutional Court in *Jaftha v Schoeman* and was the basis for its rejection of the notion of an exemption from execution for homes of low value.³⁹ The proposed amendment to section 10B of the Housing Act may suit the interests of mortgagees, in relation to the enforcement of debts, and of individual owners of state-subsidised homes, in relation to their ability to access credit. However, it is submitted that it tends to overlook the loss arising from the wasted investment by the state of public funds in the form of the subsidy which it originally granted. It is important for the state to recoup such investment in order to sustain the provision of housing through official housing programmes. It is therefore submitted that the state should have a pre-emptive right in all cases, including where the forced sale occurs at the instance of a mortgagee. It is also submitted that the question of a possible exemption from execution of state-subsidised homes should receive thorough, policy-based

³³ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2003 10 BCLR 1149 (C) par 47.

³⁴ Housing Amendment Bill, 2006, published for comment in General Notice 1852 in GG 29502 dated 22 December 2006.

³⁵ In terms of the proposed s 10A(1).

³⁶ In terms of the proposed subsecs (2)-(8) of s 10A.

³⁷ See the proposed s 10A in s 9 of the Housing Amendment Bill, 2006.

³⁸ See the proposed s 10A(10) in s 9 of the Housing Amendment Bill, 2006.

³⁹ *Jaftha v Schoeman* par 51, referred to at 3.3.1.1, above, and 5.2.3, below.

consideration by appropriate bodies in an endeavour to find a balanced solution.⁴⁰ The Housing Amendment Bill 2006 has not yet been passed by Parliament and it is hoped that this issue will be thoroughly analysed before any amendment is enacted.

4.2.3 Housing delivery

The Department of Human Settlements to some extent acknowledges its shortcomings in housing delivery.⁴¹ The slow pace and poor quality of housing delivery continues to attract media attention.⁴² In 2008, when Irene Grootboom died, a street had been named after her but she had not yet received state housing and was still living in a "shack".⁴³ It is reported that the housing backlog increased from 1,5 million in 1994 to 2,1 million in 2010.⁴⁴ It is estimated that about 12 million South Africans, perhaps even

⁴⁰It may be noted, at this point, that Evans criticises the absence of an exemption of an insolvent debtor's home of low value as a *lacuna* in South African insolvency law. He also advocates that similar exemption provisions should apply in insolvency and in the individual debt enforcement process. See Evans 2008 *De Jure* 262-263; Evans *Critical Analysis* 423; Evans "Does an insolvent debtor have a right to adequate housing?". The issue of a possible "low value" home exemption is also discussed at 3.3.1.1, above, and 4.4.3.4, 5.2.3, 5.6.8, 6.6 and 6.11, below.

⁴¹See *Strategic Statement* which states: "The housing backlog continues to grow despite the delivery of 1,831 million subsidised houses between 1994 and March 2005, as well as the servicing of 57 065 new sites and the building of 52 548 houses between April and September 2005."

⁴²Phakathi "Call to revisit laws that slow housing delivery" *Business Day* South Africa (24 February 2011) <http://www.businessday.co.za/articles/Content.aspx?id=135286> [date of use 15 March 2012]; Paton "Slow state spending endangers growth and service delivery" *Financial Mail* South Africa (20 January 2011) http://www.urbanlandmark.org.za/downloads/clipping_fm_jan2011.pdf [date of use 15 March 2012]; Sapa "Laws make housing difficult – Zille" *News24* South Africa (23 August 2010) <http://www.news24.com/SouthAfrica/Politics/Laws-make-housing-difficult-Zille-20100823> [date of use 15 March 2012]; Hayward "Houses of horror" *The Herald* South Africa (22 July 2010) <http://www.easpe.co.za/news.asp?id=475> [date of use 15 March 2012]; Mbanjwa "3 000 RDP houses to be demolished" *Daily News* South Africa (3 November 2009) <http://www.highbeam.com/doc/1G1-211159260.html> [date of use 15 March 2012]; Wilson "Banks worry over slow delivery of housing" *Business Day* 16 March 2006 http://www.banking.org.za/documents/2006/MARCH/BDay_13Mar06Housing.pdf [date of use 15 March 2012].

⁴³See, for example, Joubert "Grootboom dies homeless and penniless" *Mail & Guardian* 8 August 2008 <http://www.mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless> [date of use 15 March 2012]; Hweshe "'Heroine' dies while still waiting" (4 August 2008) <http://www.iol.co.za/news/south-africa/heroine-dies-while-still-waiting-1.410968> [date of use 15 March 2012].

⁴⁴Phakathi "Call to revisit laws that slow housing delivery" *Business Day* South Africa (24 February 2011) <http://www.businessday.co.za/articles/Content.aspx?id=135286> [date of use 15 March 2012].

more, presently lack access to adequate housing.⁴⁵ The National Planning Commission, in the *National Development Plan*, states:⁴⁶

Many households have benefited from houses provided by the capital subsidy programme, but the harsh reality is that the housing backlog is now greater than it was in 1994. New approaches are needed with both individuals and communities taking more responsibility for providing their own shelter.

It is within this context that the various rights and interests of all concerned must be weighed in considering whether the forced sale of a person's home is justifiable. Such rights and interests include not only those of the individual homeowner debtor, as discussed in Chapter 3, above, but also the state which ultimately bears the burden of providing adequate housing for the nation. Also significant are the rights and interests of members of the wider community who not only benefit from the equitable and efficient provision of socio-economic necessities and other state services, but also to whom the state owes a duty for their contribution of financial and other resources to the running of the state machinery. It is submitted that it is imperative, in the interests of all, where possible to prevent debtors, having lost their homes through forced sale, from swelling the ranks of the homeless.

A comprehensive approach to giving non-homeowners access to housing and at the same time allowing existing homeowners, despite being over-indebted, to retain their homes, wherever this is feasible, will serve the broader community and state interests and assist in the quest to combat homelessness. A consideration might be to amend national housing policy with the effect that, as long as the state has recouped its initial subsidy investment, the sale in execution of a subsidised home will no longer render a person ineligible to receive future housing assistance. A consideration also might be that a person who has previously owned an entirely self-funded home should nevertheless be eligible to receive a subsidy. Another possibility would be to introduce an exemption from sale in execution of a state-subsidised home.

⁴⁵See Tissington "Resource Guide" 33.

⁴⁶See *National Development Plan* Chapter 8 "Transforming Human Settlements" 243.

4.3 Selected aspects of private law: contract and mortgage

4.3.1 Enforcement of a contractual debt

The forced sale of a debtor's home most often involves a contractual relationship between the creditor and the debtor and, where the home has been mortgaged by the debtor in favour of his creditor, the real security rights of the mortgagee. A contract is an agreement which creates a binding legal obligation between the parties to it thus creating personal rights and duties enforceable by one party against the other.⁴⁷ By mortgaging his property in favour of a creditor, the debtor gives real rights in the property to the mortgagee creditor.⁴⁸

The principle of sanctity of contract, expressed in the maxim *pacta sunt servanda*, regarded as "the first premise of contract law",⁴⁹ has the effect that, once a valid, binding contract has been formed, when one of the parties breaches their agreement, the other is entitled to hold the former to it and to enforce its terms. This is fundamental to the conduct of business as is the ability to rely on and realise security rights acquired in a debtor's home in consequence of the latter passing a mortgage over it in favour of his creditor. It goes without saying that the terms of the agreement must accord with constitutional principles.⁵⁰ In South African law, in principle, the aggrieved party is entitled to an order of specific performance although the court does have the discretion, in appropriate circumstances, to refuse to order specific performance and to award damages instead.⁵¹

⁴⁷Van der Merwe *et al Contract* 2ff, 8ff; Christie *Law of Contract* 2.

⁴⁸See 4.3.3, below.

⁴⁹See Hu and Westbrook 2007 *Columbia Law Review* 1389; Rajak and Henning 1999 *SALJ* 273. See, also, 1.1, 2.3.5.3 and 3.3.2, above.

⁵⁰Van der Merwe *et al Contract* 11, 20; Christie *Law of Contract* 199. *Pacta sunt servanda* is also discussed at 3.3.1.3, 3.3.2, above. See, specifically, cases cited at 3.3.2, above.

⁵¹Van der Merwe *et al Contract* 380ff; Christie *Law of Contract* 522ff; Van Rensburg, Lotz and Van Rhijn "Contract" *LAWSA* 5(1) par 495.

4.3.2 Debt relief measures available in the common law of contract

Performance of the terms of the contract brings a contractual obligation to an end.⁵² It may also be terminated by subsequent agreement between the parties.⁵³ For instance, the parties may agree to cancel their contract, thus releasing one another from their respective obligations. This is also referred to as "release".⁵⁴ Novation occurs when the original obligation is extinguished and substituted by a new one.⁵⁵ A compromise occurs where parties who are in dispute as to whether they have a contract, or as to the nature and extent of the obligations under their contract, agree to settle the matter. This usually occurs in order to terminate uncertainty with regard to their obligation and to avoid litigation.⁵⁶ Once the parties reach a compromise, any obligations which arose between them by virtue of the original agreement fall away and the terms of the compromise form the basis of their obligation henceforth. Parties may validly vary the terms of their contract as long as any statutory requirements for validity as well as any previously agreed terms providing for the variation of their contract have been satisfied.⁵⁷ Variation, release, novation, and compromise, all based on the Roman and Roman-Dutch concepts, as discussed above,⁵⁸ each provide the potential to afford, by agreement, some measure of debt relief for the debtor, including the potential to avoid the forced sale of his home.

⁵²Van der Merwe *et al Contract* 512ff.

⁵³That is, in the absence of any other reason for the termination of the contract, such as, for example, by operation of law, by supervening impossibility of performance, extinctive prescription, merger or set-off; see Van der Merwe *et al Contract* 511-512, 541ff.

⁵⁴Van der Merwe *et al Contract* 526ff.

⁵⁵In the case of delegation and assignment, which occur where contracting parties agree that a third party will be substituted for one of them, as a consequence, the obligation between the original contracting parties comes to an end. To this extent, these may be regarded as forms of novation, although such a construction is not preferred by all commentators. See van der Merwe *et al Contract* 530ff.

⁵⁶Van der Merwe *et al Contract* 538ff.

⁵⁷Van der Merwe *et al Contract* 154, Christie *Law of Contract* 447. Variation of the terms of a contract may entail a waiver by one party of a right conferred in terms of that contract and the waiver of all such terms would amount to the termination of the contractual obligations; see Christie *Law of Contract* 437.

⁵⁸See 2.2.4 and 2.3.5.3, above.

4.3.3 Mortgage

The South African law in relation to mortgage is founded upon the principles of Roman and Roman-Dutch law.⁵⁹ A "mortgage bond" is a document which, when registered in the Deeds Registry in accordance with the provisions of the Deeds Registries Act 47 of 1937, creates a right of security over immovable property.⁶⁰ The NCA applies to mortgage bonds.⁶¹

A real right of security is accessory to the obligation that it secures and cannot be divorced from it. Thus, if the principal obligation is invalid from the outset, or if it subsequently terminates, the right of security also does not arise or it becomes unenforceable.⁶² Common types of mortgage bond are: a *kustingbrief*; a covering bond; a collateral bond; a surety bond; an indemnity bond; and a participation bond. A *kustingbrief* is a bond passed by the purchaser of immovable property simultaneously with the transfer of the property into his name.⁶³ The bond may be in favour of the seller, to secure payment of the purchase price, or a third party such as a bank, to secure the repayment of a loan provided to the mortgagor to enable him to pay the purchase price.⁶⁴ A covering bond is one which secures a debt, or debts, which will, or may, be incurred in the future. A collateral bond is one which is passed by the mortgagor to secure an obligation for which he has already provided security. A surety bond is one in which a surety secures his obligation to the creditor. The most likely forms of mortgage bond to feature in the context of forced sale of a debtor's home would be a *kustingbrief* or, possibly, a covering, collateral, or surety bond, in the case of a homeowner or a businessperson who has passed a mortgage bond over his home in order to secure personal or business debts.

⁵⁹As set out in 2.2.5 and 2.3.4, above.

⁶⁰Lubbe and Scott "Mortgage and Pledge" *LAWSA* 17 pars 439 – 441, 459, 464, 467 and 479.

⁶¹See 4.5, below. It may be noted, however, that, in *Rossouw v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA), hereafter referred to as "*Rossouw v FirstRand Bank*", it was held that s 130(2) does not apply to mortgage bonds.

⁶²See *Kilburn v Estate Kilburn* 1931 AD 501.

⁶³See 2.3.4 above.

⁶⁴Lubbe and Scott "Mortgage and Pledge" *LAWSA* 17 par 509.

A mortgage bond invariably contains, *inter alia*, the following particulars and terms:⁶⁵ an acknowledgment of indebtedness by the mortgagor in favour of the mortgagee; a description of the cause of indebtedness and the amount owed; a statement of the interest rate applicable; the terms of repayment; and a "foreclosure clause" in terms of which it is agreed that, should the mortgagor breach the principal obligation or any other term contained in the mortgage bond, the principal debt together with interest will become payable immediately and the mortgagee will be entitled to institute action for payment and for an order declaring the mortgaged property specially executable. Ordinarily, the parties agree that, if the debtor fails to pay any *one* instalment, the creditor will be entitled to demand the entire balance of the debt. This is termed an "acceleration clause".⁶⁶ Thus, upon failing to pay a single instalment, the entire balance of the debt will become due for payment by the debtor, failing which the creditor will be entitled to enforce all the other terms of their contract.⁶⁷ However, constitutional implications must also be borne in mind. In the case of a mortgagor missing a single instalment due in terms of a home mortgage, any limitation of his housing and other rights and, for that matter, any limitation of the creditor's rights must accord with proportionality assessments required by section 36 of the Constitution.⁶⁸

The effect of the registration of a mortgage bond is that the mortgagor, who remains the owner, may use and enjoy the property.⁶⁹ Where the mortgagor breaches any term of the mortgage bond, the mortgagee is not required first to execute against the movable property of the judgment debtor, as a judgment creditor is ordinarily required to do, but he is entitled to immediate execution against the mortgaged immovable property.⁷⁰ This is the case even where there is no clause in the bond to this effect. However, he cannot execute against the mortgaged property without reference to the mortgagor or the court:

⁶⁵Lubbe and Scott "Mortgage and Pledge" *LAWSA* 17 pars 465, 472.

⁶⁶Christie *Law of Contract* 420-421; Van der Merwe *et al Contract* 380.

⁶⁷Such as was the case in *ABSA v Ntsane*; see pars 67-68, 81-82, 85, 91 and 93-94 of the judgment.

⁶⁸See 3.2.3, above.

⁶⁹Lubbe and Scott "Mortgage and Pledge" *LAWSA* 17 par 476.

⁷⁰*Colonial Mutual Life Assurance Society Ltd v Tilsim Investments (Pty) Ltd* 1952 (4) SA 134 (C) 135.

he must first sue and obtain judgment on the mortgage bond and obtain an order declaring the mortgaged immovable property executable.⁷¹

A *parate executie* clause, permitting the mortgagee to take possession of the mortgaged immovable property and to sell it without reference to the mortgagor or the court, is invalid and therefore void.⁷² Likewise, a forfeiture clause providing that, upon the mortgagor's default, the mortgagee will become the owner of the mortgaged property, is void.⁷³ However, the mortgagee may purchase or, as it is termed, "buy in" the mortgaged property at the sale in execution and may set off the amount due under the bond against the purchase price.⁷⁴ If the purchase price is less than the amount due under the bond, the mortgagee still has a claim against the mortgagor for the balance. In other words, the mortgagor will nevertheless be liable for the shortfall.⁷⁵

A person who purchases immovable property at a sale in execution pursuant to foreclosure of a mortgage bond may apply for the eviction of the erstwhile mortgagor once he obtains transfer of the property. However, the new owner will be obliged to meet the substantive and procedural requirements, contained in PIE, which effectively delay the enforcement of the new owner's right to possession until a court has determined whether eviction of the erstwhile mortgagor would be just and equitable. If the court grants an eviction order, it must determine a just and equitable date on which the erstwhile mortgagor should vacate his home.⁷⁶ Thus, PIE offers a measure of protection against being rendered immediately homeless to a debtor, including a

⁷¹Lubbe and Scott "Mortgage and Pledge" *LAWSA* 17 par 480.

⁷²*Iscor Housing Utility Co v Chief Registrar of Deeds* 1971 (1) SA 613 (T), approved in *Bock v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) par 7, *Citibank NA v Thandroyen Fruit Wholesalers CC and others* 2007 (6) SA 110 (SCA) par 13 and *Nedcor Bank Ltd v SDR Investment Holdings Co (Pty) Ltd and Others* 2008 (3) SA 544 (SCA). This was also the position at the time of Grotius, see 2.3.4, above.

⁷³As was the position in Roman law, after the passing of the *lex commissoria*, in AD 320.

⁷⁴*Smiles' Trustee v Smiles* 1913 CPD 739; *ABSA Bank Ltd v Bisnath NO and Others* 2007 (2) SA 583 (D), hereafter referred to as "*ABSA v Bisnath*". See also *Cronje and Others v Hillcrest Village (Pty) Ltd and Another* 2009 (6) SA 12 (SCA).

⁷⁵In *Rossouw v FirstRand Bank*, it was held that s 130(2) of the NCA does not apply to mortgage bonds. *ABSA v Bisnath* 589-590 is authority for the proposition that, if the mortgagee thereafter sells the property to a third party for a price higher than the total cost that he has been occasioned, the mortgagee must account to the mortgagor for any ultimate profit arising from his subsequent transactions.

⁷⁶See discussion of PIE at 3.3.1.4 (b), above.

mortgagor, who chooses to "hold over". The question remains, however, whether such protection is satisfactory and sufficient, in the circumstances.

4.4 Selected aspects of the individual debt enforcement procedures

4.4.1 General

In this section, specific provisions of the Magistrates' Courts Act, the Magistrates' Courts Rules, the Supreme Court Act and the High Court Rules, and other relevant rules or practice directives, will be set out. By and large, the provisions concern execution against a judgment debtor's assets and the exemption from execution of certain types of assets as well as execution against immovable property in the individual debt enforcement process. The provisions, with respect to the procedure followed in the magistrates' courts and the high court, largely mirror one another but with some differences. The NCA, which provides substantive and procedural requirements for the enforcement of credit agreements entered into by consumers⁷⁷ and which introduced alternative debt relief mechanisms for over-indebted consumers,⁷⁸ will be discussed under a separate heading.⁷⁹

4.4.2 Jurisdiction

The main principle, based on the common law and statutory provisions, is that the person initiating the proceedings must do so in the forum where the defendant or respondent resides, or is domiciled,⁸⁰ or where the cause of action arose.⁸¹ Where more than one court has concurrent jurisdiction, convenience and expense are important

⁷⁷For a succinct account, and analysis of, the debt enforcement process since the coming into operation of the NCA, see Coetzee *Impact*.

⁷⁸See the objects of the legislation, set out in s 3 of the NCA.

⁷⁹See 4.5, below.

⁸⁰*Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) 305C; *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd* 1987 (4) SA 883 886I; Cilliers, Loots and Nel *Herbstein and Van Winsen The Civil Practice of the High Courts*, hereafter referred to as "Cilliers, Loots and Nel *Herbstein and Van Winsen*", 69.

⁸¹See van Loggerenberg and Farlam *Superior Court Practice* A1-21; s 19 of the Supreme Court Act.

factors to determine the most appropriate court.⁸² A defendant may consent to the jurisdiction of a specific court.⁸³ The high court has inherent jurisdiction to make orders, without any monetary limit,⁸⁴ unless there is a specific statutory prohibition⁸⁵ or its jurisdiction is limited by the common law.⁸⁶ On the other hand, the magistrate's court, being a creature of statute, will have jurisdiction only where it is specially conferred on it by statute.⁸⁷ General limitations placed on the powers of a court include territorial limitations or those based on subject matter or type of claim, or limitations on the amount claimed or on the parties to the dispute.⁸⁸ These general limitations may be specifically overridden by legislation such as, for example, the provisions in the Magistrates' Courts Act and the NCA which confer jurisdiction, without any express monetary limit, upon the magistrates' courts in actions on, or arising out of, any credit agreement.⁸⁹

Because the high court has inherent jurisdiction to hear any matter,⁹⁰ a plaintiff will sometimes choose to institute action in the high court although the magistrate's court also has jurisdiction. Although this practice is permitted, the high courts discourage it by granting costs to a successful plaintiff on only the magistrates' courts scale.⁹¹ Another common occurrence concerns the territorial jurisdiction of the high court. Each high

⁸²Cilliers, Loots and Nel *Herbstein and Van Winsen* 44. *Bid Industrial Holdings (Pty) Ltd v Strang (Minister of Justice and Constitutional Development, third party)* 2008 (3) 355 (SCA) 370C.

⁸³See s 45 of the Magistrates' Courts Act and commentary to it by Van Loggerenberg *Jones and Buckle*.

⁸⁴It derives its jurisdiction from s 173 of the Constitution and is further regulated by s 19 of the Supreme Court Act; see Cilliers, Loots and Nel *Herbstein and Van Winsen* 49.

⁸⁵Such as, for example, where legislation has created special courts for income tax appeals and land claims. See s 169 of the Constitution; Cilliers, Loots and Nel *Herbstein and Van Winsen* 53-56. See also *Phillips v National Director of Public Prosecutions* 2006 1 SA 505 (CC) 520F-H; *Standard Credit Corporation Ltd v Bester* 1987 (1) SA 812 (W).

⁸⁶Cilliers, Loots and Nel *Herbstein and Van Winsen* 56.

⁸⁷For example, by provisions contained in the Magistrates' Courts Act and the NCA. See Cilliers, Loots and Nel *Herbstein and Van Winsen* 49; Van Loggerenberg *Jones and Buckle* commentary to s 28(1). *Mason Motors (Edms) Bpk v Van Niekerk* 1983 (4) SA 406 (T) 409E-F.

⁸⁸See ss 26-29A of the Magistrates' Courts Act; s 172 of the Constitution. See also Cilliers, Loots and Nel *Herbstein and Van Winsen* 53; Van Loggerenberg *Jones and Buckle* commentary to ss 26-29A.

⁸⁹Cilliers, Loots and Nel *Herbstein and Van Winsen* 52. See s 29(1)(e) of the Magistrates' Courts Act, read with s 1 of the NCA.

⁹⁰Unless its jurisdiction has been specifically ousted by statute.

⁹¹*Goldberg v Goldberg* 1938 WLD 83 85-86; Van Loggerenberg and Farlam E12-13-E12-14; Cilliers, Loots and Nel *Herbstein and Van Winsen* 52-53. Further, High Court Rule 69(3) provides that the maximum civil magistrate's court fees for advocates on party-and-party scale will apply where matters were instituted in the high court while the claim fell within the monetary jurisdiction of the magistrate's court; see Coetzee *Impact* 26.

court has jurisdiction with regard to a specific territory within the Republic of South Africa. The result is that it has jurisdiction only over a person "residing or being in", or if the cause of action arose within, its area of jurisdiction.⁹² However, a provincial division and a local division have concurrent jurisdiction.⁹³ Therefore, a plaintiff may choose to institute action in either a provincial or a local division of the high court, regardless of where the defendant resides, or is employed, or where the property involved is situated.⁹⁴ It may be noted, however, that an order of any high court is effective throughout the Republic of South Africa.⁹⁵

4.4.3 *The magistrates' courts*

4.4.3.1 Summons

Following the practice direction issued by the Supreme Court of Appeal in *Standard Bank v Saunderson*,⁹⁶ rule 5(10) of the Magistrates' Courts Rules provides:

A summons in which an order is sought to declare executable immovable property which is the home of the defendant shall contain a notice in the following form:

"The defendant's attention is drawn to section 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for eviction [*sic*] will infringe that right it is incumbent on the defendant to place information supporting that claim before the Court".

It is submitted that the reference to the "the order for eviction" is incorrect and that it should read "order for *execution*", according to the practice directive set out in *Standard Bank v Saunderson*.

⁹²S 19(1)(a) of the Supreme Court Act; see Cilliers, Loots and Nel *Herbstein and Van Winsen* 52.

⁹³S 6(2) of the Supreme Court Act; see Van Loggerenberg and Farlam *Superior Court Practice* A1-21.

⁹⁴See *Nedbank Ltd v Mateman*; *Nedbank Ltd v Stringer* 2008 (4) SA 276 (T), [2008] 1 All SA 593 (T), hereafter referred to as "*Nedbank v Mateman*" 283I-284G, 286B-D, 599-600 and 601.

⁹⁵S 26 of the Supreme Court Act.

⁹⁶*Standard Bank v Saunderson* par 27.

Rule 5(7) provides that, where the original cause of action is a credit agreement under the NCA, the summons must deal with each of sections 129 and 130 of the NCA and must allege that each of the sections has been complied with.

4.4.3.2 Judgment

After a summons commencing action in the magistrate's court⁹⁷ has been served on a defendant, the latter may oppose the matter, settle the matter, or decide not to oppose it. Where the defendant opposes the matter, it may go to trial and the court will ultimately either grant absolution from the instance or grant judgment against the defendant. Where the parties settle, and they have carried out the terms of the settlement, it will be the end of the matter. Likewise, where the defendant does not oppose the claim but pays the amount claimed it will be the end of the matter. On the other hand, the defendant may offer to pay the amount claimed in instalments. Usually, if a plaintiff accepts such an offer, it will be subject to an agreement that, if the defendant fails to pay the agreed instalments, the plaintiff may obtain judgment against him without further notice to him. It will therefore have the effect of a default judgment.⁹⁸ The defendant may also, instead of opposing the matter, unconditionally consent to judgment in the amount claimed or some other amount, including costs, and may agree to pay it in instalments. Upon the plaintiff's written request, the clerk of the court is obliged to grant judgment against the defendant. This will also have the effect of a default judgment.⁹⁹

If, once the summons has been served, the defendant does nothing at all, the plaintiff may obtain default judgment which is entered against a party in his absence.¹⁰⁰ Default

⁹⁷ Issued by the clerk of the court; see rule 5 of the Magistrates' Courts Rules.

⁹⁸ See s 57 of the Magistrates' Courts Act. This procedure is also available to a defendant upon receiving a letter of demand; service of summons is not required.

⁹⁹ See s 58 of the Magistrates' Courts Act, as well as the commentary to it by Van Loggerenberg *Jones and Buckle*. As in the case of s 57, this procedure is also available to a defendant upon receiving a letter of demand; service of summons is not required. See, particularly, ss 57(4) and 58(2) of the Magistrates' Courts Act.

¹⁰⁰ See rule 12(1) of the Magistrates' Courts Rules, as well as the commentary to it by Van Loggerenberg *Jones and Buckle*.

judgment usually occurs where the defendant has not timeously delivered a notice of intention to defend.¹⁰¹ In such a case, upon a written request by the plaintiff, the clerk of the court, without prior notice to the defendant, may grant default judgment in respect of a liquidated claim.¹⁰² However, in terms of the NCA, a request for default judgment in respect of a claim in relation to a credit agreement must be referred to the court.¹⁰³

Summary judgment is an extraordinary remedy employed to finalise a matter speedily where a defendant has delivered a notice of intention to defend but where he has no *bona fide* defence and is only defending the action in order to delay its finalisation.¹⁰⁴ The remedy should be resorted to and accorded only where the plaintiff can establish his claim clearly and there must be no need for evidence to be led.¹⁰⁵ A plaintiff may apply for summary judgment only where his claim is based on a liquid document, or is for a liquidated amount, or for the delivery of specified movable property or for ejection.¹⁰⁶

4.4.3.3 Execution against immovable property

Execution is the formal process which enables a judgment creditor to achieve satisfaction of the judgment where the defendant has not complied with it.¹⁰⁷ The plaintiff must obtain a warrant of execution.¹⁰⁸ Execution of a judgment sounding in money, which is mostly what we are concerned with in this study, is effected through the attachment and sale in execution of property and creates a judicial pledge, or *pignus*

¹⁰¹See Van Loggerenberg *Jones and Buckle* commentary to rule 12(1) of the Magistrates' Courts Rules. Default judgment may also be granted where a party has not delivered or served a pleading within the prescribed time limits. Another instance is where a party, or his legal representative, fails to appear in court on the date that the matter has been set down; see rule 32 of the Magistrates' Courts Rules.

¹⁰²See rule 12(1) of the Magistrates' Courts Rules.

¹⁰³Coetzee *Impact* 34-35 states that this was the position in terms of the now repealed Hire Purchase Act 36 of 1942 and the Credit Agreements Act 75 of 1980, the latter now having been replaced by the NCA.

¹⁰⁴See rule 14(1) of the Magistrates' Courts Rules, as well as Van Loggerenberg *Jones and Buckle* commentary to it. See also *Mosehla v Sancor CC 2001 (3) SA 1207 (SCA)*.

¹⁰⁵See Van Loggerenberg *Jones and Buckle* commentary to Rule 14.

¹⁰⁶Rule 14(1) of the Magistrates' Courts Rules.

¹⁰⁷Cilliers, Loots and Nel *Herbstein and Van Winsen* 1020.

¹⁰⁸See s 66(1)(a) of the Magistrates' Courts Act, as well as Van Loggerenberg *Jones and Buckle* commentary to s 66(1)(a).

judiciale.¹⁰⁹ Except in a case where immovable property has been mortgaged in favour of the creditor to secure the debt,¹¹⁰ the judgment creditor is obliged first to execute against the movable property of the judgment debtor. It is only if insufficient movable property is found to satisfy the judgment debt and costs that he may execute against the immovable property of the judgment debtor.¹¹¹

Section 66(1)(a) of the Magistrates' Courts Act provides, *inter alia*, for the sale in execution of immovable property, in the absence of sufficient movable property, in order to satisfy a debt. In *Jaftha v Schoeman*, the Constitutional Court held that section 66(1)(a) was unconstitutional in that it was overbroad and that, in order to render it valid, certain words should be read in to require judicial oversight in every case. Accordingly, section 66(1)(a) must now be read as providing:¹¹²

Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then *a court, after consideration of all the relevant circumstances, may order execution* against the immovable property of the party against whom such judgment has been given or such order has been made.

(Emphasis indicates the words which were held to be required to be read in.)

In effect, it is no longer permissible for a debtor's home to be sold in execution after the clerk of the magistrate's court has recorded a default judgment and, in the absence of sufficient movable property to satisfy the judgment debt, issued a warrant of execution for the judgment debtor's home.

The requirements for the seizure, attachment, and sale in execution of immovable

¹⁰⁹*Reynders v Rand Bank Bpk* 1978 (2) SA 630 (T) 633E-F.

¹¹⁰See 4.3.3, above.

¹¹¹See rule 43 of the Magistrates' Courts Rules, as well as Van Loggerenberg *Jones and Buckle* commentary to Rule 43.

¹¹²*Jaftha v Schoeman* par 44.

property are provided by rule 43 of the Magistrates' Courts Rules.¹¹³ The sale in execution must be by public auction, without reserve, and the property must be sold to the highest bidder.¹¹⁴ The sale must be held before the magistrate's court building or, for good cause shown, at another place determined by the magistrate.¹¹⁵ An immovable property will often be sold for a price well below its market value.¹¹⁶ This operates to the disadvantage of the judgment debtor who might have obtained a higher price for his asset on the open market in less urgent circumstances. In such a case, if the price obtained is lower than the amount of the indebtedness, the judgment debtor will remain liable for the shortfall.¹¹⁷ A common, disquieting occurrence has been identified that judgment creditors, or persons who are privy to their affairs, or even the sheriff's agent, buy the auctioned properties for exceedingly low prices.¹¹⁸ An abuse of such a nature was highlighted in *Jaftha v Schoeman* where the judgment creditors' attorney had bought a number of properties in the town of Prince Albert in this manner.¹¹⁹ It may be noted that the Department of Justice and Constitutional Development is investigating a possible amendment to the Rules of Court to provide for a reserve price to be fixed for

¹¹³Powers are conferred and duties are placed upon the sheriff, in this regard, by rule 43 of the Magistrates' Courts Rules and s 68 of the Magistrates' Courts Act.

¹¹⁴Rule 43(10) of the Magistrates' Courts Rules. Rule 43(10) contains a proviso that this is subject to the provisions of s 66(2) of the Magistrates' Courts Act, which requires notice to be given to a creditor who has a claim in respect of the immovable property which is preferent to that of the judgment creditor, and subject to the other conditions of sale.

¹¹⁵Rule 43(11) of the Magistrates' Courts Rules.

¹¹⁶As occurred, for example in *Jaftha v Schoeman*. See *Jaftha v Schoeman* par 12, with reference to *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2003 (10) BCLR 1149 (C) par 25.

¹¹⁷See 4.3.3, above.

¹¹⁸See *Mkhize v Umvoti Municipality* 2010 (4) SA 509 (KZP), hereafter referred to as "*Mkhize v Umvoti Municipality* (KZP)", *Mkhize v Umvoti Municipality* (SCA); Sapa "Pensioner's home confiscated, sold for profit" *iol news* South Africa (26 December 2004) <http://www.iol.co.za/news/south-africa/pensioner-s-home-confiscated-sold-for-profit-1.230318> [date of use 15 March 2012]; Sapa "Protest over pensioner's plight" *News24* South Africa (6 January 2010) <http://www.news24.com/SouthAfrica/News/Protest-over-pensioners-plight-20100106> [date of use 15 March 2012]. Rogers "Court case over sale of family house to defray R6000 debt" *The Herald* South Africa (5 June 2008); see also the Legal Resources Centre website for a media article entitled "Leaving Vulnerable People Homeless", where the sheriff's agent bought the auctioned property for between R1 and R100 (26 November 2008) http://www.lrc.org.za/index.php?option=com_content&view=article&id=64:leaving-vulnerable-people-homeless&catid=84:other-news&Itemid=856 [date of use 15 March 2012]; Mtshali "House sale: MPs step in" *Words and Deeds* South Africa (14 February 2005) http://www.lawlibrary.co.za/notice/wordsanddeeds/2005/2005_02_14.htm [date of use 15 March 2012]. See, also for example, *Campbell v Botha* 2009 (1) SA 238 (SCA) par 6, where the creditor's attorney's wife purchased the debtor's property at the sale in execution for R3 500.

¹¹⁹*Jaftha v Schoeman* par 67.

the sale by public auction.¹²⁰ The position may also be contrasted with that, in Roman-Dutch law, as mentioned in Chapter 2, where, in the process of execution against immovable property, exacting requirements were imposed in a bid to maximise the price obtained at a judicial sale.¹²¹

4.4.3.4 Property protected from seizure, attachment and execution

Section 67 of the Magistrates' Courts Act protects from seizure, attachment and sale in execution:¹²²

- (a) the necessary beds, bedding and wearing apparel of the execution debtor and of his family;
- (b) the necessary furniture (other than beds) and household utensils in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the *Gazette*;
- (c) stock, tools 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 *Gazette*;
- (d) the supply of food and drink in the house sufficient for the needs of such debtor and of his family during one month;
- (e) tools and implements of trade, in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the *Gazette*;
- (f) professional books, documents or instruments necessarily used by such debtor in his profession, in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the *Gazette*;
- (g) such arms and ammunition as such debtor is required by law, regulation or disciplinary order to have in his possession as part of his equipment.

The object of this provision, based upon the humanitarian aspects of policy formulated in Roman law, and evidenced in the recognition and application of *beneficium*

¹²⁰As I have been informed by Mr J Balkishun, of the Department of Justice and Constitutional Development, Pretoria, in a telephonic conversation held on 15 March 2011.

¹²¹See 2.3.2, above.

¹²²The section is subject to the proviso that, in respect of subsections (b), (c), (e) and (f), the court will have a discretion, in exceptional circumstances, and on such conditions as it may determine, to increase the amounts that have been determined by the Minister.

competentiae,¹²³ is to leave the judgment debtor with sufficient property to meet the basic needs of himself and his dependants.¹²⁴

In *Jaftha v Schoeman*, the appellants contended that section 67 was unconstitutional for its failure to protect from execution a debtor's home in particular circumstances. This contention allegedly prompted Gilbert Marcus SC who appeared as *amicus curiae* on behalf of the appellants, to pose the question when addressing the court *a quo*: "Why stop the sheriff from taking the bed, but not the bedroom?"¹²⁵ However, the Constitutional Court held that section 67 was valid.¹²⁶

4.4.3.5 Alternative orders for payment

As mentioned above, in terms of section 58, the defendant may unconditionally consent to judgment in the amount claimed or some other amount, including costs, and may agree to pay it in specified instalments. Upon the plaintiff's written request, the clerk of the court is obliged to grant judgment against the defendant and, where applicable, an order for payment in specified instalments consented to. This has the effect of an order of court.¹²⁷ Section 73(1) provides that, if a judgment debtor is unable to satisfy the judgment debt in full at once but is able to pay reasonable periodical instalments towards satisfying it, or consents to an emoluments attachment or garnishee order being made against him, a court may, upon the application of the judgment debtor, or during proceedings in terms of section 65 of the Magistrates' Courts Act, suspend

¹²³See 2.2.3.

¹²⁴See Evans *Critical Analysis* 2.4.2.

¹²⁵Ellis "Court wrestles with sales in execution question" *The Mercury* South Africa (12 May 2004). As mentioned at 4.2.2, above, Evans criticises the absence of an exemption of an insolvent debtor's home of low value as a *lacuna* in South African insolvency law. He also advocates that similar exemption provisions should apply in insolvency and in the individual debt enforcement process. See Evans 2008 *De Jure* 262-263; Evans *Critical Analysis* 423; Evans "Does an insolvent debtor have a right to adequate housing?". The issue of a possible "low value" home exemption is also discussed at 3.3.1.1, above, and 4 5.2.3, 5.6.8, 6.6 and 6.11, below.

¹²⁶*Jaftha v Schoeman* pars 50-51; see 5.2.1, below. It may be noted that, to the extent that s 67 conflicts with provisions contained in the NCA, s 172(1) of the NCA determines that the provisions of Part D of Ch 4, ss 127, 129, 131-132, Ch 7 and s 164 of the NCA will prevail.

¹²⁷See 4.4.3.2, above. See ss 58 and 65A of the Magistrates' Courts Act, as well as the commentary to these sections by Van Loggerenberg *Jones and Buckle*.

execution against the judgment debtor.¹²⁸ Section 72 permits a court, upon *ex parte* application by the judgment creditor, or in terms of section 65E(1)(b), to make a garnishee order against the judgment debtor for an amount sufficient to satisfy the judgment and the costs of the proceedings.¹²⁹ Under section 62, a judgment debtor may approach a court and seek, on good cause shown, that a warrant of execution be stayed or set aside.¹³⁰ This also includes an order made in terms of section 72 of the Magistrates' Courts Act.

Section 65A of the Magistrates' Courts Act, in its amended form,¹³¹ creates a procedure for a court¹³² to inquire into the financial position of a judgment debtor who has not satisfied a judgment for the payment of a sum of money granted against him, and to make an order which it deems just and equitable with the aim of the settlement of the judgment debt.¹³³ At an inquiry held in terms of section 65A, information regarding the debtor's income, expenditure, dependants, assets and liabilities, and other relevant factors, should be obtained.¹³⁴ Provision is also made in section 65A for a summary inquiry into the alleged wilful failure of a debtor to appear before court for such a financial inquiry and, on conviction of the debtor, for a suitable penalty. Section 65 of the Magistrates' Courts Act provides:

If at any time after a court has given judgment for the payment of a sum of money and before the issue of a notice under section 65A (1), the judgment debtor makes a written offer to the judgment creditor to pay the judgment debt in

¹²⁸The court may suspend execution either wholly or in part on specific conditions as to security; see s 73(1). Subsec (2) states: "(2) Nothing in this section contained shall be construed as authorizing the court to suspend the execution of a judgment upon any property subject to a hypothec for the judgment debt existing irrespective of attachment in execution." Subsec (3) states: "(3) An order under paragraph (e) of section *forty-eight* or under this section may at any time and for good cause be varied or rescinded by the court." Note that, in the event of any conflict between this section and those contained in the NCA, the latter will prevail; see s 172(1) of the NCA.

¹²⁹Any garnishee order under s 73 may be suspended, amended or rescinded by the court upon good cause shown; see s 72(2). In terms of s 172(1) of the NCA, where there is a conflict between s 72 of the Magistrates' Courts Act and the NCA, the latter prevails.

¹³⁰See ss 62(2) and 62(3).

¹³¹After the declaration of invalidity of parts of ss 65A-65M of the Magistrates' Courts Act, in *Coetzee v Government*, and the subsequent repeal of other parts; see Van Loggerenberg *Jones and Buckle* commentary to s 65A.

¹³²S 65A provides for a judgment debtor to appear before a magistrate in chambers.

¹³³*Lombard v Minister of Verdediging* 2002 (3) SA 242 (T) 245E-F; see Van Loggerenberg *Jones and Buckle* commentary to s 65A.

¹³⁴*Minter NO v Baker* 2001 (3) SA 175 (W) 178C-E.

specified instalments or otherwise and such offer is accepted by the judgment creditor or his attorney, the clerk of the court shall, at the written request of the judgment creditor or his attorney, accompanied by the offer, order the judgment debtor to pay the judgment debt in specified instalments or otherwise in accordance with his offer, and such order shall be deemed to be an order of the court mentioned in section 65A (1).

Section 65D provides a procedure in terms of which a court may determine a judgment debtor's financial position to "enable the judgment creditor to obtain from his debtor as much as the latter can really afford to pay, avoiding as far as is possible the expense of issuing a warrant of execution against movable property which may prove abortive."¹³⁵

At the conclusion of the hearing held in terms of section 65D, the court may:

- postpone the proceedings to such a date as the court may determine;¹³⁶
- postpone the proceedings *sine die* pending execution;¹³⁷
- authorise the issue of a warrant of execution against movable or immovable property of the judgment debtor;¹³⁸
- authorise the attachment in terms of section 72 of a debt due to the judgment debtor;¹³⁹
- authorise the issue of an emoluments attachment order;¹⁴⁰ or
- order the judgment debtor to pay the judgment debt and costs in specified instalments.¹⁴¹

The judgment debtor may no longer be committed to prison for contempt of court.¹⁴² If, before or during the hearing in terms of section 65D, the judgment debtor lodges with the court an application, in terms of section 74 of the Magistrates' Courts Act, for an

¹³⁵Van Loggerenberg *Jones and Buckle* commentary to s 65D.

¹³⁶See s 65D(2).

¹³⁷Under the provisions of s 65E(1) and (3).

¹³⁸See s 65E(1)(a).

¹³⁹See s 65E(1)(b).

¹⁴⁰By virtue of s 65J(1) for the payment of the judgment debt and costs by the employer of the judgment debtor; see s 65E(1)(c).

¹⁴¹See s 65E(1)(c).

¹⁴²This has been the position since *Coetzee v Government*, referred to at 3.2.3, above.

administration order,¹⁴³ the court must postpone the hearing until the application for an administration order has been complied with.¹⁴⁴

4.4.3.6 Administration order

Section 74 of the Magistrates' Courts Act provides for administration of a debtor's estate.¹⁴⁵ This is a formal debt relief measure which may be viewed, in some respects, as an alternative to insolvency where the total amount of the debt does not exceed R50 000.¹⁴⁶ Upon application by a debtor¹⁴⁷ who is unable to pay any amount of any judgment against him or to meet his financial obligations and has insufficient assets capable of attachment to satisfy such judgment or obligations,¹⁴⁸ the magistrate's court may grant an order for the administration of the debtor's estate. An administration order provides for the appointment of an administrator and for the payment of the debtor's debts in instalments or otherwise.¹⁴⁹ Thus, the administration process amounts to a statutory rescheduling of debt sanctioned by a court order.¹⁵⁰

Administration in terms of section 74 of the Magistrates' Courts Act has been criticised as being limited in scope in that only a debtor with less than R50 000 of total debt is eligible and it does not cover *in futuro* debts.¹⁵¹ Further, it is of unlimited duration and does not make provision for any measure of discharge from liability for the debtor.¹⁵² It is submitted that its limitations mean that it would provide very little scope for assisting a homeowner to avert the forced sale of his home. In any event, the exclusion of *in futuro*

¹⁴³See 4.4.3.6, below.

¹⁴⁴See s 65I(1).

¹⁴⁵See Boraine 2003 *De Jure* 217-251; Boraine "Reform of Administration Orders" 187-216.

¹⁴⁶S74(1)(b). See also Boraine "Reform of Administration Orders" 187.

¹⁴⁷Or under s 65I; see s 74(1)(b).

¹⁴⁸S 74(1)(a).

¹⁴⁹S 172(1) of the NCA provides that, to the extent that there is any conflict between the provisions of the NCA and s 74 of the Magistrates' Courts Act, the provisions of Part D of Chapter 4, ss 127, 129, 131-132, Chapter 7 and s 164 of the NCA will prevail.

¹⁵⁰Boraine "Reform of Administration Orders" 187.

¹⁵¹See Boraine "Reform of Administration Orders" 191 and cases cited there, namely, *Hack's Furnishers v McKinlay* 1952 PH 17 (T); *Carletonville Huishoudelike Voorsieners (Edms) Bpk v Van Vuuren* 1962 (2) SA 296 (T) 300; *Cape Town Municipality v Dunne* 1964 (1) SA 741 (C), in relation to the treatment of hire purchase agreements, mortgage bonds and *in futuro* debts, generally.

¹⁵²See Boraine and Roestoff 2000 *Obiter* 241 263; Boraine and Roestoff 2002 *Int Ins Rev* 1 2; Roestoff and Renke 2005 *Obiter* 561 and Roestoff and Renke 2006 *Obiter* 98.

debts means that it would not cover a mortgage obligation. Abuse of the administration process became rife¹⁵³ which led to an investigation into possible reform.¹⁵⁴ Although the investigation was suspended pending the enactment of the NCA and there was some suggestion that administration orders might be abolished, it has now been revived. Currently, the proposal is to amend section 74 of the Magistrates' Courts Act by, *inter alia*, imposing a limit to the duration of an administration order and allowing a measure of discharge, at the end of the period, for the debtor.¹⁵⁵

In 2000, the South African Law Reform Commission proposed the insertion of a new section 74X in the Magistrates' Courts Act to provide for a pre-liquidation¹⁵⁶ composition procedure in terms of which a majority in number and two-thirds in value of the concurrent creditors could bind the majority.¹⁵⁷ Various aspects of the proposed procedure were unclear, including, for example, that it did not indicate what the relationship would be between the pre-liquidation composition and debt relief measures, such as administration orders, and whether the pre-liquidation composition process would become a pre-requisite for every insolvency case.¹⁵⁸ Some commentators suggested that it could replace the administration process.¹⁵⁹ It was also posited that it might be appropriate to retain a modified form of the administration order – a combination of the current administration order and the proposed section 74X process – for debtors with limited debt, but to be made available only if an offer of pre-liquidation

¹⁵³See Greig 2000 SALJ 622; *Weiner NO v Broekhuysen* 2003 (4) SA 301 (SCA).

¹⁵⁴Boraine "Reform of Administration Orders" 187-188, 213. In 2002, on the request of the then Minister of Justice and Constitutional Development, the South African Law Reform Commission initiated an investigation into possible reform of administration orders. This investigation became Project 127 *Review of Administration Orders*.

¹⁵⁵See the media statement released by the South African Law Reform Commission (7 March 2008) <http://www.justice.gov.za/salrc/media/2008%2003%2007%20Media%20statement%20Questionnaire%20Administration%20Orders.pdf> [date of use 15 March 2012]; South African Law Reform Commission 2010/2011 *Annual Report* 53 <http://www.justice.gov.za/salrc/anr/2010-2011-anr.pdf> [date of use 22 October 2011].

¹⁵⁶The term "liquidation" was proposed to replace "sequestration", in relation to the insolvency of a natural person.

¹⁵⁷See cl 11 of the Draft Insolvency Bill which forms part of the *Report on the Review of the Law of Insolvency* Project 63 February 2000.

¹⁵⁸See Boraine "Reform of Administration Orders" 197; Boraine 2003 *De Jure* 228; Boraine and Roestoff 2002 *Int Insolv Rev* 8; Roestoff and Jacobs 1997 *De Jure* 189; Roestoff and Renke 2006 *Obiter* 101-102.

¹⁵⁹See Boraine "Reform of Administration Orders" 197 who refers also to Roestoff 'n *Kritiese Evaluasie* 437 and the *Interim Report on the Review of Administration Orders in terms of Section 74 of the Magistrates' Courts Act 32 of 1944* 56; Roestoff and Renke 2006 *Obiter* 102ff.

composition was not accepted.¹⁶⁰ Commentators envisaged that this could represent one of a range of debt relief processes made available to consumer debtors in South Africa so that a debtor's position might be assessed with reference to a number of considerations in order to select the most appropriate process in the particular circumstances. It is interesting to note that, one of the various factors listed by Keay which, a decade ago, Borraine and Roestoff suggested should be considered in this regard, was "the position with respect to the family home".¹⁶¹

The proposed section 74X was never enacted. Neither does it form part of the proposed reform of administration orders mentioned above. However, a similar, modified provision appears as section 118 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill.¹⁶² Such a pre-liquidation composition procedure, covering all types of debt, would provide an additional debt relief process, available as an alternative to administration, debt review and sequestration.¹⁶³ However, it is submitted, the envisaged relationship between them and the proposed pre-liquidation procedure is not clear and the provision will need to be refined before it is ever enacted.¹⁶⁴ Concern has been expressed that the magistrates' courts, already experiencing backlogs in their rolls, including debt review hearings under the NCA, will not cope with yet another debt relief process which they must administer and adjudicate upon. It has been suggested that the proposed section 118 should be revised to provide for a less court-driven process which perhaps involves attorneys in the administration and co-ordination of the composition.¹⁶⁵

¹⁶⁰See Borraine "Reform of Administration Orders" 197; Borraine 2003 *De Jure* 229-230; Borraine and Roestoff 2002 *Int Insolv Rev* 9-10, with reference to Roestoff 2000 *De Jure* 133; Roestoff and Renke 2006 *Obiter* 102; Borraine and Roestoff 2000 *Obiter* 266.

¹⁶¹See Borraine and Roestoff 2002 *Int Insolv Rev* 10. See, also, Roestoff 'n *Kritiese Evaluasie* 370.

¹⁶²See 1.6, above.

¹⁶³That this was yet another debt relief process which would be available to debtors was pointed out by Coetzee in "Personal bankruptcy and alternative measures".

¹⁶⁴This submission is made in spite of the fact that it is proposed, in terms of s 118(22), that, if a debtor fails to comply with his obligations under the composition, and a court revokes it, it must determine whether s 74 of the Magistrates' Courts Act can be applied.

¹⁶⁵Coetzee "Personal bankruptcy and alternative measures" made these submissions which echoed sentiments expressed, in relation to the earlier proposed s 74X, by Borraine 2003 *De Jure* 230; Borraine "Reform of Administration Orders" 197.

It may be noted that the proposed section 118(17) provides that, once the requisite majority of concurrent creditors¹⁶⁶ has accepted the composition and such acceptance has been certified by the court, it will be binding on all creditors who appeared at the meeting or who had been notified of it. However, it also provides that "the right of a secured or otherwise preferent creditor is not prejudiced by the composition, unless he or she consents to the composition in writing." Thus, a mortgagee who does not consent to the composition will not be bound by it and the debtor must fulfil the mortgage terms as originally agreed.¹⁶⁷ It is submitted that this is a positive feature of the proposed pre-liquidation process. This is because, from the perspective of a debtor, it would constitute a debt relief mechanism that would allow him to retain his mortgaged home. At the same time the mortgagee will be secure in the knowledge that its claim cannot be compromised without its specific consent.

4.4.3.7 Sale in execution invalid in absence of judicial oversight

Section 70 of the Magistrates' Courts Act featured in the judgment in *Menqa and Another v Markom and Others*.¹⁶⁸ It provides:

... [a] sale in execution by the messenger shall not, in the case of movable property after delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect.

However, it was decided in *Menqa v Markom*, following the decision in *Jaftha v Schoeman*, that a sale in execution held pursuant to a warrant of execution issued in consequence of a judgment which had been obtained without judicial oversight is not valid and therefore does not afford valid title to the purchaser.¹⁶⁹ The court held that the decision in *Jaftha v Schoeman* had retrospective effect to the date of the coming into

¹⁶⁶A majority in number and a two-thirds majority in value is required.

¹⁶⁷For further discussion of s 118 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill, see 1.6, above and 6.4.3 and 6.10.6, below.

¹⁶⁸*Menqa and Another v Markom and Others* 2008 (2) SA 120 (SCA), hereafter referred to as "*Menqa v Markom*". See 5.5.3.2, below.

¹⁶⁹*Menqa v Markom* pars 16-22, 47. This precedent was followed in *Campbell v Botha* 2009 (1) SA 238 (SCA).

operation of the Constitution.¹⁷⁰ That this is indeed the position has been confirmed by the Constitutional Court in *Gundwana v Steko*.¹⁷¹

4.4.4 *The high court*

4.4.4.1 Summons

In *Standard Bank v Saunderson*,¹⁷² the Supreme Court of Appeal issued a practice direction requiring that every summons commencing action, in which an order is sought declaring immovable property executable, must contain a notice to the defendant drawing to his attention that section 26(1) of the Constitution gives everyone the right to have access to adequate housing. Further, the summons must inform the defendant that, should he claim that the order for execution will infringe that right, he should place information to support such claim before the Court.¹⁷³ Although the High Court Rules do not reflect this requirement, divergent rules of practice have been issued in some divisions of the high court with a view to meeting this requirement.¹⁷⁴

Rules of practice in respect of actions instituted under the NCA also apply in the KwaZulu-Natal High Courts, Pietermaritzburg and Durban, the Western Cape High Court, Cape Town, and in the North Gauteng High Court, Pretoria. The rules, which differ from one another in a number of respects, impose various requirements regarding the contents of summonses in actions enforcing credit agreements.¹⁷⁵ It ought to be borne in mind that a "mortgage agreement" falls under the definition of "credit

¹⁷⁰ *Menqa v Markom* pars 21, 28-29.

¹⁷¹ *Gundwana v Steko* par 52.

¹⁷² *Standard Bank v Saunderson* par 27. Judgment was delivered on 15 December 2005.

¹⁷³ Van Loggerenberg and Farlam *Superior Court Practice* B1-124.

¹⁷⁴ As mentioned in *Gundwana v Steko* par 28 n 18, the North West High Court, Mafikeng issued Practice Direction No 30 of the North West High Court Practice Directions and the Eastern Cape High Court issued Court Notice 1 of 2010 on 30 July 2010 inserting rule 14A into the Joint Rules of Practice for the High Courts of the Eastern Cape. In *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) 473D-H, the court also laid down rules of practice. The Western Cape High Court adopted the practice direction stated in *Standard Bank v Saunderson* par 27. See also *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd (No 2)* 2010 (1) SA 634 (WCC) par 29.

¹⁷⁵ See Van Loggerenberg and Farlam *Superior Court Practice* B1-124A. Compare KwaZulu-Natal's Rule of Practice 28, the Western Cape's Consolidated Practice Notes par 33(1), and the North Gauteng Practice Manual Appendix III.

agreement", in the NCA, and therefore these requirements must be met in an action by a mortgagee to enforce the principal agreement and to execute against the mortgaged property.¹⁷⁶

4.4.4.2 Judgment

The procedure in the high court is similar to that described above, for the magistrate's court, except that it is the registrar¹⁷⁷ who issues the summons commencing action and the High Court Rules prescribe the form of a summons.¹⁷⁸ After summons has been served, the defendant may consent to judgment.¹⁷⁹ The plaintiff may then apply in writing, through the registrar, to a judge for judgment in accordance with it.¹⁸⁰

Default judgments based on debt or liquidated demands¹⁸¹ may be granted by the registrar of the high court.¹⁸² The plaintiff may apply in writing to the registrar and no notice to the defendant is required.¹⁸³ The registrar may:¹⁸⁴

- grant judgment as requested;
- grant judgment for part of the claim only or on amended terms;
- refuse judgment wholly or in part;
- postpone the application for judgment on such terms as he may consider just;
- request or receive oral or written submissions; or
- require that the matter be set down for hearing in open court.

¹⁷⁶See 4.5.1, below.

¹⁷⁷And not the clerk of the court.

¹⁷⁸Rule 17 of the High Court Rules.

¹⁷⁹Rule 31(1)(a) and 31(1)(b) of the High Court Rules.

¹⁸⁰Rule 31(1)(c) of the High Court Rules.

¹⁸¹See s 27A of the Supreme Court Act and rule 31(5)(a) of the High Court Rules. In respect of unliquidated claims, evidence must be led and, therefore, the registrar must refer then to open court; see rule 31(2)(a) of the High Court Rules.

¹⁸²See rules 31(2)(a), 31(4), and 31(5)(a) of the High Court Rules, for default judgment granted when the defendant fails timeously to deliver a notice of intention to defend, and also rules 24(1), 26 31(3) and 39, for other situations in which default judgment may be granted. In relation to the implications of *Gundwana v Steko*, see Van Loggerenberg and Farlam *Superior Court Practice* B1-204A and see, further, 4.4.4.3 and 5.6.2, below.

¹⁸³Except when the defendant is in default of delivery of a plea; see rule 31(5)(a) of the High Court Rules.

¹⁸⁴Rule 31(5)(b) of the High Court Rules.

Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after he has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court.¹⁸⁵ Summary judgment may be applied for and granted on a similar basis as in the magistrate's court.¹⁸⁶

4.4.4.3 Execution

To enforce or execute a judgment, the plaintiff must obtain a writ of execution issued by the registrar¹⁸⁷ and then delivered to the sheriff.¹⁸⁸ Rule 45(1) of the High Court Rules, corresponding with section 66(1)(a) of the Magistrates' Courts Act,¹⁸⁹ used to provide:

The party in whose favour any judgment of the court has been pronounced may, at his own risk, sue out of the office of the registrar one or more writs for execution thereof as near as may be in accordance with Form 18 of the First Schedule: Provided that, except where immovable property has been specially declared executable by the court or, in the case of a judgment granted in terms of rule 31 (5), by the registrar, no such process shall issue against the immovable property of any person until a return shall have been made of any process which may have been issued against his movable property, and the registrar perceives therefrom that the said person has not sufficient movable property to satisfy the writ.

Rule 46(1) used to provide:

A writ of execution against immovable property shall contain a full description of the nature and situation (including the address) of the immovable property to enable it to be traced and identified by the sheriff; and shall be accompanied by sufficient information to enable him to give effect to subrule (3) hereof.

In terms of an amendment to the Uniform Rules of Court, which came into operation on 24 December 2010,¹⁹⁰ rule 45(1) now provides:

¹⁸⁵Rule 31(5)(d) of the High Court Rules.

¹⁸⁶High Court Rule 32. See 4.4.3.2.

¹⁸⁷High Court Rule 45(1).

¹⁸⁸Rule 45(3). Van Loggerenberg and Farlam *Superior Court Practice* B1-324A.

¹⁸⁹Discussed at 4.4.3.3, above.

¹⁹⁰Amended by the Rules Board for Courts of Law in terms of section 6 of the Rules Board for Courts of Law Act 107 of 1985 and approved by the Minister of Justice and Constitutional Development. See Amendment: Rules regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa; Rules regulating the Conduct of the Proceedings of the High Courts of South Africa; Government Notice R981 of 2010 published in GG 33689 dated 19 November 2010.

A judgment creditor may, at his or her own risk, sue out of the office of the registrar one or more writs for execution thereof corresponding substantially with Form 18 of the First Schedule.

The amended rule 46(1) now provides:

(a) No writ of execution against the immovable property of any judgment debtor shall issue until –

- (i) a return shall have been made of any process which may have been issued against the movable property of the judgment debtor from which it appears that the said person has not sufficient movable property to satisfy the writ; or
- (ii) such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of rule 31 (5), by the registrar:

Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property.

(b) A writ of execution against immovable property shall contain a full description of the nature and situation (including the address) of the immovable property to enable it to be traced and identified by the sheriff; and shall be accompanied by sufficient information to enable him or her to give effect to subrule (3) hereof.

These significant amendments were effected to the High Court Rules in an endeavour to bring the high court process into line with the precedent established in *Jaftha v Schoeman*. They have introduced into the high court process the requirement of judicial oversight in every matter in which the judgment creditor seeks the sale in execution of the primary residence of the judgment debtor. However, it may be noted that the text version of the amended rule 46(1), as reproduced above, does not make clear that the proviso applies to both rule 46(1)(a)(i) and rule 46(1)(a)(ii). Presumably, this was the intention and the error is essentially one of formatting of the text.¹⁹¹ As things stand, the position in the high court, in relation to immovable property which is the primary residence of the judgment debtor, now conforms to the requirements laid down in *Jaftha v Schoeman* in matters in which section 66(1)(a) of the Magistrates' Courts Act applies. And, it is submitted, it may be regarded as going even further in the sense that *Jaftha v Schoeman* dealt only with section 66(1)(a) of the Magistrates' Courts Act which applies

¹⁹¹See a similar criticism of this aspect of the amended rule by Peter AJ in *Nedbank Ltd v Fraser* par 12, with which the court agreed, in *Standard Bank v Bekker* par 4.

in relation to execution against the immovable property of a debtor once it has been established that there are insufficient movables to satisfy a writ of attachment. The Supreme Court of Appeal has since stated, in *Mkhize v Umvoti Municipality* (SCA), that "[t]he amended Rule 46 is in effect a legislative interpretation of *Jaftha* demonstrating the policy of the legislature."¹⁹²

No definition or explanation is provided for the meaning of the phrase "all the relevant circumstances" in the context of rule 46(1).¹⁹³ Presumably, the factors mentioned by Mokgoro J, in *Jaftha v Schoeman*, as well as *dicta* in subsequently reported decisions, such as *ABSA v Ntsane*¹⁹⁴ and *FirstRand Bank v Maleke*,¹⁹⁵ were anticipated would provide guidelines in this regard. The North Gauteng Practice Manual states, in relation to the amended rule 46(1), that "[i]t is expected that the courts will develop guidelines" for the authorisation of a writ of execution in such circumstances. It is submitted that greater specificity is required regarding the relevant factors and circumstances which may be applicable.¹⁹⁶ In *Standard Bank v Bekker*, the most recently reported judgment in which it was considered what would constitute "relevant circumstances", in light of the judgment in *Gundwana v Steko* and subsequently reported cases, the court concluded that it was unable to formulate a clearer explanation than had already been provided by the courts. The reason given was that "relevant circumstances" would depend on the particular facts of each case and what information was available to the court in each matter.¹⁹⁷

In *Gundwana v Steko*, the Constitutional Court held that it was unconstitutional for a registrar of a high court to declare immovable property specially executable when ordering default judgment under rule 31(5) of the High Court Rules to the extent that it

¹⁹² *Mkhize v Umvoti Municipality* (SCA) par 13.

¹⁹³ The same observation is made in *Nedbank Ltd v Fraser* par 15.

¹⁹⁴ See 5.5.2, below.

¹⁹⁵ *FirstRand Bank Limited v Maleke; FirstRand Bank Limited v Motingoe and Another; Peoples Mortgage Ltd v Mofokeng and Another; FirstRand Bank Limited v Mudlaudzi* 2010 (1) SA 143 (GSJ), hereafter referred to as *FirstRand Bank v Maleke*; see 5.5.4.3, below.

¹⁹⁶ See *FirstRand Bank Ltd v Meyer* ECPE Case No. 3483/10 [2011] (17 March 2011), discussed at 5.5.4.6, below.

¹⁹⁷ *Standard Bank v Bekker* pars 10, 30.

permits the sale in execution of the home of a person.¹⁹⁸ It also stated that, where it is sought to execute against immovable property, some preceding enquiry which goes beyond merely checking the contents of the summons is necessary "to determine whether the facts of a particular matter are of the *Jaftha*-kind".¹⁹⁹ In *Mkhize v Umvoti Municipality* (SCA), the Supreme Court of Appeal appears to have interpreted this statement to mean that it is for a court to hold such preceding enquiry in order to determine whether s 26(1) rights will be affected by a sale in execution.²⁰⁰ It may be observed that, if such an interpretation is indeed adopted, current logistical arrangements and practices in various courts, where an administration official, such as a registrar, decides which matters to allocate to a specific court roll or to the open court, for judicial oversight to take place, will have to be revisited.²⁰¹ While the amended rule 46(1) of the High Court Rules had already regulated the position prospectively, the effect of the decision in *Gundwana v Steko*, which also applies retrospectively, is that writs of execution and the pursuant sales in execution may be declared void in "deserving past cases".²⁰²

As in the magistrate's court process, the sheriff executes judgments and writs.²⁰³ The sale in execution of immovable property must be by public auction, without reserve, and the immovable property must be sold to the highest bidder.²⁰⁴ As mentioned above,²⁰⁵ a common occurrence is that properties are sold in execution at prices well below their market value and, often, the mortgagee "buys in" at a low price which is sometimes less even than the amount of the judgment debt. The Department of Justice and

¹⁹⁸ *Gundwana v Steko* pars 49, 65.

¹⁹⁹ *Gundwana v Steko* par 43.

²⁰⁰ *Mkhize v Umvoti Municipality* (SCA) par 19.

²⁰¹ See, for example, *Practice Manual of the North Gauteng High Court* Appendix IV – Applications for Default Judgments and Authorisation of Writs of Execution 157 (25 July 2011) <http://www.saflii.org/userfiles/file/Court%20Rolls/South%20Africa/Pretoria%20High%20Court/North%20Gauteng%20Practice%20Manual%20final%20version%20-%20%2025%20July%202011.pdf> [date of use 15 March 2012]; the South Gauteng High Court's *Practice Note: Default Judgments and Execution against Primary Residence* (20 May 2011) http://www.northernlaw.co.za/images/stories/files/Practice_Note.pdf [date of use 15 March 2012]. See also 5.6.5, below.

²⁰² *Gundwana v Steko* par 59. For comments on the implications of this aspect of the judgment, see Mills 2010 *De Rebus* (June) 50-51. For insights into the implications for creditors, see *FirstRand Bank v Woods and Similar Cases* 2011 (5) SA 536 (ECP).

²⁰³ S 36 of the Supreme Court Act.

²⁰⁴ High Court Rule 46(7).

²⁰⁵ See 4.4.3 and 4.4.3.3, above.

Constitutional Development is considering amending the High Court Rules to provide for a public auction at which a reserve price is set for the sale of immovable property.²⁰⁶

4.4.4.4 Assets protected from seizure

Section 39 of the Supreme Court Act mirrors exactly the provisions of section 67 of the Magistrates' Courts Act, protecting the same types of property of the judgment debtor from seizure in the execution process and the comments made above are equally applicable here.²⁰⁷

4.5 *The National Credit Act*

4.5.1 *Overview*

The NCA, which came into full effect on 1 June 2007, with consumer protection as one of its main objectives,²⁰⁸ impacts significantly on the enforcement of credit agreements including "mortgage agreements".²⁰⁹ The NCA limits the powers of a creditor, termed a "credit provider", to enforce a credit agreement by, *inter alia*, requiring notices to be issued to the debtor, termed the "consumer", advising him of his rights and options available under the NCA and prescribing the lapse of minimum periods between the various stages of the debt enforcement process. The NCA forbids "reckless" lending by credit providers. It also provides an alternative debt relief measure for an over-indebted consumer by providing for debt counselling, debt review, and, where appropriate, debt restructuring in terms of which it is envisaged that a consumer will be required

²⁰⁶As I have been informed by Mr J Balkishun, of the Department of Justice and Constitutional Development, Pretoria, in a telephonic conversation held on 15 March 2011; see 4.4.3.3, above.

²⁰⁷See 4.4.3.4, above.

²⁰⁸See s 3 of the NCA.

²⁰⁹A credit agreement is defined, in s 1, as "an agreement that meets all the criteria set out in section 8". A "credit agreement" includes a "credit facility", a "credit transaction", a "credit guarantee", or a combination of them; see s 8(3), s 8(4) and s 8(5). A "mortgage agreement or a secured loan" constitutes a "credit transaction"; see s 8(4)(d). In s 1, a "mortgage agreement" is defined as "a credit agreement that is secured by a pledge of immovable property" and a "mortgage" is defined as "a pledge of immovable property that serves as security for a mortgage agreement".

eventually to fulfil all of his or her financial obligations without any measure of discharge.²¹⁰

4.5.2 Debt enforcement under the NCA

In terms of section 130 of the NCA, a credit provider cannot enforce a credit agreement unless the consumer has been in default under that credit agreement for at least 20 business days.²¹¹ The credit provider must then deliver to the consumer a notice as contemplated in section 129(1)(a).²¹² Such notice must draw the consumer's attention to the default and propose that he consults a debt counsellor,²¹³ alternative dispute resolution agent,²¹⁴ consumer court,²¹⁵ or ombud with jurisdiction²¹⁶ so that they may resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.²¹⁷ Section 129(3) permits a consumer who has fallen into default, at any time before the credit provider has cancelled the agreement, to "reinstate" such agreement by paying all amounts overdue and all permitted default charges and costs. The NCA does not set a limit to the number of times which a consumer is entitled to rely on this provision.

Where at least 10 business days have elapsed²¹⁸ after delivery of the section 129(1)(a) notice, the court may hear the matter. This is as long as there is no issue regarding the

²¹⁰See s 3 of the NCA.

²¹¹S 130(1).

²¹²See, also, s 129(1)(b). For declaratory orders regarding, *inter alia*, ss 129 and 130, see *National Credit Regulator v Nedbank Ltd* 2009 (6) SA 295 (GNP), [2009] 4 All SA 505 (GNP), hereafter referred to as "*NCR v Nedbank* (GNP)" and, on appeal, *Nedbank v The National Credit Regulator* 2011 (3) SA 581 (SCA), hereafter referred to as "*Nedbank v NCR* (SCA)".

²¹³"Debt counsellors" must be registered in terms of s 44 of the NCA.

²¹⁴An "alternative dispute resolution agent", according to s 1, is "a person who provides services to assist in the resolution of consumer credit disputes through conciliation, mediation or arbitration".

²¹⁵In terms of s 1 of the NCA, a "consumer court" is defined as "a body of that name, or a consumer tribunal established by provincial legislation".

²¹⁶In terms of s 1 of the NCA, an "ombud with jurisdiction" in respect of any particular dispute arising out of a credit agreement in terms of which the credit provider is a "financial institution" as defined in the Financial Services Ombud Schemes Act 37 of 2004 means an "ombud" or the "statutory ombud", as those terms are respectively defined in that Act, who has jurisdiction in terms of that Act to deal with a complaint against the financial institution.

²¹⁷S 129(1)(a).

²¹⁸S 130(1)(a). The consumer must also not have responded or rejected the credit provider's proposals; see s 130(1)(b).

credit agreement pending before the National Consumer Tribunal²¹⁹ or the matter is not already serving before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction.²²⁰ Further, the consumer must not have already surrendered property to the credit provider, brought the payments under the agreement up to date, or agreed to a proposal or complied with an agreed plan²²¹ to bring them up to date.²²² The failure to issue a section 129 notice in compliance with the NCA will prevent a mortgagee from obtaining judgment against a debtor upon the latter's default and, consequently, an order of executability in respect of the mortgaged property.²²³

4.5.3 Debt relief measures: debt review and "reckless lending"

In terms of the NCA, a consumer may apply to a debt counsellor for debt review with a view to being to be declared over-indebted.²²⁴ A court, in any proceedings in which a credit agreement is being considered, may also refer the matter directly to a debt counsellor with a request for an evaluation to be made of the consumer's circumstances.²²⁵ In either event, the debt counsellor may recommend to the magistrate's court, in the former situation, and to the court which made the request, in the latter, that the consumer should be declared over-indebted. Where such a declaration is made, the court may order the rearrangement of the consumer's obligations²²⁶ by, for example, extending the period of credit agreements and reducing the amount of each payment due or by postponing the dates on which payments are due.

²¹⁹S 130(3)(b).

²²⁰S 130(3)(c)(i).

²²¹As contemplated in s 129(1)(a).

²²²S 130(3)(c).

²²³See *Dwenga v First Rand Bank Ltd and Others* (EL 298/11, ECD 298/11) [2011] ZAECELLC 13 (29 November 2011), hereafter referred to as "*Dwenga v FirstRand Bank*".

²²⁴See s 86 of the NCA.

²²⁵See s 85 of the NCA.

²²⁶See s 87 of the NCA.

A court may declare a credit agreement to be "reckless"²²⁷ and make an order setting aside all or part of the consumer's rights and obligations under the agreement, as it determines just and reasonable in the circumstances, or suspending the force and effect of the agreement until a date determined by it. A "reckless" credit agreement, according to the NCA, is one where the credit provider, prior to making the agreement, failed to take reasonable steps to assess:

- the consumer's general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;
- the consumer's debt repayment history under credit agreements;
- the consumer's existing financial means, prospects and obligations; and
- whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.²²⁸

A "reckless" credit agreement is also formed where the credit provider entered into the agreement even though the preponderance of information available to it at that time indicated either that the consumer did not generally understand or appreciate his risks, costs or obligations under the agreement, or that entering into the agreement would make him over-indebted.²²⁹

4.5.4 *Difficulties experienced in interpretation and application of the NCA*

The NCA has been widely criticised for having been badly drafted and for the lack of clarity in its provisions.²³⁰ It was not very long after it came into operation that various problems were encountered in its interpretation and application. This resulted in numerous issues being raised and matters being contested in the magistrates' courts, with mounting controversy as approaches adopted were at variance with one another.

²²⁷See, specifically, s 83 and, in relation, more generally, to "reckless credit", see also ss 80, 81 and 84 of the NCA. See Boraine and Van Heerden 2010 *THRHR* 650.

²²⁸See s 80(1)(a) and s 81(2) of the NCA.

²²⁹See s 80(1)(b) and s 81(2) of the NCA.

²³⁰See *Nedbank v NCR* (SCA) par 2; Roestoff *et al* 2009 *PELJ* 251 and media reports cited there.

Disputes as to the powers of magistrates exacerbated the situation. "Bottlenecks" in the system and a backlog of cases hindered the practical implementation of the NCA.²³¹

This prompted the National Credit Regulator to apply for a declaratory order by the high court in relation to various contentious issues arising out of the interpretation and application of some of the provisions of the NCA.²³² Some aspects of the high court's judgment were taken on appeal and, although the Supreme Court of Appeal dismissed all of the appeals, it provided further clarity on them.²³³ In its application, in the high court, the National Credit Regulator alleged that consumers were being deprived of the protection which the legislature envisaged and credit providers potentially faced "huge financial losses"²³⁴ in that, although assets with an estimated value of R2.5 million had at that stage fallen under debt review, matters were not being finalised. A media report stated that mortgaged property worth approximately R15 billion was subject to debt review at that time.²³⁵ Statistics provided by the National Credit Regulator, in the application papers, indicated that since June 2007 about 44 000 consumers had applied for debt counselling and yet only about 2 000 cases had gone through the courts.

The issues upon which the National Credit Regulator sought clarity were fundamental.²³⁶ One of them concerned section 86(2) which provides that an application for debt review "may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement." An order was sought that section 86(2) refers to the commencement of legal proceedings mentioned in section 129(1)(b) and that it does not include steps

²³¹Roestoff *et al* 2009 *PELJ* 249.

²³²*NCR v Nedbank* (GNP).

²³³*Nedbank v NCR* (SCA).

²³⁴See Gabriel Davel's affidavit par 36 in support of the applicant's notice of motion.

²³⁵Marud "Regulator takes Credit Act to court for clarity" in *Pretoria News* South Africa (27 February 2009)

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²³⁶There were eleven main issues on which clarity was sought; see *NCR v Nedbank* (GNP). See the National Credit Regulator's *Communique: Declaratory Order* http://www.ncr.org.za/publications/Communique_Declaratory_Order/NCR%20Communique_01.pdf [date of use 15 March 2012]. See also the reservations expressed by De Villiers 2010 *PELJ* 128 157.

taken in terms of section 129(1)(a).²³⁷ The Supreme Court of Appeal pointed out that the notice required by section 129(1)(a) refers to a specific credit agreement and seeks to bring about consensual resolution in respect of that agreement, whereas section 86 contemplates a general debt restructuring and deals with an application by a consumer to be declared over-indebted. The court held that "by giving the notice envisaged by s 129(1)(a), the credit provider 'has proceeded to take the steps contemplated in section 129 to enforce that agreement': a debt review relating to that specific agreement is thereafter excluded."²³⁸

It is submitted that this decision renders the process cumbersome. It means that, where the debtor's home has been mortgaged, as soon as the mortgagee has issued a notice in terms of section 129(1)(a), the agreement will be excluded from the debt review process. Therefore, if the matter is not resolved by agreement, regardless of whether the mortgagor has since sought relief, through the provisions of the NCA, on account of his over-indebtedness, the mortgagee will be entitled to enforce the terms of the mortgage agreement and may obtain judgment against the mortgagor and seek an order declaring the property specially executable.²³⁹ However, once execution against the mortgagor's home is sought, a court is required first to consider all the relevant

²³⁷ See 4.5.2, above.

²³⁸ *Nedbank v NCR* (SCA) pars 4-15, confirming this aspect of the decision of the High Court, in *NCR v Nedbank* 319B-C, and overruling certain aspects of the decision of Wallis J, in *BMW Financial Services (SA)(Pty) Ltd v Mudaly* 2010 (5) SA 618 (KZD), hereafter referred to as "*BMW Services v Mudaly*". It is submitted that this interpretation of section 86(2) may make sense, in credit agreements which provide for financing the purchase of motor vehicles, or other movable assets, and which provide for the consumer's possession of movable property of which the credit provider is the owner. This was the situation, for example, in *BMW Financial Services v Mudaly*. However, it is submitted that this interpretation appears to be "nonsensical", as submitted by Boraine and Renke 2008 *De Jure* 1 9, in relation to other types of credit agreements.

²³⁹ Although, in terms of *BMW Financial Services (Pty) Ltd v Donkin* 2009 6 SA 63 (KZD) par 12, the new debt created by the granting of judgment against the mortgagor will be included in the debt review. This aspect was not specifically addressed in *Nedbank v NCR* (SCA) but, if this is indeed the position, one may wonder whether there is much point in excluding the mortgage agreement from it. This case is discussed by Van Heerden and Coetzee 2010 *Obiter* 756. A further point to bear in mind is that, apparently, credit providers commonly permit their agreements to be included in the debt review, despite the fact that a s 129(1)(a) notice has already been issued, provided that the consumer is making a "decent monthly payment"; see Wasserman "Blow to banks as indebted get a break" (30 March 2011) <http://www.fin24.com/Money/Money-Clinic/Blow-to-banks-as-indebted-get-a-break-20110331> [date of use 15 March 2012].

circumstances.²⁴⁰ It is submitted that there is a need for specific, explicit, provision to be made for more streamlined treatment of a debtor's mortgaged home,²⁴¹ in this context.

Another issue which was clarified was that, where a debt counsellor refers a matter to the court, under sections 86 and 87, the formal application process, according to the Magistrates' Courts Act and the Magistrates' Courts Rules, must be followed, and that no less formal, more speedy, or less expensive process was intended.²⁴² Yet another concerned the interpretation of section 103(5), read with subsections 101(1)(b)-(g) of the NCA, in relation to the amount of interest and charges which a credit provider may levy. It was held that, while the consumer is in default, the amount of interest and other charges which accrue "may not exceed ... the unpaid balance of the principal debt when the default occurred" and that, once the total amount of the charges reaches that of the unpaid balance, no further charges may be levied. Further, even if, thereafter, a consumer makes payments which reduce the amount outstanding, the credit provider is not permitted "to charge further interest while such default persists".²⁴³ It is anticipated that this stance, adopted by the Supreme Court of Appeal, will be cause for concern on the part of mortgagees²⁴⁴ and may make them less inclined willingly to participate in the debt review process under the NCA.

Jurisdictional issues have also been problematic.²⁴⁵ As mentioned above,²⁴⁶ there is no monetary limit to the jurisdiction of the magistrate's court in matters concerning credit agreements. Specific references, in section 86, 87 and 127 of the NCA, to the "Magistrate's Court" and the "Magistrates' Courts Act" have raised the question whether the legislature intended that primarily it will be the magistrates' courts which will decide

²⁴⁰This is in terms of rule 46(1) of the High Court Rules and *Gundwana v Steko*. See 4.4.4.3, above.

²⁴¹Or "primary residence", to use the terminology employed in rules 45 and 46 of the High Court Rules.

²⁴²*NCR v Nedbank* (GNP) 310E. It was decided that a court performs a judicial role, and not an administrative role, in this context; see *NCR v Nedbank* (GNP) 306H.

²⁴³See *NCR v Nedbank* (GNP)319C-320C; *Nedbank v NCR* (SCA) pars 33-49.

²⁴⁴See Wasserman "Blow to banks as indebted get a break" *fin24.com* (30 March 2011) <http://www.fin24.com/Money/Money-Clinic/Blow-to-banks-as-indebted-get-a-break-20110331> [date of use 15 March 2012].

²⁴⁵See *Nedbank Ltd v Mateman*; *Nedbank Ltd v Stringer* 2008 (4) SA 276 (T); [2008] 1 All SA 593 (T); *FirstRand Bank v Maleke*.

²⁴⁶See 4.4.2, above.

matters concerning credit agreements.²⁴⁷ A point which has been mooted arises when an allegation is made in high court proceedings that the consumer is over-indebted. The question is whether it is only a magistrate's court which has the power, under section 85 of the NCA, to refer the consumer to a debt counsellor and, ultimately, to make a declaration of over-indebtedness, and to deal with the debt restructuring, or whether the high court may deal with it.²⁴⁸ *Nedbank Ltd v Mateman; Nedbank Ltd v Stringer*²⁴⁹ dealt with yet another contentious jurisdictional issue in relation to a clause in the credit agreement in terms of which the consumer consented to the jurisdiction of the magistrate's court and the credit provider reserved the right to litigate in the high court. It was argued that section 90(2)(k)(vi)(aa) of the NCA ousted the jurisdiction of the high court.²⁵⁰ However, the court held that it did not but that it was intended to prevent an agreement which gave the credit provider an express right to approach the high court. In the circumstances, the court therefore held that the clause in the credit agreement was valid.²⁵¹

Contention which surrounded the circumstances in which a credit provider may terminate a debt review and proceed to enforce a credit agreement was recently settled by the Supreme Court of Appeal in *Collett v FirstRand Bank Ltd and Another*.²⁵² Section 88(3) prevents a credit provider from enforcing "by litigation or other judicial process any right or security" under the credit agreement in question until debt review has been completed. However, section 88(3) is expressly made subject to section 86(10) which provides that, after 60 business days have elapsed after a consumer's application for

²⁴⁷Scholtz *et al Guide to the National Credit Act* 12-41. See, for example, *Collett v FirstRand Bank Ltd and Another* 2011 (4) SA 508 (SCA) pars 16-17, where the Supreme Court of Appeal held that s 86(11) of the NCA, which refers only to the "Magistrate's Court", should be construed as also referring to the High Court.

²⁴⁸See *Standard Bank of South Africa Ltd v Panyiotts* 2009 (3) SA 363 (W); *Roestoff et al* 2009 PELJ 258, 291; cf *Van Heerden* 2008 TSAR 840 845; *Coetzee Impact* 74ff.

²⁴⁹*Nedbank Ltd v Mateman; Nedbank Ltd v Stringer* 2008 (4) SA 276 (T); [2008] 1 All SA 593 (T), hereafter referred to as "*Nedbank v Mateman*".

²⁵⁰S 90(2)(k)(vi)(aa) states that a provision in a credit agreement, in which a consumer consents to the jurisdiction of the High Court, is unlawful, if the Magistrate's Court has concurrent jurisdiction.

²⁵¹*Nedbank v Mateman* 284C, 284F-G; 599, 601. Thus the full bench overruled the decision of Bertelsmann J in *ABSA Bank Ltd v Myburgh* 2009 (3) SA 340 (T). See *Roestoff and Coetzee* 2008 THRHR 678; Kelly-Louw "Consumer Credit" LAWSA 5(2) par 83.

²⁵²*Collett v FirstRand Bank Ltd and Another* 2011 (4) SA 508 (SCA), hereafter referred to as "*Collett v FirstRand Bank*".

debt review, the credit provider may give notice in the prescribed manner to the consumer, the debt counsellor and the National Credit Regulator to terminate the review. Further, section 86(11) provides that if a credit provider, who has given notice to terminate a debt review as envisaged in section 86(10), proceeds to enforce that agreement, the magistrate's court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances.

Given the delays and backlogs experienced in the magistrates' courts, in practical terms, the time lapse between the application for debt review and confirmation by the court of a debt rearrangement plan was likely to be in excess of 60 business days.²⁵³ Frequently, credit providers terminated the debt review after agreement had been reached on debt rearrangement plans and, sometimes, even though the consumer was already making payments in terms of the proposed plan which awaited confirmation by the magistrate's court on the date for which the matter had already been set down. This had considerable implications, not only for consumers who had purchased motor vehicles, and other movable assets, in credit agreements, but also in relation to mortgage bonds where enforcement of the credit agreement by the credit provider entailed cancelling it and executing against the mortgaged property. Conflicting high court judgments contributed to the confusion.²⁵⁴

In *Collett v FirstRand Bank*, the Supreme Court of Appeal held that the purpose of the sections of the NCA which provided for debt review, a declaration of over-indebtedness

²⁵³As explained by the court, in *Wesbank, A Division of FirstRand Ltd v Papier* 2011 (2) SA 395 (WCC) par 26ff; *Mercedes Benz Financial Services South Africa (Pty) Limited v Dunga* 2011 (1) SA 374 (WCC) par 26.

²⁵⁴These cases include, *inter alia*, *Standard Bank v Kruger*, *Standard Bank v Pretorius* 2010 (4) SA 635 (GSJ); *SA Taxi Securitisation (Pty) Ltd v Nako* (ECB) (19/2010, 21/2010, 22/2010, 77/2010, 89/2010, 104/2010, 842/2010) [2010] ZAECBHC 4 (8 June 2010); *FirstRand Bank Ltd v Collett* 2010 (6) SA 351 (ECG); *FirstRand Bank Ltd v Evans* (1693/10) [2010] ZAECPEHC 55 (31 August 2010); *SA Securitisation (Pty) Limited v Matlala* (6359/2010) [2010] ZAGPJHC 70 (29 July 2010); *Changing Tides 17 (Pty) Ltd v Erasmus and two similar cases*; *Changing Tides 17 (Pty) Ltd NO v Erasmus* (WCC Case No. 18153/09, 12 November 2009); *Wesbank v Martin*; *Mercedes Benz Financial Services South Africa (Pty) Limited v Dunga* 2011 (1) SA 374 (WCC); *FirstRand Bank v Seyffert* 2010 (6) SA 429 (GSJ); *FirstRand Bank Ltd v Mvelase* 2011 (1) SA 470 (KZP); *SA Taxi Securitisation (Pty) Ltd v Mbatha and two similar cases* 2011 (1) SA 310 (GSJ); *Wesbank, A Division of FirstRand Ltd v Papier* 2011 (2) SA 395 (WCC); *FirstRand Bank v Grobler* (6446/2010) [2011] ZAFSHC 58 (17 March 2011); *FirstRand Bank Ltd v Evans* 2011 (4) SA 597 (KZD). See Roestoff 2009 *Obiter* 430; Van Heerden v Coetzee 2011 *PELJ* 37.

and debt rescheduling is to assist not only over-indebted consumers but also those who find themselves in "strained circumstances" although they might not necessarily be in default of any credit agreement.²⁵⁵ The court explained that section 86(10) gives the credit provider the right to terminate the debt review only where the consumer is in default. Thus, where the consumer is not in default in respect of any of his obligations, the credit provider may not terminate the debt review but must await the hearing in terms of section 87. Furthermore, the credit provider may also not proceed to enforce the credit agreement because the consumer is not in default. On the other hand, where the consumer is in default, the credit provider may terminate the debt review once at least 60 business days have elapsed since the consumer applied for debt review.²⁵⁶ The Constitutional Court subsequently refused an application for leave to appeal against this decision.²⁵⁷

In the interim, a Task Team on Debt Counselling²⁵⁸ which the National Credit Regulator had appointed "to identify the blockages in the debt review process" and to make recommendations on addressing the problems identified, completed its work.²⁵⁹ It reported that the backlogs were being caused by a complex set of factors related to: severe capacity constraints in the judicial system; process weaknesses; inadequate operational compliance by credit providers and debt counsellors as well as lack of co-operation between them; and possible abuse of the process by consumers.²⁶⁰ It recommended codes of conduct and proposed principles and processes to be agreed upon by all stakeholders²⁶¹ and, if these did not work, that the NCA should be amended as a matter of urgency.²⁶²

²⁵⁵ *Collett v FirstRand Bank* par 9.

²⁵⁶ *Collett v FirstRand Bank* pars 9, 12.

²⁵⁷ Sapa "Banks can end credit agreement during debt review" *The Citizen* South Africa (12 August 2011).

²⁵⁸ Or Debt Review Task Team, as it referred to itself.

²⁵⁹ See Task Team Report (May 2010) <http://www.ncr.org.za/Debt%20Counselling%20Task%20Team/Full%20Task%20Team%20Report.pdf> [date of use 15 March 2012]. See also the National Credit Regulator's *Communique: Debt Counselling* [http://www.ncr.org.za/publications/Communique Debt Counselling/DC Communique Feb'11.pdf](http://www.ncr.org.za/publications/Communique%20Debt%20Counselling/DC%20Communique%20Feb'11.pdf) [date of use 15 March 2012].

²⁶⁰ Debt Review Task Team Report par 2.

²⁶¹ Debt Review Task Team Report par 3.

²⁶² Debt Review Task Team Report par 4.

In December 2010, the National Credit Regulator announced that an agreement had been reached with the four major South African banks, namely, ABSA, FirstRand Bank, Nedbank and Standard Bank, declaring a conditional moratorium on terminations of debt review and the legal enforcement of mortgage and related agreements which were under debt review.²⁶³ Despite the moratorium, a recent media report reflected a fourteen per cent increase in foreclosures between 2010 and 2011 even though "[t]he four major banks have taken steps such as restructuring repayments in a bid to spare people the loss of homes... ." Further, it was reported that "Standard Bank said it regarded foreclosure as a last resort as 'it is not in the interests of the customer or the bank to follow that particular route'."²⁶⁴

Finally, it may be observed that there is nothing to preclude a creditor from applying, in terms of the Insolvency Act, for the sequestration of a debtor's estate even if the latter has applied for debt review. Our courts have held in *Investec v Mutemeri*, *Naidoo v ABSA Bank Ltd*²⁶⁵ and *FirstRand Bank Ltd v Evans*²⁶⁶ that an application for sequestration does not amount to "enforcement" of a credit agreement in legal proceedings, for the purposes of section 88(3) of the NCA.²⁶⁷ It would seem that, in some instances, mortgagees prefer to opt for sequestration to avoid the requirements imposed on creditors by the NCA.²⁶⁸ The lack of alignment between insolvency law and

²⁶³The terms of the conditional moratorium were that, as long as the consumer had a mortgage and was already under debt counselling on 30 November 2010, and that, by 31 March 2011, the consumer was paying 80% of the contractual mortgage instalment, 70% of any vehicle finance instalment and 1.67% of the outstanding balance in respect of all unsecured debts, the banks undertook not to terminate the agreements, subject to a new proposal being finalised and a consent or court order being obtained in terms of the newly agreed rules before 30 June 2011. Presumably the reference to the "newly agreed rules" was a reference to the rules formulated by the task team and accepted as protocol in matters governed by the NCA. See conditional moratorium http://www.ncr.org.za/publications/Communique_Declaratory_Order/Conditions_of_Moratorium.pdf [date of use 15 March 2012].

²⁶⁴Govender and Naidoo "We are drowning in debt" *Sunday Times Business Times* South Africa (23 October 2011) 1.

²⁶⁵*Naidoo v ABSA Bank* 2010 (4) SA 597 (SCA), hereafter referred to as "*Naidoo v ABSA*".

²⁶⁶*FirstRand Bank Ltd v Evans* 2011 (4) SA 597 (KZD), hereafter referred to as "*FirstRand Bank v Evans*".

²⁶⁷For discussion of these cases, see 6.10, below.

²⁶⁸This is evident, it is submitted, from the facts of *Investec v Mutemeri*, *Naidoo v ABSA* and *FirstRand Bank v Evans*.

the debt review process provided by the NCA has become problematic in recent times.²⁶⁹ This issue will be discussed in more detail in Chapter 6.²⁷⁰

4.5.5 Preliminary observations regarding the NCA and forced sale of the home

The NCA's debt review and restructuring processes potentially provide an over-indebted homeowner with a means to avert the loss of his home through forced sale. Had the NCA's debt relief mechanisms been available to the debtors in *Standard Bank v Sanderson* and *ABSA v Ntsane*, the outcomes might have been different. Indeed, in *FirstRand Bank v Maleke*, the fact of the coming into operation, and the objectives, of the NCA, were the basis for the Court's refusal to grant judgment in the mortgagees' favour. In *ABSA v Ntsane*, Bertelsmann J commented that a compulsory arbitration process should be required before a mortgagee was entitled to execute against the home of a mortgagor where the arrear amount owing was small. The processes provided by the NCA may in a sense be viewed as posing an opportunity for the consumer to insist on an attempt at dispute resolution in the form of alternative repayment arrangements.

However, it should be borne in mind that the protection offered by the NCA, in this regard, is limited to circumstances in which the consumer has sufficient income to service all of his rearranged debts. A further consideration is that retention of a consumer's home is not the main consideration under the NCA. On the contrary, it is submitted, the debt counsellor's recommendation might very well be the urgent sale of the consumer's home in order for him to be relieved of the mortgage obligation and, instead, to apply available funds, including the proceeds of any equity which he had in the home, to servicing other debt. The debtor might also have debts other than those arising out of credit agreements and therefore not included in the debt review. This may detract from the efficacy of the NCA's debt review mechanism as a vehicle for saving the debtor's home from execution.

²⁶⁹See Van Heerden and Boraine 2009 *PELJ* 22; Boraine and Van Heerden 2010 *PELJ* 84; Maghembe 2011 *PELJ* 171. See, also, the cases cited in the preceding note.

²⁷⁰See 6.10, below.

It is submitted that another drawback of the NCA, with its stated purpose²⁷¹ being that the consumer should ultimately fulfil all of his financial obligations, is that it does not provide the debtor with any measure of discharge or, as it is termed in some foreign jurisdictions, a "fresh start".²⁷² Neither does the NCA limit the duration of a debt rearrangement plan. The practical effect is that, often, where debtors are severely over-indebted, completion of the plan will take place over a considerable number of years.²⁷³ Similar criticisms have been levelled at administration orders under section 74 of the Magistrates' Courts Act.²⁷⁴ The situation is reminiscent to some extent of that described by the court, in *Sasfin (Pty) Ltd v Beukes*,²⁷⁵ in relation to the illegality of requiring a person to work solely to service his debt.²⁷⁶ It is also submitted that debt rearrangement over an extended period does not always serve the interests of creditors, the benefit to whom often lies in a more clear-cut, speedy resolution of the matter.²⁷⁷

The implementation of the NCA has been fraught with difficulties related to its interpretation and its administration. There are ongoing delays, bottlenecks in the system and backlogs in the finalisation of matters. A recent media report reflects that there are currently 276 601 pending applications for debt review.²⁷⁸ In the circumstances, it is submitted that the NCA does not pose a realistic solution for debtors and creditors, regarding issues surrounding the sale in execution of debtors' homes. Expressing his frustration at the lack of clarity in parts of the NCA, Willis J remarked, in *FirstRand Bank Ltd t/a First National Bank v Seyffert and Others*,²⁷⁹ "[a] court is forced

²⁷¹ See s 3 of the NCA.

²⁷² Van Apeldoorn *Int Insolv Rev* 2008 57-72; Gross *Failure and Forgiveness*; Gross 1986 *U Penn L Rev* 59-152.

²⁷³ The realities, in this regard, were highlighted in *Ex parte Ford and two similar cases* 2009 (3) SA 376 (WCC), discussed at 6.4.1 and 6.10.4, below.

²⁷⁴ See 4.4.3.6, above.

²⁷⁵ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A), hereafter referred to as "*Sasfin v Beukes*".

²⁷⁶ *Sasfin v Beukes* 13H-I. It is also reminiscent of the Roman contract of *nexum*, discussed at 2.2.2, above, which is no longer permissible in modern times. See, also, references to peonage, in Gross 1990 *Notre Dame L Rev* 165-205.

²⁷⁷ See Van Heerden and Boraine 2009 *PELJ* 51-52.

²⁷⁸ Govender and Naidoo "We are drowning in debt" *Sunday Times Business Times South Africa* (23 October 2011) 1.

²⁷⁹ *FirstRand Bank Ltd t/a First National Bank v Seyffert and Others* 2010 (6) SA 429 (GSJ), hereafter referred to as "*FirstRand Bank v Seyffert*".

to go round and round in loops from subsection to subsection, much like a dog chasing its tail."²⁸⁰ In *SA Taxi Securitisation (Pty) Ltd v Nako and Others*,²⁸¹ Kemp AJ described the NCA as "fertile ground for litigation".²⁸²

That the NCA's debt review process, as it currently operates, is inappropriate for cases concerning debtors' mortgaged homes is confirmed in no small measure, it is submitted, by the outcome in *Collett v FirstRand Bank*. The effect of this decision renders the debtor's home vulnerable to forced sale, despite *bona fide* efforts on the part of the debtor and the debt counsellor to adhere to the NCA's substantive and procedural requirements as well as where the delays are wholly attributable to inefficiencies and backlogs in the system. The Supreme Court of Appeal adopted the approach that a court may direct, in terms of section 86(11), that the debt review be resumed in appropriate circumstances. However, it is submitted that the situation is nevertheless unsatisfactory that, ultimately, this will cause additional expense for the already financially over-stretched debtor. A more streamlined mechanism is required which is dedicated to protecting, where appropriate, a debtor's home from forced sale. It is submitted that such an approach would accord with the stance of the Constitutional Court in *Jaftha v Schoeman*, that execution of a debtor's home should take place only as a last resort.²⁸³ It would also be in line with the decision in *Gundwana v Steko*, that the drastic consequences of execution against a debtor's home should be avoided by the judicial consideration of alternative ways of obtaining satisfaction of the debt.²⁸⁴

4.6 The Consumer Protection Act

The Consumer Protection Act 68 of 2008²⁸⁵ contains provisions which largely override the common law relating to commercial transactions and the enforcement of obligations intended to have been created by them. The CPA aims, *inter alia*, to "promote and

²⁸⁰ *FirstRand Bank v Seyffert* par 10.

²⁸¹ *SA Taxi Securitisation (Pty) Ltd v Nako and Others* Case No 842/2010 (11 May 2010) (Eastern Cape Division Bisho) (unreported decision), hereafter referred to as "*SA Taxi Securitisation v Nako*".

²⁸² *SA Taxi Securitisation v Nako* par 3 n 4.

²⁸³ See *Jaftha v Schoeman* par 59, discussed at 5.2.3, below.

²⁸⁴ See *Gundwana v Steko* par 53, discussed at 5.6.2.3, below.

²⁸⁵ Hereafter referred to as the "CPA".

protect the economic interests of consumers"²⁸⁶ and its ambit is exceedingly broad.²⁸⁷ While it is submitted that it is not entirely clear whether the CPA is intended to apply to transactions involving the lending of money as such, it would certainly apply in respect of all other transactions, except for those that are specifically exempted, in which the debtor incurs liability. Thus, for example, it may affect the enforceability of a transaction on which a creditor could rely ultimately to execute against the immovable property of the debtor.

The CPA's prohibition of unfair, unreasonable or unjust contract terms has far-reaching implications for South African business.²⁸⁸ However, what amounts to unfair, unreasonable or unjust contract terms is expressed very broadly in section 48(2). Section 49 sets out requirements such as that notification to consumers of terms must be in plain language and that the terms must be conspicuous and brought to the consumer's attention before entering into the transaction. In section 1, "unconscionable" conduct is defined as, *inter alia*, behaviour that is "unethical or improper to a degree that would shock the conscience of a reasonable person". It is submitted that problems are likely to arise in relation to interpretation and application of the proposed legislation, as has been the case with respect to the NCA. My submission is that, if the CPA does apply to the lending of money, terms contained in standard form loan and mortgage contracts which until now have been used routinely by financial institutions may well fall foul of the proposed requirements provided for in section 48. These would include acceleration clauses which allow a creditor to cancel the contract and insist on repayment of the entire loan amount, and payment of all interest and other charges, as soon as the debtor defaults in any respect.²⁸⁹ We have yet to see the practical effects of

²⁸⁶See the preamble to the Consumer Protection Bill.

²⁸⁷In terms of section 5(1)(a), it applies to "every transaction occurring within the Republic", unless it is exempted in terms of subsections (2), (3) or (4) of section 5, and to "goods or services that are supplied or performed in terms of a transaction to which ... [it] applies". In terms of section 1, "'service' includes, but is not limited to[,] ...any banking services, or related or similar financial services". See comments by Du Preez 2009 *TSAR* 58 61.

²⁸⁸See s 48(1) and (2), as well as the other sections contained in Part G of the CPA. See, generally, Sharrock "Unfair contract terms" 115, 129.

²⁸⁹See 4.3.3, above.

the CPA on debtors and the implications for the retention of their homes in the face of actions by mortgagees for their execution.

A particular area of controversy²⁹⁰ is that the Consumer Protection Regulations²⁹¹ provide specific rules for the holding of auction sales²⁹² which are not capable of application to sales in execution carried out by the sheriff in the exercise of the powers conferred him by the Magistrates' Courts Act and Rules.²⁹³ It is submitted that there should be separate, dedicated provisions which apply to sales in execution.

4.7 Conclusion

4.7.1 The state's duty to provide housing

In relation to the duty of the state to adopt comprehensive programmes to facilitate the realisation of section 26(1) rights, the Constitutional Court stated in *Grootboom* that this required "legal, administrative, operational and financial hurdles ... [to] be examined and, where possible, lowered over time". It also stated that housing was required to be "made more accessible not only to a larger number of people but to a wider range of people as time progresses".²⁹⁴ In *Jaftha v Schoeman*, the Constitutional Court took into account that the National Housing Code provided that only a first-time homeowner could benefit from a state housing subsidy. The court held that the sale in execution of the homes of the indigent appellants amounted to a breach of the negative duty which rests on the state and private individuals not to infringe their existing access to adequate housing.²⁹⁵

²⁹⁰"New auction regulations to have massive impact on sales in execution" *Citizen Online South Africa* (15 April 2011) <http://www.citizen.co.za/citizen/content/en/citizen/news-auctions-announcements?oid=188055&sn=Detail&pid=146842&New-Law> [date of use 15 March 2012].

²⁹¹See GN R293 in GG 34180 of 1 April 2011.

²⁹²See Consumer Protection Regulations 18-31.

²⁹³See s 68 of the Magistrates' Courts Act and rule 43 of the Magistrates' Courts Rules.

²⁹⁴See 4.2.1, above, with reference to *Grootboom* par 45.

²⁹⁵See 4.2.1, above, with reference to *Jaftha v Schoeman* par 34.

Given that state funds for housing subsidies are limited, one may appreciate the policy reflected in the provisions of the National Housing Code that the sale in execution of a debtor's state-subsidised home will render him ineligible ever again to receive a state subsidy. According to current housing law and policy, apparently, the most state assistance available for a person who has lost his home through its sale in execution is the provision of a vacant serviced site. If he has moved to an informal settlement, he may be eligible for state assistance towards upgrading such site. Apart from that, he may also be eligible for state support by way of provision of low-rent leased accommodation.²⁹⁶

The public has an interest in preserving, or minimising any loss arising out of, state subsidisation of home acquisition. It is submitted that the relevant statute should provide that the sale of a state-subsidised home, including a forced sale at the instance of a creditor and even a mortgagee, may occur only if the property has first been offered to the provincial housing department. It is hoped that this issue will be thoroughly investigated and analysed before the proposed amendments to section 10A and 10B of the Housing Act are passed.²⁹⁷

The loss of a home through forced sale not only affects the debtor who is rendered ineligible for any meaningful state housing subsidy in the future but also places additional strain on other state housing programmes. Given the challenges which the state already faces in relation to housing delivery, it is submitted that it would be in the interests of all to prevent, where possible, debtors losing their homes through forced sale and swelling the ranks of the homeless. A comprehensive approach to providing non-homeowners with access to housing and at the same time allowing existing homeowners, despite being over-indebted, to retain their homes wherever this is feasible, will serve the broader community and state interests and assist in combating homelessness. A consideration might be to adopt a policy that, as long as the state has recouped its initial subsidy investment, after the sale in execution of a subsidised home,

²⁹⁶See 4.2.1, above.

²⁹⁷See 4.2.2, above.

the previous homeowner may be eligible nevertheless to receive future housing assistance in one form or another. Another consideration might be that a person who has previously owned an entirely self-funded home should be eligible nevertheless to receive a subsidy. Further, the possible introduction of an exemption from sale in execution of a state-subsidised home should receive proper, policy-based consideration by appropriate bodies in an endeavour to find a balanced solution considering all affected interests.²⁹⁸

4.7.2 *Contract and mortgage*

The forced sale of a debtor's home usually involves a contractual relationship between the creditor and the debtor and, where the home has been mortgaged, the real security rights of the mortgagee. Sanctity of contract, expressed in the maxim *pacta sunt servanda*, regarded as "the first premise of contract law", is fundamental to the conduct of business as is the ability to rely on and realise security rights acquired in a debtor's home, where it has been mortgaged. The principle reflected in the maxim *pacta sunt servanda* derives from the Roman-Dutch law²⁹⁹ and the principles applicable in relation to mortgage are based firmly in the Roman law and Roman-Dutch law.³⁰⁰

One way in which a debtor who is in breach of the contract might endeavour to avoid the forced sale of his home is to negotiate with the creditor, or creditors, or the mortgagee of his home, as the case may be, for a variation in, or a compromise regarding, the contractual terms pertaining to fulfilment of the obligation.³⁰¹ It may be observed that the ways in which settlement might be reached between debtor and creditor are derived from Roman law and Roman-Dutch law.³⁰²

Ordinarily, mortgage bonds contain an "acceleration clause", which provides that breach of contract by the mortgagor renders payment of the entire balance of the debt due,

²⁹⁸See 4.2.3, above.

²⁹⁹See 1.1, 2.3.5.3, 3.1, 3.3.2 and 4.3, above.

³⁰⁰See 2.2.5 and 2.3.4, above.

³⁰¹See 4.3.2, above.

³⁰²See 2.2.4, 2.3.5.3 and 3.3.2, above.

failing which the creditor will be entitled to enforce all the other terms of their contract. This has the effect of a mortgagee being entitled, in principle, to obtain judgment against the debtor and, possibly, an order of special executability in respect of the debtor's home where the latter has missed a single mortgage bond instalment. However, the position must now be viewed in light of constitutional implications of the limitation of debtors' and creditors', as well as others', rights having to accord with proportionality assessments required by section 36 of the Constitution.³⁰³

Where the debtor's home is sold in execution, if he opts not to vacate the home but to "hold over" after the purchaser has obtained transfer of the property, the latter may apply for his eviction.³⁰⁴ The new owner may include a mortgagee who "bought in" at the sale in execution.³⁰⁵ However, the new owner will be obliged to meet the substantive and procedural requirements contained in PIE. These effectively delay the enforcement of his right to possession until a court has determined whether eviction of the previous owner, including an erstwhile mortgagor, would be just and equitable. If the court grants an eviction order, it must determine a just and equitable date on which the previous owner should vacate his home.³⁰⁶ In effect, PIE offers a measure of protection to a debtor against being rendered homeless by the sale in execution of his home. However, the question remains whether such protection is satisfactory and sufficient, in the circumstances.

4.7.3 The debt enforcement process: substantive and procedural requirements

In Chapter 2, certain of the Roman-Dutch procedural rules and practices were identified as affording a measure of protection for the home of a debtor against execution by a creditor. These were rules which required personal service of summonses, four defaults before default judgment could be obtained in respect of a claim involving immovable property and a more protracted procedure for execution against immovable, as opposed

³⁰³See 3.2.3 and 4.3.3, above.

³⁰⁴See 3.3.1.4 (b), above.

³⁰⁵See 4.3.4, above.

³⁰⁶See discussion of PIE at 3.3.1.4 (b), above.

to movable, property. Exacting requirements were imposed in order to maximise the price obtained at a judicial sale of immovable property and, in both the individual and collective debt enforcement processes, extra-judicial settlement negotiations were encouraged. There was also the rule that a creditor could not levy execution upon immovable property of great value for small debts unless the property could not be divided.³⁰⁷ These procedural rules and practices are not evident in the pre-Bill of Rights South African law.

In the individual debt enforcement processes, despite amendments to the Magistrates' Courts Rules and the High Court Rules in an endeavour to bring them in line with *Jaftha v Schoeman* and *Standard Bank v Sanderson*, there are still differences between the requirements in the respective courts. As things stand, section 66(1)(a) of the Magistrates' Courts Act, with the additional words read in according to *Jaftha v Schoeman*, requires a court to decide on the execution against immovable property of the judgment debtor when insufficient movables are found to satisfy the judgment debt. This is not restricted to immovable property which constitutes the home of the judgment debtor. Further, there is no provision made for judicial oversight in decisions where a mortgagee seeks specially to execute against the mortgaged immovable property of a mortgagor.³⁰⁸ On the other hand, the High Court Rules require judicial oversight in a matter in which execution is sought against the primary residence of the judgment debtor. The amended rule 46(1) has been drafted in such a way that the proviso requiring judicial oversight, where the property sought to be attached is the primary residence of the judgment debtor, applies only to subsection (ii). This subsection refers expressly to matters in which a court declares immovable property specially executable or where a registrar has granted default judgment in terms of rule 31(5). It is submitted that rule 46(1) requires further amendment to render the proviso applicable to subsections (i) and (ii).³⁰⁹

³⁰⁷ See 2.3.2, 2.3.3, and 2.5, above.

³⁰⁸ See 4.4.3.3, above.

³⁰⁹ See 4.4.4.3, above.

These different provisions must also be read in light of the subsequent decisions of the Constitutional Court, in *Gundwana v Steko*, and the Supreme Court of Appeal, in *Mkhize v Umvoti Municipality* (SCA). In *Gundwana v Steko*, it was held that it is unconstitutional for a registrar of a high court to declare immovable property specially executable when ordering default judgment under rule 31(5) of the High Court Rules to the extent that it permits the sale in execution of the home of a person. *Mkhize v Umvoti Municipality* (SCA) dealt with default judgment issued by the clerk of the magistrate's court. The Supreme Court of Appeal interpreted the statement of the Constitutional Court, in *Gundwana v Steko*, that it is for a court to determine whether a "matter is of the Jaftha-kind", to mean that a court must have oversight in every matter in which execution is sought against immovable property. The basis for this decision was that the court must determine whether section 26(1) rights come into play or not. The effect of this decision is that, from a practical point of view, a judicial officer must differentiate between matters which a clerk of the court, or a registrar, have authority to deal with and matters concerning the judgment debtor's primary residence, or a person's home, which must be dealt with by a court. Such an interpretation may render unconstitutional the current logistical arrangements and practices in some of the courts. The discrepancies in wording, and in the apparent effect of the various rules and principles, have created an unsatisfactory lack of clarity which needs to be resolved.³¹⁰

4.7.4 Consumer debt relief

Aside from common law compromise or release,³¹¹ a debtor seeking to avoid the sale in execution of his home might consider resorting to statutory debt relief procedures which are available. However, it is submitted that administration in terms of section 74 of the Magistrates' Courts Act would not be of much use in view of its R50 000 debt limitation.³¹² Further, despite initial impressions, debt review and debt rearrangement under the NCA is not necessarily a viable option.³¹³ A drawback of the NCA is that it

³¹⁰See 4.4.4.3, above. This issue is also discussed at 5.6.5, below.

³¹¹See 4.3.2 and 4.7.2, above.

³¹²See 4.4.3.6, above.

³¹³See 4.5.4 and 4.5.5, above.

does not limit the duration of a debt repayment plan nor does it provide the debtor with any measure of discharge from liability for debt to assist him by giving him a "fresh start". The practical effect is that a debtor might be locked into paying off debt for a considerable number of years. The situation is reminiscent of that identified by the court, in *Sasfin v Beukes*, in relation to the illegality of requiring a person to work solely to service his debt.³¹⁴ It also conjures up images of the typical Roman debtor, depicted in Chapter 2, who resorted to subjecting himself to his creditor, in a contract of *nexum*, to work off his debt over a period in order to escape the otherwise drastic consequences which would befall him and his family.³¹⁵ It may also be borne in mind that debt rearrangement over an extended period does not necessarily serve the interests of creditors the benefit to whom often lies in a more clear-cut, speedy resolution of the matter.³¹⁶

The effect of the decision in *Collett v FirstRand Bank* is unsatisfactory, from a debtor's perspective. Where a debtor has fulfilled all the requirements for an application for debt review but a backlog in the system has caused 60 business days to elapse without the court having heard the matter, a mortgagee is entitled to terminate the debt review and to institute legal proceedings to enforce the agreement. Where the debtor is in arrears in respect of mortgage payments, the mortgagee may execute against the mortgaged property.³¹⁷ There is also no clearly defined interface between insolvency law and the debt review process. In terms of *Investec v Mutemeri* and *Naidoo v ABSA*, a mortgagee may bring an application for the compulsory sequestration of a mortgagor's estate while debt review is pending. In terms of *FirstRand Bank v Evans*, this may occur even after confirmation of a debt rearrangement plan by the court. This undermines the efficacy of the NCA's ability to protect a debtor's home from forced sale.³¹⁸ This issue will be explored in greater depth in Chapter 6.

³¹⁴See 4.5.5, above, with reference to *Sasfin v Beukes* 13H-I.

³¹⁵See 2.2.2, above.

³¹⁶See 4.5.5, above.

³¹⁷See 4.5.4, above.

³¹⁸See 4.5.4, above. This issue is also discussed at 6.10, below.

It must be acknowledged that statutory consumer debt relief procedures which are currently available do not operate in functional alignment with one another.³¹⁹ They were also not devised with the specific objective of protecting a debtor's home against forced sale. It is submitted that there is a need for a clear, logical, streamlined system of options to be established which caters for various situations depending on, and applicable appropriately to, the factual matrix which may present itself in each matter.³²⁰ This would be more in keeping with an approach that execution against a person's home should occur only as a last resort, as stated in *Jaftha v Schoeman*, and that the drastic consequences of execution against a debtor's home should be avoided by judicial consideration of alternatives ways of obtaining satisfaction of the debt, as stated in *Gundwana v Steko*.³²¹ In the circumstances, it is tentatively suggested that an appropriately modified version of section 118 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill, compiled in 2010, may pose a potential solution.³²²

Ironically, the Roman-Dutch procedural rules and practices, mentioned above, which in effect promoted extra-judicial settlement negotiations between the parties and did not allow execution to be levied against immovable property of great value for small debts unless the property was indivisible, might be viewed as being more in line with a contemporary, "post-Bill of Rights" approach. However, it is against the background of the existing law and policy, including the specific aspects which have recently been amended, that the reported judgments and the parameters within which a debtor's home has been protected, in the individual debt enforcement process, are considered in the following chapter.

³¹⁹ See 4.5.4, above.

³²⁰ See 4.5.5, above.

³²¹ See 4.5.5, above.

³²² See 1.6 and 4.4.3.6, above.