CHAPTER 5

PROTECTION OF THE DEBTOR'S HOME FROM EXECUTION IN THE INDIVIDUAL DEBT ENFORCEMENT PROCESS

> The balancing should not be seen as an all or nothing process. It should not be that the execution is either granted or the creditor does not recover the money owed. Every effort should be made to find creative alternatives which allow for debt recovery but which use execution only as a last resort.
>
> - *Per* Mokgoro J in *Jaftha v Schoeman* par 59

5.1 Introduction

Aspects of the groundbreaking decisions of the Constitutional Court, in *Jaftha v Schoeman* and *Gundwana v Steko*, as well as other relevant reported judgments concerning the treatment of a debtor's home in the individual debt enforcement process, have already been introduced in Chapters 3 and 4. Chapter 3 dealt with the impact of the Bill of Rights on the forced sale of a debtor's home thus providing a constitutional, or human rights, perspective of the subject. Chapter 4 canvassed various aspects of law and policy, including some of the developments through the cases, which also have a bearing on the topic. This chapter analyses in specific detail the relevant reported judgments and other developments in the individual debt enforcement process.

Since *Jaftha v Schoeman*, all developments in relation to protection of a debtor's home from forced sale in the individual debt enforcement process, except for the amendment of rule 46(1) of the High Court Rules,[1] have unfolded on a case by case basis. A period of confusion followed *Jaftha v Schoeman*. The effect of the judgment was that, in the magistrates' courts, judicial oversight was required in cases where execution was sought against a debtor's home. However, no substantive and procedural requirements were spelt out and there was a lack of clarity as to when execution would constitute an

[1]Which, in any event, was effected in response to *Jaftha v Schoeman* and subsequent court judgments.

unjustifiable infringement of the debtor's right to have access to adequate housing. Discrepancies between the applicable statutory provisions in the magistrates' courts and the high courts, respectively, created jurisdictional issues when creditors chose what was for them the more convenient high court process to obtain default judgment and orders declaring debtors' mortgaged homes specially executable. Controversy surrounded whether and, if so, in what circumstances, a mortgaged home ought to be protected from execution. Although the Supreme Court of Appeal settled a number of other controversial issues in *Standard Bank v Saunderson*, it provided little clarity in this regard.

More than five years later, in *Gundwana v Steko*, the Constitutional Court rectified incorrect aspects of *Standard Bank v Saunderson*. It confirmed that, as already required by the amended rule 46(1) of the High Court Rules, judicial oversight is required in every case in which execution is sought against a person's home, including where it has been mortgaged in favour of the creditor. This decision has had significant practical implications for the courts. More recent judgments of the high court and the Supreme Court of Appeal, in which *Gundwana v Steko* has been interpreted and applied, reveal that a lack of clarity remains, particularly with regard to the application and practical implementation of the requirements as set out by the Constitutional Court in its judgment.

This chapter aims to trace developments since *Jaftha v Schoeman* and to analyse them, and the current position, with a view to identifying problematic issues which contribute to the current uncertainty and which need to be resolved as well as grey areas which require clarification. Legislative intervention is suggested.

5.2 Jaftha v Schoeman

5.2.1. The issue and the facts

Jaftha v Schoeman[2] concerned a challenge to the constitutionality of sections 66(1)(*a*) and section 67 of the Magistrates' Courts Act.[3] The basis of the challenge was that the provisions permitted the sale in execution of the homes of persons who had failed to pay their debts thereby removing their security of tenure and violating their right to have access to adequate housing, protected by section 26 of the Constitution.[4] The facts of *Jaftha v Schoeman* are crucial to an appreciation of the particular context in which the Constitutional Court's decision was made.

The first appellant, Maggie Jaftha, with only a grade four education, whose ill health prevented her from being employed, had lived in an informal settlement until 1997 when she acquired a house with a state housing subsidy of R15 000 in terms of the Reconstruction and Development Programme (RDP).[5] In 1998, Jaftha borrowed an amount of R250 from a member of the local community. Although she repaid some of the money, she fell into arrears. The creditor, having consulted Markotter Attorneys, the only attorney in Prince Albert, the village where they lived,[6] obtained default judgment against her in the local magistrate's court for an amount of R632,45 including interest and costs. The sheriff submitted a *nulla bona* return stating that there were insufficient movable assets to satisfy the judgment debt. Consequently, Jaftha's immovable property was attached pursuant to a warrant of execution. Thereafter, Jaftha fell ill and was hospitalised. After her discharge from hospital, the creditor's attorney instructed her to pay R5 500, including accrued interest, to prevent the sale of her home. She made two payments. A few months later, he told her to pay R7 000 to prevent the sale of her

[2]The Cape Provincial Division's decision is reported as *Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others* 2003 (10) BCLR 1149 (C), hereafter referred to as "*Jaftha v Schoeman* 2003 (C)", in order to distinguish it from the Constitutional Court's decision which is referred to simply as "*Jaftha v Schoeman*".
[3]For details of which, see 4.4.3.3 and 4.4.3.4, above.
[4]*Jaftha v Schoeman* par 1.
[5]See 4.2.1, above.
[6]*Jaftha v Schoeman* 2003 (C) par 13; *Jaftha v Schoeman* par 4.

home but she failed to make any more payments. In August 2001, her house was sold in execution for R5 000.

The second appellant, Christina van Rooyen, was unemployed, with no education and with three children to support. In 1995, Van Rooyen bought vegetables on credit for R190 from another member of their local community in Prince Albert. She was unable to pay the creditor who, having consulted Markotter Attorneys, claimed from her an amount of R198,30 plus interest and costs. Default judgment was granted against Van Rooyen and a warrant of execution was authorised against her movable assets. The sheriff submitted a *nulla bona* return indicating insufficient movable assets to satisfy the judgment debt. In 1997, Van Rooyen's husband acquired, with a state housing subsidy, a house in Prince Albert which she inherited when he died later in the same year. In 2001, the property was attached pursuant to the warrant of execution and sold in execution for R1 000 on the same day as that on which Jaftha's house was sold.

The evidence was that, in Prince Albert, two RDP houses had been sold, in 1996, and then, between May and September 2001, nineteen were sold for prices ranging from R500 to R8000. Nine of these were sold to partners at the Markotter firm of attorneys. The court noted these circumstances and that the houses of Jaftha and Van Rooyen had been sold in execution for the satisfaction of insubstantial judgment debts and rendered proceeds which were markedly less than the initial cost to the state. It drew the inference that the process provided by section 66(1)(a) of the Magistrates' Courts Act was being abused. However, the court found that this did not in itself constitute an infringement of section 26 of the Constitution.[7]

According to Jaftha and Van Rooyen,[8] shortly after the sales in execution, the sheriff coerced them to vacate their homes.[9] Before ownership was transferred to the purchasers, a local accountant heard of their situation and contacted a lawyer friend. Ultimately, a legal team comprising eminent senior counsel acted on their behalf. The

[7] *Jaftha v Schoeman* 2003 (C) pars 25, 26.
[8] This was not disputed; see *Jaftha v Schoeman* 2003 (C) par 8.
[9] *Jaftha v Schoeman* 2003 (C) par 5.

applicants cited as respondents the judgment creditors, the purchasers of the properties, Markotter Attorneys, the sheriff, the Ministers of Housing, in the National Government of South Africa and for the Provincial Administration in the Western Cape, the clerk of the court in Prince Albert and the Registrar of Deeds in Cape Town. The Minister of Justice and Constitutional Development was later joined as a respondent.[10]

Markotter Attorneys having conceded that there were material irregularities in the procedural steps preceding the sales in execution, by agreement between the parties, the high court set aside the warrants of, and the subsequent sales in, execution, and granted interdicts against the defendants' eviction pursuant to the sales in execution.[11] However, Jaftha and Van Rooyen each had other unsatisfied judgments against them. Therefore, they were concerned that, because of their continued indebtedness without having sufficient movable property to satisfy their debts, their immovable properties continued to be vulnerable to attachment and sale in execution.[12] They therefore applied for an order declaring invalid sections 66(1)(a) and 67 of the Magistrates' Courts Act. It was common cause that a recipient of a state housing subsidy who lost ownership of the home in a sale in execution would be disqualified from obtaining other state-aided housing.[13] It was also common cause that the applicants' circumstances were such that, if they were evicted in consequence of sales in execution, they would have no suitable alternative accommodation.[14]

5.2.2 The decision of the high court

Counsel for the applicants contended that section 66(1)(a) failed to "respect" and "protect"[15] the right to have access to adequate housing. This was because it provided an execution process that permitted the sale of individuals' homes for trifling judgment debts and for unrealistic prices. It also enabled third parties to buy such houses and to

[10] *Jaftha v Schoeman* 2003 (C) par 11.
[11] *Jaftha v Schoeman* 2003 (C) pars 13-14.
[12] *Jaftha v Schoeman* par 29.
[13] This was the position according to the National Housing Code 2000, in terms of the Housing Act 107 of 1997. The Code has since been amended by the Housing Code 2009; see 4.2.1, above.
[14] *Jaftha v Schoeman* 2003 (C) par 24; *Jaftha v Schoeman* par 12.
[15] As required by s 7(2) of the Constitution; see 3.2.1, above.

evict the previous owners thus further depriving them of their right to have access to adequate housing.[16] It was contended that, although the purpose of section 66(1)(a) was unobjectionable, the procedure established by it had an unconstitutional effect in that it "could result in persons being unnecessarily and disproportionately deprived of their homes". They submitted that section 66(1)(a) would be rendered constitutional if:

- the exercise of a judicial discretion was introduced;
- immovable property, up to a value determined by the Minister for Justice and Constitutional Development, which constituted the home of a judgment debtor enjoyed immunity from execution, on the same basis as other goods did in terms of section 67 of the Magistrates' Courts Act; and
- immovable property which constituted the home of a judgment debtor could be sold in execution only if the sale would yield proceeds sufficient to justify depriving such a judgment debtor of his or her home.[17]

On the other hand, counsel for the Minister disputed that section 66(1)(a) conflicted with the provisions of section 26 of the Constitution in that the issuing of a warrant of execution and the sale of a judgment debtor's immovable property did not automatically result in eviction and homelessness. It was further contended that, if eviction proceedings were subsequently instituted, the provisions of PIE[18] would ensure that any eviction was effected in a fair and dignified manner. It was argued in the alternative that, if the court found that section 66(1)(a) did infringe the right of access to adequate housing, it was justifiable as a reasonable limitation in terms of section 36 of the Constitution.[19]

Referring, *inter alia*, to *Grootboom*,[20] the high court stated that, reading subsections 26(1) and (2) together, the entrenched right might "vary from person to person, place to place and time to time, because of the different social strata and economic levels prevailing in our society". It did not view the right as entitling a person to ownership of a

[16] *Jaftha v Schoeman* 2003 (C) par 31.
[17] *Jaftha v Schoeman* 2003 (C) par 32.
[18] See 3.3.1.4, above.
[19] *Jaftha v Schoeman* 2003 (C) par 34.
[20] See 3.3.1.1, above.

house, any form of housing, or to the occupation of "a specific residential unit".[21] It noted that section 26(3), which provides protection against arbitrary eviction from one's home, applies horizontally.[22] The high court stated that issuing a warrant of execution did not *per se* affect the judgment debtor's right of ownership or right to occupation[23] but that it was only upon transfer of the immovable property to the purchaser that the judgment debtor lost ownership.[24] The court explained that, at that point, the judgment debtor could choose whether to vacate the property, in which case the loss of access to housing would be as a result of his own act and not the execution process, or simply to continue to occupy it by "holding over".[25] In the latter case, the purchaser, once he acquires ownership,[26] would be obliged to institute separate legal eviction proceedings in which the substantive and procedural requirements of PIE would have to be complied with.[27]

Thus the high court held that the consequences of a sale in execution in terms of section 66(1)(*a*) of the Magistrates' Courts Act and the pursuant transfer of immovable property that constituted a debtor's home did not conflict with the provisions of section 26. It followed logically that the clerk of the court's issuing of a warrant of execution against such property, "irrespective of the amount of the judgment debt, and whether other, less invasive, means of satisfying it … [were] available", also did not conflict with the right to have access to adequate housing.[28]

5.2.3 The decision of the Constitutional Court

Jaftha and Van Rooyen appealed to the Constitutional Court. The same arguments were raised as had been presented in the high court to support the contention that

[21] *Jaftha v Schoeman* 2003 (C) par 39.
[22] The court referred to *Brisley v Drotsky* 20F–G; see 3.3.1.3 and 3.3.1.4, above.
[23] *Jaftha v Schoeman* 2003 (C) pars 42, 45.
[24] *Jaftha v Schoeman* 2003 (C) par 46.
[25] See 3.3.1.4, above.
[26] Or the sheriff, if he had contractually bound himself to provide *vacua possessio*. See *Sedibe and Another v United Building Society and Another* 1993 (3) SA 671 (T).
[27] *Jaftha v Schoeman* 2003 (C) par 40. See 3.3.1.4, above.
[28] *Jaftha v Schoeman* 2003 (C) pars 47, 48.

sections 66(1)(*a*) and 67 of the Magistrates' Courts Act were unconstitutional.[29] The Minister counter-argued that sections 62 and 73 of the Magistrates' Courts Act contained built-in safeguards that served to protect the debtor.[30] Although the Minister conceded that many people similarly situated to the appellants might not have the wherewithal to rely on these provisions, she argued that this in itself did not render the provisions of the Magistrates' Courts Act unconstitutional.[31]

The appellants sought to amplify their challenge to the constitutionality of sections 66(1)(a) and 67 on the basis that they infringed the right to dignity, protected by section 10,[32] and the right against unlawful deprivation of property, protected by section 25(1)[33] of the Constitution.[34] However, the Constitutional Court, *per* Mokgoro J, pointed out that it had already made it clear, in *Grootboom*, that any claim based on socio-economic rights must necessarily engage the right to dignity. The court deemed it unnecessary to consider the challenge based on an infringement of section 25 in view of its decision in relation to the impact of section 66(1)(a) on section 26 of the Constitution.[35]

The court noted that, while the concept of adequate housing had been "briefly discussed" in *Grootboom*, it had yet to be considered in detail by the Constitutional Court.[36] As required by section 39(1)(*b*) of the Constitution,[37] the court considered the treatment in international law of the right to adequate housing.[38] Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, 1966 reads as follows:[39]

> The States Parties to the present Covenant recognize the right of everyone to an

[29] *Jaftha v Schoeman* pars 17-18.
[30] See 4.4.3.5, above.
[31] *Jaftha v* Schoeman par 19.
[32] See 3.3.2, above.
[33] See 3.3.4, above.
[34] *Jaftha v Schoeman* par 20.
[35] *Jaftha v* Schoeman pars 21-22.
[36] *Jaftha v Schoeman* par 23.
[37] See 3.2.2, above.
[38] *Jaftha v Schoeman* par 24.
[39] See art 11 of the International Covenant on Economic, Social and Cultural Rights 1966 http://www2.ohchr.org/english/law/cescr.htm#art11 [date of use 15 March 2012] quoted at *Jaftha v Schoeman* par 24.

> adequate standard of living for himself and his family, including *adequate food, clothing and housing*, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

(Emphasis added by Mokgoro J.)

Mokgoro J stated that in General Comment 4[40] the United Nations Committee on Economic, Social and Cultural Rights, giving content to Article 11(1) of the Covenant, emphasised that the right to housing should not be interpreted restrictively but should be viewed as "the right to live somewhere in security, peace and dignity".[41] The concept of adequacy was also significant. While the Committee acknowledged that adequacy "is determined in part by social, economic, cultural, climatic, ecological, and other factors", it identified "certain aspects of the right that must be taken into account for this purpose in any particular context." Particularly relevant, Mokgoro J stated, was the Committee's focus on security of tenure that, in its view, goes beyond ownership in that "all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats."[42]

The Constitutional Court observed that "the international law concept of adequate housing and its central theme of security of tenure reinforce the notion of adequate housing" in section 26 of the Constitution, as understood in the South African historical context of forced removals and racist evictions, as well as its link with dignity and self-worth.[43] But, it stated, the purpose of section 26 was not only to provide protection against forced removals and summary eviction from land[44] but also to create "a new dispensation in which every person has adequate housing and in which the state may not interfere with such access unless it would be justifiable to do so".[45] Thus, the Constitutional Court viewed section 26 as signifying a break from the past and

[40]See General Comment 4 http://www.fao.org/righttofood/kc/downloads/vl/docs/AH356.pdf [date of use 15 March 2012].
[41]General Comment 4 par 7.
[42]General Comment 4 par 8.
[43]*Jaftha v Schoeman* pars 25, 27.
[44]See s 26(3), discussed at 3.3.1, above.
[45]*Jaftha v Schoeman* par 28.

emphasising "the importance of adequate housing and … security of tenure, in our new constitutional democracy".[46]

Mokgoro J observed that this case did not concern "greed, wickedness or carelessness, but poverty" and that it was essentially a "welfare problem". It also indicated the vulnerability of poor people who were unable to pay for the necessities of life and had little prospect of raising loans since their only asset was a state-subsidised house. Further, the case illustrated how easily they could find themselves at the mercy of unscrupulous persons who would abuse the law with the consequence that they would be "cast back into the ranks of the homeless in informal settlements".[47]

The court identified a significant, novel issue in *Jaftha v Schoeman*. In contradistinction to previous Constitutional Court cases which had all involved the positive obligation on the state to provide access to the socio-economic rights contained in the Constitution, this case specifically concerned the negative obligation imposed not only upon the state but also private persons, not to prevent or impair existing access to adequate housing.[48] As stated above,[49] it was common cause that a recipient of a state housing subsidy who lost ownership of his home in a sale in execution would be disqualified from obtaining other state-aided housing. It was also common cause that Jaftha and Van Rooyen had no suitable alternative accommodation.[50] Mokgoro J stated that the high court's finding that section 26(1) did "not give rise to a self-standing and independent right irrespective of the considerations enumerated in s 26(2)"[51] was incorrect because it did not take cognisance of the negative content of socio-economic rights.[52] She concluded that at the very least any measure that permits a person to be deprived of existing access to adequate housing limits the rights protected under section 26(1).[53] However, as

[46] *Jaftha v Schoeman* par 29.
[47] *Jaftha v Schoeman* par 30.
[48] See 3.3.1.1 and 3.3.1.2, above.
[49] See 5.2.1, above.
[50] *Jaftha v Schoeman* par 12.
[51] This was in reliance upon remarks made in *Minister of Health v Treatment Action Campaign* 2002 5 SA 71 (CC).
[52] *Jaftha v Schoeman* pars 32-33. See 3.3.1.1 and 3.3.1.2, above.
[53] *Jaftha v Schoeman* par 34.

Mokgoro J noted, such a measure may be justifiable under section 36 of the Constitution.

Without conceding that the legislative provisions in question violated the rights of the appellants, counsel for the Minister had contended that the procedure which they provided was reasonable and justifiable in view of the important government purpose which debt recovery serves and that, "without it, the administration of justice would be severely hampered". It was further argued that it was "not possible for every execution order to be overseen by a magistrate and that the procedure provided by s 66(1)(*a*) facilitate[d] collection of debt in the most viable manner".[54] It was contended that to strike down section 66(1)(*a*) would "hinder commercial transactions benefiting persons in the same position as appellants … [as,] for poor people with few assets other than low-cost housing, often the only way to raise capital to improve their living conditions … [was] to take out loans against security in the form of their homes". The Minister's argument was that, without a mechanism to execute against a debtor's immovable property, creditors would be reluctant to provide loans to people similarly situated to the appellants and that less affluent creditors who were deprived of the execution procedure might be left in a difficult financial situation.[55]

Considering the close link between the right to have access to adequate housing and "the inherent dignity of a person", Mokgoro J stated:[56]

> Relative to homelessness, to have a home one calls one's own, even under the most basic circumstances, can be a most empowering and dignifying human experience. The impugned provisions have the potential of undermining that experience. The provisions take indigent people who have already benefited from housing subsidies and, worse than placing them at the back of the queue to benefit again from such subsidies in the future, put them in a position where they might never again acquire such assistance, without which they may be rendered homeless and never able to restore the conditions for human dignity.

Thus section 66(1)(*a*) constituted a severe limitation of an important right. While the

[54] *Jaftha v Schoeman* par 37.
[55] *Jaftha v Schoeman* par 38.
[56] *Jaftha v Schoeman* par 39.

court confirmed the importance of the collection of debts as the purpose of the limitation, it viewed the trifling nature of the debt as diminishing its importance, especially where it allowed existing access to adequate housing to be "totally eradicated, possibly permanently", while other methods existed to enable recovery of the debt. However, the court observed that this did not mean that every sale in execution in order to satisfy a trifling debt would be unreasonable and unjustifiable. This was because the concept of a "trifling debt" is relative and for many creditors the execution process constitutes the only means available for debt recovery.[57]

The court also recognised that there were various, case-dependent factors which would affect the justifiability of execution. For instance, if the debtor had incurred the debt knowing that he would not be in a position to repay it, and was reckless as to the consequences, this might militate against a finding that execution was unjustifiable.[58] The court stated that the interests of creditors had also to be considered and that there might well be circumstances where, even though the debtor owed a relatively small amount of money, the advantage to the creditor, in execution, would outweigh the harm caused to the debtor. On the other hand, as the facts of the case demonstrated, section 66(1)(a) provided the potential for abuse by unscrupulous people who might take advantage of ignorant debtors in which case execution would not be justifiable.[59] The court explained that, in a sense, "a consideration of the legitimacy of a sale in execution must be seen as a balancing process".[60] It concluded that section 66(1) was sufficiently broad to allow execution to proceed in circumstances where it would not be justifiable.[61]

The court did not regard sections 62 and 73 of the Magistrates' Courts Act as creating sufficient protection for debtors who wished to avoid the sale of their homes in execution. It noted that each of these provisions placed a burden on the debtor to approach a court and either to show good cause why the warrant of execution ought to be set aside or to request that the debt be repaid in instalments. The court recognised

[57] *Jaftha v Schoeman* par 40.
[58] *Jaftha v Schoeman* par 41.
[59] *Jaftha v Schoeman* par 43.
[60] *Jaftha v Schoeman* par 41.
[61] *Jaftha v Schoeman* par 44.

that many debtors in the position of the appellants were vulnerable because they were unaware of the protection offered by these provisions or, even if they were aware of it, their indigence and lack of knowledge prevented them from approaching a court to claim such protection. In the result, the court did not view sections 62 and 73 as saving section 66(1)(*a*) from unconstitutionality.[62]

The court found that section 67 was not unconstitutional for its lack of excluding from execution a person's home below a certain value. It considered such a "blanket prohibition" to be inappropriate in that it created a potential "poverty trap" which would prevent "many poor people from improving their station in life because of …incapacity to generate capital of any kind". It would also pay insufficient attention to the interests of creditors as it might prevent a creditor from recovering debts owing by "owners of excluded properties".[63] The court regarded it as impossible to anticipate all of the potential factual permutations and therefore inappropriate to attempt to delineate all the circumstances in which a sale in execution would not be justifiable. It therefore considered an appropriate remedy to be one which was sufficiently flexible to take "cognisance of the plight of a debtor who stands to lose his or her security of tenure" but also to be sensitive to the interests of creditors whose "countervailing consideration" is the recovery of the debt owed "in a context where there is a need for poor communities to take financial responsibility for owning a home".[64]

Mokgoro J noted that, as things stood, judicial oversight occurred only initially, when the creditor sought judgment against the debtor. Moreover, if, after the issue of a summons for payment of a liquidated amount a debtor did not enter an appearance to defend, the creditor could obtain default judgment from the clerk of the court without any judicial intervention at all. Thereafter, once a creditor had obtained judgment, various officers of the court and the sheriff administered the entire process. In the circumstances, the court

[62] *Jaftha v Schoeman* pars 47, 49.
[63] *Jaftha v Schoeman* par 51.
[64] *Jaftha v Schoeman* par 53.

decided that judicial oversight should be required invariably without any prompting required by the debtor and even in the case of default judgment.[65]

Reluctant to set out all of the facts that would be relevant to the exercise of judicial oversight, Mokgoro J nevertheless provided the following "guidance":[66]

- If the procedure prescribed by the rules has not been complied with, a sale in execution cannot be authorised.
- If there are other reasonable ways in which the debt may be recovered, an order permitting a sale in execution will ordinarily be undesirable.
- On the other hand, if the requirements have been complied with and there is no other reasonable way of recovering the debt, an order authorising the sale in execution might ordinarily be appropriate. However, this will not be the case if the interests of the judgment creditor, in obtaining payment, are significantly less than the interests of the judgment debtor, in security of tenure in his home, such as where the sale of the home is likely to render the judgment debtor and his family "completely homeless".[67]
- It is for the abovementioned reason that the size of the debt is relevant in that it might be unjustifiable for a person to lose his or her access to housing for a trifling debt that is insignificant to the judgment creditor. However, this will depend on the circumstances of the case as the debt may be significant to the particular creditor and it is important to bear in mind the "widely recognised legal and social value that must be acknowledged in debtors meeting the debts that they incur".[68]
- The circumstances in which the debt arose are significant. Mokgoro J stated it thus:[69]

> If the judgment debtor willingly put his or her house up in some or other manner as security for the debt, a sale-in-execution should ordinarily be permitted where there has not been an abuse of court procedure. The need to ensure that homes may be used by people to raise capital is an

[65] *Jaftha v Schoeman* par 55.
[66] *Jaftha v Schoeman* pars 56-60.
[67] *Jaftha v Schoeman* par 56.
[68] *Jaftha v Schoeman* par 57.
[69] *Jaftha v Schoeman* par 58.

> important aspect of the value of a home which courts must be careful to acknowledge.

- Finally, a judicial officer should always consider the practicability of ordering that the debt be paid in instalments and, in the "balancing[, which] should not be seen as an all or nothing process … [e]very effort should be made to find creative alternatives which allow for debt recovery but which use execution only as a last resort".[70]

Mokgoro J summarised, as follows, the factors that a court should consider when deciding whether to grant an order for the sale in execution of a debtor's home:[71]

- the circumstances in which the debt was incurred, such as, for example, whether the debtor willingly put up the property as security for the debt;[72]
- any attempts made by the debtor to pay the debt;
- the financial situation of the parties;
- the amount of the debt;
- whether the debtor is employed or has a source of income to pay the debt; and
- any other factor which is relevant in the circumstances.

The court concluded that section 66(1)(*a*) of the Magistrates' Courts Act was unconstitutional in that it was sufficiently broad to allow sales in execution to proceed in circumstances where they would not be justifiable.[73] It declared that judicial oversight is required in every case. In the result, the Constitutional Court directed certain words to be read into section 66(1)(*a*) which would have the effect that, while the process for obtaining a judgment and execution against movables remained unchanged, once the sheriff had issued a *nulla bona* return indicating that insufficient movables existed to discharge the debt, the creditor would need to approach a court to seek an order

[70] *Jaftha v Schoeman* par 59.
[71] *Jaftha v Schoeman* par 60.
[72] *Jaftha v Schoeman* par 58.
[73] *Jaftha v Schoeman* par 44.

permitting execution against the immovable property of the judgment debtor.[74]

5.3 Developments following Jaftha v Schoeman

5.3.1 Background

After *Jaftha v Schoeman*, a period of uncertainty ensued. Because the case had concerned an extraneous debt, its effect on the position where a creditor sought an order declaring specially executable the mortgaged home of the debtor was unclear. There was controversy as to whether in the high court a registrar could grant a writ of execution against a debtor's home pursuant to a default judgment issued in terms of rule 31(5) of the High Court Rules. The constitutional validity of rule 31(5) was called into question. Contradictory approaches were adopted in different divisions of the high court as illustrated by *Standard Bank v Snyders and Others*,[75] *Nedbank Ltd v Mortinson*,[76] and practice rules issued in KwaZulu-Natal,[77] each of which is discussed below.

5.3.2 Divergent approaches in the high court

5.3.2.1 Standard Bank v Snyders

Standard Bank v Snyders concerned nine cases in the Cape Provincial Division in which Standard Bank sued for payment of the balance due in terms of mortgage bonds and applied for orders declaring the specially hypothecated properties executable.[78] In eight of the matters, Standard Bank had applied in terms of rule 31(5)(*a*) of the High

[74]The section has not yet been formally amended by the legislature. For the wording as a result of the reading-in, see 4.4.3.3, above.
[75]*Standard Bank v Snyders and Others* 2005 (5) SA 610 (C), hereafter referred to as "*Standard Bank v Snyders*", also discussed at 5.3.2.1, below.
[76]*Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W), hereafter referred to as "*Nedbank v Mortinson*", discussed at 5.3.2.3, below. See, also, 4.4.4.1, above.
[77]See 5.3.2.2, below.
[78]*Standard Bank v Snyders* par 2.

Court Rules[79] for default judgment and an order declaring the mortgaged property executable. However, the registrar adopted the attitude that, in light of the decision in *Jaftha v Schoeman*, she did not have the power to grant an order declaring immovable property executable.[80] The Deputy Judge President instructed that the registrar should not dispose of similar matters until further notice and the matters were enrolled for hearing in open court as unopposed applications for default judgment.[81] In a ninth matter, in which the defendant represented herself, Standard Bank brought an application for summary judgment.[82] In view of the uncertainty created by the decision in *Jaftha v Schoeman*, all nine matters were set down for full argument on the same day. *Amici curiae* were appointed to represent the interests of all of the defendants.[83]

The court, *per* Blignault J, assumed that all of the immovable properties in question were the debtors' homes[84] and decided that an order declaring each of them executable would be subject to the provisions of section 26(3) of the Constitution. In light of the decision in *Jaftha v Schoeman*, this meant that only a court could make the order, and not the registrar.[85] Blignault J stated that, since *Jaftha v Schoeman*, it was no longer simply a matter of procedural law but, by virtue of section 26(3), as a prerequisite for the granting of such an order "the court must consider all relevant circumstances".[86] This, as Blignault J expressed it, "created important rights for defaulting debtors".[87] The court held that Standard Bank was required to have complied with section 26(3).[88] The court further observed that, in the absence of an express reference in the summons to section 26, the defendant would probably not even know about it or the protection which it provided. Therefore, the court held that the plaintiff's summons should contain a suitable allegation to the effect that the facts alleged by it were sufficient to justify an order in

[79] See 4.4.4.2 and 4.4.4.3, above.
[80] *Standard Bank v Snyders* par 3.
[81] *Standard Bank Ltd v Saunderson* 2006 (2) SA 264 (SCA) par 4.
[82] *Standard Bank v Snyders* par 3.
[83] *Standard Bank v Snyders* par 4.
[84] This was on the basis that the loans had been advanced by Standard Bank's home loans office.
[85] *Standard Bank v Snyders* par 7.
[86] *Standard Bank v Snyders* pars 17-22.
[87] *Standard Bank v Snyders* par 22.
[88] *Standard Bank v Snyders* par 23-24.

terms of section 26(3) of the Constitution.[89] In the circumstances, although the court granted judgment in favour of Standard Bank, it refused to order execution against the immovable properties of the defendants for lack of this essential allegation in each case.[90] In all nine matters, costs were awarded against the defendants on the attorney and client scale, in accordance with the original agreements.[91]

The reasoning behind the decision in *Standard Bank v Snyders* was followed in the Cape Provincial Division, in *Standard Bank Ltd v Adams*[92] and in *ABSA Bank Ltd v Xonti and Another*,[93] on the basis that incorrect or inappropriate wording had been used in the notice to the mortgagor informing him of section 26. In each case, the court refused to grant an order declaring the immovable property specially executable.[94] In *Standard Bank v Adams*, costs were awarded against the defendant on a scale as between attorney and client, as provided in the mortgage bond.[95]

5.3.2.2 Practice Rules in the KwaZulu-Natal High Court

In the wake of the uncertainty created by the judgment in *Jaftha v Schoeman*, on 8 August 2005, the Natal Provincial Division issued a practice rule to be followed in its jurisdiction. Rule 26 provided, *inter alia*, that, where a plaintiff sought default judgment and an order declaring residential property executable, the case was required to be referred to the motion court. Further, the summons or particulars of claim had to contain a notice to the defendant to the effect that, if the defendant objected to the property being declared executable, he was obliged to place facts and submissions before the court for its consideration, in terms of section 26(3) of the Constitution. Failure to do so might result in such an order being made.[96]

[89] *Standard Bank v Snyders* par 24.
[90] *Standard Bank v Snyders* pars 25, 30.
[91] *Standard Bank v Snyders* par 31.
[92] *Standard Bank Ltd v Adams* 2007 (1) SA 598 (C), hereafter referred to as "*Standard Bank v Adams*".
[93] *ABSA Bank Ltd v Xonti and Another* 2006 (5) SA 289 (C), hereafter referred to as "*ABSA v Xonti*".
[94] See *Standard Bank v Adams* 600E-F; *ABSA v Xonti* 290H.
[95] See *Standard Bank v Adams* 598I, 600F.
[96] It may be noted that Rule 26 has since been amended to conform to the Supreme Court of Appeal's practice direction, in *Standard Bank v Saunderson*, discussed at 5.4, below.

5.3.2.3 Nedbank v Mortinson

Nedbank v Mortinson concerned a claim by a mortgagee, upon the mortgagor's default, for payment of an amount of R422 817,21, the balance owing in terms of the mortgage bond, and for an order declaring the specially hypothecated property executable.[97] The defendant failed to enter an appearance to defend. Nedbank applied to the registrar, in terms of rule 31(5) of the High Court Rules, for default judgment. Doubting his competence to grant default judgment, in light of the decision in *Jaftha v Schoeman*, the registrar referred the matter to be set down for hearing in open court.[98] The Deputy Judge President directed[99] that a full bench should hear the matter to determine:

- whether the judgment in *Jaftha v Schoeman* applied to applications for default judgment, in terms of rule 31(5), where the defendant had mortgaged immovable property as security for the debt, and the plaintiff sought, in addition, an order declaring such immovable property executable; and, if so,
- whether such application for default judgment could be heard by a judge in chambers or whether it had to be heard in open court; and
- if such application could be heard in chambers, what the effect, if any, would be of the Transvaal Rule 3(2); and
- whether the judgment in *Jaftha v Schoeman* applied to rule 45(1) of the High Court Rules, and, if so, how that rule should be applied.[100]

Amici curiae were appointed to represent the interests of the defendants.

The full bench of the Witwatersrand Local Division, *per* Joffe J, noted that *Jaftha v Schoeman* concerned section 66(1) of the Magistrates' Courts Act which was analogous

[97] *Nedbank v Mortinson* par 1.
[98] *Nedbank v Mortinson* par 2; the referral was in terms of Rule 31(5)(*b*)(vi).
[99] In terms of section 13(1)(*a*) of the Supreme Court Act.
[100] *Nedbank v Mortinson* par 4. It should be borne in mind that this is a reference to the former rule 45(1), ie, before it was amended by Government Notice R981 of 2010 published in *GG* 33689 dated 19 November 2010, with effect from 24 December 2010, as discussed at 4.4.4.3, above.

to rule 45(1) of the High Court Rules.[101] The court traced the origin and development of the practice of immovable property being declared executable.[102] Initially, a court order was required for the immovable property to be attached, regardless of whether it was after a writ of attachment had been issued against the debtor's movable property and a *nulla bona* return had been made or whether the debtor had specially hypothecated immovable property to secure the debt.[103] By 1903, the position in the high court, in the Transvaal, was that there were two recognised methods of attachment of immovable property. On the one hand, once a writ of attachment had been issued against movables and the registrar had determined that the judgment had not been satisfied, he was authorised to issue a writ of attachment in respect of immovable property. This practice was reflected in rule 45(1), as it was then worded.[104] On the other hand, where the debtor had specially hypothecated immovable property, a court had to grant the order as the creditor was seeking a "short-cut" in the sense of not having first to execute against the debtor's movable property but to go directly against the immovable property.[105] In 1991, section 27A was inserted in the Supreme Court Act to provide that the registrar could grant a default judgment.[106] In 1994, rule 31(5)[107] was added to the Rules of Court.

The court accepted that a prayer for immovable property to be declared executable was a "liquidated demand" as intended in rule 31(5)(*a*).[108] It concluded that rule 45 confers the competence on the registrar to issue a writ of execution against the immovable property of the debtor and section 27A of the Supreme Court Act, read with rule 31(5), confers the competence on the registrar to declare specifically hypothecated immovable

[101] *Nedbank v Mortinson* par 21. This is a reference to rule 45(1) as it was worded before 24 December 2010, as discussed at 4.4.4.3, above.
[102] *Nedbank v Mortinson* pars 12-16.
[103] *Nedbank v Mortinson* pars 13-14.
[104] Again, it should be borne in mind that this is a reference to rule 45(1) as it was worded before the amendment effective on 24 December 2010, as discussed at 4.4.4.3, above.
[105] *Nedbank v Mortinson* pars 15-17.
[106] *Nedbank v Mortinson* par 18. S 27A was inserted by s 5 of Act 4 of 1991 and substituted by s 29 of Act 139 of 1992.
[107] See 4.4.4.2, above.
[108] *Nedbank v Mortinson* par 19, citing *Erf 1382 Sunnyside* (*Edms*) *Bpk v Die Chipi BK* 1995 (3) SA 659 (T) as authority for this proposition.

property executable.[109] Ultimately, the court distinguished *Jaftha v Schoeman* on the basis that it concerned neither section 27A of the Supreme Court Act nor rule 31(5) of the High Court Rules, but section 66(1) of the Magistrates' Courts Act which was analogous to rule 45(1). In the circumstances, the court did not consider itself bound by the decision in *Jaftha v Schoeman* but acknowledged that the *ratio* was of great persuasive authority in determining the constitutionality of section 27A and rule 31(5).[110] The court stated that the decision in *Jaftha v Schoeman* "establishes the principle that a scheme which permits of execution against immovable property without judicial sanction is a limitation of the rights contained in s[ection] 26 of the Constitution".[111] The court indicated that, for the purposes of the judgment, it would assume that all immovable property which the registrar could potentially declare executable was residential property. It also accepted that such a declaration is a limitation of the rights protected in section 26 of the Constitution.[112]

The court proceeded to consider whether, in the circumstances, the limitation of section 26 was reasonable and justifiable in terms of section 36(1) of the Constitution. It took into account the following factors.

- "The smaller the amount claimed, the greater the need for careful scrutiny and the more compelling the reasoning in the *Jaftha* judgment that the limitation is not reasonable and justifiable."[113] However, most applications for default judgment in terms of rule 31(5) were for amounts well in excess of R100 000.[114]
- In every case in which the plaintiff relies upon rule 31(5), the debtor had "participated in a commercial transaction" and had "willingly utilised his or her immovable property as security and thus put it at risk".[115] It had long been recognised that, upon the debtor's default, the creditor is entitled to have the

[109] *Nedbank v Mortinson* par 20.
[110] *Nedbank v Mortinson* par 21.
[111] *Nedbank v Mortinson* par 21. Presumably, the court's reference to "immovable property" was intended to mean "immovable property which is the home of the debtor". It did qualify its statement by its subsequent statements in par 22.
[112] *Nedbank v Mortinson* par 22.
[113] *Nedbank v Mortinson* par 24.
[114] The court did, however, mention that some applications were brought in situations where the magistrates' courts would have jurisdiction; see *Nedbank v Mortinson* par 24.
[115] *Nedbank v Mortinson* par 25.

hypothecated immovable property sold in execution in order to recover the amount due from the proceeds of the sale.[116] Further, the Constitutional Court recognised in *Jaftha v Schoeman* that "a sale in execution should ordinarily be permitted where the immovable property has been put up as security for the debt and there has been no abuse of court procedure".[117]

- Rule 31(5)(*d*) provides "a valuable safeguard" for the debtor in that 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. Unlike section 62 of the Magistrates' Courts Act, which the Constitutional Court dismissed in *Jaftha v Schoeman* as rescuing section 66(1) from unconstitutionality, rule 31(5)(*d*) requires the court to reconsider the application *de novo* without any onus being placed on the debtor other than to bring the matter to the attention of the court.[118] Considering whether the debtor would be aware of this provision, Joffe J was of the view that "[d]ebtors who participate in economic activity to the extent of hypothecating immovable property would normally have access to legal advice". He observed that a rule of practice could be prescribed requiring the writ of execution presented to the registrar to contain advice to the debtor of the provisions of rule 31(5)(*d*).[119]
- It would not be practicable for all applications for default judgment where immovable property was sought to be declared executable to be heard in open court.[120] The majority of these applications were uncomplicated and would not require judicial oversight.

[116] Joffe J cited, as authority, Grotius 2.48.41; *Roodepoort United Main Reef GM Co Ltd* (*in Liquidation*) *v Du Toit* 1928 AD 66 at 71, *Marsh v Makein* (1882) 2 SC 104; *Goldfields Building*, *Finance and Trust Corporation Ltd v Pienaar* 1928 WLD 211; and Wille's *Mortgage & Pledge* 232.
[117] *Nedbank v Mortinson* par 25, where Joffe J referred to *Jaftha v Schoeman* par 11.
[118] *Nedbank v Mortinson* par 26.
[119] *Nedbank v Mortinson* par 27.
[120] Joffe J mentioned, at par 28, that, in view of the fact that 300 to 400 such applications were made each week in the Transvaal Provincial Division, "[i]n effect, one Court would do nothing else but hear these applications".

- Rule 31(5)(*b*)(vi) provides another safeguard in that the registrar may refer an application for default judgment for hearing in open court.[121] This sub-rule was introduced specifically to relieve the burden resting on the judges by delegating to the registrar the right (and duty) to grant or refuse judgment in uncomplicated default matters.[122] The registrar simply checks that all administrative and formal steps have been taken and is not expected to decide extraordinary or obscure points of law or fact. If the registrar has any legitimate doubt whether judgment should be granted, it is his duty to refer the matter for hearing in terms of rule 31(5)(*b*)(vi).
- Presumably, the Minister of Justice would appoint appropriate persons, with the necessary competencies, as registrars and assistant registrars in terms of section 34 of the Supreme Court Act.[123]

The court criticised the following aspects of the judgment in *Standard Bank v Snyders*.

- Blignault J did not provide reasons for holding that the judgment in *Jaftha v Schoeman* applied to applications for specially hypothecated immovable property to be declared executable in terms of rule 31(5).[124]
- Blignault J held that the creditor's "summons should contain a suitable allegation to the effect that the facts alleged by it (which should be identified) are sufficient to justify an order in terms of s 26(3) of the Constitution".[125] Joffe J was of the view that these facts would be no more than allegations that the loan existed, the full amount had become repayable by virtue of the debtor's default and that the loan was secured by specially hypothecated immovable property. This was "no different to the allegations contained in any non-excipiable summons for this relief".[126] Regarding Blignault J's requirement that reference be made to section

[121] *Nedbank v Mortinson* par 29.
[122] The court referred, in this regard, to *Standard Bank of SA Ltd v Ngobeni* 1995 (3) SA 234 (V) 235C-E.
[123] *Nedbank v Mortinson* par 30.
[124] *Nedbank v Mortinson* par 31, quoting from *Standard Bank v Snyders* par 7.
[125] *Nedbank v Mortinson* par 32, quoting from *Standard Bank v Snyders* par 24.
[126] *Nedbank v Mortinson* par 32.

26(3) of the Constitution, Joffe J pointed out that a pleader is not required to refer in specific terms to a statute upon which he or she is relying.[127]

In the result, the court held that, where a debtor had specially hypothecated his immovable property and there was no abuse of the court procedure, its sale in execution would be a reasonable and justifiable limitation of section 26 as contemplated in section 36(1) of the Constitution.[128] It held that what was required were rules of practice which would alert the registrar to potential abuses and to assist him or her in identifying applications which it would be appropriate to refer for consideration by the court. To this end, the court issued the following rules of practice.

1 In all applications for default judgment where the creditor seeks an order declaring specially hypothecated immovable property executable, the creditor shall aver in an affidavit filed simultaneously with the application for default judgment:
- The amount of the arrears outstanding as at the date of the application for default judgment.
- Whether the immovable property which it is sought to have declared executable was acquired by means of or with the assistance of a State subsidy.
- Whether, to the knowledge of the creditor, the immovable property is occupied or not.
- Whether the immovable property is utilised for residential purposes or commercial purposes.
- Whether the debt which is sought to be enforced was incurred in order to acquire the immovable property sought to be declared executable or not.

2 All applications for default judgment where the creditor seeks an order declaring specially hypothecated immovable property executable, where the amount claimed falls within the jurisdiction of the magistrate's court, shall be referred by the Registrar for consideration by the Court in terms of Rule 31(5)(*b*)(vi).[129]

3 A warrant of execution which is presented to the Registrar for issue, pursuant to an order made by the Registrar declaring immovable property executable, shall contain a note advising the debtor of the provisions of Rule 31(5)(*d*).[130]

[127]With reference to *Fundstrust* (*Pty*) *Ltd* (*in Liquidation*) *v Van Deventer* 1997 (1) SA 710 (A) 725H-I.
[128]*Nedbank v Mortinson* par 33.
[129]*Nedbank v Mortinson* par 33.
[130]*Nedbank v Mortinson* par 34.

With regard to the second question posed, the court declared that applications referred to the court by the registrar should be heard in open court. It emphasised that, while a court could entertain applications for default judgment, applications to the registrar would be the preferred route.[131] In the circumstances, the third question posed had fallen away.[132]

Finally, in relation to rule 45(1), as it was then worded,[133] the court stated that, where a writ is issued after an attachment of movables is insufficient to satisfy the debt, the judgment in *Jaftha v Schoeman* is applicable.[134] In the circumstances, the court held that certain words should be read in to remedy the defect contained in rule 45(1).[135] The effect is that rule 45(1) would read as follows:

> 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 a court, after consideration of all relevant circumstances, has authorised execution against the immovable property*, and the registrar perceives therefrom that the said person has not sufficient movable property to satisfy the writ.

(Words inserted by Joffe J appear in italics.)

In the result, the court referred the application for default judgment to the registrar to be dealt with in terms of rule 31(5).[136]

A number of criticisms may be levelled at this decision. First, it is submitted that the insertion of words, by Joffe J, to rule 45(1) did not make sense without the omission of

[131] *Nedbank v Mortinson* par 36.
[132] *Nedbank v Mortinson* par 37.
[133] Again, it should be borne in mind that this is a reference to rule 45(1) as it was worded before the amendment effective on 24 December 2010, as discussed at 4.4.4.3, above.
[134] *Nedbank v Mortinson* par 38.
[135] *Nedbank v Mortinson* par 39.
[136] *Nedbank v Mortinson* 40.

certain words as well.[137] Secondly, the fact that rule 31(5)(*d*) requires the debtor only to bring the matter to the attention of the court and not to make specific allegations or furnish specific information, is unsatisfactory. Further, Joffe J expressed the view that, if a person has engaged in a transaction such as registering a mortgage bond over his immovable property, he would probably be competent to deal with the creditor seeking execution against his immovable property. However, it is submitted that this is not necessarily the position. Frequently, even intelligent and educated persons "sign on the dotted line" without any appreciation of the detailed legal position into which they are entering. It is for this very reason that the National Credit Act and the Consumer Protection Act contain specific provisions to assist and to protect ignorant consumer debtors. Finally, Joffe J expressed confidence in the fact that competent registrars would be appointed.[138] It is submitted that this is an unsatisfactory approach. Reliable, tangible, safeguards ought to be put in place rather than to anticipate competent appointments in future.

The *ratio* in *Nedbank v Mortinson* was followed and applied in the Transvaal Provincial Division in *Nedbank Ltd v Mashiya and Another*.[139] Nedbank, the mortgagee, had applied for default judgment, in the amount of R17 379,10 plus interest, against the mortgagors who had allegedly fallen into arrears in an amount of R5 452,26[140] with respect to their monthly repayments. Nedbank also sought an order declaring the mortgaged property executable.[141] In accordance with the precedent established in *Nedbank v Mortinson*, because the amount claimed fell within the jurisdiction of the magistrate's court, the registrar referred the matter for hearing in open court.[142] The court, *per* Bertelsmann J, referred in the reported judgment to *Jaftha v Schoeman* and *Nedbank v Mortinson*.[143] The court stressed that care had to be taken in declaring

[137]Van Heerden and Boraine 2006 *De Jure* 342 make a similar point.
[138]*Nedbank v Mortinson* par 30.
[139]*Nedbank Ltd v Mashiya and Another* 2006 (4) SA 422 (T), hereafter referred to as "*Nedbank v Mashiya*".
[140]*Nedbank v Mashiya* par 32.
[141]*Nedbank v Mashiya* par 6.
[142]*Nedbank v Mashiya* pars 13-15.
[143]But not, it may be noted, to the judgment in *Standard Bank v Saunderson*, discussed below, which had been delivered on 15 December 2005. Although copies of the judgment were available, it was not officially reported in Juta's *South African Law Reports* until March 2006. *Nedbank v Mashiya* was heard

residential property[144] executable.[145] It further explained that judicial oversight is required to ensure that "access to housing is not lost if the debt can be liquidated or is 'trifling in amount and significance to the judgment creditor'".[146] It also observed that "the smaller the amount claimed, the greater the need for careful scrutiny and the more compelling the reasoning in the *Jaftha* judgment that the limitation is not reasonable and justifiable."[147] The court stated that "[t]he right to housing, and the protection against unwarranted eviction, is not to be trifled with".[148]

With specific reference to the practice rules laid down in *Nedbank v Mortinson*,[149] Bertelsmann J requested counsel for Nedbank to address certain deficiencies in its papers. According to the decision in *Nedbank v Mortinson* the balance outstanding was required to be established by affidavit.[150] Bertelsmann J noted that the affidavit filed by Nedbank was by a person who described herself as "teamleader", a designation which was "vague in the extreme".[151] He emphasised that the information in the affidavit had to be reliable and a deponent had to show convincingly that he had actual knowledge of the sum outstanding in respect of the mortgage bond[152] so that a court could be certain that a cause of action had been properly established.[153] Therefore, the court required the description of the deponent to be supplemented and an indication provided from which source, such as a computer record or a book entry, the figure reflecting the outstanding balance had been extracted.[154] The court also required the certificate of balance, filed with the papers, to be signed by a manager whose identity was clearly

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on 10 February 2006 and judgment was delivered on 5 April 2006. Although reference was made, in *Nedbank v Mashiya* pars 18-20, to the delay between the court hearing and the judgment, no reason was given for it. It is submitted that it may be speculated that the matter was delayed until the judgment, in *Campus Law Clinic v Standard Bank*, also discussed below, was delivered on 31 March 2006.

[144] Which the property clearly was: see *Nedbank v Mashiya* pars 7, 9.

[145] *Nedbank v Mashiya* par 10.

[146] *Nedbank v Mashiya* par 11, with reference to *Jaftha v Schoeman* par 57.

[147] *Nedbank v Mashiya* par 12, with reference to *Nedbank v Mortinson* par 24.

[148] *Nedbank v Mashiya* par 51.

[149] *Nedbank v Mortinson* par 31.

[150] *Nedbank v Mortinson* par 33.1.

[151] *Nedbank v Mashiya* pars 21-23.

[152] *Nedbank v Mashiya* pars 24-25.

[153] *Nedbank v Mashiya* par 29.

[154] *Nedbank v Mashiya* pars 30-33.

indicated and whose signature was decipherable.[155] The court regarded the bald statement in the affidavit that the property had not been acquired with a state subsidy was insufficient and required supplementation with a statement of how the knowledge had been acquired and an indication of its reliability.[156] Likewise, the statements that the defendants occupied the mortgaged property, that it was used for residential purposes, and that the debt was incurred for its acquisition were held to require supplementation to indicate the source of the information and its reliability.[157] In the circumstances, the court postponed the matter *sine die* to enable the plaintiff to supplement its papers with appropriate allegations to place the court in a position to decide whether an order declaring the mortgaged property to be specially executable was justified.[158]

5.3.3 Comments on the position post-Jaftha v Schoeman

Shortly after *Jaftha v Schoeman*, commentators expressed concern regarding the uncertainty which it had created.[159] It was submitted, *inter alia*, that *Jaftha v Schoeman* "caused great confusion among bondholders who wanted to take legal action against their defaulting debtors who had mortgaged their homes"[160] and that the law concerning execution against immovable property had become "somewhat of a legal quagmire".[161] Van Heerden and Boraine pointed out that *Jaftha v Schoeman* had introduced a new process in the magistrates' courts in which execution could not be levied against the immovable property of a debtor without prior court intervention[162] but without clear substantive and procedural requirements. They raised several practical issues, such as:

- what the form and method, and other requirements, were for notification of the debtor of his or her constitutional right to access to adequate housing;
- how service ought to be effected;
- whether the application should be made in chambers or in open court;

[155] *Nedbank v Mashiya* pars 44-49.
[156] *Nedbank v Mashiya* pars 34-35.
[157] *Nedbank v Mashiya* pars36-43.
[158] *Nedbank v Mashiya* par 52.
[159] Van Heerden and Boraine 2006 *De Jure* 319; Saller 2005 *SALJ* 725; Steyn 2007 *Law Dem Dev* 119.
[160] Kelly-Louw 2005 *JBL* 35-39.
[161] Steenkamp and Burr-Dixon 2006 *De Rebus* (August) 12-14.
[162] See Van Heerden and Boraine 2006 *De Jure* 330.

- who would bear the costs of the new procedure, and
- who would bear the onus of proving whether execution would be justifiable or not and, if it is the creditor, how he or she would be expected to ascertain information exclusively within the knowledge of the debtor.[163]

Van Heerden and Boraine further noted that, although the judgment was intended to apply only to instances in which it was sought to attach the home of the debtor, the court did not specifically articulate this. The result was that the words directed to be read-in created a "blanket" requirement of judicial oversight in all cases where it was sought to execute against immovable property of the debtor.[164] The authors also expressed concern that the magistrates' courts might become overburdened.[165] They further questioned whether requiring the creditor to indicate that there is no reasonable way of recovering the debt other than by execution against the home of the debtor presupposed a duty on the creditor first actively to exhaust all other methods of obtaining payment. They commented that this would place an inordinately heavy burden on the creditor. Another issue which Van Heerden and Boraine raised was that the Constitutional Court did not consider the question of an improvement in the debtor's circumstances. In other words, once a court found that the debtor's home could not be declared executable, in what circumstances might the judgment creditor attach the home at some later stage?[166] In light of the uncertainty arising out of *Jaftha v Schoeman* they posited a set of substantive and procedural requirements for an application for execution against a debtor's immovable property.[167]

Contrary to the Constitutional Court's approach, the authors suggested that it might be more appropriate to protect the right to have access to adequate housing, as well as

[163]Van Heerden and Boraine 2006 *De Jure* 331ff.
[164]Van Heerden and Boraine 2006 *De Jure* 330.
[165]Although the authors did note that the court had attempted to limit the application of the judgment by specifying that a sale in execution of mortgaged homes should ordinarily be permitted where there has been no abuse of court procedure. See Van Heerden and Boraine 2006 *De Jure* 331. See also Deosaran 2005 *De Rebus* (July) 39 39-40.
[166]Van Heerden and Boraine 2006 *De Jure* 331.
[167]The authors also suggested a format for the applicant's affidavit, appropriate wording for a warrant of execution, and that amendments be made to rule 45(1) of the Uniform Rules of the High Court to accord with section 66(1) of the Magistrates' Courts Act. See Van Heerden and Boraine 2006 *De Jure* 332-336.

any affected children's rights to shelter, recognised in section 28(1)(c) of the Constitution, by adding a limited exempt category of immovable property to section 67 of the Magistrates' Courts Act. They submitted that such a provision could exempt a state-subsidised home and it could exempt a family home under certain conditions, such as by making the exemption subject to review if the debtor's circumstances changed or after a prescribed period.[168]

In *Jaftha v Schoeman*, Mokgoro J deliberately kept the "guidance"[169] flexible. It is submitted that this made it difficult to obtain much sense of the hierarchy, or relative weighting, of the considerations which were mentioned. For instance, it is not clear whether the "final consideration"[170] repeats, amplifies or even relates to, the second guideline provided[171] or whether it is a separate consideration which has a bearing on balancing the judgment creditor's and debtor's respective interests.[172] Further, Mokgoro J stated that "[w]hile it will ordinarily be unjustifiable for a person to be rendered homeless where a small amount of money is owed, and where there are other ways for the creditor to recover the money lent, this will not be the case in every execution of this nature."[173] It is submitted that this is not sufficiently explicit to be effectively applied as a workable formula in a variety of circumstances.

Concerns were expressed that the large measure of flexibility and the lack of a coherent approach could lead to further confusion.[174] The validity of these concerns was borne out by the later cases.[175] A caution was expressed that, ironically, reluctance to define parameters more strictly might set a "poverty trap" of a different kind to that envisaged by Mokgoro J – that creditors would not be prepared to lend money to homeowners where the consequences of default were so unpredictable.[176] It was amidst this

[168] Van Heerden and Boraine 2006 *De Jure* 347-351, 352 and 353.
[169] See *Jaftha v Schoeman* pars 56-59, discussed at 5.2.3, above.
[170] See *Jaftha v Schoeman* par 59.
[171] See *Jaftha v Schoeman* par 56.
[172] This is referred to in *Jaftha v Schoeman* par 59.
[173] *Jaftha v Schoeman* par 41.
[174] Steyn 2007 *Law Dem Dev* 119; Van Heerden and Boraine 2006 *De Jure* 352.
[175] As discussed earlier in this chapter.
[176] See Steyn 2007 *Law Dem Dev* 119.

controversy and uncertainty that the decision of the Supreme Court of Appeal in *Standard Bank v Saunderson* was anticipated in the hope that it would bring much needed clarity to the position.

5.4 Standard Bank v Saunderson

5.4.1 The issues and the decision

In an appeal against the decision in *Standard Bank v Snyders*,[177] the Supreme Court of Appeal, regarding this as a "test case"[178] in light of the different approaches being adopted in various divisions of the high court, appointed *amici curiae* to represent the respondents' interests.[179] In a unanimous judgment[180] the Supreme Court of Appeal recognised that a "mortgage bond is an indispensable tool for spreading home ownership"[181] in that few people are able to buy a home without passing a mortgage bond over it to provide security for a loan of money in order to purchase it.[182] It stated that a mortgage bond "curtails the right to property at its root, and penetrates the rights of ownership, for the bond-holder's rights are fused into the title itself."[183]

The Supreme Court of Appeal pointed out that the value of a mortgage bond as an instrument of security lies in confidence that the law will give effect to its terms. It stated that such confidence had been shaken[184] because of the stance adopted by the court *a quo* that the Constitutional Court had decided, in *Jaftha v Schoeman*, that in all cases where it was sought to execute against residential property it had to be shown that execution was justified under section 26(3) of the Constitution. Thus, according to the judges of appeal what had until then "been routine practice in the courts … [had]

[177] See 5.3.2.1, above.
[178] *Standard Bank Ltd v Saunderson* par 6.
[179] The application for summary judgment, in *Standard Bank v Snyders*, in which the defendant had initially entered an appearance to defend the matter, had fallen away.
[180] Delivered jointly by Cameron and Nugent JJA.
[181] *Standard Bank v Saunderson* par 1.
[182] *Standard Bank v Saunderson* par 1. The appellant had stated that, in August 2005, loans secured by mortgage bonds on residential property in South Africa amounted to almost R500 billion.
[183] *Standard Bank v Saunderson* par 2.
[184] *Standard Bank v Saunderson* par 3.

become controversial because of uncertainty as to what must be alleged to justify an order for execution". As they noted, from the appellant's attorney's letter requesting urgent attention to this issue, "matters … [had] all but ground to a halt" in the Cape.[185] The Supreme Court of Appeal further observed that in *Nedbank v Mortinson* the full court in the Witwatersrand Local Division had also assumed that the rights conferred by section 26 would be compromised and would require justification whenever it was sought to execute against residential property. It also noted that the Natal High Court had issued different practice directions for guidance in future cases.[186] Thus, clarity and guidance as to a uniform approach was required.

The appeal court found that the court *a quo* was incorrect to base its decision on section 26(3)[187] of the Constitution which would become relevant only in the event of eviction consequent upon a sale in execution.[188] As it explained, *Jaftha v Schoeman* concerned the right to adequate housing, enshrined in section 26(1), and the impact of that right on execution against residential property. It emphasised that section 26(1) does not confer a right of access to housing *per se* but only a right of access to "adequate housing" which is a relative concept.[189] Further, the Constitutional Court, in *Jaftha v Schoeman*, "did not decide that the ownership of all residential property … [was] protected by s 26(1); nor could it have done so bearing in mind that what constitutes 'adequate housing' is necessarily a fact-bound enquiry".[190] Nor did the Constitutional Court decide that section 26(1) is compromised in every case where execution is levied against residential property. It decided only that a writ of execution which would deprive a person of "adequate housing"[191] would compromise his section 26(1) rights and would therefore need to be justified as contemplated by section 36(1).[192]

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[185] *Standard Bank v Saunderson* par 14.
[186] *Standard Bank v Saunderson* par 14.
[187] As elaborated by the legislature in PIE; see 3.3.1.4, above.
[188] *Standard Bank v Saunderson* par 15, with reference to *Ndlovu v Ngcobo* (see 3.3.1.4 (b), above) par 16.
[189] This observation was made with reference to the decision in *Grootboom*.
[190] *Standard Bank v Saunderson* par 17. The Supreme Court of Appeal commented that executing against a luxury, or a holiday, home, for example, could never impact upon the right to access to adequate housing.
[191] Including a threat to ownership of adequate housing; see *Standard Bank v Saunderson* par 17.
[192] *Standard Bank v Saunderson* par 15.

Cameron and Nugent JJA emphasised how "radically different" the situation was from that in *Jaftha v Schoeman* where "the sale in execution deprived the debtor of title to the home a state subsidy enabled her to acquire because she was unable to pay a relatively trifling extraneous debt, and no judicial oversight was interposed to preclude an unjustifiably disproportionate outcome."[193] In *Jaftha v Schoeman*, it was accepted[194] that "the forfeiture in question" entailed a deprivation of "adequate housing".[195] Moreover, the judgment creditor "was not a mortgagee with rights over the property that derived from agreement with the owner." By contrast, in the cases before the court the property owners had "willingly bonded their property to the bank to obtain capital" and therefore, in the appeal court's analysis, their debt was not extraneous but "fused into the title to the property."[196] The judges of appeal pointed out that in *Jaftha v Schoeman* the Constitutional Court did not consider the effect of section 26(1) on this sort of case. Therefore, its observations concerning mortgage bonds were made "in the context of the kind of interests that might need to be considered [only] once it was shown that s[ection] 26(1) was in fact compromised."[197]

The Supreme Court of Appeal noted that the case before it did not require a decision whether section 26(1) may be compromised when a mortgagee seeks to enforce rights conferred by a mortgage bond where the mortgaged property does in fact constitute "adequate housing". Nevertheless, it was of the view that, even if execution against mortgaged property could conflict with section 26(1), such cases were "likely to be rare" and that it was "particularly hard to conceive of instances where a mortgagee's right to reclaim the debt from the property … [would] be denied altogether".[198] It acknowledged no surprise that in *Jaftha v Schoeman* the Constitutional Court had stated that, in the absence of abuse of court procedure, a sale in execution should ordinarily be permitted

[193] *Standard Bank v Saunderson* par 18.
[194] By both the high court and the Constitutional Court.
[195] *Standard Bank v Saunderson* par 16.
[196] *Standard Bank v Saunderson* par 18.
[197] *Standard Bank v Saunderson* par 19.
[198] *Standard Bank v Saunderson* par 19.

against a home that had been mortgaged as security for payment of the debt.[199] It explained that:[200]

> Though it is more easily possible to contemplate a court delaying execution where there is a real prospect that the debt might yet be paid, even in such cases the approach to pleading does not change. A plaintiff is called to justify an infringement of a constitutionally protected right only once it has been established that infringement has in fact occurred. As pointed out by Stuart Woolman in Chaskalson *et al Constitutional Law of South Africa* at 12-2:
>
> > Constitutional analysis under the Bill of Rights takes place in two stages. First, the applicant is required to demonstrate that her ability to exercise a fundamental right has been infringed. . . . If the court finds that the law [or measure] in question infringes the exercise of the fundamental right, the analysis may move to its second stage. In this second stage . . . the party looking to uphold the restriction . . . will be required to demonstrate that the infringement is justifiable.
>
> Until the defendants in the cases before us could show that orders for execution would infringe s 26(1) the bank was not called on to justify the grant of the orders. The sole fact that the property is residential in character is not enough to found the conclusion that an infringement of s 26(1) will necessarily occur.

None of the defendants had shown, or even alleged, that an order for execution against the mortgaged immovable property would infringe their rights of access to adequate housing. Nor, in the appeal court's view, did any reason exist to believe that it would. Thus, the Supreme Court of Appeal held that Standard Bank did not need to justify the orders it sought which, in the circumstances, ought to have been granted.[201]

Although the issue did not strictly arise in the appeal, for the sake of achieving certainty, the Supreme Court of Appeal dealt with the ancillary issue of whether the registrar had the authority to grant the orders permitting immediate execution against the immovable properties in terms of rule 31(5).[202] It reiterated[203] that it is only where the defendant contests the validity of a writ of execution, on the basis of an alleged infringement of section 26(1), that the plaintiff would have to justify the granting of it. It also pointed out

[199] *Standard Bank v Saunderson* par 19, with reference to *Jaftha v Schoeman* par 58.
[200] *Standard Bank v Saunderson* par 20.
[201] *Standard Bank v Saunderson* par 21.
[202] *Standard Bank v Saunderson* pars 22-23. The court first distinguished *Jaftha v Schoeman*, on the facts, and pointed out that the equivalent provision, in the high court procedure, would be rule 45(1). However, as the question of the constitutional validity of that rule 45(1) was not before the court, it was expressly left open.
[203] The court dealt with this earlier, in the judgment, at pars 20-21.

that, in any event, where a defendant formally defends, or at least lodges an informal objection to, the grant of the order of execution, rule 31(5) precludes the registrar from giving the order sought and requires the matter to be referred for hearing in open court.[204] It therefore concluded that in cases where the constitutional validity of an order of execution is not disputed, the registrar could enter judgment in accordance with rule 31(5).[205] Their reasoning was as follows:[206]

> What is required of the Registrar in such cases is neither the exercise of a judicial discretion nor the mechanical grant of an order in circumstances where that would be constitutionally impermissible. All that is required of the Registrar is a formal evaluation of whether the summons discloses a proper cause of action – that is a task quite distinct from evaluation of the kind reserved for a court and does not involve the Registrar in performing a judicial function. No doubt Registrars ought in any event to be cautioned to refer matters for hearing in open court even where a defendant raises a constitutional objection informally by approaching the Registrar and objecting to the order.

The Supreme Court of Appeal stressed that the application of the right of access to adequate housing in the case of mortgaged property had not yet been explored by our courts, nor was it a question before it for determination as none of the defendants had raised it in the court *a quo*. However, it acknowledged, "it is possible that s 26(1) may be infringed by execution"[207] and that, in most cases where an order for execution is sought, the defendant has no defence to the claim and would thus be unlikely to seek or obtain legal advice. In the circumstances, the court, permitted by section 172 of the Constitution to make an order that is "just and equitable", laid down a rule of practice requiring a summons in which an order for execution against immovable property is sought to inform the defendant that his right of access to adequate housing may be implicated by such an order. The court specifically stated that this rule of practice would be required prospectively only and that existing summonses were not invalid for lack of any reference to section 26(1).[208]

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[204] *Standard Bank v Saunderson* par 23.
[205] *Standard Bank v Saunderson* par 24.
[206] *Standard Bank v Saunderson* par 24.
[207] *Standard Bank v Saunderson* par 25.
[208] *Standard Bank v Saunderson* par 25.

In the result, the court held that, since none of the defendants had contested the constitutional validity of the orders which Standard Bank sought, there were no proper grounds to refuse them and the registrar had been entitled to issue them. The court, finding that the summonses were not deficient, upheld the appeal in each case and supplemented the order of the court *a quo* with an order declaring each property specially executable.[209] In addition, the court issued a practice direction which read as follows:[210]

> The summons initiating action in which a plaintiff claims relief that embraces an order declaring immovable property executable shall, from the date of this judgment, inform the defendant as follows: "The defendant's attention is drawn to s 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 execution will infringe that right it is incumbent on the defendant to place information supporting that claim before the Court."

5.4.2 On appeal: Campus Law Clinic v Standard Bank

In *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank Ltd and Another*,[211] the University of KwaZulu-Natal's Campus Law Clinic, citing the Standard Bank and the Minister for Justice and Constitutional Development as respondents, applied to the Constitutional Court for leave to appeal against the decision in *Standard Bank v Saunderson*. In the alternative, it sought an order granting it direct access to the Constitutional Court. In the latter event, it sought an order declaring either that section 27A of the Supreme Court Act and rule 31(5)(*a*) of the High Court Rules did not permit a registrar to grant an order declaring immovable property specially executable or that they were unconstitutional to the extent that they did permit a registrar to do so. It also sought an order declaring that a court may declare immovable property specially executable only when the summons includes a warning to the defendant specifically setting out his rights.

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[209] *Standard Bank v Saunderson* pars 26-27.
[210] *Standard Bank v Saunderson* par 27.
[211] *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank Ltd and Another* 2006 (6) SA 103 (CC); hereafter referred to as "*Campus Law Clinic v Standard Bank*". The Constitutional Court held that the Campus Law Clinic had public interest standing in relation to the constitutional issues raised in *Jaftha v Schoeman*; see *Campus Law Clinic v Standard Bank* pars 2, 18.

The Campus Law Clinic reiterated the following submissions[212] which had been made by the *amici curiae* in *Standard Bank v Saunderson*.[213]

- Section 28(2) of the Constitution[214] imposes an obligation not only on parents properly to shelter their children but also on the State to provide the necessary legal and administrative infrastructure for children to receive, and not to be unconstitutionally deprived of, the protection (including housing) to which they are entitled in terms of section 28.
- Courts, not registrars, are the upper guardians of the best interests of children. Thus, judicial supervision of the process is required.
- An execution order may impact upon the right to human dignity[215] of "innocent victims of the debtor's financial failure" including dependants other than children such as spouses and elderly or infirm adult members of the household or family.
- A decision to execute against the family home may involve complex questions of law and policy which make judicial oversight a prerequisite.

The Campus Law Clinic also submitted that the practice direction issued in *Standard Bank v Saunderson* provided inadequate protection of rights and constitutional principles. It submitted that it ought to:[216]

- draw the defendant's attention to the fact that information might be placed before the court even in the absence of a defence to the claim for payment, especially as most defendants would be lay-people;
- draw attention to the relevance of the interests of dependants or children;
- inform him how to "place information… before the Court"; and
- explicitly instruct the registrar to refer to open court all matters in which a defendant indicates that his right to access to adequate housing may be affected.

[212]*Per* affidavit by the then Social Justice Project manager, Sarah Linscott (hard copy on file with author). These submissions were not mentioned in the reported judgments, in *Standard Bank v Saunderson* and *Campus Law Clinic v Standard Bank*.
[213]See pars 38-39 of Linscott's affidavit.
[214]Which provides that a "child's best interests are of paramount importance in every matter concerning the child"; see 3.3.3, above.
[215]See 3.3.2, above.
[216]See par 44 of Linscott's affidavit.

It suggested the following wording for a summons:[217]

> Inform the Defendant further that the order declaring the property specially executable may infringe his or her constitutional rights and that the court will therefore enquire into all relevant circumstances before declaring the property to be specially executable.
>
> Such enquiry will include, but will not be confined to:
> - the circumstances in which the debt arose;
> - the size of the debt and the availability of movables to satisfy the debt; and
> - whether the property is used for commercial or residential purposes and, if residential, whether and by whom it is occupied.
>
> Inform the Defendant further that he or she has the right to make representations to the court and place evidence before the court on the above matters. If the Defendant intends doing so, he or she must notify the Registrar of the court and the plaintiff's attorneys in writing within . . . days.

The Constitutional Court acknowledged the importance of the issue and stated that it would be inappropriate to consider the correctness of the order and practice direction, in *Standard Bank v Saunderson*, without consideration of the broader issues. Further, it was of the view that this should occur in proceedings which had properly commenced in the high court with all interested parties, such as other lending institutions and bodies representing housing and homeowners' interests, joined. It also considered it important that the Minister should have a proper opportunity to lodge appropriate affidavits and argument in relation to the justification of any limitation of persons' rights. In the circumstances, the Constitutional Court refused leave to appeal and direct access but noted that this constituted no bar to the Campus Law Clinic or other interested body or person pursuing this issue in future proceedings.[218]

5.4.3 Comments on Standard Bank v Saunderson

Standard Bank v Saunderson settled a number of controversial issues. A number of divisions of the high court introduced practice directives to implement the practice

[217] See par 47 of Linscott's affidavit.
[218] *Campus Law Clinic v Standard Bank* pars 23-28.

direction issued in *Standard Bank v Saunderson* although there was a lack of uniformity.[219] However, some doubted whether the practice direction, as set out in *Standard Bank v Saunderson*, was sufficient to provide the level of protection which Mokgoro J had envisaged, in *Jaftha v Schoeman*, for debtors who lacked resources and access to legal advice and representation.[220] Further, it was still unclear in which circumstances it would *not* be justifiable to execute against a debtor's home where it had been mortgaged in favour of the creditor. The combined effect of *Jaftha v Schoeman* and *Standard Bank v Saunderson* had yet to be fully comprehended.

5.5 Developments following Standard Bank v Saunderson

5.5.1 Background

ABSA v Ntsane was the first reported case after *Standard Bank v Saunderson* in which the high court refused to grant an order declaring mortgaged property specially executable in spite of the mortgagors' default. In *ABSA v Ntsane*, the decision was based largely on the fact that, at the time when default judgment was sought, the mortgagors were in arrears in the amount of a mere R18,46. In the circumstances, the court regarded an application for a writ of execution to constitute an abuse of process. The court suggested that a compulsory arbitration process should be imposed in such matters.

Soon thereafter, the effect of the coming into operation of the NCA became evident in the reported judgments. A significant judgment which reflects the implications of the NCA in such cases is *FirstRand Bank v Maleke*. However, problems associated with the application and interpretation of the NCA's provisions complicated matters and this may

[219] For example, Rule 26 of the *Practice Manual* in the KwaZulu-Natal High Court was amended to require wording extracted *verbatim* from the judgment, in *Standard Bank v Saunderson*. The Western Cape High Court had adopted the practice direction as it was stated in *Standard Bank v Saunderson* par 27. The North West High Court, Mafikeng had issued Practice Direction No. 30 of the North West High Court Practice Directions. Other examples are cited in *Gundwana v Steko* par 28.

[220] See Steyn 2007 *Law Dem Dev* 108 regarding arguments in *Campus Law Clinic v Standard Bank*. See Du Plessis and Penfold 2005 *AS* 27 77-81; Du Plessis and Penfold 2006 *AS* 45 83-93. See, also, the arguments put forward in this regard in *Campus Law Clinic v Standard Bank*, discussed above.

be regarded as hindering the efficacy of the newly introduced consumer debt relief measures, as far as over-indebted mortgagors were concerned. One issue, for instance, was whether, in a bid to avoid execution against his home by a mortgagee, a debtor could insist on the matter being referred for debt review by a court. Another issue which affected mortgagors of homes who sought debt rearrangement was the circumstances in which the mortgagee could terminate the debt review. The amendment of rule 46(1) of the High Court Rules also impacted on the position.

The judgments, some of which are canvassed below, indicate inconsistent approaches by the courts in the various circumstances presented in the cases. Evidently, the parameters of the effect of *Jaftha v Schoeman* required clearer definition.

5.5.2 ABSA v Ntsane

5.5.2.1The facts and the issues

In *ABSA v Ntsane*, the defendants had fallen into arrears in respect of monthly repayments due in terms of a mortgage bond passed over their home to secure repayment of a loan of money which they had obtained to purchase it.[221] ABSA, relying on an acceleration clause[222] in the mortgage bond, claimed not only the arrear amount but the total outstanding loan debt.[223] The defendants did not enter an appearance to defend and ABSA applied for default judgment in the amount of R62 042,43 as well as an order declaring the mortgaged property specially executable.[224] Although the amount claimed fell within the jurisdiction of the magistrate's court, ABSA applied for default judgment in the Transvaal Provincial Division, as it was then called. In terms of the decision in *Nedbank v Mortinson*,[225] the registrar referred the matter for hearing in the open motion court.[226] At the time of the application for default judgment, the defendants

[221] *ABSA v Ntsane* par 17.
[222] See 4.3.3, above.
[223] *ABSA v Ntsane* par 6.
[224] *ABSA v Ntsane* pars 8-9.
[225] See 5.3.2.3, above.
[226] *ABSA v Ntsane* par 10.

were in arrears in an amount of R18,46.[227]

The court, *per* Bertelsmann J, assuming that the property was the defendants' home,[228] observed:[229]

> [The] plaintiff sought to deprive the defendants of their home while the amount that was allegedly in arrears when the balance outstanding on the bond was sought to be called up can only be described as piffling, particularly when the status of the plaintiff as part of a multi-billion rand international financial conglomerate is taken into account.

The court also assumed that, at the time that the decision was taken to "call up the bond", the arrear amount had been greater, and the defendants had in the interim "made very real efforts to bring any arrears up to date".[230] No explanation emerged from the papers for ABSA's insistence upon enforcing the terms of the mortgage bond when the arrear amount was so small.[231] The court expressed its disquiet by stating that it "appeared morally and ethically questionable, strongly reminiscent of Shylock insisting upon every single ounce of his pound of flesh, … [considering] the apparently irreversible prejudice the defendants would suffer" for the non-payment of such a "minute" amount.[232] It stated further that "the first impression … was … that it would be unfair and a striking injustice to deprive apparently poor persons of the only dwelling."[233]

The court had reserved judgment and, having considered the decisions in *Jaftha v Schoeman*, *Nedbank v Mortinson* and *Standard Bank v Saunderson*, appointed the Legal Resources Centre to act as *amicus curiae*. The court requested the Legal Resources Centre to present argument on behalf of the defendants[234] and posed the following questions to be addressed by the parties on the day on which the matter was

[227] *ABSA v Ntsane* par 12.
[228] *ABSA v Ntsane* par 61.
[229] *ABSA v Ntsane* par 18.
[230] *ABSA v Ntsane* par 20.
[231] *ABSA v Ntsane* par 21.
[232] *ABSA v Ntsane* par 22.
[233] That they were indeed poor was likely, according to the court, "given the modest nature of their home." See *ABSA v Ntsane* par 24.
[234] *ABSA v Ntsane* par 27.

enrolled for argument.[235]

[26.1] The bond was registered in 1998. Would the manner and fashion in which the defendants have repaid their liability in terms of the bond from time to time be relevant to the question whether the default judgment ought to be granted?
[26.2] If so, on what grounds would such history be relevant?
[26.3] Would the enforcement of the plaintiff's rights in terms of the bond for the sum of R18,46 be unconscionable or not?
[26.4] Is the enforcement of the plaintiff's right to declare the immovable property executable unconscionable? On what ground would such a finding be made?
[26.5] Would an enforcement of the provisions of the bond entitling the plaintiff to declare the property executable for the sum of R18,46 be in conflict with the provisions of s 26 of the Constitution of the Republic of South Africa, 1996, the right of access to housing?
[26.6] If so, on what grounds would the fundamental right of access to housing be infringed by the enforcement of the plaintiff to have the property declared executable?
[26.7] Given the plaintiff's rights, would the Court have or retain a discretion to grant the default judgment prayed for or not? If so, on what grounds should such discretion be exercised?
[26.8] If the plaintiff's insistence upon the enforcement of its right to have the property declared executable is to be branded as unconscionable, what would the underlying moral considerations be that would lead to this finding?
[26.9] When would the insistence upon the right to enforce the execution against the property be morally and ethically acceptable? Which yardsticks ought the Court to apply?
[26.10] Could the Court insist, in cases where the total arrears are comparatively minor, that execution should first be sought to be levied against the debtor's movable property, or should be collected by way of a garnishee order against the debtor's salary, rather than enforce the loss of the dwelling by declaring the property executable?
[26.11] Once the debtor has fallen into arrears and the plaintiff has exercised its right and elected to accelerate the payment of the capital owing in terms of the bond and its underlying agreement, would a Court be entitled to force the plaintiff to reinstate (as it were) the repayment provisions of the bond by refusing to enforce an order that the full amount of the liability that has become owing and due should be paid?
[26.12] Would the refusal on the part of the Court to enforce the bond not amount to dictating a new contract to the parties?
[26.13] If so, on what grounds could the Court exercise such a power?

On the appointed day, counsel representing ABSA informed the court that it wished to withdraw the application for default judgment in order to prepare a fresh application

[235] *ABSA v Ntsane* par 26.

containing full details.[236] The court refused leave to withdraw the application because, *inter alia*, it "concerned matters of significant constitutional and commercial import and of public interest" and it postponed the matter for argument to be properly prepared.[237]

By the next court date, ABSA had filed an additional affidavit[238] in which it explained that the mortgage bond had originally been registered in respect of a loan of R60 000 and that for the following eight years the defendants had "intermittently" fallen into arrears. On each occasion that they had defaulted ABSA had tried to accommodate them and allowed them to arrange for payment. All in all, over a period of eight years, ABSA had recorded 110 computer notes entered on its system indicating the arrear status of the account. After ABSA had repeatedly issued warnings that legal action would be taken and after the issue of summons, the defendants reduced the arrear amount to R18,46. ABSA alleged that the total outstanding balance, when calculated six months previously, had been R62 042,43 to which interest at 10,5% *per annum* had to be added.[239] ABSA further alleged that the defendants were in arrears in respect of the municipal rates and taxes due on the property to the extent of R20 801,11.

5.5.2.2 The decision

The court perused the account statements which had been made available by ABSA and made the following observations:

- clearly, the defendants had struggled to maintain their payments "bringing the arrears up to date from time to time … and then failing to pay promptly again";[240]
- ABSA's affidavits did not disclose that interest was the first charge paid by the defendants every month, over the years, and that they had paid book fees and other bank charges for each entry made, as well as penalty interest,

[236] *ABSA v Ntsane* par 31.
[237] *ABSA v Ntsane* pars 32-34.
[238] *ABSA v Ntsane* par 36.
[239] *ABSA v Ntsane* par 39-40.
[240] *ABSA v Ntsane* par 42.

every time that they had fallen into arrears;[241]

- ABSA had apparently not suffered any loss in the circumstances;[242]
- The current value of the property did not appear in the affidavits which formed part of ABSA's application.[243]

Bertelsmann J stated that the ABSA's failure to disclose relevant and complete information regarding the defendants' "struggle … in their endeavour to retain their house" would, in the circumstances, be sufficient grounds alone to warrant a dismissal of the application.[244]

The *amicus curiae*'s research into the history of the defendants' possession of the property revealed that the defendants had held the property, 294 square metres in extent, in a former "black township". In 1988, they acquired registered leasehold in terms of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988, apparently for a price of R52 719. The defendants' leasehold rights were converted to ownership,[245] probably during 1998, when the mortgage bond in question was registered.[246] The defendants did not receive any state assistance to purchase the property.[247] The court assumed, in light of the known circumstances, that it was their first[248] and only[249] home. The *amicus curiae* relied on section 26 of the Constitution and the judgment in *Jaftha v Schoeman* to argue that the loss of the defendants' home, coupled with their consequent disqualification from accessing a housing subsidy,[250] would effectively deprive them of access to "adequate" housing. Therefore, he contended, an order declaring the immovable property executable would be

[241] *ABSA v Ntsane* par 43.
[242] *ABSA v Ntsane* par 44.
[243] *ABSA v Ntsane* par 45.
[244] *ABSA v Ntsane* pars 49-54.
[245] Apparently in terms of s 3 of the Upgrading of Land Tenure Rights 112 of 1991.
[246] *ABSA v Ntsane* pars 55-59.
[247] *ABSA v Ntsane* par 60.
[248] *ABSA v Ntsane* par 61.
[249] *ABSA v Ntsane* par 84.
[250] *ABSA v Ntsane* par 62. In terms of the National Housing Code 2000, only a first-time house owner was entitled to a state housing subsidy; see 4.2.1 and 5.2.1, above. The position is effectively the same under the National Housing Code 2009.

unconstitutional.[251] The court, apparently endorsing this contention,[252] noted that any measure which limits the right to have access to adequate housing may, however, be justified under section 36 of the Constitution.

The court referred to the following statements made in the judgment in *Jaftha v Schoeman*.[253]

- Execution against the family home will not be justifiable when it is for the recovery of a debt of trifling importance to the creditor that would result in a disastrous dispossession of the debtor's family of its only shelter.
- Consideration of the legitimacy of a sale in execution of a house should be seen as a balancing of the interests of the debtor and the creditor.
- The circumstances in which the debt arose are important: if the debtor has mortgaged his home in favour of the creditor, "a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure. The need to ensure that homes may be used by people to raise capital is an important aspect of the value of a home which courts must be careful to acknowledge."[254]

Bertelsmann J further noted that in *Standard Bank v Saunderson*, the Supreme Court of Appeal had stated that cases in which the enforcement of rights arising out of a mortgage bond would conflict with the right to have access to adequate housing are "likely to be rare". It had also stated that it was "particularly hard to conceive of instances where a mortgagee's right to reclaim the debt from the property … [would] be denied altogether …[and that it was] more easily possible to contemplate a court delaying execution where there … [was] a real prospect that the debt might yet be paid."[255] However, Bertelsmann J identified a novel issue in the matter before him:

[251] *ABSA v Ntsane* par 63.
[252] The court did not expressly accept, nor reject, the contention, but went on to mention how a limitation may be justifiable in terms of s 36 of the Constitution.
[253] *ABSA v Ntsane* par 64.
[254] This is a reference to *Jaftha v Schoeman* par 58.
[255] *ABSA v Ntsane* par 66, with reference to *Standard Bank v Saunderson* pars 19-20.

whether a mortgagee's decision to enforce an acceleration clause[256] could be set aside or reviewed by the court in an application for default judgment and an order declaring the property specifically executable.[257] Expressing difficulty in being able to conceive of a ground upon which a creditor's decision to enforce an acceleration clause could be held to be unlawful,[258] Bertelsmann J stated:[259]

> At best for the debtor who has willingly bonded his or her property a Court could enquire whether, *prima facie*, enforcement of the bond might be held in abeyance while ways and means are explored by which payment of the debt might be arranged in spite of the debtor having defaulted. The enquiry would be complicated by the fact that most matters of this nature would come before the Court by way of an application for default judgment.

Bertelsmann J remarked that in *Nedbank v Mortinson* the court had not decided as a matter of law that declaring residential property executable constituted a limitation of the rights protected in terms of section 26(1), but had simply accepted it for the purposes of the judgment. However, Bertelsmann J noted, the court had added that, if a small arrear amount triggered the action against the debtor, the possibility of an infringement of these rights was increased and such claims therefore required careful scrutiny.[260]

In the circumstances, Bertelsmann J regarded the issue to be the weighing of ABSA's right to commercial activity and to enforce agreements lawfully entered into against the defendants' right to have access to adequate housing.[261] The proportionality of harm to the defendants, if judgment were to be granted against them, had to be weighed against the harm which ABSA might suffer if the agreement underlying the registration of the mortgage bond was rendered commercially ineffective. Referring to *Standard Bank v Saunderson*,[262] Bertelsmann J explained that not only would this deny ABSA the right to enforce a contract lawfully entered into but it could also create uncertainty and distrust in commercial activities. He warned also that if courts apparently interfered "willy-nilly

[256]That is, to insist on repayment of the full amount outstanding, where the debtor had defaulted by not paying one or more of the agreed instalments.
[257]*ABSA v Ntsane* par 67.
[258]*ABSA v Ntsane* par 68.
[259]*ABSA v Ntsane* par 69.
[260]*ABSA v Ntsane* par 69.
[261]*ABSA v Ntsane* par 71.
[262]See *Standard Bank v Saunderson* pars 2-3.

with established practices" this could negatively affect investment in the economy.[263] Bertelsmann J identified the following factors as being relevant to the consideration of the parties' respective rights:

- the value of the bonded property;
- the amount outstanding on the bond;
- the past history of payments made by the debtor;
- any other assets which the debtor owns, particularly movable assets capable of easy attachment and sale in execution;
- any other debts of which the bondholder is aware, such as arrear rates and municipal taxes; and
- whether the debtor is employed or not.[264]

The court also observed that the average first-time house owner who has defaulted on his mortgage loan repayments would very rarely enter an appearance to defend when application is made to execute against the property.[265] This would leave the court to enquire into the debtor's ability to rectify the situation and thereby evade execution.[266] Bertelsmann J stated the position thus:[267]

> The Court is enjoined by the Constitution to ensure that fundamental rights are not infringed. If necessary, it has to act *mero motu* to prevent the infringement of constitutionally safeguarded rights…The present case demonstrates just how cumbersome and often ill-defined such an intervention might become. The issues that must be addressed once the Court is of the view that a constitutional right may be infringed, should be clearly formulated and defined as narrowly as possible.

Bertelsmann J stated that, although it might be difficult in practice for a court to carry out this duty,[268] it should determine from the bondholder why "a small amount that is in arrears on a bond over a moderate property could not be collected by execution against

[263] *ABSA v Ntsane* par 72.
[264] *ABSA v Ntsane* par 73.
[265] *ABSA v Ntsane* par 75.
[266] *ABSA v Ntsane* par 76.
[267] *ABSA v Ntsane* par 77.
[268] *ABSA v Ntsane* par 78, Bertelsmann J stated not "every case of this nature can be dealt with as thoroughly at the cost of an NGO as was done in this instance".

movable assets."[269] He concluded that, even if the terms of a mortgage loan agreement included an acceleration clause, a court would be entitled to refuse to grant execution against an immovable property if the result would be "so seemingly iniquitous or unfair to the house owner that … [it] would amount to an abuse of the system."[270] While he could not find precedent directly in point, he referred to cases in which it had been held that claims in the high court that would produce an unfair result, create undue difficulty to conduct or to settle the claim, or that brought about undue exposure to high court litigation costs constituted an abuse of process.[271] Bertelsmann J concluded that, in the circumstances, enforcing the right to execute against the immovable property while the arrear amount was so minute, thereby terminating the defendants' right to adequate housing, would conflict with section 26 of the Constitution.[272] The court stated:[273]

> To allow such a result in a country where housing is at a premium and poverty and the legacy of a previous dispensation deny millions the fundamental right to a roof over their heads infringes the fundamental right to adequate housing and may also …be in conflict with the right to dignity.

The court added that it would be grossly unfair if a forced sale were to obtain a price less than the market value while a "controlled sale" might obtain a much higher price and leave the defendants with some money after paying the plaintiff's claim.[274] It therefore regarded a plaintiff's insistence upon the right to execute against immovable property which is the defendants' only home, in circumstances where there were easier ways to obtain payment of the arrears without any prejudice to the plaintiff's rights, as constituting an abuse of the system and the processes of the court.[275] The court stated the position thus:[276]

> Every circumstance that does or could constitute an infringement of a fundamental right should be capable of a definition of the principle involved. In

[269] *ABSA v Ntsane* pars 79.
[270] *ABSA v Ntsane* par 79.
[271] *ABSA v Ntsane* par 80, with reference to *Standard Bank of South Africa v Shiba*; *Standard Bank of South Africa v Van den Berg* 1984 (1) SA 153 (W) at 158D-159B and *Whitfield v Van Aarde* 1993 (1) SA 332 (ECD).
[272] *ABSA v Ntsane* pars 81-82.
[273] *ABSA v Ntsane* pars 83.
[274] *ABSA v Ntsane* par 84.
[275] *ABSA v Ntsane* par 85.
[276] *ABSA v Ntsane* pars 86-87.

> this matter this definition presents a challenge because of the many variable circumstances that might arise in individual cases. It should include the following (without any claim to finality or comprehensiveness): whenever a bondholder calls up the bond, or seeks an order declaring the bonded property specially executable, while the amount in arrears at date of application for judgment is so small that it should readily be capable of settlement by execution against movable assets, taking all circumstances into account, the declaration of the immovable property as executable would constitute an infringement of the debtor's fundamental right to adequate housing.

Further, the onus would be on the plaintiff to prove that, in the circumstances, no other reasonable alternative method existed to enforce its right, failing which the court should refuse the application.[277]

The court concluded that, even if it had erred in finding that ABSA's attempt to enforce the acceleration clause would infringe the defendants' right of access to adequate housing, default judgment should nevertheless be refused. This was because it constituted *prima facie* abuse of the right to claim an outstanding amount that could easily be obtained by executing against movable assets.[278] Further, ABSA had failed to deal with issues that the court had raised. In particular, it had failed to show that it had not profited overall from the transaction with the defendants.[279] In the circumstances, the court refused the application to declare the immovable property executable for default judgment for the full amount outstanding on the bond. However, it did grant judgment against the defendant for the sum of R18,46 plus interest and costs on the magistrates' courts scale.[280]

In conclusion, Bertelsmann J voiced concern that courts might find it difficult and costly to hold the type of investigation which he had arranged.[281] He suggested as a solution that the mortgagee's affidavit, setting out the arrears as at the date of the application for default judgment, should contain sufficient facts to justify granting an order declaring the mortgaged property executable according to the considerations indicated in the

[277] *ABSA v Ntsane* pars 88-89.
[278] *ABSA v Ntsane* par 91.
[279] *ABSA v Ntsane* par 92.
[280] *ABSA v Ntsane* pars 93-94.
[281] *ABSA v Ntsane* par 95.

judgment.[282] Bertelsmann J also expressed the need for "a compulsory arbitration process" to be established with a tribunal to which courts could refer matters in which the arrear amount is very low[283] for "informal and speedy resolution".[284] Bertelsmann J envisaged the tribunal's function to be, where possible, to resolve any differences between the parties by exploring ways in which the arrears might be paid or alternative arrangements might be made, including for the sale of the home on the open market, to avoid "poor homeowners … [being] deprived of the roof over their head ….by creative co-operation between the debtor and the creditor."[285]

5.5.2.3 Comments on ABSA v Ntsane

The remark was made that *Standard Bank v Saunderson* illustrated that the "constitutionally entrenched right of adequate housing ... [was] starting to have implications in areas where the powers of banks and other mortgage holders were previously unassailable".[286] It is submitted that this comment is also apposite in relation to the judgment in *ABSA v Ntsane* which signalled that cases in which execution against a mortgagor's home would constitute an unjustifiable infringement of his section 26 rights might occur more frequently than the Supreme Court of Appeal had anticipated, in *Standard Bank v Saunderson*.[287] The effect of *ABSA v Ntsane* was to broaden the parameters set by the Constitutional Court in *Jaftha v Schoeman* of circumstances in which the sale in execution of a debtor's home would constitute a limitation of his section 26 rights. This occurred in at least two respects. First, the court treated the action to enforce the acceleration clause, where the trivial amount of R18,46 was in arrears, as constituting an infringement of the debtor's fundamental right to housing.[288] In the result, the court refused to allow the enforcement of the acceleration clause and

[282] *ABSA v Ntsane* par 96.
[283] *ABSA v Ntsane* par 97.
[284] It may noted that such an extra-judicial approach would be in keeping with contemporary international initiatives as reflected, for example, in the INSOL International *Consumer Debt Report II* 21.
[285] *ABSA v Ntsane* par 98.
[286] Van der Merwe 2006 *ESR Rev* 26 28.
[287] *Standard Bank v Saunderson* par 19. See Steyn 2007 *Law Dem Dev* 112.
[288] *ABSA v Ntsane* par 86.

refused to grant default judgment for the full amount outstanding in terms of the mortgage bond.

Another aspect of the judgment in *ABSA v Ntsane* led to a broadening of the parameters of the conception of an infringement of section 26 rights. In *Jaftha v Schoeman*, the limitation of section 26 rights was constituted by execution against the state-subsidised house of an indigent debtor who had no alternative accommodation and who, once she lost her home, would not be eligible again to receive a housing subsidy. In *ABSA v Ntsane*, the circumstances were different. The house in question was not an "RDP" house and neither had the defendants received a subsidy when they purchased it. Yet the court impliedly endorsed[289] the argument put forward by the *amicus curiae* that the loss of the defendants' home, coupled with their consequent disqualification from accessing a housing subsidy because they would no longer be "first-time homeowners", would effectively compromise their right to have access to adequate housing. According to this reasoning, every incidence of execution against the only home of a first-time homeowner would constitute a limitation, or infringement, of his section 26 rights. Therefore, in every such case, judicial oversight would be required in order to determine if the infringement is justifiable in terms of section 36.[290]

Further, in *ABSA v Ntsane* the court extended the concept of "an abuse of the process" beyond that to which the court, in *Jaftha v Schoeman*, was apparently referring.[291] It also extended the application of the concept in this context in that it treated the claim, based as it was on enforcing the acceleration clause where the arrear amount was so

[289]Although the court did not expressly accept this argument, it did so by implication, in that it went on to consider factors relevant to the balancing process which takes place only once a limitation of a right has been established. See *ABSA v Ntsane* par 63.
[290]Consequently, the submission was made that, according to this reasoning, the creditor ought also to incorporate in the summons commencing action an allegation setting out whether or not the defendant was a first-time homeowner. See Steyn 2007 *Law Dem Dev* 113, with reference to Van Heerden and Boraine 2006 *De Jure* 319, on the implications of earlier reported decisions for the essential allegations to be made by a plaintiff.
[291]In *Jaftha v Schoeman*, references to abuse of process stemmed from a comment made by the court *a quo*, in the face of evidence that the increase in sales in execution of state-subsidised houses, in Prince Albert, for prices well below the cost to the state, and at which the attorneys for the judgment creditors had themselves bought almost a half of them, pointed to a suggestion that there might be an abuse of the process. See *Jaftha v Schoeman* 2003 (C) pars 25, 26, discussed at 5.2.1, above, and *Jaftha v Schoeman* par 30.

small, as "a *prima facie* abuse of the right to claim an outstanding amount that can be easily obtained by way of execution against movable assets."[292] The court stated that in such a situation the enforcement of an acceleration clause and the exercise of a right to execution against the property, which would bring about an iniquitous or grossly unfair result for the homeowner, would amount to an abuse of the system.[293]

Bertelsmann J stated that it is for the plaintiff to produce evidence that there is no alternative but to sell the debtor's home in execution. This is in line with the approach adopted by the Supreme Court of Appeal in *Standard Bank v Saunderson* that, once it is established that the mortgagor's rights will be compromised by an order declaring that his home is specially executable, it will be for the mortgagee to justify the order that it seeks.[294] However, it is submitted that it is not always clear from the reported judgment in *ABSA v Ntsane* whether particular statements were made in relation to the limitation of section 26 rights or in relation to the justifiability of such limitation as envisaged by section 36 of the Constitution.[295] There is a need for precision in expression in this regard. In terms of the decision in *Jaftha v Schoeman*, the fact that the creditor seeks execution against the debtor's home in circumstances where the arrears are trivial would be a factor for consideration by the court once it has been established on some other basis that section 26 rights are infringed.[296] This would form part of the proportionality assessment required in terms of section 36 of the Constitution to determine whether an infringement is justifiable in the circumstances. On the other hand, in *ABSA v Ntsane*, the court treated this in itself as an infringement of section 26 rights and an abuse of the process. This may be a subtle distinction but it is significant in constitutional limitation analysis.

[292] *ABSA v Ntsane* par 91.
[293] *ABSA v Ntsane* pars 79-80, 84-85.
[294] *Standard Bank v Saunderson* pars 20-21.
[295] See, for example, *ABSA v Ntsane* pars 77-79, 81-82 and 86.
[296] Although, as submitted, at 5.3.3, above, the distinction is also not entirely clear in *Jaftha v Schoeman* pars 56-59, discussed at 5.2.3, above.

5.5.3 Other issues arising during this period

5.5.3.1 Wording of the summons

An issue which arose was whether, for a summons to be valid, its wording had to comply exactly with that used in the practice direction issued in the judgment in *Standard Bank v Saunderson*. In *Standard Bank of South Africa Ltd v Adams*,[297] which was decided before *Standard Bank v Saunderson*, the summons had included wording drawn from the judgment of Blignaut J, in *Standard Bank v Snyders*. In *Standard Bank v Adams*, the specific wording which had been employed in the summons was held to be misleading as it suggested to the defendant that section 26(3) of the Constitution empowered the plaintiff to execute against the property.[298] Thus, they were held to have failed to achieve the intended purpose of bringing to the attention of the defendant his or her rights in respect of execution against his or her home.[299]

On the other hand, in *FirstRand Bank Ltd v Soni*,[300] the court regarded the wording, although different from that used in *Standard Bank v Saunderson*, as sufficient to sustain an order declaring the immovable property specially executable.[301] It distinguished *Standard Bank v Adams* on the facts by regarding it as sufficient that the words employed achieved the purpose of alerting the defendant to the intended execution of her immovable property and informing her of her right to place facts and submissions before the court for its consideration. The wording used also informed her that failure to do so might result in the immovable property being declared executable. She had failed to do this.[302] However, the court noted that FirstRand Bank had been fully aware that the defendant had sold the property. In the circumstances, the court was of the view that, in the absence of proof of notice to the purchasers who might be prejudiced by it, it would not be just and equitable to grant an order declaring the

[297] *Standard Bank v Adams*.
[298] *Standard Bank v Adams* 600C-D.
[299] *Standard Bank v Adams* 600D-E.
[300] *FirstRand Bank Ltd v Soni* 2008 (4) SA 71 (N), hereafter referred to as "*FirstRand Bank v Soni*".
[301] *FirstRand Bank v Soni* par 28.
[302] *FirstRand Bank v Soni* par 30.

property executable. Summary judgment was therefore granted, with costs, but the immovable property in question was not declared executable.[303]

It may be noted that the summons in question referred to section 26(3) of the Constitution and not section 26(1) which, as the court in *Standard Bank v Saunderson* clarified, is the correct subsection applicable in this context. In *FirstRand Bank v Soni*, the court did not allude to this and referred to section 26(3) as if it were the correct subsection to be applied.[304] The judgment in *Standard Bank v Adams*, to which the court had referred, likewise referred to section 26(3), based as it was on the judgment of Blignaut J, in *Standard Bank v Snyders*, and delivered before *Standard Bank v Saunderson*.[305] Further, in *FirstRand Bank v Soni*, it appears that the plaintiff had relied on the old version of the Practice Rules for the KwaZulu-Natal High Court, when it drafted the summons, and not the amended version updated in consequence of the practice direction issued by the Supreme Court of Appeal in *Standard Bank v Saunderson*.

In *FirstRand Bank v Soni*, the mortgagee had instructed its attorneys to cancel the mortgage bond because the property had been sold and was due to be transferred to new purchasers. On the very same day, it had issued summons in an action seeking to sell the property in execution on account of the mortgagor's default.[306] One may wonder if this was deliberate or merely a classic case of "the left hand not knowing what the right hand was doing". It is submitted that a type of "compulsory arbitration process" along the lines envisaged by Bertelsmann J, in *ABSA v Ntsane*, and a clear set of criteria to be met before a creditor will be entitled to an order to execute against the debtor's primary residence, should be introduced. It may avert such occurrences in the future and would go a long way to providing an opportunity for parties' respective rights to be addressed while saving litigation costs and valuable court time.

[303] *FirstRand Bank v Soni* par 31.
[304] *FirstRand Bank v Soni* pars 28, 30.
[305] *Standard Bank v Adams* 599E-600F.
[306] *FirstRand Bank v Soni* pars 8, 10 and 11.

5.5.3.2 Retrospective effect of Jaftha v Schoeman

During the period following *Standard Bank v Saunderson*, in *Menqav Markom*, the Supreme Court of Appeal decided the important point that the decision in *Jaftha v Schoeman* had retrospective effect to the inception of the Constitution. *Menqa v Markom* did not deal with mortgaged property but concerned the validity of a sale in execution of immovable property, held before *Jaftha v Schoeman*, which had occurred pursuant to a warrant of execution issued by the clerk of the magistrate's court after default judgment had been granted in terms of section 66(1) of the Magistrates' Courts Act.[307] The correctness of the decision in *Menqa v Markom* was confirmed by the Constitutional Court which applied the same rationale in respect of the sale in execution of the mortgaged home of the defendant pursuant to a default judgment issued by the registrar of the high court, in *Gundwana v Steko*.[308]

While the decision in *Menqa v Markom* is undoubtedly correct, it is submitted that from a practical perspective, in the circumstances, the immediate outcome of the case was unsatisfactory for all concerned. Although the court declared Markom to be the owner of the property, the property register did not reflect this. However, in view of the fact that Menqa, in whose name the property was registered after he had purchased the property at its sale in execution, would have an unjustified enrichment claim against Markom, the court was not prepared to order rectification of the deeds register.[309] In the circumstances, the court considered it preferable for the various claims to be dealt with simultaneously in future proceedings. Therefore, it interdicted Menqa from transferring the property to the person to whom he had subsequently sold it.[310] In effect, for the property to be registered in his name once again, Markom would be obliged to institute action and to incur additional costs involved in further litigation in the high court if the

[307]The creditor's claim had been one for damages based on a delict committed against him by Markom. Menqa had purchased the property at its sale in execution held at the instance of the judgment creditor. See *Menqa v Markom* pars 2-6.
[308]*Gundwana v Steko* par 57.
[309]This was on the basis that Menqa had paid the purchase price for the property as a result of which the mortgagee had credited Markom's account and had cancelled the mortgage bond. Menqa had probably also paid rates and taxes in respect of the property. See *Menqa v Markom* par 25.
[310]*Menqa v Markom* pars 12, 25 and 51.

parties were unable to settle the matter. Added to this, at the time, Markom was "impecunious, with his only patrimony tied up in the property"[311] which was not registered in his name. This meant that he could not even use the property as security to access capital. Apparently, his only option would be to wait for Menqa to institute action against him in respect of a claim based on unjustified enrichment. In the meanwhile, Menqa, having been interdicted from passing transfer of the property, could not fulfil his obligations arising out of the sale agreement subsequently concluded by him. Matters could remain in limbo indefinitely pending the institution of action by one against the other – a "catch 22" situation which may be described as a type of "trap" as frustrating of persons' constitutional rights as the "poverty trap" envisaged by Mokgoro J as the potential consequence of introduction of a "blanket home exemption".[312]

The decision in *Campbell v Botha* followed *Menqa v Markom*. Although *Campbell v Botha* did not concern the home of the debtor, it may be noted that, in his application for orders declaring that he was the owner of the immovable property and that he had never lost ownership of it by virtue of the sale in execution, the appellant anticipated difficulties surrounding unjustified enrichment. This he did by tendering payment to the respondents, if they could satisfy the court that they were entitled to it, of the difference between the value of the property with improvements and its value without improvements.[313] This approach may pose a potential solution to some of the difficulties. However, it is submitted that it will not always be practicable or ideal where, for instance, the applicant is in dire financial straits. It is undesirable for the position to be that parties are expected to engage in litigation *ex post facto* in order to obtain clarity on their rights and respective positions in relation to their home, as occurred in *Menqa v Markom*.

It is submitted that *Menqa v Markom* highlights how the courts are ill-equipped, within our current legal framework, to provide appropriate solutions *ex post facto* for debtors

[311]According to Advocate MA Grieg who reported to the author, in a telephonic conversation in 2008, that he had acted *pro bono* throughout the proceedings. That this was the position is to some extent acknowledged by the court, in *Menqa v Markom* par 49.
[312]*Jaftha v Schoeman* par 51.
[313]*Campbell v Botha* par 8.

and creditors where debtors' homes have been sold in execution improperly. Important considerations are wasted time and costs attendant upon resolving problematic issues after execution and, often, eviction have occurred. It is also submitted that a lack of predictability will subsist if this area of the law is left to develop in a protracted manner on a case by case basis. As Brand pointed out, albeit in a different context, the issues which arise in cases and, therefore, courts' decisions are limited by the way in which parties have framed their pleadings and how they argue the points before the court.[314] It may mean that an appeal court will not be in a position to adjudicate upon a matter appropriately and that it might become necessary for it to refer the case to the court *a quo* for proper treatment of the issues. In *Standard Bank v Saunderson*, the Supreme Court of Appeal adopted the approach that none of the defendants had disputed the constitutionality of the sales in execution and therefore the court was not seized with that issue.[315] Similarly, in *Menqa v Markom*, the court was not prepared to deal with issues relating to unjustified enrichment because they had not been raised in the pleadings.[316]

It is submitted that it would be preferable in matters such as these if clear criteria, including issues relating to unjustified enrichment, are required to be addressed by the parties in advance. It is therefore submitted that, in the interests of all concerned, substantive and procedural requirements, ideally entailing a reasonable level of engagement between creditors and debtors, should be laid down explicitly in legislative form to be followed in all matters in which execution is sought against a person's home.

5.5.4 The impact of the NCA

5.5.4.1 Background

Since the NCA came into full operation, on 1 June 2007, it has affected the position where a person defaults in his obligations arising from a mortgage passed over his

[314] See the remarks of Brand 2009 *SALJ* 71 89, in relation to *Afrox v Strydom*.
[315] *Standard Bank v Saunderson* par 25.
[316] This was stated by Advocate MA Grieg in a telephonic conversation with the author, in 2008.

home. Introduced as a debt relief measure for consumers, one might have anticipated that the new processes provided by the NCA would pose ready solutions for debtors and creditors in such matters. However, the difficulties encountered in the implementation of the NCA, including conflicting approaches to the application and interpretation of its provisions, are evident in reported judgments concerning claims by mortgagees for execution against debtors' homes. Cases considered at this point cover the exercise by a court of its discretion to refer a matter to a debt counsellor in terms of section 85 of the NCA and termination of debt review by a creditor provider in terms of section 86(10).

As mentioned in Chapter 4, once a creditor has issued a section 129(1)(*a*) notice to a debtor, the effect of section 86(2) is that the specific credit agreement will be excluded from any ensuing debt review for which the latter applies.[317] Theoretically, there is an alternative avenue available to a debtor who has not applied in terms of section 86 for a declaration of over-indebtedness. This would be where proceedings are brought against him in respect of a credit agreement, for him to allege that he is over-indebted and to request the court in its discretion to refer the matter to a debt counsellor in terms of section 85 with a view to his being declared over-indebted. If the court were to do so, debt review and debt rearrangement would follow. Further, it is submitted, not having emanated from an application in terms of section 86, the debt review might include even credit agreements in which section 129(1)(*a*) notices have been issued. However, in practice, courts have generally not been inclined to exercise their discretion in favour of a debtor who refrained, at an early stage, from resorting to the NCA's debt relief mechanisms.[318]

As explained in Chapter 4,[319] section 86(10) provides that, after 60 business days have elapsed since a consumer's application for debt review, the credit provider may give notice in the prescribed manner to the consumer, the debt counsellor and the National

[317]See *Nedbank v NCR* (SCA) pars 4-15, discussed at 4.5.4, above.
[318]See, for example, *Standard Bank of South Africa Ltd v Hales and Another* 2009 (3) SA 315 (D); remarks made in *FirstRand Bank Ltd v Olivier* 2009 (3) SA 353 (SE) pars 15-16; *Standard Bank of South Africa Limited v Panyiotts* 2009 (3) SA 363 (W).
[319]See 4.5.4, above.

Credit Regulator to terminate the review. Once this has occurred, the creditor may enforce the credit agreement in legal proceedings.

5.5.4.2 Standard Bank v Hales

In *Standard Bank of South Africa Ltd v Hales and Another,*[320] the mortgagors had fallen into arrears in an amount of R53 611,88. This represented fourteen monthly instalments on a mortgage bond which they had passed over their home in order to finance its purchase. Standard Bank had given the mortgagors notice in terms of sections 129 and 130 of the NCA[321] and issued summons against them for payment of the amount of R868 889,31, being the total outstanding balance plus interest. The mortgagors entered an appearance to defend and Standard Bank applied for summary judgment and an order for the execution of the mortgaged property. It was only then that the defendants consulted a debt counsellor. It was common cause that the defendants were over-indebted, as contemplated in section 79 of the NCA, but that they had not applied for debt review in terms of section 86 of the NCA before the plaintiff instituted proceedings against them. With a view to obtaining relief from their over-indebtedness or, as the court expressed it, "to avoid an order"[322] they requested the court to refer the matter to a debt counsellor in terms of section 85(*a*) of the NCA[323] which, Standard Bank argued, the court should exercise its discretion to refuse to do.[324]

Having considered the defendants' financial situation, including their joint income and expenses and other debt obligations, the court, *per* Gorven J, doubted whether rescheduling their mortgage bond payments would be a solution.[325] The court also took into account that the objects of the NCA included not only the protection of consumers but also the balancing of rights and responsibilities of consumers and credit providers

[320] *Standard Bank of South Africa Ltd v Hales and Another* 2009 (3) SA 315 (D), hereafter referred to as "*Standard Bank v Hales*".
[321] See 4.5.2, above.
[322] *Standard Bank v Hales* par 10.
[323] See 4.5.3, above.
[324] *Standard Bank v Hales* par 2.
[325] *Standard Bank v Hales* par 23.

as well as enforcement of debt.[326] It noted the paucity of relevant facts which the defendants had placed before the court to support their request. For example, the court pointed out that there was no evidence of the property's market value nor whether a sale in execution would extinguish the mortgage debt.[327] The court also noted that the defendants would, in any event, need to incur expense on accommodation.[328]

Counsel for the defendants submitted that an order granting the sale in execution of their home would infringe their right to housing as provided by section 26 of the Constitution. However, Gorven J remarked that the defendants had not placed any relevant material before the court to show how it would infringe their section 26 rights even though the summons had specifically drawn to their attention that they should do so. Having referred to portions of the judgment in *Jaftha v Schoeman*, the court distinguished the case before it on the basis that the defendants had mortgaged the property as security for the payment of the debt, that the debt was by no means trifling and that the mechanisms of the NCA had been available to the defendants.[329] In the circumstances, the court was not prepared to exercise its discretion in terms of section 85(*a*) of the NCA to refer the matter to a debt counsellor. It granted judgment against the defendants and declared the mortgaged property specially executable.[330] Costs were awarded against the defendants on the attorney and client scale as provided for in the mortgage bond.[331]

5.5.4.3 FirstRand Bank v Maleke

A very different scenario from that in *Standard Bank v Hales* played itself out in *FirstRand Bank v Maleke*. In this matter, for the first time, applications for orders

[326] *Standard Bank v Hales* par 13.
[327] *Standard Bank v Hales* par 24.
[328] *Standard Bank v Hales* par 20.
[329] *Standard Bank v Hales* par 25.
[330] *Standard Bank v Hales* par 25. The court distinguished the matter before it from *FirstRand Bank Ltd v Olivier* 2009 (3) SA 353 (SE), hereafter referred to as "*FirstRand Bank v Olivier*", a case which did *not* concern the home of the defendants. See *Standard Bank v Hales* pars 14-16, with reference to *FirstRand Bank v Olivier* pars 15-16.
[331] *Standard Bank v Hales* pars 27, 28.

declaring specially executable the mortgaged homes of defendants were refused on the basis that the procedures provided by the NCA might be more appropriate. The case concerned four applications for default judgment pursuant to rule 31(5). The registrar before whom they had been placed referred them to open court, following the rule of practice laid down in *Nedbank v Mortinson*,[332] because the amounts claimed fell within the jurisdiction of the magistrate's court. In each case, the plaintiff, a banking institution, had lent money to the defendant, or defendants, against security of a mortgage bond registered over their immovable property.

The court, *per* Claassen J, noted that the mortgage agreements were governed by the NCA[333] and that the plaintiffs alleged that they had complied with the provisions of sections 129 and 130. In each case, the plaintiff relied on an acceleration clause in the agreement to claim the outstanding balance due on the loan agreement in spite of relatively small amounts allegedly in arrears.[334] Each plaintiff also sought an order declaring the mortgaged immovable property executable and an award of costs on an attorney and client scale. In each case, summons had been served at the chosen *domicilium*, the address where the mortgaged property was situated. Each of the four properties constituted the defendant's, or defendants', residence and each summons had advised the defendants that section 26(1) of the Constitution afforded everyone the right to have access to adequate housing and that, should they claim that execution would infringe that right, they should place information supporting such claim before the court. None of the defendants had done so.[335]

The court was mindful of recently reported cases in which it had been expressed that the NCA is:[336]

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[332]See *Nedbank v Mortinson* par 33, discussed at 5.3.2.3, above.
[333]*FirstRand Bank v Maleke* par 2. The plaintiffs were registered credit providers, the loan agreements were "credit agreements", and the defendants were private individuals, and "historically disadvantaged persons", as defined in the NCA.
[334]The alleged arrear amounts ranged from R2 000 to R5 000, except for one case in which it was allegedly R76 036.91, although, as the court noted, at par 2 n 3, this calculation was "clearly incorrect".
[335]*FirstRand Bank v Maleke* par 2.
[336]*FirstRand Bank v Maleke* par 3. Claassen J particularly expressed agreement with the overview of the NCA as set out by Bertelsmann J, in *ABSA Bank Ltd v Myburgh* 2009 (3) SA 340 (T).

> a piece of consumer legislation which introduces new forms of protection of debtors in South Africa, both rich and poor … The Act is further designed to render assistance and protection to the previously disadvantaged section of our population who may wish to enter the property market. The Act levels the playing field between a relatively indigent and unsophisticated consumer and a moneyed and well-advised credit provider, and to limit the financial harm that the consumer may suffer if he/she is unable to perform in terms of the credit agreement.

Claassen J expressed concern that execution against the absent defendants' immovable properties might constitute an injustice in the following circumstances which had emerged, in his view, from the applicants' papers:[337]

- The defendants were "historically disadvantaged" persons to whom the NCA extended protection.[338]
- The defendants had been paying mortgage bond instalments for 13, 14, 17 and 19 years, respectively. The court noted the relatively small original loan amount, in each case, in relation to the outstanding balance claimed by the plaintiff, and anticipated that the market value of each property had increased to become significantly greater than the outstanding balance. Granting default judgment might mean that the defendants would lose the equity they had gained in the properties.[339]
- The proven arrears, which were R4 189,62, R4 969,37 and R2 358,93, respectively,[340] were "trifling in their amounts and significance to the applicants". The "prejudice which would be suffered by the defendants in potentially losing their properties" would be disproportionate to "the minor prejudice to the applicants in being denied immediate payment of the outstanding balances on the bonds". The delay "would not harm the… [applicants] in any way … [whereas] execution would constitute a permanent setback to the relatively indigent and historically disadvantaged defendants". Negotiation between the parties with a view, for example, to reducing the monthly instalments and

[337] *FirstRand Bank v Maleke* par 5.
[338] Claassen J had noted that the defendants were all African persons born between 1939 and 1967 and who had therefore "laboured under the disadvantages of the previous dispensation"; see par 5.1.
[339] *FirstRand Bank v Maleke* pars 5.2-5.3.
[340] In one case, the court found that the arrear amount was not conclusively proved; see *FirstRand Bank v Maleke* par 5.4.

extending the repayment period or, alternatively, resorting to sections 85 and 86 of the NCA might have led to a satisfactory solution with the creditors ultimately receiving payment in full and the defendants retaining their homes.[341]

- The low monthly instalments[342] indicated that the defendants were "low income persons" as contemplated in section 13(*a*)(ii) of the NCA.[343]
- The letters of demand issued in terms of section 129 of the NCA did not expressly warn the defendants that their homes would be sold in execution – presumably, because the NCA does not require this. The absence of such a warning places "an additional burden of careful oversight on the court, before granting judgment." Historically disadvantaged persons may lack the sophistication to appreciate sufficiently the risk of eviction in the circumstances and the understanding of the need to refer the matter to a debt counsellor. This meant that, in the defendants' absence, a court must be particularly vigilant in "avoiding injustices which may be perpetrated in the application of the provisions of the Act" and to prevent as far as possible "unfair … conduct by credit providers".[344]

The court further took into account the following considerations, in relation to applications for default judgments, which did not emerge from the plaintiffs' papers:

- The protection afforded to consumers by the NCA is not generally known to the public and particularly historically disadvantaged persons. Thus, the defendants' failure to respond to the letters of demand issued in terms of section 129 might have been because of their ignorance.[345]
- The defendants were probably unaware that in terms of section 86(2) of the NCA, once the credit provider took steps to enforce the agreement, their right to approach a debt counsellor lapsed. Had they been made aware of this, they

[341] *FirstRand Bank v Maleke* par 5.4.
[342] All of them were under R1 000.
[343] Claassen J stated that courts should reflect, in their judgments, the pursuit of the ideal of promoting a fair credit market, a duty which s 13 of the NCA imposes on the National Credit Regulator; see *FirstRand Bank v Maleke* par 5.5.
[344] *FirstRand Bank v Maleke* par 5.6, with reference to s 3(e)(iii) of the NCA.
[345] *FirstRand Bank v Maleke* par 6.1.

might have applied to a debt counsellor for assistance in restructuring their debt to avoid losing their homes.[346]

- Lack of money might have prevented the defendants from seeking legal advice. While historically disadvantaged persons are not always aware of free legal services available at law clinics at universities, through the Legal Aid Board and the Legal Resources Centre, on the other hand, their ownership of immovable property might have disqualified them from obtaining free legal advice because of "means tests" applied by these institutions.[347]
- The prohibitively high legal costs associated with litigating in the high court might have deterred the defendants from opposing the plaintiffs' claims. Further, where attorney and client costs are claimed, one anticipates that a defendant would defend the claim and place before the court facts and circumstances in order to limit the costs. However, historically disadvantaged persons cannot be expected to appreciate the significance of an award of attorney and client costs, and neither would they know of the need to request the court to reduce the costs where the amount claimed falls within the jurisdiction of the magistrate's court, and that rule 69(3) of the High Court Rules provides a remedy in the form of a reduction in costs.[348]
- The fact that "the courts *mero motu* protect the interests of defendants in default by reducing the costs" where the claim falls within the jurisdiction of the Magistrate's Court, indicates the courts' acceptance of a duty to apply a standard of fairness without being prompted to do so. This duty was particularly applicable in view of the purposes of the NCA as set out in its section 3. To permit execution in such cases "would, in effect, bedevil or terminate the defendants' 'access to credit'" and place them in a position where they would in future be denied adequate housing.[349]

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[346] *FirstRand Bank v Maleke* par 6.2. The manner in which Claassen J expressed this consideration is indicative, it is submitted, of an interpretation of s 86(2) which accords with that sought by the National Credit Regulator, in *NCR v Nedbank* 318-319, rather than the interpretation decided upon by the Supreme Court of Appeal, *per* Malan JA, in *Nedbank v NCR* (SCA) par 14.
[347] *FirstRand Bank v Maleke* par 6.3.
[348] *FirstRand Bank v Maleke* pars 6.5-6.6.
[349] *FirstRand Bank v Maleke* par 6.7, with reference to s 3(*a*) of the NCA.

Claassen J was of the view that it was the court's duty, in accordance with the "purposes and spirit" of the NCA, to determine whether any of these circumstances applied to avoid grave injustice being done.[350]

Claassen J applied, and evaluated the position in light of, the abovementioned considerations and concluded that it would be "blatantly unfair and unjust" for the credit providers to benefit by the capital growth in the immovable properties where the arrear amounts were relatively low. The court observed that although, in principle, any amount received from a sale in execution in excess of the outstanding balance owing reverts to the execution debtor, in practice, there is no incentive for the credit provider to obtain a bid in excess of the outstanding balance. Therefore, the court reasoned, the debtor's only hope would be that there would be sufficient excess to obtain a substitute home. In the circumstances, with the value of immovable property having increased over the years it was unlikely that the defendants would obtain a substitute home of equal size and value. Thus, the sale in execution of the defendants' homes would harm them "in a very material and substantial way" and, compared with the advantage to the credit provider, the disadvantage to the consumer would be disproportionately large.[351] Noting the low monthly mortgage bond instalments and the extent of each property, as reflected in their descriptions in the mortgage bonds, Claassen J concluded that the defendants formed part of "low income communities" and that some intervention was necessary to protect their interests in accordance with the provisions of the NCA.[352]

Turning to consider the implications of section 26 of the Constitution, Claassen J quoted at length and closely analysed passages from the judgment in *Jaftha v Schoeman*.[353] Claassen J particularly bore in mind Mokgoro J's statement that "at the very least, any measure which permits a person to be deprived of existing access to adequate housing,

[350] *FirstRand Bank v Maleke* par 7.
[351] *FirstRand Bank v Maleke* par 8.
[352] *FirstRand Bank v Maleke* par 9.
[353] *FirstRand Bank v Maleke* pars 10-13.

limits the rights protected in section 26(1)".[354] He drew analogies between *Jaftha v Schoeman* and the cases before him: execution of the defendants' homes and subsequent eviction would very likely deprive them of obtaining other adequate housing. Further, even if the sale did realise an amount in excess of the debt owed it would not assist the defendants in purchasing immovable property of equivalent size and value. They would be placed "at the back of the queue" and would be rendered homeless. In this regard, Mokgoro J had stated that in many instances execution would be unjustifiable "because the advantage that attaches to a creditor who seeks executions will be far outweighed by the immense prejudice and hardship caused to the debtor".[355] Claassen J noted that Mokgoro J had identified "judicial oversight prior to the execution being levied" as a remedy for a court to identify alternative means whereby the debt might be paid while avoiding the defendant being rendered homeless in the process.[356]

Claassen J distinguished *Standard Bank v Hales*[357] on the basis that "the debt in that case was not trifling at all."[358] He further took into account the prevailing economic climate – "the international melt-down and the effect that it has had on the debtors at the lower end of the market"[359] – and that the defendants' falling into arrears might very well have been beyond their control. In the circumstances, he exercised his discretion against the plaintiffs by refusing to grant orders declaring the immovable properties executable and absolving the defendants from the instance. However, he pointed out that the plaintiffs could seek redress in another court.[360]

Claassen J outlined possible alternatives[361] which would allow the recovery of the debt by the plaintiffs without levying execution.[362] He identified the referral of the defendants for debt counselling, as contemplated by section 85(*a*) of the NCA, as the most

[354] *FirstRand Bank v Maleke* par 12.
[355] *FirstRand Bank v Maleke* par 12, with reference to *Jaftha v Schoeman* par 43.
[356] *FirstRand Bank v Maleke* par 13, with reference to *Jaftha v Schoeman* pars 56-60.
[357] See 5.5.4.2, above.
[358] *FirstRand Bank v Maleke* par 14.
[359] *FirstRand Bank v Maleke* par 15.
[360] *FirstRand Bank v Maleke* par 16.
[361] As contemplated by Mokgoro J, in *Jaftha v Schoeman*.
[362] *FirstRand Bank v Maleke* pars 17-24.

appropriate alternative in the circumstances.[363] However, in view of the fact that an allegation of over-indebtedness was a prerequisite for a referral in terms of section 85[364] and that, in the context of rule 31(5), in the absence of the debtors such an allegation would not be before the court, Claassen J's approach was that section 85 could not apply.[365] He also adopted the stance that the process of debt review and restructuring was not available, or possible, in the high court.[366] Claassen J considered payment of the outstanding amounts in instalments, expressly provided for in section 73 of the Magistrates' Courts Act, as a feasible solution in which the plaintiffs would ultimately receive payment of the outstanding balances while the defendants retained their homes. However, he noted that this was a possibility only as long as the defendants participated in the process. He explained that dismissing the applications would mean that the plaintiffs would be obliged to begin the process afresh and to comply again with the provisions of the NCA in order to enforce the agreements in the magistrate's court.[367]

With reference to *ABSA Bank Ltd v Myburgh*[368] and *Nedbank v Mateman*,[369] Claassen J concluded that it is permissible to issue a summons out of the high court in cases falling under the NCA but that a high court is not always obliged to hear such a case. Noting also that the magistrate's court has unlimited, concurrent jurisdiction with the high court to hear cases under the NCA,[370] Claassen J adopted the stance that the high court had the discretion to decline to hear a case under the NCA and to terminate the proceedings and refer the matter to a magistrate's court with jurisdiction. This, he stated, would be particularly appropriate where the amount claimed was within the jurisdiction of the magistrate's court unless the applicable principles of law and/or the facts were of such a difficult nature that a hearing in the high court would be more appropriate. However,

[363]Claassen J remarked that the defendants' failure to resort to this remedy might be attributed to any of the considerations which he had listed and discussed in par 6 of the judgment.
[364]Claassen J agreed with the reasoning of Masipa J, in *Standard Bank v Panyiotts*, referred to at 4.5.4 and 5.5.4.1, above.
[365]*FirstRand Bank v Maleke* pars 18-19.
[366]*FirstRand Bank v Maleke* par 20.
[367]*FirstRand Bank v Maleke* par 21, with reference to ss 3(g) and (i) of the NCA.
[368]*ABSA Bank Ltd v Myburgh* 2009 (3) SA 340 (T).
[369]See 4.5.4,above. Claassen J also referred to Roestoff and Coetzee 2008 *THRHR* 678.
[370]*FirstRand Bank v Maleke* par 22. Claassen J referred to s 29(1)(*e*) of the Magistrates' Courts Act, as well as to Van Heerden 2008 *TSAR* 840.

Claassen J observed that it appeared that the NCA contemplated the debt review process would be controlled and concluded in the magistrate's court. Therefore, he stated that, where appropriate, a high court could terminate the proceedings and refer a matter to a magistrate's court.[371]

Finally, Claassen J was mindful of the fact that referring the cases to the appropriate magistrate's court would not secure the participation of the defendants in order that they might benefit from the provisions of the NCA. In the circumstances, in order to encourage them to participate he made a special order that service of copies of his judgment on the defendants was a prerequisite for the plaintiffs to recommence proceedings against them.[372] In the result, the court dismissed the applications and absolved all four defendants from the instance. An unprecedented aspect of the judgment was that the plaintiffs were interdicted from instituting, in the high court, actions arising out of the mortgage bonds to recover the respective debts and to obtain execution orders against the properties. The court further ordered that, in the event of either plaintiff recommencing proceedings against any of the defendants for the recovery of the outstanding balance, it was required to effect personal service upon the defendant of a copy of the court's judgment simultaneously with the issue of a letter of demand contemplated in section 129 of the NCA. The court did not award costs.[373]

5.5.4.4 FirstRand Bank v Seyffert

FirstRand Bank Ltd t/a First National Bank v Seyffert and Another and three similar cases[374] concerned four applications for summary judgment and for orders declaring the mortgaged property specially executable. In each matter, the respondents were spouses who resided at the property in question, situated in a "comfortably affluent or 'middle-class' area".[375] Further, in each matter, the defendants claimed that they had

[371] *FirstRand Bank v Maleke* par 23, with reference to ss 86(7)(*c*), (8)(*b*), (9) and (11) of the NCA.
[372] *FirstRand Bank v Maleke* par 24.
[373] *FirstRand Bank v Maleke* par 25.
[374] *FirstRand Bank Ltd t/a First National Bank v Seyffert and Another and three similar cases* 2010 (6) SA 429 (GSJ), hereafter referred to as "*FirstRand Bank v Seyffert*".
[375] *FirstRand Bank v Seyffert* par 2.

consulted a debt counsellor and that the matter was subject to debt review. However, the applicant had given notice to terminate the debt review in terms of section 86(10) of the NCA.[376]

The court, *per* Willis J, expressed concern and frustration in relation to the difficulties experienced in the interpretation and application of the NCA, particularly the sections providing for termination of debt review by the credit provider.[377] Having commented on the objects of the NCA and its effect on the South African economy, Willis J granted summary judgment against the respondents in each of the four matters, in the amounts, respectively, of: R219 715,69; R731 217,72; R927 350,14; and R777 011,18.[378] However, significantly, taking into account section 26(1) of the Constitution, the provisions of PIE, and the decisions in *Jaftha v Schoeman* and *Standard Bank v Saunderson*, Willis J concluded that it would be appropriate to exercise his discretion against declaring the mortgaged properties specially executable.[379] The rationale was that a clear purpose of the NCA is to afford a debtor the opportunity to discharge a debt on less onerous terms. The court considered that although the credit providers, unable to execute against the mortgagors' homes, might have to wait longer to recover the debt, at least the respondents could try to settle their debt without losing their homes. Willis J stated that the "*Jaftha* and *Saunderson* cases are not … directly in point but they do indicate a wariness about persons losing their homes."[380] Significantly, also, the court regarded these matters as "test cases" and considered it appropriate not to make any order as to costs.[381]

[376] See 4.5.4, above.
[377] *FirstRand Bank v Seyffert* pars 4-18, particularly, par 10.
[378] *FirstRand Bank v Seyffert* par 20.
[379] *FirstRand Bank v Seyffert* par 18.
[380] *FirstRand Bank v Seyffert* par 18.
[381] *FirstRand Bank v Seyffert* par 19.

5.5.4.5 FirstRand Bank v Siebert

FirstRand Bank Ltd v Siebert and Another, FirstRand Bank Ltd v Nel and Another[382] concerned two applications in the Eastern Cape High Court, in Port Elizabeth, for summary judgment, payment of the outstanding balance in respect of a mortgage loan agreement and an order declaring the mortgaged property specially executable.[383] In each matter, the defendants had filed notice of intention to defend but had not filed an affidavit setting out their defence.[384] Annotations to the judgment[385] reflect that there was "no appearance" for the defendants, at court, and that the matters were unopposed. The amounts claimed were R850 106,82 and R69 951,96, respectively, plus interest.[386] Each summons alleged that the mortgage agreement was being reviewed in terms of section 86 of the NCA and that the plaintiff had given notice in terms of section 86(10) to terminate the debt review.[387]

The court, *per* Dambuza J, related how a new Rule of Practice had come into effect in the Eastern Cape High Court, similar to that applicable in the South Gauteng High Court, specifying requirements in relation to default judgment and writs of execution issued in terms of rule 31(5).[388] The court explained that this Rule of Practice, based on section 26 of the Constitution, had been formulated in consequence of decisions such as *Jaftha v Schoeman*, *Nedbank v Mortinson*, *Standard Bank v Saunderson* and *ABSA v Ntsane*.[389] It requested counsel for the plaintiff, in each matter, to address the court on why the Rule of Practice should not apply in the circumstances of the case. It explained that it was concerned that, in the absence of any indication of the amount of the arrears, it was unable to determine whether there had, or had not, been abuse of the process of

[382] *FirstRand Bank Ltd v Siebert and Another, FirstRand Bank Ltd v Nel and Another* (2635/2010, 2219/2010) [2010] ZAECPEHC 75 (17 December 2010), hereafter referred to as "*FirstRand Bank v Siebert*".
[383] *FirstRand Bank v Siebert* pars 8-9.
[384] *FirstRand Bank v Siebert* par 8.
[385] Entered below the signature of Dambuza J.
[386] *FirstRand Bank v Siebert* par 18.
[387] *FirstRand Bank v Siebert* par 9.
[388] Rule of Practice 14A, of the Joint Rules of Practice for the High Court in the Eastern Cape Province, effective 2 August 2010.
[389] *FirstRand Bank v Siebert* par 7, with specific reference to *ABSA v Ntsane* par 85.

the court and whether it would be appropriate to declare the mortgaged property specially executable.[390] While the court recognised that there was no duty on a plaintiff seeking execution of mortgaged property to prove non-infringement of the mortgagors' section 26 rights, it stated that there is "an equally relevant principle that emanates from the decisions" imposing a duty on courts in this context to "guard against abuse of the court process." The court did not view such duty as ceasing "with the filing of an appearance to defend or even the filing of an affidavit in opposition to an application for summary judgment." Dambuza J stated that a clause in a summons calling upon the defendants to place information before the court in support of their claim that a sale in execution would infringe their section 26 rights does not assist the court in the exercise of its discretion. This was because to discharge its duty properly the court must take into account all the relevant circumstances and determine whether there has been an abuse of court procedure. He reasoned that such duty cannot be discharged where not all of the relevant factors have been placed before the court.[391]

The court was of the view that where a plaintiff relies on a defendant's failure to make payment it is incumbent upon him to clearly to set out facts or circumstances from which the court may determine whether or not there has been an abuse of process. Dambuza J did not regard such a requirement as being in conflict with *Nedbank v Mortinson* or *Standard Bank v Saunderson* because, in his view, the determination could be made simply by considering the amount of the arrears and the period for which the arrears had been outstanding.[392] Considering certain *dicta* in *Jaftha v Schoeman* and *ABSA v Ntsane*, Dambuza J concluded that in the absence of allegations in relation to the extent of the defendants' default, he was not in a position to apply the guidelines provided.[393] In the circumstances, in each matter the court granted summary judgment in the plaintiff's favour but refused to declare the mortgaged property specially executable.[394]

[390] *FirstRand Bank v Siebert* par 8. Dambuza J, referring specifically to the latter judgment,
[391] *FirstRand Bank v Siebert* par 11.
[392] *FirstRand Bank v Siebert* par 11.
[393] *FirstRand Bank v Siebert* par 14.
[394] *FirstRand Bank v Siebert* par 15.

5.5.4.6 FirstRand Bank v Meyer

The judgment, *per* Eksteen J, in *FirstRand Bank Ltd v Meyer and Another*,[395] also emanating from the Eastern Cape High Court, in Port Elizabeth, reflects a very different approach to that of Dambuza J, in *FirstRand Bank v Siebert*, discussed above.[396] *FirstRand Bank Ltd v Meyer* was decided after the coming into effect of the amended rule 46 of the High Court Rules.[397] The case concerned an application for summary judgment against the defendants who were married to each other in community of property, based on four loans granted to them in 1983, 2004, 2005 and 2006, respectively. A mortgage bond passed over their primary residence in favour of FirstRand Bank secured the repayment of each loan. The loans having been consolidated into a single debt,[398] the total amount claimed was R154 337,41 plus interest. FirstRand Bank also sought an order declaring the mortgaged property specially executable.[399] It was common cause that, before the issue of summons, the defendants had applied for debt review in terms of section 86 of the NCA. Their debts had been restructured in terms of section 87 of the NCA but they had failed subsequently to make payments in accordance with the restructured payment plan and were in arrears in the amount of R2 922,36.[400]

The court, regarding the amendment to rule 46(1) as being to bring it into line with *Jaftha v Schoeman*, distinguished it on the basis that it concerned an unsecured, relatively trifling debt which was unrelated to the property and the sale in execution of a modest, state-subsidised home.[401] It also emphasised that not every sale in execution would constitute a deprivation of "adequate housing", a concept which is "necessarily

[395] *FirstRand Bank Ltd v Meyer and Another* ECPE Case No. 3483/10 [2011] (17 March 2011), hereafter referred to as *FirstRand Bank v Meyer*.
[396] See 5.5.4.5, above.
[397] Therefore, the court was obliged to consider all relevant circumstances before granting an order declaring the primary residence of the defendants to be specially executable. Rule 46(1) is discussed at 4.4.4.3, above.
[398] *FirstRand Bank v Meyer* par 2.
[399] *FirstRand Bank v Meyer* par 1.
[400] This was common cause. See *FirstRand Bank v Meyer* pars 3, 35.
[401] *FirstRand Bank v Meyer* pars 23-24.

relative".[402] Although the defendants had not disclosed the value of their property, the court viewed the amounts of the mortgage bonds as an indication of its minimum value[403] and remarked that the nature of the property was markedly different from that in *Jaftha v Schoeman*.

The defendants' personal circumstances were that they had been living in their home since 1983 and they had nowhere else to go, not being in a position to afford alternative accommodation. Their joint income was R7 330. Mr Meyer, who was 65 years old, had suffered a stroke, five years before, suffered from chronic high blood pressure and high cholesterol levels, and was diabetic. Mr Meyer's chronic medication cost about R13 000 in excess of his annual medical aid allowance. Mrs Meyer, who was 60 years old, suffered from Alzheimer's disease. In the circumstances, the defendants argued that execution against their home would cause proportionately more hardship and prejudice to them than a refusal of the order would occasion FirstRand Bank.[404]

The court noted, with reference to *Jaftha v Schoeman*, that there was no suggestion of any abuse of court procedure in this instance[405] and, with reference to *Standard Bank v Saunderson*,[406] that the approach cannot differ depending on the reasons the property owner might have had for mortgaging his home. He further distinguished the case from *FirstRand Bank v Seyffert*[407] and *ABSA v Ntsane*[408] on the basis that the defendants had "voluntarily secured loans of substantial proportion"[409] by passing the mortgage bonds in the creditor's favour and that "the arrears on the repayments due in terms of the loan agreements was (*sic*) not trifling at all".[410] Eksteen J noted that, as stated by Willis J in *FirstRand Bank v Seyffert*, the object of the debt restructuring process is to afford the debtor a reasonable opportunity to discharge a debt on terms that may be

[402] *FirstRand Bank v Meyer* par 25, with reference to *Standard Bank v Saunderson* and *Grootboom*.
[403] *FirstRand Bank v Meyer* par 26.
[404] *FirstRand Bank v Meyer* par 27.
[405] *FirstRand Bank v Meyer* par 30.
[406] *FirstRand Bank v Meyer* par 31, with reference to *Standard Bank v Saunderson* par 19.
[407] See 5.5.4.4, above.
[408] See 5.5.2, above.
[409] *FirstRand Bank v Meyer* par 35.
[410] *FirstRand Bank v Meyer* par 36.

less onerous than may otherwise be the case. Eksteen J observed that they had indeed received such an opportunity but had again fallen into arrears in an amount which equated to nearly three instalments which in context did not seem to be "trifling".[411] In the circumstances, the court granted judgment in favour of FirstRand Bank in the amount sought, with interest, and orders declaring the defendants' property specially executable awarding the plaintiff costs on the attorney and client scale.[412]

5.5.4.7 January v Standard Bank

The events in *January v Standard Bank of South Africa Ltd*[413] played themselves out from around March 2005 to November 2009, when the court heard the matter, and January 2010, when it delivered its judgment. Therefore, they occurred over the period spanning the delivery of the judgments in *Jaftha v Schoeman*, *ABSA v Ntsane*, *Standard Bank v Hales* and *FirstRand Bank v Maleke*. The circumstances which emerge from the judgment of the Eastern Cape High Court, *per* Goosen AJ, provide a striking contrast to other cases in the light of contemporaneous issues which were being considered in other matters and significant developments in the context of execution against a debtor's home. What one will not know, it is submitted, is the extent to which *January v Standard Bank* depicts a situation which is commonplace but which goes largely unnoticed.

The case concerned an application which had originally been brought on an urgent basis by counsel, instructed by the Justice Centre, King William's Town, on behalf of Penelope January, a divorced woman, with three children, whose home had been sold in execution. The applicant sought the rescission of a judgment which had been granted in respect of an amount outstanding on a mortgage bond.[414] She applied also for the stay of execution of that judgment, or of any eviction proceedings instituted pursuant to

[411] *FirstRand Bank v Meyer* par 36.
[412] *FirstRand Bank v Meyer* par 37.
[413] *January v Standard Bank of South Africa Ltd* (2235/2008) [2010] ZAECGHC 6 (28 January 2010), hereafter referred to as "*January v Standard Bank*".
[414] The case report does not state it, but, presumably, default judgment had been granted in terms of rule 31(5) of the High Court Rules.

it, pending an application for an interdict and an appeal against the decision, in another case, rescission of judgment in yet another high court case and the holding of an enquiry in terms of PIE.[415] There had been a number of delays in prosecuting the matter.[416] The sale in execution had been held eight months before the application was heard[417] and the property had already been transferred to the new owner who was not cited as a respondent in the matter.[418] The new owner had brought eviction proceedings in terms of PIE and they, too, had been finalised, an eviction order already having been granted and executed.[419] In the circumstances, therefore, the application was also for cancellation of the transfer of the property in question to the new owner and for an order permitting the applicant and her family to re-occupy it.[420]

Goosen AJ described the court papers as being in a "sorry state".[421] Details pertaining to the specific circumstances of the case are scant. However, it appears that Penelope January's former husband had mortgaged their home in favour of Standard Bank. This had occurred around the time of their divorce in order to obtain a loan of money to cover arrear maintenance which he owed to her.[422] Penelope January recalled signing certain documents in connection with the loan but she was not aware that she was responsible for the loan or that a mortgage bond had been registered against the property.[423] The papers did not make clear how the applicant and her former husband had been married,[424] what the proprietary consequences were of their divorce, nor whether there was any basis upon which the applicant had been entitled to occupy the house, as she had done for more than four years after the divorce.[425] In the circumstances, the court

[415] *January v Standard Bank* par 1.
[416] The matter had been struck off the court roll four times within a period of five or six months; see *January v Standard Bank* par 42.
[417] *January v Standard Bank* par 11.
[418] *January v Standard Bank* par 54.
[419] *January v Standard Bank* pars 61-62.
[420] *January v Standard Bank* par 1.
[421] *January v Standard Bank* par 7.
[422] *January v Standard Bank* par 5.
[423] *January v Standard Bank* pars 5, 6 and 51.
[424] The court drew an inference that they had been married in community of property; see *January v Standard Bank* pars 4, 7.
[425] However, the judgment does state that Standard Bank had issued summons against both the former husband and the applicant for defaulting in respect of loan repayments and for foreclosure in respect of the mortgage bond. See *January v Standard Bank* pars 8, 9 and 52.

found that the papers did not disclose a defence to Standard Bank's claim nor any basis for the relief sought and dismissed the application.[426] In view of what the court regarded as "grossly unreasonable and negligent conduct on the part of both the applicant's attorney and counsel", the court ordered them to be jointly and severally liable to pay Standard Bank's costs associated with the application, *de bonis propriis*, on the attorney and client scale.[427] The court further directed that the conduct of counsel and the instructing attorney should be reported to the appropriate professional bodies.[428]

A number of observations may be made in relation to this case. The judgment in *January v Standard Bank* mentions an allegation by the applicant that, upon receipt of the summons in November 2008, she had consulted Mr Ndunyana who, it may be noted, was the instructing attorney from the Legal Aid Board's Justice Centre, in King William's Town, in the application for rescission of judgment. He allegedly informed her "that there was nothing that could be done to resist the foreclosure and that it would not be possible to prevent her eviction from the property".[429] Clearly, the applicant's legal representatives did little to ensure that the personal circumstances of the applicant and her children were placed on record, in the original matter, in respect of which judgment was sought to be rescinded. While the judgment in *January v Standard Bank* reflects that there were three children, nothing else is disclosed about them.[430] The fact, if it is true, that the former husband obtained a loan of R10 000 from Standard Bank against security of a mortgage bond passed over their home, in order to "facilitate payment of arrear maintenance due to the applicant", speaks volumes, it is submitted, about the family's financial need.[431]

It is surprising that no mention is made of the applicant's right to have access to adequate housing protected by section 26 of the Constitution. The judgment is silent on whether the original summons, issued by Standard Bank in October 2008, complied

[426] *January v Standard Bank* pars 51, 52 and 63.
[427] *January v Standard Bank* pars 64-79. On costs *de bonis propriis*, see Van Loggerenberg and Farlam *Superior Court Practice* E12-27.
[428] *January v Standard Bank* pars 80-83.
[429] *January v Standard Bank* par 10.
[430] *January v Standard Bank* par 4.
[431] *January v Standard Bank* par 5.

with the practice directive issued by the Supreme Court of Appeal in *Standard Bank v Saunderson*. No mention is made of the amount of the mortgage bond or the arrear amount which caused the respondent to obtain judgment and to execute against the applicant's home. There is no indication of the value of the property at the time of the foreclosure nor the price obtained for it at the sale in execution. One may also wonder whether the debt relief measures provided in the NCA were considered, summons having been issued, in October 2008, after its coming into operation. However, it is doubtful whether the NCA would have offered any appropriate relief, given the apparently impoverished circumstances of the applicant. It must also be borne in mind that, by the time the court, in which Goosen AJ presided, entertained the application for rescission of judgment, the "damage had been done".

Ideally, the arguments relevant to the issues and considerations, mentioned above, ought to have been presented to the court through the assistance of, and representation by, the Justice Centre's attorney and legal counsel instructed by him, at the earliest opportunity, prior to a decision being reached to permit execution against the applicant's home. It is submitted that *January v Standard Bank* underscores the need for a system to be introduced requiring specific criteria to be addressed by parties to, and considered by courts in, matters concerning the forced sale of a person's home. This, it is submitted, would enhance consistency and objectivity in the treatment of cases and would go a long way to achieving not only the protection of the right to have access to adequate housing but also the all-important right of access to justice.[432]

5.5.5 Comments on developments after Standard Bank v Saunderson

The cases show a lack of consistency in the courts' treatment of matters concerning execution against a person's home during the period after *Standard Bank v Saunderson*. Changes in aspects of the applicable law, with the coming into operation of the NCA and the amendment of rules 45 and 46 of the High Court Rules, affected the position. However, the divergent approaches evident in the judgments are not

[432]See reference to access to justice at 3.3.5, above.

attributable merely to statutory amendments but also to the fact that differently constituted courts adopted different perspectives within the context of the available information in each set of circumstances.

The approaches in *ABSA v Ntsane* and *FirstRand Bank v Maleke* differ markedly from the approach adopted in *Standard Bank v Saunderson*. The Supreme Court of Appeal, in *Standard Bank v Saunderson*, adopted the stance that the defendants had not raised the sale in execution of the mortgaged properties as an infringement of their section 26 rights and therefore it was not an issue before the court.[433] In *ABSA v Ntsane* and *FirstRand Bank v Maleke*, the courts adopted a more proactive approach, viewing it as the courts' duty to protect persons such as the defendants who, to use the terminology of Mokgoro J, in *Jaftha v Schoeman*, might not have the "wherewithal" themselves to protect their rights. In *ABSA v Ntsane*, Bertelsmann J relied on the trifling arrear amount of R18,46 to find that to enforce the acceleration clause in the mortgage bond constituted an infringement of the defendants' section 26 rights and amounted to an abuse of process. In *FirstRand Bank v Maleke*, Claassen J seized the opportunity of applying the purposes of the recently enacted provisions of the NCA as a means of saving the defendants' homes from immediate forced sale thus providing a "breathing space" for the defendants and a potential alternative solution. However, the NCA might not necessarily have provided the solution that the defendants sought. In *FirstRand Bank v Seyffert*, clearly, the purposes of the NCA influenced the court's thinking and the effect of the decision may be regarded as having broadened the parameters of the effect of *Jaftha v Schoeman* to protect middle class debtors in their homes.

In *FirstRand Bank v Siebert*, having referred specifically to *dicta* issued by Bertelsmann J, in *ABSA v Ntsane*, Dambuza J confirmed the court's duty to protect the mortgagors' interests by ensuring that there was no abuse of court process. Other aspects of the judgment reveal parallels between the approach adopted by Dambuza J and the approach of the courts in eviction proceedings. Dambuza J's stance was that a court will not be in a position properly to exercise its discretion if not all relevant circumstances

[433] *Standard Bank v Saunderson* par 19.

have been placed before it. In eviction cases, all relevant circumstances are required to be provided and, if necessary, by the applicant. However, it is submitted that to require only information about the extent of the arrears, as mentioned by Dambuza J, does not provide a solution in all cases. For example, in *FirstRand Bank v Siebert*, the judgment does not reflect, probably because the application papers did not do so, whether the defendants were spouses,[434] whether the mortgaged properties constituted their homes, or whether they had any dependants. No personal circumstances emerge from the judgment. It is submitted that, even if the plaintiff in each of these matters had indicated the extent of the arrears and the length of time for which the defendants had been in arrears, the court would not necessarily have been in a position properly to exercise its discretion whether to issue an order declaring the immovable property specially executable. It is submitted that additional information, including the personal circumstances of the defendants, ought to be presented to the court as is required in eviction cases.[435]

Standard Bank v Hales and *FirstRand Bank v Meyer* provide examples of factual circumstances in which the court in each case concluded that the NCA's provisions did not pose an alternative to execution. In *Standard Bank v Hales*, Gorven J was not prepared to exercise his discretion to refer the matter to a debt counsellor in terms of section 85 of the NCA, mainly in view of the fact that the mortgagors themselves had delayed in doing so but also on account of their financial circumstances of which the court was aware. Gorven J made a pertinent observation that, regardless of whether the home was sold in execution, the defendants would have to incur expense on accommodation. This, it is submitted, is a factor which always ought to be borne in mind in matters of this nature and it should not be assumed that the sale of the home will necessarily yield more disposable funds for payment to creditors.

On the other hand, in *FirstRand Bank v Meyer*, the court regarded the beleaguered mortgagors as already having been granted the opportunity of debt relief measures

[434]Although, presumably, the defendants were spouses: in each matter, the two defendants had the same surname and their first names are those which are ordinarily used for a male and a female, respectively.
[435]See 3.3.1.4, above.

provided by the NCA. Further, having considered all the relevant circumstances as required by the amended rule 46(1) of the High Court Rules, in spite of their chronic health problems and desperate financial circumstances, with nowhere else to live, the court permitted execution against their home. The outcome of this case is significant as it emphasises the limitations inherent in the amended rule 46(1) which reduce its capacity to play a meaningful role in protecting section 26 rights. Clearly, execution would render the defendants homeless. Presumably, their only option thereafter would be to "hold over" and to rely on the provisions of PIE to extend their occupation of their home for as long as possible.

Finally, the sobering exposition in *January v Standard Bank* of the facts surrounding the loss of Penelope January's home, and the outcome of the case in spite of legal counsel having been provided for her by the Justice Centre, underscore the inadequacies of the system. It is submitted that there is a need for urgent attention to be given not only to establishing clear substantive and procedural requirements for matters in which execution is sought against persons' homes but also for explicit directives and guidelines to be issued. This is to ensure not only that judicial officers, practitioners, and administrative court staff are able to apply the criteria properly and efficiently but also that non-government organisations, legal advice office personnel, and social workers are placed in a position effectively to assist persons who do not have the "wherewithal" to handle costly litigation in order to assert their rights.

As emerges from most of the case discussions above, commonly, mortgage bonds provide for the mortgagor to be liable for costs on the attorney and client scale, if litigation arises in connection with it. The reality is that such costs orders are imposed on defendant mortgagors when they can least afford them, thus exacerbating their plight. Also, after *Jaftha v Schoeman*, mortgagees often preferred to bring action in the high court to avoid having to follow the process requiring judicial oversight in the magistrates' courts. Bertelsmann J, in *ABSA v Ntsane*, expressed the need for an alternative compulsory arbitration process to apply in situations where mortgage arrears amounts were low. In the same vein, it is submitted that a more desirable procedure

would be one which is handled less formally, initially, to save court time and expense, with the compilation of relevant information according to explicit directives and guidelines and where the court is involved only where parties are unable to reach mutually satisfactory resolution of the matter. It is submitted that this might also address to some extent the inconsistency in treatment of such cases which potentially leads to a skewing of the administration of justice in this context.

5.6 Gundwana v Steko and subsequent cases

5.6.1 Background

The Constitutional Court's unanimous decision, requiring judicial oversight for consideration of all the relevant circumstances in every case in which execution is sought against the home of a person, has been interpreted in a number of recent judgments including *Nedbank v Fraser*, *FirstRand Bank v Folscher*, *Standard Bank v Bekker* and *Mkhize v Umvoti Municipality* (SCA). Further, practice directives have been issued and logistical arrangements have been made in an effort to comply with constitutional imperatives. Consideration of the developments from *Gundwana v Steko* onwards, follows.

5.6.2 Gundwana v Steko

5.6.2.1 The principle established

In *Gundwana v Steko*, the Constitutional Court unanimously declared, *per* Froneman J, 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 permits the sale in execution of the home of a person.[436] The court did not regard the invalidity as being cured by provisions in the High Court Rules

[436] *Gundwana v Steko* pars 49, 65.

allowing a registrar to set the matter down for hearing in open court[437] and for dissatisfied parties to set a matter down for reconsideration once they acquired knowledge of the default judgment.[438] It applied the same reasoning as was applied in *Jaftha v Schoeman*, where Mokgoro J rejected arguments that sections 62 and 73 of the Magistrates' Courts Act cured the constitutional invalidity of section 66(1)(*a*). The reason was that many debtors would be unaware of the provisions and, in any event, would not have the wherewithal to use them.[439]

5.6.2.2 The facts

The applicant, Elsie Gundwana, had purchased immovable property in 1995 for R52 000.[440] She passed a mortgage bond over the property to secure a loan of R25 000 which she paid towards the purchase price. During 2003, she fell into arrears in respect of her monthly mortgage bond repayments. She received a summons on 14 October 2003, claiming an amount of R33 543,06 plus interest, outstanding as at 1 September 2003.[441] She contacted the mortgagee, Nedcor Bank, and arranged to borrow money from friends and colleagues. She paid three amounts of R853,70 to the bank between 1 September 2003 and 7 November 2003 on which latter date the bank obtained default judgment against her, granted by the registrar, for payment of R33 543,06, as well as an order declaring the immovable property executable.[442] A writ of attachment was issued on the same day but the bank did not execute against the property for approximately four years.[443]

Nedcor Bank's financial records, which were later before the Court, reflected that the actual amount outstanding on the day of the default judgment was R32 581,62.[444] Thereafter, Gundwana, who was unaware of the default judgment, continued making

[437] In terms of rule 31(5)(b)(vi).
[438] In terms of rule 31(5)(d).
[439] *Gundwana v Steko* par 50, with reference to *Jaftha v Schoeman* par 47.
[440] *Gundwana v Steko* par 5.
[441] *Gundwana v Steko* par 11.
[442] *Gundwana v Steko* par 5.
[443] *Gundwana v Steko* par 6.
[444] *Gundwana v Steko* par 11.

fairly regular payments to the bank from 1 December 2003 to April 2004 after which she paid additional amounts of R6 000, on 24 April 2004, and R9 000, on 28 April 2004. She made irregular payments in 2005 and no payments in 2006. On 5 February 2007, she paid an amount of R10 066.[445] In August 2007, when she returned from a visit to her sister in Cape Town, she learned of the impending sale in execution and she immediately contacted a bank official who told her that she was in arrears to the extent of R5 268,66 and that the total balance outstanding was R23 779,13. She promised to pay as soon as possible and, believing she could avert the sale in execution, on 13 August 2007, she paid R2 000 to Nedcor Bank.[446] However, on 15 August 2007, the property was sold in execution on the original writ of attachment to Steko Development CC to whom it was later transferred.

On 23 April 2008, Steko brought an application in the magistrate's court for her eviction from the property.[447] Gundwana obtained a postponement in order to obtain legal advice but, on the second court date, 3 June 2008, her request for a further postponement to obtain her file from the Legal Aid Board, so that she could present a proper defence to the court, was refused and the eviction order was granted. Gundwana's appeal against this order was dismissed in the high court on 27 February 2009 after which the Supreme Court of Appeal denied her further leave to appeal.[448] In the interim, Gundwana had also launched an application, on 13 October 2008, in the high court for rescission of the default judgment which had been granted in 2003. The parties had agreed to postpone the application for rescission pending the decision of the Constitutional Court.[449]

5.6.2.3 The issues, the arguments, and the decision

The Constitutional Court had invited interested parties, including the Banking Association of South Africa, to apply to be admitted as *amici curiae*. However, no one

[445] *Gundwana v Steko* par 11.
[446] *Gundwana v Steko* par 6.
[447] *Gundwana v Steko* par 7.
[448] *Gundwana v Steko* par 8.
[449] *Gundwana v Steko* par 9.

applied. Later, the National Consumer Forum applied and it was admitted.[450] The National Consumer Forum submitted that there was a recurring problem of people's homes being declared specially executable in the high courts even where they could be dealt with in the magistrates' courts. It also submitted that it was unlikely that the issue of the constitutionality of the High Court Rules would ever reach the Constitutional Court because of the tendency of the banks to settle as soon as the constitutionality was raised in the high courts.[451] The National Consumer Forum provided further details relating to the application of the new rule 14A(a) in the Eastern Cape High Court. It presented statistical data on default judgments obtained in the high court, which could have been obtained in the magistrate's court. It also related the facts of three cases in the Eastern Cape in which the Legal Resources Centre had been involved. Thus, it brought to the attention of the Constitutional Court what was happening on the ground, so to speak.[452]

The Constitutional Court noted that the reach of the decision in *Jaftha v Schoeman* had been interpreted in various courts,[453] including the Supreme Court of Appeal in *Standard Bank v Saunderson*, and that the outcomes had been inconsistent.[454] It observed the difference in the rules applicable in the magistrates' courts, where full effect had been given to *Jaftha v Schoeman*, and the High Court Rules where that had not been the case. It also stated that banks had apparently exploited this by seeking execution orders in the high court even in instances which fell within the jurisdiction of the magistrates' courts. The Constitutional Court also noted that practice rules varied

[450] *Gundwana v Steko* par 15.
[451] *Gundwana v Steko* par 18. The court itself also mentioned, in its judgment, in *Gundwana v Steko* par 14, that on 23 September 2010, a similar application, *Siphiwo Peter Kanana and Another v Nedbank Limited and Others* Case No. CCT 91/10, involving different parties, had been brought, in the Constitutional Court, against Nedbank emanating from the Eastern Cape High Court, Grahamstown, for orders declaring rule 31(5)(*b*) and rule 45(1) of the High Court Rules unconstitutional. However, the application had been withdrawn when the Bank withdrew its opposition to rescission of the original default judgment. See also Carlisle "G'town couple approach court to prevent sale" *Daily Dispatch* South Africa (23 June 2010); Carlisle "Court rules against sale" *Daily Dispatch* South Africa (26 June 2010).
[452] *Gundwana v Steko* par 19.
[453] The court referred to *Mkhize v Umvoti Municipality* (KZP); *ABSA Ntsane*; *Standard Bank v Adams*; *Nedbank v Mashiya*; *Nedbank v Mortinson*; *Standard Bank v Snyders*.
[454] *Gundwana v Steko* par 28.

from court to court.[455] It was concerned that, if the issue was not dealt with in this case, the constitutional issue would not easily reach the Constitutional Court again and, if it did, it would only be after much time and costs had been wasted.[456] Further, the court was satisfied that the issues had been fully aired and that finality on the substantive constitutional issue would be to the benefit of all concerned.[457] The court noted that, in terms of the recent amendment to rules 45(1) and 46(1) of the High Court Rules, a registrar could no longer make an order declaring executable immovable property that is the primary residence of the judgment debtor. Thus, if the court were to declare rule 31(5) unconstitutional, its decision would have retrospective significance only.[458]

The court set out the historical origin and development of the applicable provisions.[459] It further explained that practical expediency was the reason for the development of the practice of declaring immovable property specially executable at the time of judgment, where such property had been mortgaged as security for the payment of a debt, and why the registrar was empowered to deal with the execution process as an executive matter.[460] However, the combined effect of the decisions in *Chief Lesapo* and *Jaftha v Schoeman*, based on the principle against self-help, established that execution may only follow upon judgment in a court of law.[461] Further, after judgment on a money debt, where it is sought to execute against the home of an indigent debtor whose security of tenure is at risk, judicial oversight by a court of law of the execution process is required.[462]

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[455]The court noted the following: The North West High Court, Mafikeng had issued Practice Direction No. 30 of the North West High Court Practice Directions. 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 v Mortinson* 473D-H, the court also laid down rules of practice. The Western Cape High Court had adopted the practice direction, stated in *Standard Bank v Saunderson* par 27. The court also referred to *Standard Bank of South Africa Ltd v Hunkydory Investments 188* (*Pty*) *Ltd* (*No 2*) 2010 (1) SA 634 (WCC) par 29.
[456]*Gundwana v Steko* pars 28-30.
[457]*Gundwana v Steko* par 32.
[458]*Gundwana v Steko* par 33.
[459]*Gundwana v Steko* pars 35-37.
[460]*Gundwana v Steko* par 37, with reference to *Gerber v Stolze* 1951 (2) SA 166 (T).
[461]*Gundwana v Steko* pars 38-41, with reference to *Chief Lesapo* pars 15-16 and *Jaftha v Schoeman* pars 52, 55.
[462]*Gundwana v Steko* par 41, with reference to *Jaftha v Schoeman* par 55.

It was argued on behalf of Nedcor Bank that the case before the court did not fall within the ambit of *Jaftha v Schoeman*. This argument was based on two grounds. The first, which the court termed "the fact-bound argument", was that neither Gundwana herself nor her property fell within the protection afforded by *Jaftha v Schoeman*. The second ground, which the court termed "the voluntary placing-at-risk argument", was that mortgagors willingly accept the risk of losing their property in execution. The court rejected both arguments.[463] In relation to the first argument, the court's response was that some sort of preceding enquiry, which goes beyond merely checking whether the summons discloses a proper cause of action, is necessary to determine whether the facts of a particular matter fall within the ambit of *Jaftha v Schoeman*. It pointed out that in the case before it the summons did not indicate whether the applicant was indigent or whether the mortgaged property was her home.[464] In relation to the second argument, the court stated that mortgaging one's property, as security for one's indebtedness does not imply an acceptance that:

- the mortgage debt may be enforced without court sanction;
- it constitutes a waiver of the right to have access to adequate housing or the right not to be evicted without court sanction in terms of section 26(1) and (3); or
- the mortgagee is entitled to enforce performance in the form of execution, even when it is done in bad faith.[465]

Thus, the court concluded that the mortgage of a person's home as security for the repayment of a loan is not sufficient *per se* to place the case beyond the ambit of *Jaftha v Schoeman*. It decided that an evaluation of the facts of each case is necessary in order to determine whether an order may be made declaring executable mortgaged property which constitutes a person's home. The court stated "execution orders relating to a person's home all require evaluation"[466] of a kind which must be carried out by a court and not the registrar. It therefore declared the High Court Rules and practice

[463] *Gundwana v Steko* par 42.
[464] *Gundwana v Steko* par 43.
[465] *Gundwana v Steko* pars 44, 45-48.
[466] *Gundwana v Steko* par 50.

unconstitutional to the extent that they permitted a registrar to carry out such evaluation.[467]

The effect of the judgment in *Gundwana v Steko* is to overrule the decisions in *Nedbank v Mortinson* and *Standard Bank v Saunderson* to the extent that it was found, in those cases, that it was competent for the registrar to make execution orders when granting default judgment in terms of rule 31(5)(*b*).[468] However, the Constitutional Court specifically stated that the practical suggestions made in *Nedbank v Mortinson* and *Standard Bank v Saunderson*, to alert defendants to the potential impact that judgment against them might have on their right to have access to adequate housing, still stand. It also stated that "the practical directions" issued in these two cases could assist courts in evaluating whether to grant execution orders.[469] It stressed that the judgment did not affect a judgment creditor's right to execute against the assets of a judgment debtor in satisfaction of a judgment debt sounding in money and stated:[470]

> What it does is to caution courts that in allowing execution against immovable property due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes. If the judgment debt can be satisfied in a reasonable manner without involving those drastic consequences that alternative course should be judicially considered before granting execution orders.

Mindful of the warning issued by Mokgoro J, in *Jaftha v Schoeman*, that "it would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight", the Constitutional Court stated:[471]

> It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells

[467] *Gundwana v Steko* par 49. As already mentioned, the court did not regard such constitutional invalidity to be cured by either rule 31(5)(b)(vi) and/or rule 31(5)(d), allowing a registrar or, at a later stage, dissatisfied parties, to set a matter down for hearing by the court; see *Gundwana v Steko* par 50.
[468] *Gundwana v Steko* par 52.
[469] *Gundwana v Steko* par 52, with reference to *Nedbank v Mortinson* pars 33-34 and *Standard Bank v Saunderson* par 27. It also referred, at par 28 n 18, to the various practice rules, issued in different divisions of the High Court, based largely on these decisions.
[470] *Gundwana v Steko* par 53.
[471] *Gundwana v Steko* par 54.

> should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided.

The court explained that, prospectively, the effect of the decision in *Gundwana v Steko* would not make a difference given that the amended rule 46 now provides that, where property sought to be attached is the primary residence of the judgment debtor, a court, having considered all the relevant circumstances, must order execution against it.[472] Having taken into consideration that in *Jaftha v Schoeman* the court had not placed any limit on the retrospectivity of its effect, the Constitutional Court adopted a similar approach in *Gundwana v Steko*.[473] The court stated that, just as was the position in relation to sales in execution held pursuant to section 66(1)(*a*) of the Magistrates' Courts Act prior to *Jaftha v Schoeman*, so aggrieved debtors first would have to apply for the original default judgment to be set aside. The court envisaged that an aggrieved debtor would be required to explain the reason for not having brought an application of rescission earlier and would have to set out a defence to the original claim.[474] The court emphasised that only "deserving past cases" should benefit from this declaration of invalidity. It considered the position of aggrieved debtors who seek to set aside past default judgments and execution orders granted by a registrar. It anticipated that they should, "in addition to the normal requirements for rescission, [be required to show] that a court, with full knowledge of all the relevant facts existing at the time of granting default judgment, would nevertheless have refused leave to execute against specially hypothecated property that is the debtor's home."[475]

The Constitutional Court further envisaged that, once a court determined that special execution should not have been permitted, it would have to take appropriate steps applying established legal principles to deal in a just and equitable manner with issues surrounding invalid execution sales and subsequent transfers. The court regarded it as

[472] *Gundwana v Steko* par 56; see also 4.4.4.3, above.
[473] *Gundwana v Steko* par 57.
[474] *Gundwana v Steko* par 58.
[475] *Gundwana v Steko* par 59. For comments on this aspect of the judgment and further issues raised in this regard, see Mills 2010 *De Rebus* (June) 50-51. For insights into the difficulties which creditors might experience, in relation to the retrospectivity of effect of *Gundwana v Steko*, see *FirstRand Bank v Woods and Similar Cases* 2011 (5) SA 536 (ECP).

impossible to lay down inflexible rules to deal with all the permutations which might arise in the different cases.[476] Presumably, the Constitutional Court had in mind issues such as unjustified enrichment of the debtor and the difficulty of the title deed not accurately reflecting the ownership of the property, as arose in *Menqa v Markom*.[477]

Considering the facts in the case before it, the Constitutional Court remitted the matter to the Western Cape High Court, Cape Town, for the application for rescission of judgment to be considered. It also upheld the appeal against the eviction order, thus setting it aside, and referred the matter to the magistrate's court for it, including the issue of costs, to be determined after the finalisation of the rescission application. The Constitutional Court ordered Nedcor Bank and the Minister for Justice and Constitutional Development to pay the costs of the applicant, including the cost of two counsel, for all of which they would be liable jointly and severally.[478]

Soon after delivery of judgment in *Gundwana v Steko*, the North Gauteng High Court Deputy Judge President appointed specially designated courts to deal with default judgments in cases where mortgage bonds over residential properties were involved.[479] He also issued a practice notice informing the legal profession about the manner in which the North Gauteng High Court would deal with such applications. The practice note observed that, while rule 46(1)(*a*)(ii) requires a court to "'consider all the relevant circumstances' before authorising the issuing of a warrant of execution", these had not been defined and that questions remained as to its practical implementation. It announced that a full court would be constituted to deal with the interpretation of, and practical questions relating to, the amended rule 46 in order to give direction to legal practitioners.

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[476] *Gundwana v Steko* par 60.
[477] Discussed at 5.5.3.2, above.
[478] *Gundwana v Steko* par 65.
[479] See practice note (20 April 2011) http://www.northernlaw.co.za/images/stories/files/Enrollment_of_unopposed_motion_court_applications.pdf [date of use 15 March 2012]. See *Legalbrief* dated 28 April 2011 with reference to "Special courts to handle defaulting owners" *The Star*.

5.6.3 Nedbank v Fraser

In *Nedbank v Fraser*, the South Gauteng High Court, Johannesburg, considered the circumstances which were relevant and the procedure which should be adopted in light of the amendments to rule 45 and rule 46 and the decision in *Gundwana v Steko*.[480] The court, *per* Peter AJ, traced the history and development of rules 45 and 46 and discussed the effect of *Jaftha v Schoeman*, *Nedbank v Mortinson* and *Standard Bank v Saunderson*, including the rule of practice and the practice directive, issued in each of the latter two cases.[481] The court observed that where a person's home had been sold in execution, usually it would be only after transfer to the new owner who had purchased it at the sale in execution that the latter would bring an application to evict the occupier. It noted that section 26(3) of the Constitution requires judicial oversight at that final stage of the process, the eviction application. Peter AJ stated that the effect of *Gundwana v Steko* "is that the execution process is equated with eviction for the purposes of section 26(3) that '*judicial oversight by a court of law of the execution process is a must*.'" (Emphasis placed by Peter AJ.)[482] He regarded "early judicial interposition" as a mechanism introduced to prevent abuse bearing in mind that, later, when eviction is sought, "circumstances are different and the scope to remedy a past abuse is much narrower than prior to attachment of the property."[483]

Turning to rule 46, the court in *Nedbank v Fraser* regarded the proviso as having to be read in such a way as to qualify both sub-paragraphs (i) and (ii) of rule 46(1)(*a*) which, it may be noted, accords with submissions made above.[484] The court further pointed out an important difference between the wording of the proviso and the principle enunciated in *Gundwana v Steko*. The proviso to rule 46(1)(a)(ii) requires judicial consideration of all the relevant circumstances where the property sought to be attached is "the primary residence of the judgment debtor". On the other hand, the principle enunciated in *Gundwana v Steko* requires the same sort of judicial oversight where the property

[480] *Nedbank v Fraser* pars 1-2.
[481] *Nedbank v Fraser* pars 3-8.
[482] *Nedbank v Fraser* par 9, with reference to *Gundwana v Steko* par 41.
[483] *Nedbank v Fraser* par 9.
[484] See comment at 4.4.4.3, above.

sought to be attached is "the home of the person".[485] It noted that the latter "echoed" the text of section 26(3) of the Constitution.[486] The court observed that the judgment debtor may be a juristic person which owns immovable property constituting the home of a person.[487] The court also noted that the effect of the decision in *Gundwana v Steko* was that the fact that the immovable property had been specially hypothecated as security for the debt giving rise to the judgment did not exclude the need for judicial oversight and that this was in "no way an unimportant consideration."[488]

Thus, Peter AJ emphasised that an evaluation of the facts of each case was required.[489] However, he stated, it would be unwise to set out all facts which are relevant to the exercise of judicial oversight[490] "because … what circumstances are relevant may vary from case to case; as too the relative weight to be attached and relevance attributed to the various factors."[491] Observing that neither the Constitution nor the Rules of Court defined or gave content to "*all the relevant circumstances*",[492] Peter AJ stated that he did "not consider it particularly useful to succumb to the impulse to fossick about the divergent practice directions of the various High Courts in order to catalogue a check-list of relevant circumstances."[493] He further expressed the view that there was "no urgent need to embark on a search to get some". He regarded it as more appropriate first to consider the context and purpose of judicial oversight as required by section 26(3) of the Constitution, which would be "a useful lens with which to bring into focus that which might properly be identified as relevant in the circumstances of any given case."[494]

The court regarded the requirement of judicial oversight, in section 26(3), as arising out of an apparent tension between two competing social values. On the one hand, there is

[485] *Nedbank v Fraser* par 12, with reference to *Gundwana v Steko* pars 1, 18, 23, 34, 49-50, 55 and 65.
[486] *Nedbank v Fraser* par 12.
[487] Such as a member of a company or a close corporation, as was the case in two of the matters before it, or the beneficiary of a trust.
[488] *Nedbank v Fraser* par 13.
[489] *Nedbank v Fraser* par 14, with reference to *Gundwana v Steko* par 49.
[490] *Nedbank v Fraser* par 14, with reference to *Jaftha v Schoeman* par 56 and *Gundwana v Steko* par 54.
[491] *Nedbank v Fraser* par 14.
[492] *Nedbank v Fraser* par 15; emphasis added by Peter AJ.
[493] *Nedbank v Fraser* par 16.
[494] *Nedbank v Fraser* par 16.

the need for people to be housed and the value of having a home as well as an appreciation that many people deserve the protection of "a measure of judicial initiative" in this regard – hence section 36 of the Constitution. On the other hand, there is the social value which attaches to the enforcement of contracts and the discharge of debts for the promotion of which court structures, the process of execution, and section 34 of the Constitution exist.[495] All of these factors form a matrix for a judge to consider.[496] Peter AJ noted that, while a judgment creditor's right to execution is not absolute and various assets have been placed beyond the reach of execution by different statutory enactments,[497] significantly, these do not include a residential home. He pointed out that in *Jaftha v Schoeman* the Constitutional Court declined to read into section 67 of the Magistrates' Courts Act a prohibition against the sale in execution of houses of a particular minimum value.[498] Thus, Peter AJ concluded, "in the competition between the rights of the judgment creditor to obtain satisfaction of the judgment debt … and the rights to housing of a judgment debtor … the judgment creditor's rights will enjoy relative primacy."[499]

The court also perceived symbiosis existing on a macroeconomic level between the social values referred to, on the basis that to put residential property beyond the reach of a judgment creditor would "sterilise the immovable property from commerce" and render it useless as a means of obtaining credit. In the court's view, this would create a class of "homeless persons" who could not afford the full purchase price of a home and who could not obtain a loan even though they could afford to repay one.[500] Further, it would "lock up capital" by preventing persons from providing their homes as security in order to obtain finance for business initiatives.[501] The court also mentioned that it would deprive poor communities of the opportunity of taking financial responsibility for owning a home.[502] It reiterated what the Constitutional Court had stated in *Gundwana v Steko*:

[495] *Nedbank v Fraser* par 17.
[496] *Nedbank v Fraser* par 23.
[497] *Nedbank v Fraser* par 18.
[498] *Nedbank v Fraser* par 19, with reference to *Jaftha v Schoeman* par 51.
[499] *Nedbank v Fraser* par 20.
[500] *Nedbank v Fraser* par 21.
[501] *Nedbank v Fraser* par 21, with reference to *Jaftha v Schoeman* pars 51, 58.
[502] *Nedbank v Fraser* par 21, with reference to *Jaftha v Schoeman* par 53.

constitutional considerations do not challenge a judgment creditor's entitlement to execute against the assets of a judgment debtor to enforce a judgment debt sounding in money and execution is not in itself an odious thing but is part and parcel of normal economic life.[503]

However, Peter AJ noted that, where execution amounts to an abuse, it offends against the attainment of one or both of the identified social values. He cited *Jaftha v Schoeman* as an example of a situation where a creditor resorting to execution in respect of a trifling debt provided a strong indication of an abuse. In such a case, the social value of ensuring that a debt is paid may easily be satisfied without the judgment debtor losing his home and thus execution would be unjustifiable.[504] Peter AJ identified another instance of abuse where the judgment creditor insists upon executing against the immovable property in order to acquire it, either directly or in collusion with another, for a price significantly lower than what it is worth at a sale in execution.[505] He concluded that, "seen in this context, the purpose of the judicial function required in section 26(3) is to act as a filter or check on execution that does not serve the social interest and which is an abuse." He expressed the function of the court, in simple terms, to be "to safeguard against abuse of the execution process."[506]

Peter AJ viewed the guidelines regarding "relevant circumstances", provided in *Jaftha v Schoeman*, as "the most valuable and authoritative starting point". Further, bearing in mind that the guidance and practice directions issued in *Nedbank v Mortinson* and *Standard Bank v Saunderson* remained intact, Peter AJ stated that courts should apply these within the context and purpose which he had identified.[507] He stated that each case should be decided on its facts, with flexibility being retained rather than "adherence to an inflexible procedure or [a] list of prescripts".[508]

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[503] *Nedbank v Fraser* par 21, with reference to *Gundwana v Steko* pars 53-54.
[504] *Nedbank v Fraser* par 22, with reference to *Jaftha v Schoeman* par 55.
[505] *Nedbank v Fraser* par 21; see related comments at 4.4.3.3 and 4.4.4.3, above.
[506] *Nedbank v Fraser* par 24.
[507] *Nedbank v Fraser* par 25, with reference to *Jaftha v Schoeman* pars 56, 60 and *Gundwana v Steko* par 52.
[508] *Nedbank v Fraser* par 25.

Peter AJ regarded the most important consideration to be the circumstances in which the debt was incurred and, particularly, whether or not the immovable property had been mortgaged in favour of the judgment creditor as security for the judgment debt.[509] He stated that in the case of a *kustingbrief*,[510] which had "long been recognised as a superior front-ranking form of security",[511] ordinarily, it would not be regarded as an abuse of process for the judgment creditor to seek execution against the judgment debtor's home upon the latter's default.[512] Peter AJ also considered a case where the immovable property has been mortgaged as security for some other debt, such as one incurred to effect improvements to the property or to obtain working capital for the conduct of business. He observed that there would be less scope for execution to amount to an abuse of process than where property had not been mortgaged in favour of the creditor.[513] Referring to *Jaftha v Schoeman*, Peter AJ stated that in the absence of an indication of an abuse of procedure that would alert a court to conduct "a more vigilant enquiry" execution against mortgaged property ought normally to occur. Further, where the immovable property has not been mortgaged a court should be "more astute to enquire into the need to execute against the immovable property".[514]

The next factor which Peter AJ identified as having to be considered is the amount of the judgment debt. Bearing in mind that mortgage bonds almost invariably contain an acceleration clause,[515] he stated that it is the total outstanding balance of the mortgage debt, rather than the current arrear amount, which ought to be considered in this context.[516] Peter AJ criticised the judgment in *ABSA v Ntsane* on the basis that it failed to take into account that the plaintiff had two distinct rights: a right "to accelerate and ask for judgment for the full balance of the debt outstanding" and a "procedural right to execute against the hypothecated immovable property for that judgment sum."[517] Peter

[509] *Nedbank v Fraser* par 26, with reference to *Jaftha v Schoeman* pars 58, 60.
[510] For discussion of which, see 2.3.4 and 4.3.3, above.
[511] *Nedbank v Fraser* par 26.
[512] *Nedbank v Fraser* par 27.
[513] *Nedbank v Fraser* par 27.
[514] *Nedbank v Fraser* par 27.
[515] For discussion of which, see 4.3.3, above.
[516] *Nedbank v Fraser* par 28.
[517] *Nedbank v Fraser* pars 29-32.

AJ pointed out that judicial oversight is required in relation to the latter, procedural right and not with respect to whether a creditor should be entitled to enforce his common law, contractual right arising out of an acceleration clause in the agreement.[518] He regarded the approach of Bertelsmann J in *ABSA v Ntsane* as incorrect and viewed the reasoning and conclusion to be calculated to favour the debtor.[519] He regarded the refusal by Bertelsmann J to permit the plaintiff to enforce the acceleration clause as incapable of justification on the basis of the purpose and function of judicial oversight which emerges from *Jaftha v Schoeman* and *Gundwana v Steko*[520] and remarked that this could only ever be a function of the legislature.[521]

Peter AJ considered whether section 129(3) of the NCA which allows the debtor to right to reinstatement of the agreement if he pays the arrears and other charges and costs,[522] and which was not in force at the time of *ABSA v Ntsane*, might provide a solution to the difficulties posed in that case.[523] He remarked that where, as a result of the enforcement of an acceleration clause, the judgment debt is for a significant amount which justifies execution against immovable property, the provisions of section 129(3) and (4) ought to be brought to the attention of the judgment debtor. He considered that this could be done by incorporating it in the order declaring the immovable property executable.[524]

In relation to ascertaining whether, in the circumstances, reasonable alternatives exist for the judgment debt to be satisfied without the judgment creditor having to resort to execution, Peter AJ stated that any attempts on the part of the debtor to pay the debt should be considered as well as the debtor's resources.[525] Recognising that it is much

[518] *Nedbank v Fraser* pars 32, 35.
[519] *Nedbank v Fraser* par 35.
[520] *Nedbank v Fraser* pars 36-37.
[521] *Nedbank v Fraser* par 38. Peter AJ cited s 11 of the now repealed Credit Agreements Act 75 of 1980 as an example of a legislative amendment to the common law relating to the enforcement of a contract. As mentioned by Peter AJ, in his judgment, the NCA contains provisions which have a similar effect, including not only s 129, which he mentioned, but also a number of others.
[522] See 4.5.2, above.
[523] *Nedbank v Fraser* pars 39, 41. For the purposes of s 129(4) of the NCA, which does not permit reinstatement "after execution", Peter AJ regarded "execution" as comprising both the sale and the registration of transfer of ownership into the name of the purchaser at the sale in execution; see par 40.
[524] *Nedbank v Fraser* par 42.
[525] *Nedbank v Fraser* par 43, with reference to *Jaftha v Schoeman* pars 56, 60.

easier to ascertain this where the matter is defended, Peter AJ cautioned against imposing too great a burden on an execution creditor to produce evidence which would be within the knowledge of the debtor. He remarked that, while financial information obtained by the judgment creditor at the time when the credit was granted might indicate an ability on the part of the debtor to pay, any change of circumstances and the reasons for the default would be within the knowledge of the judgment debtor. On the other hand, the amount of the arrears and the number of instalments which it represents might provide an indication of whether or not the judgment debtor could satisfy the judgment debt without execution being levied against his immovable property.[526]

Peter AJ stated that, where immovable property has been mortgaged in favour of a creditor, a court should not be inflexible by insisting on prior execution against movables as this could prejudice the judgment creditor. He also cautioned against placing too much of a burden on a creditor to obtain and provide additional information about the debtor, once the latter fell into default, as this could lead to increased collection costs which would ultimately be borne by the judgment debtor and, logically, borrowers generally, as expenses inevitably would be factored into the cost of lending. He also expressed concern that additional burdens on a creditor might create a disincentive to lend at all.[527] In relation to judgment debts for relatively insignificant amounts and extraneous debts where the property had not been provided as security, Peter AJ noted that "a greater degree of enquiry and closer scrutiny" is required. He stated that consideration ought to be given to postponing the application for an order declaring the home executable pending an enquiry in terms of section 65 and, more specifically, the process provided for in section 65A, read with section 65M, of the Magistrates' Courts Act.[528]

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[526] *Nedbank v Fraser* par 44.
[527] *Nedbank v Fraser* par 45. For similar remarks, in relation to an overly onerous burden being imposed on the creditor to obtain relevant information about the debtor's circumstances, see Van Heerden and Boraine 2006 *De Jure* 332, 352.
[528] *Nedbank v Fraser* par 46. See 4.4.3.5, above. It may be noted that Van Heerden and Boraine made similar submissions, commenting on the position during the period between the decision in *Jaftha v Schoeman* and before the decision in *Standard Bank v Saunderson*; see Van Heerden and Boraine 2006 *De Jure* 346, 350-351.

Considering each of the two applications for default judgment, Peter AJ noted that the summons complied with the practice directive, issued in *Standard Bank v Saunderson*, that an affidavit stated that section 129 of the NCA had been complied with, and that the requirements laid down in *Nedbank v Mortinson* had been satisfied.[529] In the first matter, the claim was for the balance outstanding of R986 853,87 and the arrear amount was R95 888,95 which constituted more than 11 monthly instalments of R8 420,07.[530] In the second matter, the balance owing was R430 068,20 and the arrears were R51 102,48 which represented more than 17 monthly instalments.[531] On the basis of this information, the court decided that default judgment could be granted in each of the matters and that the order sought, declaring each property executable, was not an abuse.[532]

Peter AJ refused two of the applications for summary judgment as an essential requirement was missing.[533] The fifth matter was an application for summary judgment against a close corporation, which had passed a mortgage bond over immovable property as security for a loan granted for its acquisition, and against a member of the close corporation, as second defendant, as surety for the close corporation's obligation.[534] According to the plaintiff's affidavit, the mortgaged property, owned by the close corporation, was used for residential purposes according to the plaintiff's classification of its records. It was not known if, and so the court assumed that, the mortgaged property constituted the home and primary residence of the second defendant.[535] The arrear amount was R392 471,55[536] and the balance outstanding was R3 805 761,82.[537] The affidavit did not disclose detail regarding the agreed instalments

[529] *Nedbank v Fraser* pars 51, 53. The last-mentioned requirement was satisfied by the information provided: the property had not been acquired with state assistance; it was currently occupied by the defendants as their residence; and the debt was incurred in order to purchase the property.
[530] *Nedbank v Fraser* par 51
[531] *Nedbank v Fraser* par 53.
[532] *Nedbank v Fraser* pars 52, 54.
[533] *Nedbank v Fraser* pars 55-62. In one matter, the mortgage bond did not disclose the applicable interest rate and, in the other, the summons had not been served at an address within eight kilometres of the office of the registrar.
[534] *Nedbank v Fraser* pars 63-64.
[535] *Nedbank v Fraser* par 63.
[536] *Nedbank v Fraser* par 65.
[537] *Nedbank v Fraser* par 63.

and therefore the court was unable to calculate how long the defendants had been in arrears or how many instalments the arrears represented. Peter AJ remarked that, had the application been one for default judgment, he would have been inclined to request further information in this regard.[538] However, given that it was an application for summary judgment, in which the defendants were represented by attorneys, Peter AJ concluded that there was little scope for abuse, especially in light of the fact that the amount outstanding was in excess of the capital amount of R3 350 000,00.[539] Summary judgment was granted in favour of the plaintiff and the mortgaged property declared executable.[540]

5.6.4 FirstRand Bank v Folscher

5.6.4.1 Background

Following close on the heels of *Nedbank v Fraser* was the judgment, in *FirstRand Bank v Folscher*, of the full bench of the North Gauteng High Court[541] constituted to deal with the interpretation and application of *Gundwana v Steko* and the amended rule 46(1). Having provided a historical perspective on the relevant legislation and rules, the court explained section 26 of the Constitution, with reference to *Brisley v Drotsky*, and that its basis lay in section 34 the application of which was illustrated in *Chief Lesapo*. The court then reviewed the main developments with reference to specific *dicta* from *Jaftha v Schoeman*, *Nedbank v Mortinson*, and *Standard Bank v Saunderson*.[542]

[538] *Nedbank v Fraser* par 65.
[539] *Nedbank v Fraser* par 66.
[540] *Nedbank v Fraser* pars 67.
[541] Delivered by Bertelsmann, Makgoba and Tuchten JJ.
[542] *FirstRand Bank v Folscher* pars 16-24.

5.6.4.2 Main aspects of the judgment

(a) The amended rule 46(1) and the decision in *Gundwana v Steko*

Concerning the amended rule 46(1), the court made no mention of the correctness, or otherwise, of the proviso nor the comments made in that regard by Peter AJ in *Nedbank v Fraser*.[543] On the contrary, the full court indicated that the proviso qualifies sub-rule 46(1)(a)(ii)[544] and made no reference to the need for it to be construed as also qualifying sub-rule 46(1)(i).[545] It also stated, later in its judgment, that "[t]he amendment to the Rule requires judicial oversight of the execution process against property especially hypothecated which is the 'primary residence' of the judgment debtor".[546] A further statement was that in *Gundwana v Steko*, the Constitutional Court "declared unconstitutional the practice of allowing the Registrar to declare immovable property specially executable when ordering default judgment in terms of Rule 31(5) '…to the extent that it permits the sale in execution of the *home of a person*.' ([court's] emphasis.)" It also stated that "[i]t is clear … that all applications for execution against specially hypothecated property must henceforth be dealt with by the court".[547]

It is submitted that it is unfortunate that the full court did not deal with the issue because, as things stand, the proviso does not qualify the sub-rule dealing with execution against a debtor's immovable property where there are insufficient movable assets to satisfy the judgment debt. Thus, on the face of it, there is a *lacuna* in rule 46(1) and it has not yet brought the position in the high court into line with the position in the magistrate's court, subsequent to *Jaftha v Schoeman*. This is despite the fact, presumably, that it was intended to do so. However, it is submitted that the saving grace is the effect of *Gundwana v Steko* that, in every case in which it is sought to execute against a person's home, the court and not the registrar must decide the matter.

[543] *Nedbank v Fraser* par 12, discussed at 5.6.3, above.
[544] *First RandBank v Folscher* par 1.
[545] See discussion at 4.4.4.3, above.
[546] *First RandBank v Folscher* par 25.
[547] *FirstRand Bank v Folscher* par 27.

The full court regarded "primary residence" in rule 46(1) as being "the same concept as 'the home of a person' as formulated in the *Gundwana* judgment". It therefore found no conflict between the amended rule 46(1) and the decision in *Gundwana v Steko*.[548] It also concluded that judicial oversight is required only in those instances where the execution order relates to the debtor's principal or, as is usually the case, only dwelling.[549] It specifically stated that immovable property owned by a company, a close corporation or a trust is not affected by the amended rule 46(1) even where it constitutes the principal residence of a shareholder, a member, or a beneficiary.[550] Therefore, the full court did not consider whether the reach of *Gundwana v Steko* extends further than rule 46(1) in that it may be regarded as being applicable to the home of *any* person, aside from the judgment debtor, whereas the amended rule 46(1) applies only in relation to the primary residence owned by the judgment debtor.[551] It is submitted that it is unfortunate that the full court did not specifically clarify this issue, especially in light of what had been held in the then very recent judgment in *Nedbank v Fraser*.[552]

(b) The meaning of "relevant circumstances"

The full court pointed out that the phrase "relevant circumstances", taken from section 26(3) of the Constitution, is the same phrase which must be read into section 66(1)(*a*) of the Magistrates' Courts Act, in terms of the decision in *Jaftha v Schoeman*, and which has now been imported into the amended rule 46(1). It reasoned that the factors which must be weighed up, before a court orders eviction from or demolition of a house or execution against a debtor's home in the enforcement of an extraneous debt, as was the case in *Jaftha v Schoeman*, or before granting an order declaring a mortgaged

[548] *FirstRand Bank v Folscher* pars 28-29.
[549] *FirstRand Bank v Folscher* par 30.
[550] *FirstRand Bank v Folscher* par 32.
[551] Mills 2011 *De Rebus* (June) 51 makes a similar comment.
[552] It may be noted that the judgment, in *Nedbank v Fraser*, was available to the public on 4 May 2011, before the matter was argued before the full court, in *FirstRand Bank v Folscher*, on 13 May 2011 and judgment was delivered on 24 May 2011. Further, *Nedbank v Fraser* was referred to in the heads of argument presented by the *amici curiae* (on file with the author).

home to be specially executable, "are of the same nature".[553] Relying on the majority judgment in *Brisley v Drotsky*,[554] the full court stated that "'relevant circumstances' must be 'legally relevant circumstances'".[555] However, it should be noted that the full court apparently overlooked subsequent Constitutional Court judgments in *Port Elizabeth Municipality* and in*51 Olivia Road* (CC)which indicate that "relevant circumstances" in section 26(3) of the Constitution are not confined to legal grounds justifying an eviction under the common law.[556] As mentioned in Chapter 3,[557] in *Port Elizabeth Municipality*, Sachs J stated, in relation to eviction and section 26(3) of the Constitution:[558]

> The court is not resolving a civil dispute as to who has rights under land law… What the court is called upon to do is to decide whether, bearing in mind the values of the Constitution, in upholding and enforcing land rights it is appropriate to issue an order which has the effect of depriving people of their homes… Of equal concern, it is determining the conditions under which, if it is just and equitable to grant such an order, the eviction should take place.

If the factors to be taken into account in cases where an order for eviction is sought are indeed "of the same nature" as the factors to be considered where execution is sought against a debtor's home, then, it is submitted, more recent *dicta* in eviction cases are apposite and ought to be applied and followed.

(c) Execution in the context of mortgage

The full court stated that, since *Jaftha v Schoeman*, it has been clear that courts must bear in mind that a judgment debtor facing execution and subsequent eviction should not be a victim of an abuse of process "even though such would be rare in matters in which a specially hypothecated immovable property is the object of the execution

[553] *FirstRand Bank v Folscher* pars 33-35.
[554] *Brisley v Drotsky* par 42.
[555] The full court explained that the majority, in *Brisley v Drotsky*, had held that "relevant circumstances" restricted the enquiry to whether the owner was lawfully entitled to evict an occupier "and rejected the notion that s 26(3) of the Constitution clothed the court with a discretion to refuse to grant an eviction order to an owner who was otherwise entitled thereto." *FirstRand Bank v Folscher* par 36.
[556] See 3.3.1.4, above. See also Liebenberg *Socio-Economic Rights* 277, with reference to *Brisley v Drotsky* pars 38 and 42 and *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (6) SA 417 (SCA), 2007 (6) BCLR 643 (SCA) pars 40-41. See also Van der Walt *Property in the Margins* 157-158.
[557] See 3.3.1.4, above.
[558] *Port Elizabeth Municipality* par 32, referred to by Liebenberg 277-278.

process".[559] It further stated that, when weighing up the issues in determining whether to issue a writ of execution against mortgaged property, one must first consider the position of the creditor in its proper context.[560] The court referred to the judgment in *Standard Bank v Saunderson* where it was stated:[561]

> A mortgage bond is an agreement between borrower and lender, binding upon third parties once it is registered against the title of the property, that upon default the lender will be entitled to have the property sold in satisfaction of the outstanding debt. Its effect is that the borrower, by his or her own volition, either on acquiring a house or later when wishing to raise further capital, compromises his or her rights of ownership until the debt is repaid. The right to continued ownership, and hence occupation, depends on repayment. The mortgage bond thus curtails the right of property at its root, and penetrates the rights of ownership, for the bond-holder's rights are fused into the title itself.
>
> … The value of a mortgage bond as an instrument of security lies in confidence that the law will give effect to its terms.

With regard to the importance of sanctity of contract, the full court quoted at length from the judgment of Cameron JA in *Brisley v Drotsky*, emphasising that "contractual autonomy is part of freedom … [and it] informs the constitutional value of dignity."[562] The full court regarded mortgage as being entered into consciously and deliberately by both lender and borrower for mutual benefit. It considered the importance of mortgage finance as a socio-economic tool which enables persons to purchase a home, to benefit from capital growth, and to acquire an asset which may serve as security for subsequent access to capital. It stated that, if a lender no longer had the assurance that the security provided could be realised, access to housing for persons who do not qualify for a state subsidy would become expensive and beyond the reach of the average person. Viewing this as having grave consequences for society and its social and commercial stability, the court stated, "trust in bond finance … should therefore not be undermined".[563] It referred, in particular, to a passage from the judgment in *Gundwana v Steko* which included that:[564]

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[559] *FirstRand Bank v Folscher* par 37.
[560] *FirstRand Bank v Folscher* par 38.
[561] *Standard Bank v Saunderson* pars 2-3.
[562] See *Brisley v Drotsky* pars 93-95.
[563] *FirstRand Bank v Folscher* par 39.
[564] *Gundwana v Steko* par 54.

> …these [constitutional] considerations do not challenge the principle that a judgment creditor is entitled to execute against the assets of a judgment debtor in satisfaction of a judgment debt sounding in money. What it does is to caution courts that in allowing execution against immovable property due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes. If the judgment debt can be satisfied in a reasonable manner without involving those drastic consequences that alternative course should be judicially considered before granting execution orders.

The full court concluded that, in the absence of "extraordinary circumstances", a mortgagee will ordinarily be entitled to enforce a judgment by executing against the mortgaged property.[565] It explained that it was impossible to provide a list of extraordinary circumstances which might persuade a court to decline a writ of execution but that these "would usually consist of factors that would render enforcement of the judgment debt an abuse of the process, which a court is obliged to prevent".[566] Thus, the meaning of "extraordinary circumstances" depends on a clear conception of "an abuse of the process".[567] Be that as it may, it is submitted that it would be more accurate to state that "extraordinary circumstances" would usually consist of factors that would render *execution of the mortgaged home* an abuse of the process (my emphasis).

This would signify that it is only the mortgagee's contractual right to sell the mortgaged property which may not be enforced, in such circumstances, but that other rights arising out of their contract remain unaffected and enforceable. Clearly, the judgment debt, or the duty to pay a specific amount of money, remains intact. It is submitted that it must be emphasised at this juncture that infringement of the debtor's right to have access to adequate housing does not affect the judgment creditor's claim to the money debt but only his entitlement, as mortgagee, to execute against the mortgaged property.[568] It is only once it has been established that execution against the judgment debtor's home will infringe his right to have access to adequate housing that a court will have to weigh

[565] *FirstRand Bank v Folscher* par 39.
[566] *FirstRand Bank v Folscher* par 40, with reference to *Hudson v Hudson & another* 1927 AD 259; *Beinash v Wixley* 1997 (3) SA 721 (SCA) 734F.
[567] The definition of "an abuse of the process" is discussed at 5.6.4.2 (d), below.
[568] See related comments by Peter AJ, in *Nedbank v Fraser* pars 29-32.

the various considerations to determine whether execution would be justifiable in the circumstances and nevertheless should be permitted.

(d) Abuse of process

As to what constitutes "an abuse of the process", the full court quoted a passage from the judgment in *Beinash v Wixley*[569] in which it was stated: "…an abuse of the process takes place where the procedures permitted by the Rules of Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective…". The full court identified "instances of this nature … [as falling] into the category enumerated by Mokgoro J, in *Jaftha*[*v Schoeman*], … and encountered in … [*ABSA v Ntsane*]".[570] It pointed out that these examples illustrate that to constitute an abuse "the creditor's conduct need not be wilfully dishonest or vexatious". The position could be that, despite the existence of *bona fides*, the consequences of a writ of execution being issued against a mortgaged property "may be iniquitous because the debtor will lose his home while alternative modes of satisfying the creditor's demands might exist that would not cause any significant prejudice to the creditor."[571]

Thus, the full court attributed an extended meaning to an "abuse of the process" where a writ of execution should not be issued by the court. Its conception of an "abuse of the process" included a situation such as that indicated in *Jaftha v Schoeman*, where homes were sold in execution for trifling debts and the judgment creditors' attorneys were purchasing them for very low prices. However, it also included the situation where a judgment creditor seeks to execute against the debtor's home in circumstances where he could obtain satisfaction of the debt by alternative means. The overall effect may be regarded as reconciling aspects of *dicta* issued by Mokgoro J in *Jaftha v Schoeman* and by Froneman J in *Gundwana v Steko* in relation to circumstances where execution against the debtor's home ought not to be permitted. At the same time, it underscores the extent to which the parameters of the reach of *Jaftha v Schoeman* have expanded

[569] *Beinash v Wixley* 1997 (3) SA 721 (SCA) 734F.
[570] *FirstRand Bank v Folscher* par 40.
[571] *FirstRand Bank v Folscher* par 40.

as developments have unfolded. However, it is submitted that the result is that the conception of an "abuse of the process" is now less precisely defined. It is submitted that it is unclear how the type of abuse which was identified in *ABSA v Ntsane* may be regarded as falling into the category of abuse "where the procedures permitted by the Rules of Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective". Perhaps it would be more appropriate explicitly to identify and acknowledge the type of abuse which occurred in *ABSA v Ntsane* as one which leads to an unfair or iniquitous result. However, this does tend to leave the definition of an "abuse of the process" rather open-ended and, in turn, "extraordinary circumstances" remain ill-defined.[572]

(e) A list of relevant factors

The full court provided a list comprising nineteen factors, with a certain measure of overlap between them, which a court may need to consider when deciding whether to issue a writ of execution against the judgment debtor's home.[573] The list of factors mostly reiterates considerations emanating from the judgments in *Jaftha v Schoeman*, *Nedbank v Mortinson*, *Standard Bank v Saunderson* and *ABSA v Ntsane* as well as the requirements contained in the NCA and rule 46(1), respectively. The factors listed are:

- whether the mortgaged property is the debtor's primary residence;
- the circumstances under which the debt was incurred;
- the arrears outstanding under the bond when it was called up;
- the arrears on the date default judgment is sought;
- the total amount owing in respect of which execution is sought;
- the debtor's payment history;
- the relative financial strength of the creditor and the debtor;
- whether it is possible that the debtor's liabilities to the creditor might be satisfied within a reasonable period without execution against his home;

[572] See 5.6.4.2 (c), above.
[573] *FirstRand Bank v Folscher* par 41.

- the proportionality of prejudice the creditor might suffer if execution were to be refused, compared to the prejudice the debtor would suffer if execution were permitted;
- whether any notice in terms of section 129 of the NCA was sent to the debtor prior to the institution of action;
- the debtor's reaction, if any, to such notice;
- the period that elapsed between delivery of such notice and the institution of action;
- whether the property sought to be declared executable was acquired by means, or with the aid, of a state subsidy;
- whether the property is occupied or not;
- whether the property is in fact occupied by the debtor;
- whether the immovable property was acquired with moneys advanced by the creditor;
- whether the debtor will lose access to housing as a result of execution being levied against his home;
- whether there is any indication that the creditor has instituted action with an ulterior motive; and
- the position of the debtor's dependants and other occupants of the house, although, in each case, these facts will have to be established as being legally relevant.

This is a useful compilation of considerations which provides the sort of "check list" for which, it may be noted, Peter AJ did not see the need, in *Nedbank v Fraser*.[574] However, it is submitted that it is unfortunate that the full court did not provide clear guidelines as to how these factors or considerations should be applied by the court in practice. The full court's list of factors does not differentiate between facts that must be considered in order to establish whether the debtor's section 26(1) right is infringed and, on the other hand, factors or circumstances influencing the exercise of the court's

[574] *Nedbank v Fraser* par 16.

discretion in the process of balancing the parties' interests, as required by section 36 of the Constitution.[575] For example, the first factor mentioned in the list – "[w]hether the mortgaged property is the debtor's primary residence" – and the seventeenth factor mentioned – "whether the debtor will lose access to housing as a result of execution being levied against his home" – determine whether execution will constitute an infringement of the debtor's section 26(1) right. If there is no infringement of the right, the enquiry ends there. The seventeenth factor should come second only, perhaps, to consideration of whether an abuse of the process has occurred that means a writ of execution should be refused.

Further factors to be considered include the "arrears outstanding under the bond when the latter was called up", the "arrears on the date default judgment is sought" and the "total amount owing in respect of which execution is sought". Given the issues raised in *Nedbank v Fraser*, in relation to considerations which the court should apply where a mortgagee relies on an acceleration clause in a mortgage agreement,[576] it would have been more useful if the full court had explained what significance ought to be attached to these figures once they have been furnished to the court. In similar vein, one may wonder what the full court had in mind should occur, once it has been established that a notice in terms of section 129 of the NCA was sent to the debtor and what the nature was of the debtor's reaction to it. The implications of various possible reactions by the debtor were not canvassed. Nor was the significance of another factor mentioned – the period which had elapsed between delivery of the section 129 notice and the institution of the action by the creditor. Further, bearing in mind that in *Jaftha v Schoeman* the houses in question were state-subsidised and that in *ABSA v Ntsane* the house concerned was not, it is submitted that greater clarity is required in relation to the significance which ought to be attached to whether the purchase of the home was subsidised by the state. As regards the remark, in the final factor mentioned in the list, that only "legally relevant" facts need to be considered, it is submitted that this is

[575] See 3.2.3, and a similar comment, in relation to *ABSA v Ntsane*, at 5.5.2.3, above.
[576] *Nedbank v Fraser* pars 29-38.

incorrect as it overlooks the Constitutional Court's approach in *Port Elizabeth Municipality* and *51 Olivia Road* (CC).[577]

As explained in the judgment, several matters which were already pending, "involving the potential granting of warrants of execution against immovable properties that … [were] the judgment debtor's home or primary residence … were placed before the full court."[578] None of the facts of these cases was canvassed in the full court's judgment nor was any list of "common facts" compiled to serve as a backdrop for some sort of analysis of the application of potentially relevant factors. It is submitted that this would have provided a basis and more useful, practical tools for use by courts and practitioners involved in future cases. In the circumstances, it is submitted that there remains a need for further clarification of the position and the provision of a sound framework, a streamlined procedure, and explicit practical guidelines.

(f) Informing the debtor

During argument, counsel suggested that a practice directive should be issued requiring personal service on the debtor of notification that possible consequences might be that orders would be granted for judgment against him, execution against his home and eviction. The full court was of the view that personal service was not required, as it would cause delay and escalation of costs for the debtor, but that service at the debtor's domicile, according to their agreement, would be sufficient.[579] The full court noted that it was already required that a summons should inform the debtor of his rights in terms of section 26(1) of the Constitution.[580] It issued a practice directive that every notice in terms of section 129 of the NCA should include a notification to the debtor that, should judgment be granted against him in the matter, execution against his primary residence will ordinarily follow and will usually lead to his eviction from his home.[581] The full court also indicated that a writ of execution should include a reference to the provisions of

[577] See 5.6.4.2 (b), above. These cases are discussed at 3.3.1.4, above.
[578] *FirstRand Bank v Folscher* par 5.
[579] *FirstRand Bank v Folscher* par 46.
[580] *FirstRand Bank v Folscher* pars 47, 52.
[581] *FirstRand Bank v Folscher* par 53.

rule 31(5)(d),[582] in accordance with the decision in *Nedbank v Mortinson*, to ensure that the debtor is aware of his rights.[583] The court emphasised the desirability of including in the summons a prayer for a writ of execution against the mortgaged property, properly supported by an affidavit verifying the relevant circumstances, in order to obviate the need for a separate application for it and to save time and costs.[584]

(g) Manner of obtaining information

Regarding the manner in which information pertaining to the "relevant circumstances" ought to be placed before the court, it observed that, if a creditor's claim is opposed, the debtor will ordinarily be in the best position to furnish relevant information to the court.[585] However, it anticipated that obtaining relevant information might be problematic in cases where the debtor remains in default. It referred to the *dictum* of Harms JA in *Ndlovu v Ngcobo*,[586] in the context of PIE, that "[r]elevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative [*sic*] in advance facts not known to him and not in issue between the parties".[587] While the court noted that, ordinarily, a court should not be expected to take proactive steps to establish whether the debtor is the victim of abusive litigation, it stated that a court would be obliged to do so in extraordinary instances where there is no other way of obtaining necessary information as occurred, for example, in *ABSA v Ntsane*.[588]

The court anticipated that, ordinarily, a creditor will fulfil the function of informing the court of relevant facts which would address the various pertinent considerations. It stated that, in default proceedings, the creditor is in a position "akin to that of an applicant in unopposed motion proceedings and is … duty bound to make full disclosure

[582] Discussed at 4.4.4.2, above.
[583] *FirstRand Bank v Folscher* par 47.
[584] *FirstRand Bank v Folscher* pars 48, 56.
[585] *FirstRand Bank v Folscher* par 42.
[586] Discussed at 3.3.1.4, above.
[587] *FirstRand Bank v Folscher* par 43 with reference to *Ndlovu v Ngcobo* par 19.
[588] *FirstRand Bank v Folscher* par 43.

to the court of all facts that might influence the court in coming to a conclusion."[589] It noted that, in terms of the judgment in *Standard Bank v Saunderson*, every debtor is informed routinely of his section 26 rights and that, in terms of the decision in *Nedbank v Mortinson*, when application is made for default judgment, essential information relating to the debtor and his residence must be provided in an affidavit.[590] The full court stated that this affidavit should deal with all of the factors enumerated in its judgment to the extent that the information relating to them falls within the creditor's knowledge "prior to judgment being granted and execution effected".[591] In the final paragraphs of the judgment, as part of a practice directive it ruled that:[592]

> A creditor applying for the granting of a writ for execution after obtaining judgment by default must file an affidavit setting out all the applicable circumstances enumerated in para 41 above of which the creditor is aware or is able to reasonably establish from the information at its disposal.

Earlier in the judgment, the court had stated:[593]

> It may well be, though, that not all facts that might be relevant will be known to the creditor in default matters, in which event the court will have to consider those facts that are available – the known relevant facts.

It is submitted that, in this respect, the full court overlooked the unanimous judgment of the Supreme Court of Appeal in *Shulana Court* (SCA)[594] which was decided after *Ndlovu v Ngcobo*. In *Shulana Court* (SCA), in the context of PIE, the Supreme Court of Appeal set aside an eviction order for the reason that the court *a quo* had not possessed sufficient facts about the personal circumstances of the unlawful occupiers. The appeal court stated that it "ought to have been proactive and … [to] have taken steps to ensure that it was appraised of all relevant information in order to enable it to make a just and equitable decision."[595] The Supreme Court of Appeal further stated that, in the context of PIE, courts are required "to go beyond … [their] normal functions

[589] *FirstRand Bank v Folscher* par 43.
[590] *FirstRand Bank v Folscher* pars 43, 54.
[591] *FirstRand Bank v Folscher* par 43.
[592] *FirstRand Bank v Folscher* par 55.
[593] *FirstRand Bank v Folscher* par 44.
[594] Discussed at 3.3.1.4.
[595] *Shulana Court* (SCA) par 15.

and to engage in active judicial management",[596] to use their "powers to investigate,[to] call for further evidence", to be "innovative" and, in some instances "to depart from the conventional approach".[597]

In its interpretation of the decision in *Gundwana v Steko*, the full court acknowledged the similar nature of the circumstances relevant to eviction and to execution.[598] It is submitted that the above *dicta* in *Shulana Court* (SCA) as well as the fact that, in eviction cases, the Constitutional Court has required "grace and compassion" to be infused into the process and "meaningful engagement" between the parties concerned[599] ought to be considered. It is submitted that the practice directive pertaining to the manner in which notice should be given to the debtor of the possible consequences of execution against and eviction from his home and in which information about the "relevant circumstances" should be placed before the court do not go far enough.

5.6.5 High court practice in Gauteng

The new Practice Manual for the North Gauteng High Court, Pretoria, effective 25 July 2011,[600] includes directives to be complied with "in applications for default judgments of the type referred to in the *Gundwana* case as well as applications for orders for execution against the particular immovable property referred to".[601] This reference is to an order for execution against the "home of a person".[602] Neither the Practice Manual

[596] *Shulana Court* (SCA) par 12, quoting from the Constitutional Court's judgment in *Port Elizabeth Municipality* par 36.
[597] *Shulana Court* (SCA) par 12, with reference to *Shorts Retreat* par 14.
[598] *FirstRand Bank v Folscher* pars 33-35, discussed at 5.6.4.2 (b), above.
[599] See 3.3.1.4 above. See *Port Elizabeth Municipality*, *51 Olivia Road* (CC), *Blue Moonlight Properties* (SCA), *Blue Moonlight Properties* (CC).
[600] See *Practice Manual of the North Gauteng High Court*http://www.saflii.org/userfiles/file/Court%20Rolls/South%20Africa/Pretoria%20High%20Court/North%20Gauteng%20Practice%20Manual%20final%20version%20-%20%2025%20July%2011.pdf [date of use 15 March 2012].
[601] *Practice Manual of the North Gauteng High Court* Appendix IV - Applications for Default Judgments and Authorisation of Writs of Execution 157.
[602] *Gundwana v Steko* pars 49, 65. It may be noted that Appendix IV 157 makes no reference to Rule 46(1) of the Uniform Rules of Court, which applies in relation to the issuing of a writ of execution against the "primary residence of the judgment debtor", nor does it differentiate between the application of the

nor the full court's judgment in *FirstRand Bank v Folscher* deals specifically with the issue whether this process applies not only to where the immovable property in question is the home or primary residence of the judgment debtor, but also where it is the home or primary residence of any person other than the judgment debtor.[603] Mostly, the relevant directives concern logistical arrangements in an effort to streamline the operation of the North Gauteng High Court and to obviate a backlog of cases because of the decision in *Gundwana v Steko* and the amended rule 46(1). The Practice Manual indicates that a special motion court roll will be prepared and specific courts will be constituted to hear matters of this type. The number of courts will depend on the number of matters enrolled for that day.[604] No more than 150 applications may be enrolled on a particular day[605] and no more than fifty matters may be enrolled before a single court.[606]

Significantly, the Practice Manual requires that any section 129 notice preceding a summons must also specifically notify the debtor that, should action be instituted and judgment obtained against him, "execution against the debtor's primary residence will ordinarily follow and will usually lead to the debtor's eviction from such home."[607] However, further than this, the Practice Manual contains no specific or clear directives as to the requirements for, or the facts or circumstances which must be established in, an application for an order for the execution of a person's home. It simply directs that "the guidelines laid down in … [*FirstRand Bank v Folscher*], and the judgments referred to therein, must be followed."[608] It is submitted that it is unfortunate that clearer, more

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principle established in *Gundwana v Steko* and the application of Rule 46(1) and the respective circumstances covered by each. The reason may be that, in *FirstRand Bank v Folscher*, it was held, at pars 28–29, that "home" and "primary residence" was the "same concept" and that there was therefore no conflict between *Gundwana v Steko* and the amended Rule 46(1). However, in the note preceding the appendices, in *Practice Manual of the North Gauteng High Court* 149-150, reference is made to both the decision, in *Gundwana v Steko*, and Rule 46(1) and their respective contextual application. It may also be noted that the *Practice Manual of the North Gauteng High Court* 149, purportedly quoting from *Gundwana v Steko*, refers to "… the *house* of a person", as opposed to the *home*.

[603] See discussion at 5.6.4.2 (b), above.

[604] *Practice Manual of the North Gauteng High Court* Appendix IV par 9.

[605] *Practice Manual of the North Gauteng High Court* Appendix IV par 3.

[606] *Practice Manual of the North Gauteng High Court* Appendix IV par 10.

[607] *Practice Manual of the North Gauteng High Court* Appendix IV par 14. This is in accordance with the practice directive issued by the full court, in *FirstRand Bank v Folscher* par 53.

[608] *Practice Manual of the North Gauteng High Court* Appendix IV par 15.

specific directives were not issued to serve as guidance for practitioners and judicial officers in such matters.

It may be noted that suggested practice still differs in the various branches of the high court in South Africa. For example, in the South Gauteng High Court, the most recent practice note in this regard,[609] issued subsequently to the decision in *Gundwana v Steko*, announced that:[610]

> [t]he Registrar will as usual continue to consider and grant applications for default judgment and the accompanying prayers for declaration of other immovable property specially executable. Where execution is sought against primary residence (*sic*), the Registrar shall refer such application to the open court. The Registrar still has authority and must deal with prayers for default judgment even where execution is sought against immovable property an shall, in terms of the latest ruling, refer to the open court the prayer for declaring of primary residence executable.

In terms of the practice note, it will be for the registrar to determine, preferably by virtue of a statement under oath by the applicant, whether the property sought to be declared specially executable is a primary residence or not. If this is not clear, the registrar will refuse to consider the application for an order declaring the immovable property specially executable.[611] Thus, it appears that the registrar is still granting default judgments but simply referring, for hearing in the open court, any "accompanying" applications for the granting of orders that primary residences are specially executable. Applications for orders of executability of a primary residence will be enrolled in the motion court, but only on a Tuesday, and a specific judge will be designated to hear the applications.[612]

Contrary to the practice directive issued in the North Gauteng High Court, the practice note for the South Gauteng High Court does provide guidance to the parties as to how courts will exercise their oversight in applications for orders of executability of primary

[609] See *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].
[610] *Practice Note: Default judgments and execution against primary residence* par 4.
[611] *Practice Note: Default judgments and execution against primary residence* par 5.
[612] *Practice Note: Default judgments and execution against primary residence* pars 8 and 9.

residences. The practice note states, in this regard, that it "is essentially an aspect which needs to be regulated by law (either in the form of judicial pronouncement – in interpreting the relevant rules and the constitution (*sic*), or by way of rules)." It may be observed that it was not specifically suggested that legislation might regulate the position. It further stated that, once the full bench in the North Gauteng High Court had delivered its judgment on the matter, a practice directive might be issued for the South Gauteng High Court.[613] Pending the full court decision and "in the interest of clarity and consistency", following discussion between the judges of the South Gauteng division of the High Court, it would require:[614]

- personal service of the summons on the owners where the immovable property in question is used as their primary residence, and/or on the occupiers, where the property is owned by a company, close corporation or trust and the shareholders, directors, trustees or beneficiaries occupy the property as their primary residence; and
- that the summons includes:
  - the current estimated value on the open market;
  - the amount of, and the number of instalments represented by, the arrears at the time when the judgment creditor exercised its rights against the mortgagor;[615]
  - a statement of the bond account indicating all debits and credits posted by the judgment creditor against the account of the mortgagor,[616] occupier and/or owner;
  - a statement that the court, upon hearing the application for declaring the immovable property executable, may call for further information to enable it to exercise its discretion whether to order execution or not.

[613] *Practice Note: Default judgments and execution against primary residence* par 6.
[614] *Practice Note: Default judgments and execution against primary residence* par 7.
[615] The practice note states "mortgagee" which, it is submitted, is obviously an error.
[616] This a second instance where the practice note states "mortgagee" which, it is submitted, is obviously an error.

5.6.6 Standard Bank v Bekker

In *Standard Bank v Bekker*, the full bench of the Western Cape High Court considered five applications for default judgment and for orders declaring mortgaged immovable property specially executable.[617] Although none of the summonses contained an allegation that the mortgaged property was the home of the defendant, in four of the cases there was reason to believe that it might be. In the fifth case, there was no indication at all, in this regard, but the court decided to adopt a cautious approach and to deal with it as if it was the home of the defendant.[618] The matters had been set down in the unopposed motion court but were subsequently referred to the full court by the Judge President. According to the judgment, this had occurred because of difficulties experienced by the motion court judge in the light of the "vastly divergent views" taken by various courts as to what is required in terms of the amended rule 46(1) before a court may authorise the issue of a writ of execution against immovable property. The full court explained that this was a reference to "inconsistent conclusions as to the influence and effect" of the judgments of the Constitutional Court, in *Gundwana v Steko*, and the full bench of the North Gauteng High Court, in *FirstRand Bank v Folscher*. It also drew attention to the judgment of Peter AJ, in the South Gauteng High Court, in *Nedbank v Fraser*, and stated that all three of these judgments fell to be considered in the context of *Standard Bank v Saunderson* to the extent that the precedent established in the latter case remained unaffected by the judgment in *Gundwana v Steko*.[619]

The full court, in *Standard Bank v Bekker* was uncertain, at first, as to the reason why the matters had been referred to it. Therefore, it invited counsel for the plaintiffs to formulate questions for it to address. The following questions were put forward for determination:[620]

[617] *Standard Bank v Bekker* par 1.
[618] *Standard Bank v Bekker* par 2.
[619] *Standard Bank v Bekker* par 3.
[620] *Standard Bank v Bekker* par 5.

1 What are the "relevant circumstances" to which a court should have regard before ordering execution against mortgaged property specially hypothecated to satisfy the debt secured by such mortgage?
2 By whom must such circumstances be placed [pleaded?] before the court?
3 Does the new rule 46(1) have the effect of setting up any substantive requirement on the part of the plaintiff in order to obtain the relief sought, namely the enforcement of contractual rights and obligations?

Thus, as noted by the court, the questions all had a bearing on the meaning and effect of rule 46(1)(a) and the manner in which the provisions should be implemented, in practice. At the court's request, counsel was appointed as *amicus curiae*.[621]

At the outset, the full court agreed with the observation by Peter AJ, in *Nedbank v Fraser*, that the proviso to rule 46(1)(a)(ii) should be read also to apply to rule 46(1)(a)(i).[622] This would mean that a court would also have to consider "all the relevant circumstances" where a creditor had obtained judgment against a debtor and the judgment debt remained unpaid after the creditor had excussed all of the debtor's movable property and thereafter sought to levy execution against the debtor's immovable property.[623] The full court, having briefly set out the developments brought about by *Jaftha v Schoeman* and *Gundwana v Steko*, respectively, noted that "[i]n context it is clear that the phrase 'all the relevant circumstances' used by the court in both *Jaftha* and *Gundwana* drew on the language of s[ection] 26(3) of the Constitution."[624] The full court emphasised that, in *Gundwana v Steko*, the Constitutional Court had not decided that the issue of the writ of execution against the appellant's home was exceptionable, in the circumstances, but that it had referred the appellant's rescission of judgment application to the high court for determination.[625]

The full court observed that in both *Jaftha v Schoeman* and *Gundwana v Steko*, the Constitutional Court had "declined to offer a definitive indication of what the relevant facts or circumstances might be" in the required evaluation. The full court explained that

[621] *Standard Bank v Bekker* par 6.
[622] See my related comment at 4.4.4.3, above, and *Nedbank v Fraser* par 12, discussed at 5.6.3, above.
[623] *Standard Bank v Bekker* par 4.
[624] *Standard Bank v Bekker* par 8.
[625] *Standard Bank v Bekker* par 9.

this was "because the possible permutations are innumerable" and, in some matters, the relevant circumstances would become evident only on peculiar facts that it would be "impracticable to try to conceive in the abstract".[626] Therefore, it stated that it was unable to address the first question posed in any better manner than the Constitutional Court had done. However, it did affirm that the circumstances must be *legally* relevant, and, in this regard, the court referred specifically to the same passage, in *Brisley v Drotsky*, as had been referred to in *FirstRand Bank v Folscher*.[627] The full bench of the Western Cape High Court further held that any facts which would "tend to demonstrate either an infringement of basic rights, or a justification for any such infringement" would be relevant "as would any facts that would be relevant to the exercise by a court of its discretion to refuse enforcement of contractual rights." In the latter regard, the court stated that obtaining an order for a writ of execution to be issued against hypothecated immovable property is closely analogous to obtaining an order for specific performance. The court noted that, in *Jaftha v Schoeman* and in *Gundwana v Steko*, it was the *judgment debtor* who had adduced evidence supporting the allegation that the sale in execution of her home would infringe her section 26 rights. However, it also observed that the evidence had not been presented in the court of first instance from which the writ of execution had been issued.[628]

Because the court, in *Standard Bank v Bekker*, had concluded that it could not answer the first question posed particularly helpfully, it decided to address all three questions put to it on a "globular", rather than an individual, basis. Counsel for the plaintiffs and the *amicus curiae* presented arguments primarily with reference to the judgments in *Standard Bank v Saunderson*, *Nedbank v Fraser* and *FirstRand Bank v Folscher*. This led the court to identify the essential problem as being the lack of consistency between individual judges' approaches in relation to procedural, rather than evidential, requirements for a plaintiff mortgagee to satisfy in order to obtain an order authorising execution against the mortgaged home of the debtor. The court observed that any consideration of the relevant circumstances, as required by rule 46(1), would "obviously

[626] *Standard Bank v Bekker* par 10.
[627] The court made specific reference to *Brisley v Drotsky* par 42. See my comment at 5.6.4.2 (b), above.
[628] *Standard Bank v Bekker* par 10.

[be] circumscribed by the ambit of the material … [which has been] placed before the court for such consideration." The court identified the main difficulty as being "an inconsistent approach by judges" as to whether it was the plaintiff or the defendant who was "responsible for ascertaining and placing evidence as to the relevant circumstances before the court, and the manner in which this should be done."[629]

The court noted that, in *Gundwana v Steko*, the Constitutional Court had found it unnecessary to decide whether the Supreme Court of Appeal's stance in *Standard Bank v Saunderson* – that the import and effect of *Jaftha v Schoeman* extended only to section 26(1) of the Constitution and not to section 26(3) – was correct. The full court explained that such a distinction was fundamental to the decision in *Standard Bank v Saunderson* because section 26(3) expressly requires judicial oversight in respect of evictions from, or demolition of, homes. Thus, had the court found that section 26(3) was also affected, it would not have been able to sustain the reasoning that the registrar had the power to authorise execution against immovable property that was the home of the judgment debtor. The full court accepted that execution against the home of a judgment debtor is "conceptually distinct" from any subsequent eviction of the judgment debtor from his home. However, it pointed out that accepting this distinction "still leaves unanswered the determination of the character of 'the relevant circumstances' referred to in rule 46(1)(a)."[630]

The court adopted the approach that the judgment in *Gundwana v Steko* had confirmed that the reach of the decision in *Jaftha v Schoeman* extended further than the Supreme Court of Appeal in *Standard Bank v Saunderson* had perceived it to have done. Further, in light of *Gundwana v Steko*, the full court regarded the judicial oversight which the Constitutional Court had required in *Jaftha v Schoeman* to be:[631]

> predicated on an acceptance of the reality that in the overwhelming majority of matters execution against immovable property that is the home of the judgment debtor will inexorably entail the subsequent forfeiture by the judgment debtor of

[629] *Standard Bank v Bekker* par 11.
[630] *Standard Bank v Bekker* par 12.
[631] *Standard Bank v Bekker* par 13.

> his right to occupation, whether voluntarily or by eviction, thereby negating any security of tenure bound up in the substance of the right to access to adequate housing in terms of s 26(1).

The court further remarked:[632]

> That much seems to be underscored by Mokgoro J's observation, in *Jaftha v Schoeman*, that section 26 of the Constitution falls to be read and applied as a whole, thereby implying an inextricable interrelationship between the provisions of s 26(1) and s 26(3).

In the result, the full bench of the Western Cape High Court expressed general agreement with the conclusion reached by the full bench of the North Gauteng High Court in *FirstRand Bank v Folscher* that the circumstances which are required to be taken into account "include those that would be relevant in matters arising for consideration under s 26(3)." It pointed out, however, that it had reached this result by applying the reasoning behind the decisions in *Jaftha v Schoeman* and *Gundwana v Steko*, and not with reference to the proviso to rule 46(1)(a).[633]

The full court noted that the Constitutional Court had not prescribed any content for the evaluation required in terms of section 46(1)(a), nor had it advised how or by whom the relevant evidence should be placed before the court in a default judgment situation. The only suggestion which the Constitutional Court had made in *Gundwana v Steko* was that the practical directions given in *Standard Bank v Saunderson* and *Nedbank v Mortinson*, to ensure that the defendants were alerted to the possible effect which judgment might have on their fundamental rights, might be of assistance.[634] However, the full court regarded a number of pertinent observations which the Constitutional Court had made, as providing important guidance. The first point was that the Constitutional Court had emphasised in *Gundwana v Steko* that the requirement of judicial oversight did not challenge the principle that a judgment creditor is entitled to

[632] *Standard Bank v Bekker* par 13.
[633] *Standard Bank v Bekker* par 13. The court, in *Standard Bank v Bekker*, regarded the amendment to rule 46(1)(a) as merely giving effect to the constitutional principles enunciated in *Jaftha v Schoeman* and *Gundwana v Steko*.
[634] *Standard Bank v Bekker* par 14, with reference to *Gundwana v Steko* par 52.

execute against the assets of a judgment debtor in satisfaction of a debt sounding in money.[635]

The full court considered the significance of the decision of the Constitutional Court in *Gundwana v Steko* that judicial evaluation must occur even in respect of a mortgaged home. The full court stated that in this way the Constitutional Court endorsed the observation in *Jaftha v Schoeman* that, if a judgment debtor had willingly put his or her home up as security for the debt, a sale in execution should ordinarily be permitted unless the application for the issue of a writ amounted to an abuse of court procedure.[636] The full court noted that, in *Jaftha v Schoeman*, the Constitutional Court had emphasised that an important aspect of the value of a home was the ability to use it to raise capital.[637] It further pointed out that, in *Standard Bank v Saunderson*, the Supreme Court of Appeal had regarded the mortgage bond as "an indispensable tool for spreading home ownership" and had stated "the value of a mortgage bond as an instrument of security lies in confidence that the law will give effect to its terms".[638] In *Standard Bank v Bekker*, the full court remarked that nothing in the judgment in *Gundwana v Steko* "derogates from the materiality and cogency of these observations" in *Standard Bank v Saunderson*.[639] The full court therefore concluded that *Gundwana v Steko* confirmed that, "in the absence of unusual circumstances, or an abuse of process", execution by a mortgagee against the mortgaged home of the debtor "is *prima facie* constitutionally justifiable, even if its effect would be to infringe the judgment debtor's section 26 rights."[640]

Thus, the full court identified specific observations which the Supreme Court of Appeal had made in *Standard Bank v Saunderson* as remaining unaffected by the judgment in *Gundwana v Steko*. These included that: cases in which execution against mortgaged property would conflict with section 26(1) are likely to be rare; it was hard to conceive of

[635] *Standard Bank v Bekker* par 15, with reference to *Gundwana v Steko* pars 53, 54.
[636] *Standard Bank v Bekker* par 16, with reference to *Gundwana v Steko* par 47, *Jaftha v Schoeman* par 58 and *Nedbank v Mortinson* pars 25, 28.
[637] *Standard Bank v Bekker* par 16, with reference to *Jaftha v Schoeman* par 58.
[638] *Standard Bank v Bekker* par 16, with reference to *Standard Bank v Saunderson* pars 1, 3.
[639] *Standard Bank v Bekker* par 16.
[640] *Standard Bank v Bekker* par 17, with reference to *Jaftha v Schoeman* par 58.

instances where a mortgagee's right to claim the debt from the property would be denied altogether; the approach ought not to differ depending on the property owner's reasons for mortgaging the property, or the object on which the loan was expended; and a plaintiff is required to justify an infringement only once the defendant has established that an order for execution would infringe his section 26(1) rights.[641] The full court observed that, in *Standard Bank v Snyders*, Blignault J had held that "the appropriate means of equipping the court to effectively discharge the function of judicial oversight" in such matters was to require "the mortgagee plaintiff to include in its summons a suitable allegation to convey to the defendant that the latter's section 26(1) rights could be a relevant matter in the determination of the relief sought." According to the full court, the "practical direction" issued by the Supreme Court of Appeal in *Standard Bank v Saunderson* "gave embodiment to this consideration" and "enjoyed commendation" in *Gundwana v Steko*.[642]

With reference to the practice note issued in *Standard Bank v Saunderson*, the full court, in *Standard Bank v Bekker*, stated that its object was to alert defendants whose section 26 rights could be infringed by execution against the mortgaged property to bring the relevant facts to the court's attention. It further stated that there could be no doubt that any court would have regard to such facts irrespective of the manner in which the defendant might present them. In other words, whether the defendant brought the facts forward in a plea, in a letter to the court, or by personal appearance at the application for judgment, the court would give procedural directions to facilitate the proper ventilation and consideration of the issues raised by the information provided by the defendant.[643]

The full court, in *Standard Bank v Bekker*, noted the importance, in the economic context, of hypothecation of immovable property. It also recognised the crucial part which it plays in facilitating private means of access to housing and in affording the state

[641] *Standard Bank v Bekker* par 17, with reference to *Standard Bank v Saunderson* pars 19 and 20 which are discussed at 5.4.1, above.
[642] *Standard Bank v Bekker* par 18.
[643] *Standard Bank v Bekker* par 19.

collateral assistance in discharging its obligation to achieve the progressive realisation of the right of all persons to have access to adequate housing. Considering this, the court stated:[644]

> … it would be counter-productive to impede … [its] efficient functioning … by introducing, without cogent reasons, novel and onerous procedural impositions on mortgagees seeking to exercise their contractual rights of security. Unnecessarily imposing constraints that would make obtaining orders for execution, that the Constitutional Court has confirmed should ordinarily follow in foreclosure cases, significantly more costly or cumbersome would, in the end, only be to make access to mortgage finance more difficult, and redound against the wider realisation of rights under s 26(1) of the Constitution.

The full court further stated that what should also be borne in mind was the measure of protection afforded by the NCA to mortgagors who are natural persons.[645] It agreed with the Supreme Court of Appeal's view in *Standard Bank v Saunderson*,[646] that the circumstances within which the property was mortgaged is irrelevant, in general, to a determination of whether or not an order for execution against the mortgaged property should be granted. It noted the approach of Peter AJ, in *Nedbank v Fraser*, that a court should be more inclined to order execution against the mortgaged property in circumstances where the debt was incurred to acquire the property than where it was incurred for purposes unrelated to the acquisition or improvement of the property. It stated that it was unable to reconcile such approach with that of the Supreme Court of Appeal in *Standard Bank v Saunderson* and the Constitutional Court in *Jaftha v Schoeman* and *Gundwana v Steko*.[647] The full court specifically cited, as an example, the situation where property was acquired with the assistance of a state subsidy provided in terms of the state's obligation in terms of section 26(1) of the Constitution. It explained that, if the property owner's right subsequently to use it to raise credit is not

[644] *Standard Bank v Bekker* par 20.
[645] *Standard Bank v Bekker* par 21. It is submitted that, although this was not clearly expressed, it would seem that the court tried to convey that this protection tempered the need for a court to be creatively proactive in seeking out ways to give effect to rule 46(1) by imposing, on the mortgagee plaintiff, as a matter of course, an obligation to obtain and place before the court information which, in most cases, would not affect the mortgagee's *prima facie* entitlement to realise its security. See *Standard Bank v Bekker* par 22, with reference to *Nedbank v Fraser* pars 20-21.
[646] *Standard Bank v Bekker* par 23, with reference to *Standard Bank v Saunderson* par 19.
[647] *Standard Bank v Bekker* pars 23 and 24, with reference to *Standard Bank v Saunderson* par 19, *Jaftha v Schoeman* par 58 and *Gundwana v Steko* par 47.

fettered, there is no reason to afford such property any "special protection against the consequences of the contract of hypothecation". The court stated:[648]

> If the courts were to adopt a different approach it would be liable to result in the economic stigmatisation of property acquired with State assistance with attendant adverse effects on the dignity and economic freedom of the owners of such property. The advancement of human freedoms by choosing to use one's property in a certain way, such as to raise credit, unavoidably bears with it the assumption of a corresponding responsibility.

In the result, the full court expressed the view that there is no foundation in legal principle for the approach adopted by Peter AJ in *Nedbank v Fraser*.[649] However, the court, in *Standard Bank v Bekker*, emphasised "the duty of the court to act proactively to obtain whatever additional information might appear relevant for the purpose of consideration in terms of rule 46(1) if, in a peculiar case, some or other feature of the matter flashes warning signals." It cited *ABSA v Ntsane* as an example of such a situation.[650]

The full court stated that the defendant is in the best position to inform the court of circumstances showing that execution against his home might result in an unjustifiable infringement of his section 26 rights. However, the court also pointed out that the mere fact that it is the home of the defendant against which execution is sought does not by itself justify an inference that section 26 rights are implicated.[651] It noted that, as was stated in *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd and Others (No 2)*,[652] "s[ection] 26 of the Constitution enshrines a right of access to adequate housing, not a right to continue living in the house of one's choice even

[648] *Standard Bank v Bekker* par 23, with reference to *Jaftha v Schoeman* par 58.
[649] *Standard Bank v Bekker* par 24. It may be noted that the English appeal court adopted a different approach, in *Abbey National Building Society v Cann* [1991] AC 56 which concerned home acquisition finance. As Fox *Conceptualising Home* 55-56 points out, in this case, the court held, at 92, that "the debtor's acquisition of title and the creation of the charge were 'indissolubly bound together'" and that the effect of the decision is that "the weight of the occupier's home interest as against the creditor who provided acquisition finance may … be relatively less compared to the home interests of more 'established' occupiers."
[650] *Standard Bank v Bekker* par 25.
[651] *Standard Bank v Bekker* par 26.
[652] *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd and Others (No 2)* 2010 (1) SA 634 (WCC).

though one cannot afford it".[653] The full court, in *Standard Bank v Bekker*, reiterated that it is ordinarily up to the defendant to alert the court to any facts or circumstances that implicate his section 26 rights. It recalled that the Supreme Court of Appeal had determined, in *Ndlovu v Ngcobo*, that the occupier bore the evidentiary onus in eviction applications under section 4 of PIE. It expressed the view that this applies *mutatis mutandis* when the mortgagee seeks an order authorising execution against the hypothecated property and the mortgagor wishes to avoid the mortgage being enforced in the usual course, as contemplated in *Jaftha v Schoeman*.[654] The full court, in *Standard Bank v Bekker*, referred specifically to the passage in the judgment, in *Ndlovu v Ngcobo*, where it was held that, provided the owner had made out a *prima facie* case for eviction and complied with the procedural formalities prescribed in PIE:[655]

> [u]nless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties.

It may be noted that, as in *FirstRand Bank v Folscher*, the court made no mention, in *Standard Bank v Bekker*, of the *dicta* issued in this regard by the Supreme Court of Appeal in *Shulana Court* (SCA).[656]

The full court, in *Standard Bank v Bekker*, stated that an appropriate allegation should henceforth be included in the summons in matters where a declaration of special executability is sought ancillary to judgment on a money claim. This was so that the court should be able to know from the summons whether or not the application concerns execution against the defendant's primary residence. The court further stated that, where a plaintiff does not have sufficient knowledge of the relevant facts to be able to make such an allegation, then this should be stated in the summons. It also held that, where the summons does not contain an allegation that the mortgaged property is *not* the defendant's primary residence, then the court must scrutinise the matter on the

[653] *Standard Bank v Bekker* par 30.
[654] *Standard Bank v Bekker* par 26 with reference to *Jaftha v Schoeman* par 58.
[655] *Standard Bank v Bekker* par 26 with reference to *Ndlovu v Ngcobo* par 19.
[656] See my comment at 5.6.4.2 (g), above.

assumption that it may be the defendant's primary residence, unless it is clear from other indications in the papers that this is not the situation. The full court expressly stated in *Standard Bank v Bekker* that it was undesirable for affidavits to be required in the manner set out in the practice note issued by the full bench of the North Gauteng High Court in *FirstRand Bank v Folscher*. However, in *Standard Bank v Bekker*, the court qualified its statement in this regard by pointing out that the position would be different where judgment had earlier been obtained and the judgment creditor had endeavoured first to excuss movable assets of the judgment debtor. The court explained that this would be unlikely to occur where the home had been mortgaged to secure fulfilment of the debt as, in such a case, the plaintiff would ordinarily seek an order authorising execution against the mortgaged property contemporaneously with judgment for payment of the secured debt.[657]

In *Standard Bank v Bekker*, the court stated that matters in which the plaintiff is able to allege that the mortgaged property is not the primary residence of the defendant may still be disposed of by the registrar. It further stated that the registrar had been advised in such cases to require an affidavit from the plaintiff, or judgment creditor, deposed to by a person appearing to have the relevant knowledge, confirming that the mortgaged property is not the primary residence of the defendant.[658] The court encouraged mortgagee plaintiffs to follow this process in view of the burden which the requirement of judicial oversight in terms of the proviso to rule 46(1) places on the limited judicial resources available.[659]

The full court bore in mind that a court has a duty cautiously to examine applications for execution against a defendant's home and that the duty entails more than merely ascertaining whether a cause of action has been established. It stated that it would be useful if the mortgagee plaintiff would include allegations in the summons setting out the

[657] *Standard Bank v Bekker* par 27, with reference to *FirstRand Bank v Folscher* par 54.
[658] The court explained, at par 28, that the requirement of an affidavit arises out of the exigencies of the proviso to rule 46(1)(a) and that it is consistent with the registrar's duty in terms of rule 31(5)(vi) to consider whether an application under the subrule should rather be set down for hearing in the open court.
[659] *Standard Bank v Bekker* par 28.

amount of any periodic instalments required to be paid and the amount in which the instalment payments were in arrears at the time of foreclosure or the issue of summons. It further advised that, in cases where the amount of the arrears was relatively low at the time of foreclosure, the mortgagee plaintiff should set out in the summons allegations to support its claim for direct realisation of the mortgaged property "as reasonable and appropriate in the circumstances".[660] The full court qualified this advice by stating that, although allegations of this nature were not mandatory, they might allay concerns that an order for special executability might, in the circumstances, constitute an abuse of process. It explained that if such concerns are not allayed in advance they could cause delay if it were to become necessary to address requests by judges once the matters came to court. It stated that the court would have due regard in the ordinary course to all features of the case, including the principle of *pacta sunt servanda* and the considerations specifically mentioned by the Constitutional Court in *Jaftha v Schoeman*.[661]

The full court concluded by summing up the position regarding the three questions posed as follows.[662]

- There is no definitive answer to the first question. Relevant circumstances must be legally relevant. Relevant evidence would be evidence to show an infringement of constitutional rights or an abuse of process or evidence offered to support a mortgagee's contention that an alleged or demonstrated infringement is justifiable.
- Allegations that execution against the mortgaged property would infringe the defendant's, or judgment debtor's, constitutional rights or that it would constitute an abuse of process, should, in principle, be pleaded by the defendant. Rebutting allegations should be pleaded by the plaintiff.
- Rule 46(1)(a) does not give rise to any new substantive obligation on a mortgagee seeking an order for execution against mortgaged property. The proviso to rule 46(1)(a) "gives procedural effect to the constitutional

[660] *Standard Bank v Bekker* par 29.
[661] *Standard Bank v Bekker* par 29, with reference to *Jaftha v Schoeman* par 58.
[662] See *Standard Bank v Bekker* par 30.

> requirement that execution against immovable property that is a judgment debtor's home may potentially entail an infringement of s[ection] 26 rights and must therefore occur only under judicial oversight." In the circumstances, a plaintiff is required to comply with Practice Note 33, applicable in the Western Cape High Court,[663] the practice direction issued in *Standard Bank v Saunderson* and the guidelines contained in the judgment of the full court.[664]

Dealing with the merits of the individual matters before it, in one of the five matters, the full court granted default judgment and issued an order of special executability against the mortgaged property. However, in the other four, in view of the plaintiff's failure to comply with periods prescribed in the provisions of the NCA, each application was postponed *sine die* to give the plaintiff an opportunity to remedy the defects in process.[665]

5.6.7 Mkhize v Umvoti Municipality

The judgment, in *Mkhize v Umvoti Municipality* (SCA),is the first judgment of the Supreme Court of Appeal which interprets the decision in *Jaftha v Schoeman* in light of the decision in *Gundwana v Steko*. It may be noted that the judgment, in *Mkhize v Umvoti Municipality* (SCA), refers also to *Nedbank v Fraser* and *FirstRand Bank v Folscher*, decided after *Gundwana v Steko*, but not to *Standard Bank v Bekker*.[666]

In *Mkhize v Umvoti Municipality* (SCA), the immovable property in question had been sold in execution pursuant to a default judgment issued by the clerk of the magistrate's court at the instance of the Umvoti Municipality to whom the appellant owed outstanding rates and charges in respect of the property. Thus, this case concerned an extraneous debt and not mortgaged property. The appellant, the erstwhile owner, sought, *inter alia*,

[663]Practice Note 33 of the Western Cape Consolidated Practice Notes relates to proceedings instituted in terms of the NCA.
[664]The full court specifically mentioned the guidelines contained in pars 27-29 of its judgment.
[665]*Standard Bank v Bekker* pars 31-42.
[666]Judgment was delivered, in *Standard Bank v Bekker*, on 25 August 2011. In *Mkhize v Umvoti Municipality* (SCA), argument was heard on 8 September 2011 and judgment was delivered on 30 September 2011.

a declaration that the sale was invalid for lack of compliance with the judicial oversight required by *Jaftha v Schoeman*. He also sought the retransfer of the property to him. The court dismissed the appeal on the basis that the immovable property in question was not the appellant's primary residence and thus the sale in execution had not in any way affected his section 26 rights. In this respect, the Supreme Court of Appeal confirmed the decision of Wallis J, in the court *a quo*, where it was held that section 26 does not apply in relation to a debtor's second home or a holiday home.[667] However, the appeal court's unanimous judgment, *per* Malan JA, goes further to clarify the position regarding the interpretation and application of precedent established in *Jaftha v Schoeman* and *Gundwana v Steko*.

An important issue in the appeal was whether the judicial oversight envisaged in *Jaftha v Schoeman* was required in all cases of execution against immovable property in the magistrate's court, regardless of whether the right to adequate housing was impaired.[668] In the court *a quo*, Wallis J had held that the order in *Jaftha v Schoeman* was ambiguous in that it was capable of two constructions. On the one hand, it could be regarded as applicable to all cases of execution against immovable property and, on the other, as applicable only to execution against immovable property where the debtor's right to have access to adequate housing is infringed.[669] Bearing in mind that the order was broad, thus also affecting sales in execution which did not suffer from any constitutional defect, Wallis J construed it as applying only to cases where the immovable property in question was the home of the debtor.[670] However, the Supreme Court of Appeal adopted a different approach.

In *Mkhize v Umvoti Municipality* (SCA), Malan JA pointed out that the Constitutional Court had stated, in *Gundwana v Steko*, that it preferred not to embark on a detailed

[667] *Mkhize v Umvoti Municipality* (SCA) par 18; *Mkhize v Umvoti Municipality* (KZP) pars 12, 13, 26, 41 and 42.
[668] *Mkhize v Umvoti Municipality* (SCA) par 9.
[669] *Mkhize v Umvoti Municipality* (KZP) par 40.
[670] Wallis J regarded a broader construction of this aspect of the decision in *Jaftha v Schoeman* as going beyond the constitutional issue before it and thus encroaching on the domain of the legislature and infringing the doctrine of separation of powers. See *Mkhize v Umvoti Municipality* (SCA) pars 5, 10, 11 and 12, with reference to *Mkhize v Umvoti Municipality* (KZP) pars 22, 37, 38, 40 and 41.

enquiry into whether, in *Standard Bank v Saunderson*, the Supreme Court of Appeal had correctly understood the import and effect of *Jaftha v Schoeman*. However, the Constitutional Court had overturned the decision, in *Standard Bank v Saunderson*, to the extent that it held that a registrar was not constitutionally competent to make execution orders when granting default judgment in terms of rule 31(5)(b). It also ruled that a mortgagee is in the same position as other creditors.[671] In *Mkhize v Umvoti Municipality* (SCA), the Supreme Court of Appeal was persuaded largely by the published comments of Du Plessis and Penfold[672] in relation to *Jaftha v Schoeman* and *Standard Bank v Saunderson*. It held that the only way in which to determine whether the right to have access to adequate housing is compromised is for judicial oversight to be required, on a case by case basis, in *all* cases of execution against immovable property.[673] The appeal court endorsed the submissions of Du Plessis and Penfold in their criticism of the decision in *Standard Bank v Saunderson* that:[674]

> [a]t no point in its reasoning did the Constitutional Court[, in *Jaftha v Schoeman*,] suggest that this constitutional duty only arose when there was formal opposition from the defendant…
>
> In any event, the idea of formal opposition as the trigger for constitutional justification appears to miss the point. There are many reasons why a defendant may not formally oppose such an order, not least of which may be a lack of funds and a lack of knowledge about the legal process – something which the Constitutional Court averted to in *Jaftha*. In our view there are undoubtedly circumstances in which a court would, despite the lack of opposition, be fulfilling its constitutional duty by refusing to grant such an order. One such example would be where the debt is for a disproportionately small amount of money relating to the value of the home that will be lost.

In the result, the Supreme Court of Appeal decided that judicial oversight is necessary even in cases where there has been no formal opposition by the debtor.[675] Indeed, the court went even further to hold that the effect of the decision in *Gundwana v Steko* is

[671] *Mkhize v Umvoti Municipality* (SCA) pars 14-16, with reference to *Gundwana v Steko* pars 42, 43 and 44.
[672] *Mkhize v Umvoti Municipality* (SCA) par 18, with reference to Du Plessis and Penfold 2005 *AS* 27 77-81; 2006 *AS* 45 83-93.
[673] *Mkhize v Umvoti Municipality* (SCA) par 19.
[674] Du Plessis and Penfold 2006 *AS* 45 89-90, referred to in *Mkhize v Umvoti Municipality* (SCA) par 18.
[675] *Mkhize v Umvoti Municipality* (SCA) par 19.

that a *court* must determine "whether a matter is of the *Jaftha*-kind".[676] As Malan J pointed out, the Constitutional Court stated that this "requires more than a mere checking of the summons" as, for example, in *Gundwana v Steko*, where it was not apparent from the summons whether the debtor was indigent or whether the mortgaged property was her home.[677]

The separate, concurring judgment was delivered by Navsa and Snyders JJA with the express intention of "clearing up the confusion arising out of the complexities that other courts ha[d]… found in the application of *Jaftha*" and which the judges of appeal regarded as having been caused by "a multitude of judgments seeking to come to terms with *Jaftha*".[678] The judges of appeal stated:[679]

> The object of judicial oversight is to determine whether rights in terms of s 26(1) of the Constitution are implicated. In the main a number of cases grappling with *Jaftha* sought to arrive at that determination without accepting that judicial oversight was required in every case. How, it must be asked, can a determination be made as to whether s 26(1) rights are implicated, without the requisite judicial oversight? …

This, it is submitted, constitutes a significant aspect of the interpretation by the Supreme Court of Appeal, in *Mkhize v Umvoti Municipality* (SCA), of the Constitutional Court's judgment in *Gundwana v Steko*. It establishes, or confirms, that judicial oversight is required, not only at the stage where it must be determined whether an infringement of section 26(1) rights is justifiable in terms of section 36 of the Constitution, but also even earlier in the proceedings. This earlier stage is that at which it must be determined whether the section 26(1) rights of the defendant are affected at all. In this context, proceedings include those which are unopposed and, therefore, where the defendant's right to have access to adequate housing has not even been raised as an issue. It is submitted that this interpretation is correct. In *Gundwana v Steko*, the Constitutional Court clearly stated that "the registrar's power to refer the matter to open court, and a

[676]This was held not only in the unanimous judgment delivered by Malan JA, but also in a concurring judgment delivered by Navsa and Snyders JJA with whom Meer AJA also concurred. See *Mkhize v Umvoti Municipality* (SCA) pars 16 and 24, with reference to *Gundwana v Steko* par 43.
[677]*Mkhize v Umvoti Municipality* (SCA) par 16.
[678]*Mkhize v Umvoti Municipality* (SCA) pars 22 and 24.
[679]*Mkhize v Umvoti Municipality* (SCA) par 26.

party's recourse on getting to know of a default judgment – once the horse has bolted – is a poor substitute for the initial judicial evaluation."[680] Therefore, as underscored by the judgment in *Mkhize v Umvoti Municipality* (SCA), it is a constitutional requirement in every case where immovable property is sought to be declared executable that a judicial officer, and not a registrar or a clerk of the court or, for that matter, any other administrative official, should make this determination. Consequently, it is submitted, an additional burden will be placed on judicial officers and it will be necessary to make changes in administrative procedures and logistical arrangements in the magistrate's courts and high courts.

It may be noted that the required approach differs from those of the full bench of the North Gauteng High Court, as expressed in *FirstRand Bank v Folscher*, and the full bench of the Western Cape High Court, in *Standard Bank v Bekker*. The system currently in place in the North Gauteng High Court, in which a non-judicial officer prepares a special court roll consisting of matters concerning prayers for orders permitting execution against persons' homes, does not conform to this requirement. Neither, apparently, does the system which operates in the South Gauteng High Court where, having issued the default judgment, the registrar decides which matters to refer to the open court for a decision whether to order that the home of the defendant is executable.[681]

5.6.8 Comments on the position post-Gundwana v Steko

Shortly after judgment was delivered in *Gundwana v Steko*, the view was conveyed in the media that it had clarified the process and would "give certainty to both the lenders and the homebuyers".[682] Another view was presented in the same media report, expressing concern that banks would have "to show that they did everything in their

[680] See *Gundwana v Steko* par 50.
[681] See *Practice Manual of the North Gauteng High Court* Appendix IV par 9 and the *Practice Note: Default Judgments and Execution against Primary Residence* pars 5 and 7, discussed at 5.6.5, above.
[682] See Wasserman "Indebted keep house after key ruling" *fin24.com* (21 April 2011) http://www.fin24.com/Money/Money-Clinic/Indebted-keeps-house-after-key-ruling-20110421 [date of use 15 March 2012].

power to help clients to remain in their houses" and that they would have to show that "a substantial amount is still outstanding".[683] Additional comments reported included that a more prolonged process of debt recovery would lead to an increase in bank costs which would eventually be passed on to consumers and that banks might be even less willing to enter into mortgage agreements.[684] The full impact of *Gundwana v Steko* remains to be seen. It is submitted that much remains to be clarified, not only in relation to the principles and considerations as set out in the judgment, but also as regards their practical application.

The combined effect of *Jaftha v Schoeman* and *Gundwana v Steko* is that, in the individual debt enforcement process, in both the magistrates' courts and in the high courts, judicial oversight is required in the determination of whether execution may occur against a person's home. *Gundwana v Steko* established that this includes a home which has been mortgaged in the creditor's favour. A court must determine whether execution would infringe the debtor's right to have access to adequate housing, recognised in section 26 of the Constitution, and whether, in the particular circumstances of the case, such infringement would be justifiable in terms of section 36 of the Constitution.

The Supreme Court of Appeal's interpretation of *Gundwana v Steko*, in *Mkhize v Umvoti Municipality* (SCA), is significant. Its effect is that judicial oversight is required not only at the stage where it must be determined whether an infringement of section 26(1) rights is justifiable in terms of section 36 of the Constitution but also at the earlier stage at which it must be determined whether section 26(1) rights of the defendant are affected. Further, according to this reasoning, such judicial evaluation must take place in *all* cases in which execution is sought against immovable property, including unopposed matters where the defendant's right to have access to adequate housing

[683]For similar concerns expressed during the period after *Jaftha v Schoeman*, see Van Heerden and Boraine 2006 *De Jure* 332, 352.
[684]For similar concerns expressed, after *ABSA v Ntsane*, see Steyn 2007 *Law Dem Dev* 101-102. Peter AJ made similar remarks in *Nedbank v Fraser* par 45.

has not even been raised as an issue.[685] The effect is that, in every case where immovable property is sought to be declared executable, a judicial officer, and not a registrar, a clerk of the court or other administrative official, must decide whether the registrar or a clerk of the court may deal with it or whether it must be heard in open court. Thus, it appears that logistical arrangements in place in various high courts do not conform to constitutional imperatives.[686]

The Constitutional Court has stated that in order to determine whether execution is justifiable and should therefore be permitted a court must consider "all the relevant circumstances". In the interests of retaining flexibility in the exercise of the courts' discretion in this regard there is no clear definition or closed list of "relevant circumstances" which must be considered. However, the courts have indicated factors which may be relevant depending on the facts of each particular case. Different courts have suggested different factors, with a measure of overlap between them.

In terms of *Jaftha v Schoeman*, execution should not be permitted where it would constitute an abuse of the process. Where the debtor's home has been mortgaged in favour of the creditor, ordinarily, and in the absence of any abuse of process, execution should be permitted. The Constitutional Court also stated that "[e]very effort should be made to find creative alternatives which allow for debt recovery but which use execution only as a last resort."[687] In terms of *Gundwana v Steko*, "execution orders relating to a person's home all require evaluation",[688] including in cases where the home has been mortgaged. Also, "due regard should be taken of the impact that [execution] may have on judgment debtors who are poor and at risk of losing their homes."[689] The Constitutional Court stated that if the judgment debt may be satisfied in a reasonable manner without the debtor losing his home, a court should consider such alternative

[685]See *Mkhize v Umvoti Municipality* (SCA) pars 18, 19 and 24, with reference to *Gundwana v Steko* pars 43 and 50.
[686]See 5.6.5, 5.6.6, and 5.6.7, above.
[687]*Jaftha v Schoeman* par 59.
[688]*Gundwana v Steko* par 50.
[689]*Gundwana v Steko* par 53.

course before it grants an order declaring the immovable property executable.[690] It also stated that "[i]f there are no other proportionate means to attain the same end, execution may not be avoided."[691] It is submitted that the corollary also applies: if there are proportionate means available to attain the same end, execution must be avoided.

In the period between these two Constitutional Court decisions, all developments, except the amendment to rule 46(1) of the High Court Rules, occurred on a casuistic basis in the high court. This contributed in no mean way to the uncertainty which prevailed as differently constituted courts adopted divergent approaches to the interpretation and application of the relevant precedent in the particular circumstances of each case. Thus, *Gundwana v Steko* introduced a measure of much-needed clarity to the position. However, *lacunae* still exist, particularly in relation to the identification of the relevant principles, including substantive and procedural criteria to be applied and factors to be considered and their practical implementation. Uncertainty remains regarding a number of fundamental aspects some of which have been brought to the fore by subsequent judgments in which the *dicta* in *Gundwana v Steko* were interpreted and applied. These judgments have extended the reasoning in *Gundwana v Steko*, in a number of respects, and have introduced new concepts which themselves now require explanation. The judgments also expose the fact that divergent approaches continue to be adopted in the various judgments handed down since *Gundwana v Steko*. Of great concern, it is submitted, is that the divergence appears to be almost self-perpetuating in that the divergent approaches which caused the difficulties and necessitated matters to be referred to the full bench of the Western Cape High Court, in *Standard Bank v Bekker*, have now been added to by that very judgment.

In terms of rule 46(1)(a)(ii) of the High Court Rules, a court must consider all the relevant circumstances before it may authorise a writ of execution against a judgment debtor's primary residence in consequence of a default judgment issued in terms of rule 31(5). This is different from the position in the magistrates' courts where, in terms of

[690] *Gundwana v Steko* par 53.
[691] *Gundwana v Steko* par 54.

Jaftha v Schoeman, words have to be read into section 66(1)(a) of the Magistrates' Courts Act. The effect of the reading in is that, where judgment has been granted for the payment of money and the judgment debtor has failed to pay, and there is insufficient movable property to satisfy the judgment debt, after consideration of all the relevant circumstances, a court may order execution against the immovable property of the judgment debtor. This extends to all immovable property and not only the home of the debtor. On the other hand, in *Gundwana v Steko*, the Constitutional Court held that a court must carry out an evaluation, in which all the relevant circumstances must be considered, in every case where execution is sought against the home of a person.

Thus, the reach of each of these legal principles is different, although the effect of the decision in *Gundwana v Steko* covers both of the former. However, the question may be raised whether the reach of *Gundwana v Steko* extends further than the combined effect of both of the former. In *Nedbank v Fraser*, Peter AJ pointed out differences between them as well as subsequent anomalies arising out of the proviso to the amended rule 46(1)(a)(ii) which he held should be read also to apply to rule 46(1)(a)(i).[692] On the other hand, in *FirstRand Bank v Folscher*, the full bench of the North Gauteng High Court did not make any reference to the need for the proviso to be construed as also qualifying sub-rule 46(1)(a)(i).[693] Neither did it allude to the comments made by Peter AJ, in *Nedbank v Fraser*, with regard to its construction, but expressly stated that the proviso qualifies sub-rule 46(1)(a)(ii).[694] However, in *Standard Bank v Bekker*, the full court of the Western Cape High Court endorsed the comments of, and approach adopted by, Peter AJ.[695] Clearly, it is submitted, this aspect of rule 46(1) requires amendment.

In *FirstRand Bank v Folscher*, the full bench of the North Gauteng High Court stated expressly that there was no conflict between rule 46(1) and the decision in *Gundwana v Steko*. It decided, without any reference to the earlier, contrary decision of Peter AJ in

[692] *Nedbank v Fraser* par 12, discussed at 5.6.3, above.
[693] See discussion at 4.4.4.3.
[694] *FirstRandBank v Folscher* par 1.
[695] *Standard Bank v Bekker* par 4.

Nedbank v Fraser, in the South Gauteng High Court, that rule 46(1) does not apply to a situation where the judgment debtor is a legal entity which owns immovable property which constitutes the home of its director, member, or beneficiary. Thus the question whether *Gundwana v Steko* affects the position where the immovable property in question constitutes the home of a non-owner, such as a family member, a dependant or some other person occupying with the permission of the owner, has not been addressed.[696] Children's rights have not been touched on – neither their right to shelter, recognised in terms of section 28(1)(c) of the Constitution, nor the principle reflected in section 28(2) that a child's best interests are of paramount importance in every matter concerning the child. If, at a later stage, it is sought to evict such a person from his home, perhaps he will be expected to rely on any rights he may have in terms of PIE. If this is indeed the position, it remains unclear.

In the practice directive issued, in light of *Gundwana v Steko*, by the full bench of the North Gauteng High Court in *FirstRand Bank v Folscher*, in addition to considering what might constitute "relevant circumstances", the full court referred to "extraordinary circumstances" in the absence of which a mortgagee will ordinarily be entitled to a writ of execution. This is an additional term now required to be understood and integrated with other relevant, authoritative *dicta*.[697] The full court stated that "extraordinary circumstances" would "usually consist of factors that would render enforcement of the judgment debt an abuse of the process, which a court is obliged to prevent".[698] Significantly, in *Standard Bank v Bekker*, the full court declared that it was unable to state any more clearly than the Constitutional Court had already done, what would constitute "relevant circumstances". It confirmed that "in the absence of unusual circumstances, or an abuse of process", execution by a mortgagee against the mortgaged home of the debtor "is *prima facie* constitutionally justifiable even if its effect would be to infringe the judgment debtor's section 26 rights."[699] However, in neither

[696]This issue has also been raised by Mills 2011 *De Rebus* (June) 52.
[697]See 5.6.4.3, above.
[698]*FirstRand Bank v Folscher* par 40.
[699]*Standard Bank v Bekker* par 17.

judgment was any explanation given of what would be "extraordinary circumstances" or "unusual circumstances" in this context.

The concept of what constitutes "an abuse of the process" is apparently different to that which was identified originally, in *Jaftha v Schoeman*, as is its significance in matters concerning execution against mortgaged homes. In *Jaftha v Schoeman*, the abuse of the court process consisted in execution against indigent debtors' homes in order to satisfy trifling extraneous debts.[700] In *ABSA v Ntsane*, the court held that it would be an abuse of the process to permit the enforcement of an acceleration clause in a mortgage bond leading to execution against the mortgaged home of the debtor, where the arrear amount was a trivial R18,46.[701] After the Constitutional Court confirmed in *Gundwana v Steko* that execution against a mortgaged home may also infringe a person's section 26(1) rights, in *Nedbank v Fraser*, Peter AJ regarded the required judicial oversight as posing a safeguard against abuse of the execution process.[702] He recognised, as indications of an abuse of the process, execution in respect of a trifling debt as well as where the judgment creditor insists upon executing against the immovable property, with a view to acquiring it at a sale in execution, either directly or in collusion with another, for a price significantly less than what it is worth.[703] In *FirstRand Bank v Folscher*, the full court held that it constitutes an abuse of the process where execution against the debtor's home is permitted in circumstances where the debt may be satisfied by alternative means. Thus, "an abuse of the process" has acquired an extended meaning in this context. As discussed above,[704] it is submitted that this could contribute to obfuscation of the two stages of constitutional limitation analysis and could thus render the practical application of the rules and the exercise of judicial discretion

[700] See *Jaftha v Schoeman* pars 30, 43. The circumstances in that case were that the only attorney practising in a poor, rural community represented the creditors to obtain execution orders against the indigent, uneducated and ignorant debtors' state-subsidised homes in satisfaction of trifling debts. Further, evidence was that the attorney himself had purchased, for personal gain, a number of homes, at sales in execution held at his instance, in similar circumstances.
[701] *ABSA v Ntsane* pars 79-80, 84-85.
[702] *Nedbank v Fraser* par 24.
[703] *Nedbank v Fraser* par 21; see related comments at 4.4.3.3 and 4.4.4.3, above.
[704] See 5.6.4.3, above.

even more of a challenge for courts and practitioners, especially, possibly, in the lower courts.[705]

Another fundamental aspect which requires elucidation in light of judgments delivered since *Gundwana v Steko* is the relationship, or the extent of the similarity, between execution against a person's home and eviction of a person from his home.[706] In *Nedbank v Fraser*, the court noted that an application for eviction may follow the sale in execution of a person's home. It held that section 26(3) of the Constitution requires judicial oversight at that final stage of the process and stated that the effect of *Gundwana v Steko* "is that the execution process is equated with eviction for the purposes of section 26(3)".[707] The court further recognised that the wording of rule 46(1) "echoes" that of section 26(3) of the Constitution. In *FirstRand Bank v Folscher*, the full court stated that the "relevant circumstances" which are required to be considered in terms of section 26(3), rule 46(1) and *Gundwana v Steko*, respectively, "are of the same nature". This is arguable on the basis that the purpose of the evaluation carried out by the court at the stage of the process where execution is sought, differs from that where eviction is applied for and that, therefore, different rights are required to be considered and balanced. It may also be recalled that, in *Standard Bank v Saunderson*, the Supreme Court of Appeal, correcting the approach of the court *a quo*, in *Standard Bank v Snyders*, which had decided the matter on the basis of section 26(3), held that the section in issue was section 26(1) and not section 26(3).

However, in *Standard Bank v Bekker*, the full bench of the Western Cape High Court noted that in *Gundwana v Steko* the Constitutional Court had found it unnecessary to decide whether this aspect of the decision, in *Standard Bank v Saunderson*, had been correct. The full court explained that the distinction between section 26(1) and section 26(3) was pivotal to the decision in *Standard Bank v Saunderson* because, otherwise, the Supreme Court of Appeal could not have concluded that judicial oversight was unnecessary and that the registrar had the power to authorise execution against the

[705] See 3.2.3, above.
[706] *FirstRand Bank v Folscher* pars 33-35, discussed at 5.6.4.2 (b), above.
[707] *Nedbank v Fraser* par 9, with reference to *Gundwana v Steko* par 41.

home of the judgment debtor.[708] In *Standard Bank v Bekker*, the full court accepted that execution against the home of a judgment debtor is "conceptually distinct" from any subsequent eviction of the judgment debtor from his home. However, it regarded the decision in *Gundwana v Steko* as having confirmed that the effect of *Jaftha v Schoeman* extended further than the Supreme Court of Appeal, in *Standard Bank v Saunderson*, had anticipated. Further, the full court regarded the Constitutional Court's approach, as reflected in *Jaftha v Schoeman* and *Gundwana v Steko*, to be that the reality is that, in most cases, execution against a person's home will be followed by forfeiture, whether voluntarily or by eviction, of the judgment debtor's right to occupation. It also emphasised Mokgoro J's observation, in *Jaftha v Schoeman*, that section 26 of the Constitution falls to be read and applied as a whole, thereby implying an inextricable interrelationship between the provisions of section 26(1) and s 26(3).[709]

Therefore, the position is that the full bench of the North Gauteng High Court and the full bench of the Western Cape High Court share a common view that the circumstances which are required to be taken into account in determining whether execution against a person's home should be permitted "include those that would be relevant in matters arising for consideration under s[ection] 26(3)."[710] It may be noted, in this regard, that in both *FirstRand Bank v Folscher* and *Standard Bank v Bekker*, it was held, with reference to the majority judgment in *Brisley v Drotsky*,[711] that only "legally relevant" facts need to be considered. However, it is submitted that this reasoning is flawed as it overlooks the Constitutional Court's decisions in *Port Elizabeth Municipality* and *51 Olivia Road* (CC). The latter cases indicate that "relevant circumstances", in section 26(3) of the Constitution, are not confined to legal grounds justifying an eviction under the common law.[712] They also indicate that, in relation to eviction and section 26(3) of the Constitution, the court is not resolving a civil dispute as to who has rights

[708] *Standard Bank v Bekker* par 12, discussed at 5.6.6, above.
[709] *Standard Bank v Bekker* par 13, discussed at 5.6.6, above.
[710] *Standard Bank v Bekker* par 13, discussed at 5.6.6, above.
[711] *Brisley v Drotsky* par 42.
[712] These cases are discussed at 3.3.1.4, above. See also Liebenberg *Socio-Economic Rights* 277, with reference to *Brisley v Drotsky* pars 38 and 42 and *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (6) SA 417 (SCA), 2007 (6) BCLR 643 (SCA) pars 40-41. See also Van der Walt *Property in the Margins* 157-158.

under land law but is called upon to decide whether, bearing in mind the values of the Constitution, in upholding and enforcing land rights it is appropriate to issue an order which has the effect of depriving people of their homes and, if so, the conditions under which this should occur.[713]

Another important issue, not addressed in *Gundwana v Steko*, is the manner in which it is anticipated that a court will become aware of "all the relevant circumstances" in order for it properly to evaluate whether execution against the person's home should be permitted. A crucial question is the extent to which the court is required to play a proactive role in this regard, especially where the debtor has not defended the matter or reacted in any way to the summons. In *Nedbank v Fraser*, the court, concerned that too onerous a burden should not be placed on creditors, suggested that the evaluation could be conducted using information indicating arrear amounts, relative to the total amount outstanding and the number of instalments which the arrears represents. It did suggest, however, that in cases dealing with extraneous debts and where judgment debts were for insignificant amounts scrutiny is required. Similar sentiments were conveyed by each of the courts in *FirstRand Bank v Folscher* and *Standard Bank v Bekker*, regarding too onerous a burden being placed on the plaintiff mortgagee possibly adversely affecting the availability for individuals of access to credit and the value of the mortgage bond as security, in the wider commercial and economic context. In *Standard Bank v Bekker*, the court perceived it also as potentially undermining the state's endeavour to discharge its duty to provide persons with access to adequate housing.[714]

In both *FirstRand Bank v Folscher* and *Standard Bank v Bekker*, the courts held that it is for the plaintiff mortgagee ordinarily to inform the court of relevant facts pertaining to the claim for a writ of execution to be issued. Further, if the creditor's claim is opposed, the

[713] *Port Elizabeth Municipality* par 32, referred to by Liebenberg *Socio-Economic Rights* 277-278.
[714] *FirstRand Bank v Folscher* par 39; *Standard Bank v Bekker* par 20. Cf comments made, in this regard, by Evans in “Does an insolvent debtor have a right to adequate housing?”. See also comments by Evans "A brief comparative analysis". Both of these works are also referred to, below, in this section of the manuscript.

debtor will ordinarily be in the best position to furnish relevant information to the court.[715] Therefore, a court would be expected only in extraordinary circumstances, such as in *ABSA v Ntsane*, to take proactive steps to obtain information about the debtor's situation. On this issue, in *FirstRand Bank v Folscher*, the full bench of the North Gauteng High Court stated that it would ordinarily be for the creditor, having informed the defendant in the summons of the possible consequences of execution against the mortgaged property and the implications for his section 26 rights, to place pertinent information before the court. On the other hand, it would be for the defendant to present information which would show that execution would not be justifiable. The court issued a practice directive to the effect that, in default proceedings, a creditor is required to provide an affidavit which includes information concerning factors which the court, in its judgment, enumerated as relevant, of which the creditor is aware or is able reasonably to establish. Following the approach of the Supreme Court of Appeal in *Ndlovu v Ngcobo*, the full court stated that, where all relevant information is not known to the creditor, "the court will have to consider those facts that are available – the known relevant facts."[716]

In *Standard Bank v Bekker*, the court indicated that in the Western Cape High Court, the approach is that appropriate allegations in the summons are sufficient and that it is then for the defendant to bring to the attention of the court relevant evidence showing an infringement of his section 26 rights.[717] The court did not agree with the practice directive issued in *FirstRand Bank v Folscher* that the plaintiff is required to lodge an affidavit in every case, but it stated that an affidavit will only be required where the plaintiff is alleging that the mortgaged property against which it is sought to be executed is *not* the debtor's primary residence. Thus, the North Gauteng High Court and the Western Cape High Court adopt divergent practices in this regard. However, a common feature in both *FirstRand Bank v Folscher* and *Standard Bank v Bekker* is that reference was made only to the *dictum* of Harms JA, in *Ndlovu v Ngcobo*, and the more recent, unanimous judgment of the Supreme Court of Appeal in *Shulana Court* (SCA) was

[715] *FirstRand Bank v Folscher* par 42.
[716] *FirstRand Bank v Folscher* par 44, discussed at 5.6.4.2 (g), above.
[717] *Standard Bank v Bekker* par 19.

apparently overlooked.[718] In the latter case, the Supreme Court of Appeal set aside an eviction order basing its reasoning on that of the Constitutional Court, in *Port Elizabeth Municipality*, that in the context of PIE, courts are required to go beyond their normal functions, to depart from the conventional approach, to be innovative and to call for further evidence.[719]

It was recognised in *Nedbank v Fraser*, *FirstRand Bank v Folscher* and *Standard Bank v Bekker*, that the evaluation required in relation to execution against the home is the same as that required in relation to eviction from the home. If this is so, then logically, *dicta* pertaining to the court's duty in eviction cases are equally appropriate in cases where it is sought to execute against the debtor's home. This would mean that a more comprehensive evaluation of facts, incorporating specific detail concerning the personal circumstances and resources of the debtor and his dependants, including children and aged or disabled persons, is called for. It would also mean that the "evaluation of the facts" carried out by Peter AJ in each matter in *Nedbank v Fraser* do not measure up to that which the Constitutional Court envisaged, in *Gundwana v Steko*, to be required in each case.[720] Further, the practice directive issued in *FirstRand Bank v Folscher* and the guidance given in *Standard Bank v Bekker* pertaining to procedural requirements are insufficient. The manner in which notice should be given to the debtor of the possible consequences of execution against, and eviction from, his home, and the manner in which information about the "relevant circumstances" should be placed before the court, do not go far enough. Certainly, it is submitted, as things stand, they do not appear to measure up to the Constitutional Court's requirements that "grace and compassion" should be infused into the process and that there should be "meaningful engagement" between the parties concerned.[721]

The effect of the decision in *Gundwana v Steko* is that, in every matter where execution against a person's home is sought, a court is required to consider any "alternative

[718]Discussed at 3.3.1.4.
[719]See comments at 5.6.4.2, and 5.6.6, above.
[720]*Gundwana v Steko* par 49.
[721]See 3.3.1.4 above. See *Port Elizabeth Municipality*, *51 Olivia Road* (CC), *Blue Moonlight Properties* (SCA), *Blue Moonlight Properties* (CC).

course" which may be available and whether there are "other proportionate means" to achieve satisfaction of the debt. If these exist, execution should be avoided.[722] Considering alternative solutions in general, in *Nedbank v Fraser*, the court mentioned the possibility of postponing the matter pending an enquiry in terms of section 65 of the Magistrates' Courts Act and raised the question whether section 129(3) and (4) of the NCA might be useful in the circumstances.

Prior to *Gundwana v Steko*, in *FirstRand Bank v Maleke*, Claassen J did everything in his power to "force" the consideration of alternative debt relief processes afforded to consumers by the NCA, in the event that the creditors persisted in enforcing the terms of the mortgage bonds. Earlier, in *ABSA v Ntsane*, Bertelsmann J had called for consideration of establishing a compulsory arbitration process to which banks should be subjected before they could claim an order to declare executable the debtor's home in cases where the arrear amounts were small. In that judgment, no mention was made of the NCA, which was not yet operational, nor how the suggested tribunal would function in light of the proposed provisions of the NCA. In recent eviction cases, the Constitutional Court has insisted on "meaningful engagement" between the parties in an effort to settle their dispute in a mutually satisfactory manner, before an eviction application will be entertained. In view of the analogies which have been drawn, since *Gundwana v Steko*, between the evaluation required in eviction cases and where execution against the home is sought, it is submitted that it is likely that the Constitutional Court would adopt a similar approach in the latter situation. Evidently, there is a need for a workable and effective alternative debt relief process which operates in a way which balances the interests of debtors and creditors, including, especially, mortgagees of debtors' homes, to provide a solution for over-indebted homeowners seeking to avert the sale in execution of their homes.

In *Jaftha v Schoeman*, the Constitutional Court rejected the notion of a "blanket prohibition" on execution of "low value" homes at the instance of creditors. This was on the basis that a "blanket exemption" could create a "poverty trap" because a person

[722] *Gundwana v Steko* par 54.

would be unable to use it as security to access credit.[723] In *Standard Bank v Bekker*, the court stated, in relation to the notion of disallowing execution against homes which had been acquired with a state subsidy, that this might result in the "economic stigmatisation" of such homes "with attendant adverse effects on the dignity and economic freedom of the owners of such property".[724] However, this statement apparently does not take into consideration the state's interest in preserving the value of the investment it made by providing a subsidy for the acquisition of the home. Presumably, the portion of the value of the home which reflects the amount of the state subsidy would not be available to the execution creditor and the state would enjoy preference over the judgment creditor, in respect of this amount, which ought to be paid to it from the proceeds of the sale. This, in itself, undermines the value, for a mortgagee, of the security provided by a state-subsidised home and in some cases might even negate it.

Evans questions the value of the argument of Mokgoro J, in *Jaftha v Schoeman*, that a "blanket exemption" could lead to a lack of access to credit and, consequently, a "poverty trap", for owners of homes with low value. Evans suggests that it may be "because of the possibility of obtaining capital via the security of the property that debtors in the position of the appellants [in *Jaftha v Schoeman*] are caught up in a debt trap." He also makes the point that creditors are usually in the advantageous position where "they can decide whether they wish to enter into such a [contractual] relationship whilst aware that a limited value home may be exempt from execution. In such cases debtors and creditors must make do with the legal provisions for payment of debts in instalments".[725]

From the judgments, it is clear that the identification and practical application of the legal principles, as provided by judicial precedent established in a plethora of cases, pose a challenge for judicial officers and practitioners. This challenge could well be an

[723] *Jaftha v Schoeman* par 51.
[724] *Standard Bank v Bekker* par 23.
[725] See Evans "A brief comparative analysis"; Evans "Does an insolvent debtor have a right to adequate housing?"; Evans 2008 *De Jure* 262-263; and Evans *Critical Analysis* 423. See, also, 7.5.5.2, below.

insurmountable obstacle rendering the required process impracticable, especially in the lower courts, as well as for persons who need to be *au fait* with the legal position in order meaningfully to assist the public in cases of human rights abuses and with human rights education. While it may be acknowledged that significant developments have taken place in this area of the law since *Jaftha v Schoeman*, it is submitted that many of the comments made about the lack of clarity which surfaced in its wake, as far as substantive and procedural criteria are concerned, may be regarded as equally applicable today.[726] Indeed, the current situation may be regarded as even less clear in many respects. My submission, during the period after *Jaftha v Schoeman* and *Standard Bank v Saunderson*, was that the uncertainty might create a "poverty trap" similar in effect to the one which Mokgoro J had sought to avoid.[727] In the same vein, it is submitted that if the position is not clarified the lack of predictability, from the perspective of lenders and investors, may undermine the "trust in bond finance" which the courts, including in *FirstRand Bank v Folscher* and *Standard Bank v Bekker*, have expressed the need to preserve.[728] It is submitted that, as long as the consequences of default by the debtor are predictable in any given circumstances such as, for example, where it is a "low value" home, or where it was acquired with the assistance of a state subsidy, lenders, including mortgagees, will be in a position to carry out the necessary risk assessments in advance. They will also be able to incorporate necessary safeguards in the terms of their contracts, or mortgage bonds.[729]

In *Standard Bank v Bekker*, the court concluded that it could not define or explain what would constitute "relevant circumstances" more clearly, or in any more useful manner, than the Constitutional Court had already done in *Jaftha v Schoeman* and *Gundwana v Steko*. It explained that what is relevant will depend on the facts of each case and on what issues may arise depending, in turn, on the information available to the court in the

[726]See Van Heerden and Boraine 2006 *De Jure* 319; Steyn 2007 *Law Dem Dev* 119, discussed at 5.3.3, above.
[727] See Steyn 2007 *Law Dem Dev* 119, with reference to *Jaftha v Schoeman* par 51.
[728]*FirstRand Bank v Folscher* par 39; *Standard Bank v Bekker* par 20.
[729]See Evans "A brief comparative analysis"; Evans "Does an insolvent debtor have a right to adequate housing?". See, also, similar remarks made by commentators in respect of the position, in England and Wales, referred to at 7.5.5.2, below.

particular circumstances of each matter.[730] Given the casuistic development of this area of the law thus far, it may be anticipated that the lack of definition as far as substantive requirements are concerned and the lack of clarity in relation to the procedural requirements may be self-perpetuating, in a sense, and that future development will be a protracted and, possibly, somewhat erratic process. After all, it is generally accepted that it is not the role of the judiciary to formulate policy. As alluded to by Peter AJ in *Nedbank v Fraser*, it is the function of the legislature rather than a court to provide the required solutions.[731] In the interim, however, debtors who, it may be anticipated, are already impecunious and would be unlikely to have the wherewithal to conduct and fund protracted litigation are effectively being denied adequate access to justice.

In the result, it is submitted that there is a need for explicit substantive and procedural criteria to be laid down. Pertinent information should be made available to the public providing guidance, including detail as to when execution might be regarded as infringing a person's section 26 rights, and, once it is established that this is the case, how a court might exercise its discretion. It is submitted that legislative intervention should occur to regulate the position by establishing an explicit substantive framework and a streamlined process to be applied uniformly in matters in which execution is sought against a debtor's home.

Finally, it is submitted that a clear conception of, and definition for, a debtor's "home" which will be eligible for protection will have to be devised. As Evans has pointed out, the first steps have already been taken in this regard by the Constitutional Court in *Gundwana v Steko* and also in the formulation of rule 46(1) of the High Court Rules which applies with respect to "the primary residence of a judgment debtor".[732] Further, it will have to be determined whether movable structures such as mobile homes, trailers, or "shacks" will be included. To include these, it may be noted, would conform to

[730] *Standard Bank v Bekker* par 10.
[731] *Nedbank v Fraser* par 38.
[732] Evans "Does an insolvent debtor have a right to adequate housing?".

international consumer debt relief recommendations.[733]

5.7 Conclusion

In *Jaftha v Schoeman*, the Constitutional Court recognised that execution against an indigent debtor's home in order to satisfy a trifling debt, in circumstances where it would render her homeless and ineligible for another state housing subsidy, was an unjustifiable infringement of her right to have access to adequate housing. The court declared section 66(1)(*a*) of the Magistrates' Courts Act, as it was then worded, to be unconstitutional. It held that certain words should be read into the section in order effectively to provide that only a court, after consideration of all the relevant circumstances, may order execution against the immovable property of a judgment debtor where there is insufficient movable property to satisfy the judgment debt.[734]

Thus, the effect of the judgment was that in the magistrates' courts, judicial oversight was required in cases where execution was sought against a debtor's home in order to determine whether, in the circumstances, execution would be justifiable in terms of section 36 of the Constitution. The court provided guidance with regard to the balancing of the various interests involved but, in order to retain sufficient flexibility to accommodate various circumstances, deemed it inappropriate to try to delineate all the circumstances in which a sale in execution would not be justifiable. The court stated that execution should not be permitted where it would constitute an abuse of the process. Further, where the debtor's home has been mortgaged in favour of the creditor, ordinarily, and in the absence of any abuse of process, execution should be permitted.[735] The court also stated that "[e]very effort should be made to find creative alternatives which allow for debt recovery but which use execution only as a last resort."[736]

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[733]See Insol International *Consumer Debt Report II* 5. See, also, Evans "Does an insolvent debtor have a right to adequate housing?".
[734]See 5.2.3, above.
[735]See 5.2.3, above, with reference to *Jaftha v Schoeman* par 58.
[736] See 5.2.3, above, with reference to *Jaftha v Schoeman* par 59.

However, no substantive and procedural requirements were set and the flexibility of the guidance provided brought about a lack of clarity as to when execution would constitute an unjustifiable infringement of the debtor's right to have access to adequate housing. A period of uncertainty followed *Jaftha v Schoeman*. Because judicial oversight was required in the magistrates' courts, but not in the high court, banks commonly preferred to institute action against mortgagees in the high court although the matters fell within the magistrate's court's jurisdiction. Different practices developed in the various branches of the high court to deal with this and other related issues. Controversy surrounded whether and, if so, in what circumstances execution against a mortgaged home constituted an unjustifiable infringement of the mortgagor's section 26(1) rights.[737]

Although, in *Standard Bank v Saunderson*, the Supreme Court of Appeal settled contention to the extent that it affirmed the authority of a registrar of the high court to issue a writ of execution pursuant to rule 31(5) of the High Court Rules, it did not provide the necessary clarity with regard to execution against mortgaged homes. It did, however, confirm the importance of mortgage bonds and that their terms should be upheld.[738] After *Standard Bank v Saunderson*, the judgments indicate a lack of consistency in the treatment of cases concerning execution against a person's home. The proactive approaches in *ABSA v Ntsane* and *FirstRand Bank v Maleke* differ markedly from that of the Supreme Court of Appeal in *Standard Bank v Saunderson*.[739]

The impact of the NCA which introduced changes in the applicable law, including new consumer debt relief mechanisms, is seen, for instance, in *FirstRand Bank v Maleke* and *FirstRand Bank v Seyffert*. However, problems with the practical implementation and interpretation of the NCA's provisions hampered initiatives by at least some debtors who anticipated that they could rely on the new regime to save their homes from execution by creditors. This is seen, for example, in *Standard Bank v Hales*.[740]

[737]See 5.3, above.
[738]See 5.4.1, above, with reference to *Standard Bank v Saunderson* par 3.
[739]See 5.5, above.
[740]See 5.5.4, above.

Amendments to rules 45 and 46 of the High Court Rules introduced judicial oversight into the high court process where a writ of execution is sought against a judgment debtor's primary residence. However, rule 46(1) operates in a different context to that within which section 66(1) of the Magistrates' Courts Act applies. Further, the application of rule 46(1) will not necessarily prevent execution from rendering a judgment debtor and his family homeless as is evident from the judgment in *FirstRand Bank v Meyer*, where the court granted a writ of execution despite the defendants' chronic health problems and desperate circumstances.[741] This contrasts with the approach adopted in the same, although differently constituted, court only three months earlier in *FirstRand Bank v Siebert*.[742] Thus, different approaches are evident which may be attributed not only to changes in the law and the different practice directives applicable in various branches of the high court but also, it is submitted, to the perspectives of the particular court within the context of the available information in each set of circumstances.[743]

It was anticipated that the Constitutional Court's decision in *Gundwana v Steko* would provide much-needed clarity and establish a base for uniformity and consistency in this area of the law. In *Gundwana v Steko*, the Constitutional Court confirmed that execution orders relating to a person's home all require judicial evaluation. This includes cases where the home has been mortgaged.[744] It also recognised that "due regard should be taken of the impact that [execution] may have on judgment debtors who are poor and at risk of losing their homes." The court stated that, if the judgment debt may be satisfied in a reasonable manner without the debtor losing his home, a court should consider such alternative course before it grants an order declaring it executable. It also stated that"[i]f there are no other proportionate means to attain the same end, execution may not be avoided."[745]

This decision has significant practical implications for the courts. More recent judgments

[741]See 5.5.4.6, above.
[742]See 5.5.4.5, above.
[743]See 5.5.5, above.
[744]See 5.6.2, above.
[745]See 5.6.2.3, above, with reference to *Gundwana v Steko* pars 53 and 54.

of the high court and the Supreme Court of Appeal, in which *Gundwana v Steko* has been interpreted and applied, reveal that a lack of clarity remains, particularly with regard to the application and practical implementation of the precedent which it established.[746] For example, despite changes to logistical arrangements in some high courts to accommodate special court rolls for such matters, it would appear, in light of *Mkhize v Umvoti Municipality* (SCA), that the requirement of judicial evaluation, at the initial stage, to determine whether each matter is "of the *Jaftha*-kind", is not being met. As the Constitutional Court stated in *Gundwana v Steko*, "the registrar's power to refer the matter to open court, and a party's recourse on getting to know of a default judgment – once the horse has bolted – is a poor substitute for the initial judicial evaluation."[747]

Further, in each of *Nedbank v Fraser*, *FirstRand Bank v Folscher* and *Standard Bank v Bekker*, the court regarded the circumstances which are relevant in eviction cases and where execution is sought against a person's home, respectively, as being the same. If this is indeed so then, presumably, judicial *dicta*, issued regarding eviction applications are equally applicable in cases concerning execution against a person's home. Following the rationale adopted in decisions such as *Port Elizabeth Municipality*, *Shulana Court* (SCA), *51 Olivia Road* (CC), as well as *Blue Moonlight Properties* (SCA) and *Blue Moonlight Properties* (CC), has significant implications for the conduct of cases in which execution is sought against a person's home. For instance, it must be borne in mind that "[t]he spirit of *ubuntu* … suffuses the whole constitutional order". Further, the court is required "to infuse elements of grace and compassion into the formal structures of the law", to be instrumental in bringing about "meaningful engagement" between the parties concerned, and to take proactive steps to obtain the required level of detail of information concerning the personal circumstances of those likely to be affected. Eviction cases also provide precedent for ordering state institutions, where this is called for, to fulfil their duty in terms of section 26 of the Constitution to provide access to adequate housing. This might entail the provision of

[746] See 5.6.3 - 5.6.8, above.
[747] See 5.6.5, 5.6.6 and 5.6.7, with reference to *Gundwana v Steko* par 50, and 5.6.8, above.

emergency accommodation pending access to a formal housing programme, for persons who will be affected by an eviction order, and for postponing the execution of the eviction order until this has been done. In none of *Nedbank v Fraser*, *FirstRand Bank v Folscher* or *Standard Bank v Bekker* did the court consider these judgments nor was its approach in line with them. Whether the same approach as in eviction cases is required urgently needs to be clarified.[748]

Differences are evident in the judgment of Peter AJ, sitting as a single judge in the South Gauteng High Court in *Nedbank v Fraser*, and in the later judgment in *FirstRand Bank v Folscher* of the full court of the North Gauteng High Court, specifically constituted to provide a practice directive. However, no reference is made in the judgment in *FirstRand Bank v Folscher* to these differences nor even to the earlier judgment in *Nedbank v Fraser*. In *Standard Bank v Bekker*, the full bench of the Western Cape High Court was required to address difficulties arising out of the lack of consistency between individual judges' approaches in relation to procedural, rather than evidential, requirements for a plaintiff mortgagee to satisfy in order to obtain an order authorising execution against the mortgaged home of the debtor. The difficulties were identified essentially as having arisen out of inconsistent stances as to whether it was the plaintiff or the defendant who was "responsible for ascertaining and placing evidence as to the relevant circumstances before the court, and the manner in which this should be done."[749] Ironically, this judgment may be regarded as having adding further, different perspectives to the mix. It is submitted that a uniform approach should be adopted to deal with matters in which execution is sought against debtors' homes.

At least one of the differences which may be identified as requiring clarification is whether "relevant circumstances" extend to those of a non-owner whose home is constituted by the debtor's immovable property in question. This raises other related issues including that, contrary to constitutional imperatives, the reported cases concerning execution against residential property owned by the judgment debtor have

[748] See 5.6.8, above.
[749] See 5.6.6, above, with reference to *Standard Bank v Bekker* par 11.

not specifically addressed the rights of other family members and dependants, including children's rights.[750] A comprehensive analysis, defining clearly the extent and boundaries of various parties' rights and interests, is called for.

Since *Jaftha v Schoeman*, the courts have provided a wide range of factors as examples of what might constitute "relevant circumstances" depending on the facts of each case. They have deliberately left these flexible. The latest judicial pronouncement on what constitutes "relevant circumstances", in *Standard Bank v Bekker*, was that they are incapable of being defined or explained any more clearly than the Constitutional Court had already done in *Jaftha v Schoeman* and *Gundwana v Steko*. In *Standard Bank v Bekker*, the court explained that what are relevant circumstances will depend on the facts and the information which is available to the court in each case.[751] However, inevitably, such flexibility has contributed to a lack of certainty and predictability. This is not only in relation to which factors should be applied in any given circumstances but also whether they constitute factors which have a bearing on whether execution would infringe section 26 rights, or whether they are factors which must be considered in the balancing process in terms of section 36 of the Constitution. The concept of "an abuse of the process" has been extended, since *Gundwana v Steko*. It is submitted that the concept now lacks optimal clarity of definition in this context, as does the newly introduced concept of "extraordinary circumstances" defined loosely, as it is, with reference to "an abuse of the process".[752] Given the complexities of constitutional limitation analysis and the importance of predictability, for potential creditors and investors, as well as the protracted and often unsatisfactory casuistic development of this area of law and the high cost of litigation, it is submitted that the time is ripe for legislative intervention. It is suggested that the legislature should consider establishing a streamlined, largely extra-judicial[753] process to be applied in all matters where a creditor seeks to execute against the home of a debtor.

[750] See 5.6.8, above.
[751] See 5.6.6, above.
[752] See 5.6.4.2 (d) and 5.6.8, above.
[753] See 5.5.2.2, above.

It is submitted that a simple, logically sequential process would serve at least two purposes. First, it would require parties to engage meaningfully with one another in an earnest effort to find alternative means by which the debt may be satisfied and to avoid execution against a person's home. In addition, it would facilitate the compilation of relevant detailed information to which a court might refer, where necessary, where an out of court settlement cannot be achieved. This submission is made in anticipation that a structured process would also assist practitioners and other legal and paralegal advisors, state and non-government organisation personnel as well as the parties themselves to understand the significance and purpose of furnishing specific information and properly to present their cases and possible defences. Ideally, meaningful participation in the process should be a prerequisite for any court proceedings in which execution against a person's home is sought. It is submitted that it is at this stage of the process that the existence of a workable and effective alternative debt relief mechanism such as, for example, a suitably modified version of the proposed section 118 pre-liquidation composition procedure, would be most valuable.[754] It is suggested that only where parties are unable to reach a reasonable settlement, should they be permitted to proceed to the stage entailing evaluation and determination by the court.

The suggested process could guide the court through evaluation of specific factors in order to establish whether execution would infringe any section 26, section 28 or other rights of affected persons and thereafter, if applicable, whether any such infringement would be justifiable in the circumstances. While guidelines or indicators may be provided, the court's discretion should be left intact. It is submitted that the first consideration should always be whether there is any ground on which the original, or principal, debt would be unenforceable in which case execution against the debtor's home would not even be an issue and no accessory obligation, in terms of any mortgage bond, would even have arisen.[755] At this stage, the court ought also to be vigilant in relation to any indications of "reckless lending", as defined in the NCA, as this

[754]See 4.4.3.6, 4.7.4 and 5.6.8, above. The proposed pre-liquidation composition procedure is also discussed at 6.4.3 and 6.10.6, below.
[755]See 4.3.3, above, with reference to *Kilburn v Estate Kilburn* 1931 AD 501.

could affect the enforceability of the obligation.[756] A relevant consideration is also if there has been compliance with sections 129 and 130.[757]

As far as section 26 rights are concerned, not every execution against a person's home infringes his right to have access to adequate housing. Therefore, it must first be determined whether this is indeed the case. This will depend on whether the property against which execution is sought is indeed the person's home or primary residence. It should then be determined whether execution will render him homeless, with no prospect of securing alternative adequate accommodation. If the person is indigent and will not be able to access adequate housing again unless he receives assistance from the state and if the loss of his home will render him ineligible to receive such support, then execution against his home will constitute an infringement of the negative aspect of his section 26(1) right. This will be on the basis that execution will deprive him of his existing access to adequate housing.[758]

Once it has been established that execution will constitute an infringement of the person's right to have access to adequate housing, the next stage of the process would be to consider whether such infringement is justifiable in terms of section 36 of the Constitution. This involves balancing the respective parties' rights and includes proportionality assessments of the effect on the various parties of permitting or preventing the infringement. Basically, what should be borne in mind are debtors', their families' and their dependants' housing and other constitutional rights, creditors' commercial interests, as well as the broader community's economic interests, generally, and its interest in the extension of credit as well as the enforcement of debt, generally, with proportionality being the key.[759]

It is submitted that the optimal method of ensuring that all relevant information is furnished by the parties for their, the administrative officials' and the court's benefit

[756]See 4.5.3, above.
[757]See 4.5.2, above, with reference to *Dwenga v FirstRand Bank*.
[758]See 3.3.1 and 5.2.3, above.
[759]See 3.2.3, 3.3.1 and 5.4.1 and 5.6.2.3, above, with reference to *Standard Bank v Saunderson* pars 1-3 and *Gundwana v Steko* par 54.

would be to require completion of a standard "check list" devised specifically for this purpose and, where appropriate, the provision of affidavits. In this way, it is anticipated that issues would be relatively clear cut and that "the relevant circumstances" pertaining to each case would be made known to all concerned in the process. Further, as issues would have been fully aired at the initial stage of the proposed process, this would facilitate the court's evaluation and determination of whether any reasonable alternatives to execution present themselves in the particular circumstances. The following are suggested as aspects, or questions, which a "check-list" ought to address in order to bring "relevant circumstances" into the foreground. Although mindful of the fact that balancing parties' interests in terms of section 36 of the Constitution is a nuanced, fluid, non-sequential process,[760] in order to facilitate their practical application, the following considerations are posed in as logically sequential fashion as possible.

Enforceability of the principal debt

- Is there any ground which would render the money debt unenforceable? If so, the enquiry goes no further. Any accessory obligation arising from a mortgage bond would likewise be unenforceable.[761]

Infringement of section 26(1) rights

- Are the debtor's section 26 rights infringed? The following ought to be considered:
  - Is the property the debtor's home or primary residence?
  - Will execution against the property render the debtor homeless?
  - Was the property acquired by means, or with the assistance, of a state subsidy?[762]
  - What is the value of the home?
  - Of what does the home consist? Is it movable or immovable property?

[760]See 3.2.3, above.
[761]See 4.3.3, 4.5.2 and 4.5.3, above.
[762]See 3.3.1.2, 4.2.1, and 5.3.2.3, above, with reference to *Nedbank v Mortinson* par 33.1-33.2.

- Are any family members' or other dependants' section 26 rights infringed? The following ought to be considered:
  - Is the property the home or primary residence of someone other than the debtor? If so, on what basis does the property constitute his home?[763]
  - Is the property the home of any children, elderly or disabled persons? If so, they should be identified and details should be provided concerning their circumstances.
  - Will anyone other than the debtor be rendered homeless by the sale in execution?

Compliance with procedural rules and practice directives

- Has there been compliance with the required procedure and practice directions?[764]
- Did the creditor inform the debtor of his right to have access to adequate housing and to provide information to the court setting out his circumstances?[765]
- Has the creditor complied with section 129 of the NCA?[766]

Details concerning the debt itself

- In what circumstances was the debt incurred?
- Was the debt incurred in order to acquire the immovable property against which it is sought to execute?[767]
- What is the amount of the debt? Specific questions should include:
  - Is the amount trifling?[768]

[763] In this respect, clarity is required with regard to the position of non-owners who occupy the property, as their home, through the debtor, such as, for example, a spouse married to the debtor out of community of property, a life partner, a child, or other dependant or family member. Although the issue does not form part of this thesis, the position of lessees was dealt with by the Supreme Court of Appeal, in *Maphango v Aengus*, discussed at 3.3.1.3, above, where it was held that they cannot raise section 26(1) rights against a lessor who has terminated the lease according to its terms. An appeal against this decision by the lessees is scheduled to be heard by the Constitutional Court in March 2012.
[764] See 5.2.3, above, with reference to *Jaftha v Schoeman* pars 56-60.
[765] See 5.4.1, above, with reference to *Standard Bank v Saunderson* par 27.
[766] See 4.5.2, above, with reference to *Dwenga v FirstRand Bank.*
[767] See 5.2, above, with reference to *Jaftha v Schoeman*, 5.5.2, above, with reference to *ABSA v Ntsane*, and 5.3.2.3, above, with reference to *Nedbank v Mortinson* par 33.1-33.2.
[768] See 5.2.3, above, with reference to *Jaftha v Schoeman* par 40, 5.3.2.3, above, with reference to *Nedbank v Mortinson* par 68 and 5.5.2, above, with reference to *ABSA v Ntsane* par 64.

- What is the amount of the arrears?
- What is the amount of the total outstanding balance of the debt?
- Does an acceleration clause apply? If so, details of both the arrear amount and the total outstanding balance will be pertinent.[769]
- How many of the agreed periodic instalments does the arrear amount represent?[770]

- Are there any indications, or allegations, that the above amounts are inaccurate? Does the debtor profess to have a counter-claim of any sort against the creditor?[771]

The debtor's circumstances

- What was the reason for the debtor's default?
- Have his or his family's circumstances changed since the debt was incurred? If so, details of, and reasons for, them.
- What are the debtor's resources? Is he employed? Does he have an income? Do his family members, dependants or other occupants of the home make any financial contribution to their living expenses?
- What other debts does the debtor have, such as arrear rates and municipal taxes?[772]
- What is the market value of the immovable property?
- Does the debtor have equity in the home?[773]
- Is there any prospect of selling the home privately?
- What movable assets does the debtor own?
- What are the prospects for recovery of the debtor's financial position?
- What is the financial situation of the parties, particularly, *relatively* speaking?[774]
- Is the debtor from a historically disadvantaged group of persons?[775]

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[769]See 5.5.2, above, with reference to *ABSA v Ntsane* par 66 and 5.6.3, above, with reference to *Nedbank v Fraser* par 28.
[770]See 5.6.3, above, with reference to *Nedbank v Fraser* pars 28-38.
[771]It is envisaged that, where applicable, any issues relating to unjustified enrichment may be considered in an endeavour to avoid difficulties arising *ex post facto*. In this regard, see 5.5.3.2, above, with reference to *Menqa v Markom*, and 5.6.2.3, above, with reference to *Gundwana v Steko* par 60.
[772]See 5.5.2.2, above, with reference to *ABSA v Ntsane* par 73.
[773]See 5.5.4.3, above, with reference to *FirstRand Bank v Maleke* par 5.
[774]See 5.5.2.1, above, with reference to *ABSA v Ntsane* par 18.

Conduct of the debtor

- How has the debtor conducted himself during the period of indebtedness?
- Has he been co-operative and forthcoming in his dealings with the creditor?
- Has he at some stage maintained a regular payment record or, otherwise, what attempts has he made to pay the debt or any portion of it?[776]

Conduct of the creditor

- How has the creditor conducted himself throughout? This may include the following considerations:
  - Is there any indication of "reckless lending" as defined in the NCA?[777]
  - More specifically, how has the creditor conducted himself since the debtor's default?
  - Has the creditor made reasonable efforts to settle the matter or to obtain satisfaction of the debt by alternative means?

Alternative means of satisfaction of the debt

- What alternative means are available in the circumstances to achieve satisfaction of the debt?[778] Aspects which may be considered include:
  - Would payment of lower instalments over an extended period be feasible?[779]
  - Could section 129(3) of the NCA be an option for the debtor?[780]
  - Could any other provisions of the NCA appropriately be applied to resolve the situation?[781]

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[775]See 5.5.4.3, above, with reference to *FirstRand Bank v Maleke* pars 5-6.
[776]See 5.5.4.3, above, with reference to *FirstRand Bank v Maleke* pars 5.2-5.3.
[777]See 5.5.4.4, above, with reference to *FirstRand Bank v Seyffert* pars 2 and 15.
[778]See 5.6.2.3, above, with reference to *Gundwana v Steko* par 53.
[779]See 5.2.3, above, with reference to *Jaftha v Schoeman* par 59.
[780]See 5.6.3, above, in relation to such a suggestion by Peter AJ, in *Nedbank v Fraser* pars 39-42.
[781]Once the court is aware of more detailed information, it could revisit the question of any indications of "reckless lending" by the creditor. In this regard, see 5.5.4.4, above, with reference to *FirstRand Bank v Seyffert* pars 2 and 15. In light of the approach of the courts, in reported judgments concerning the NCA, it would appear that s 85 would probably not be applied at this late stage of the proceedings, even if an allegation of over-indebtedness were to be made; see 5.5.4.2, above, with reference to *Standard Bank v Hales*.

- Should resort be had to section 65 of the Magistrates' Courts Act in order to obtain further information about the debtor and his dependants?[782]
- Ought the granting of the order of executability to be postponed in order to obtain additional information[783] or to provide the debtor with a "breathing space" or an opportunity to try to sell the property on the open market?[784]

Alternative accommodation arrangements

- Where there are no reasonable alternative means by which the debt may be satisfied and execution is unavoidable, what arrangements have been made for affected persons' alternative accommodation?
- Has the debtor attempted to access any applicable or appropriate state housing programmes? Are any state or non-government organisations assisting him and his family?[785]
- Would it be appropriate to make an order that is just and equitable in terms of section 172(1)(b) of the Constitution?

Regarding the second to last category of considerations, headed "Alternative means of satisfaction of the debt", it is submitted that a suitably modified version of the proposed section 118 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill, compiled in 2010, should be considered. This might pose an appropriate alternative means of satisfaction of the debt in order to avert the sale in execution of the debtor's home[786] as envisaged in *Gundwana v Steko*. It may also be borne in mind, however, that encouraging extra-judicial settlement between debtors and creditors before a matter may be heard by a court, is not a new concept. As discussed in Chapter

[782]See 5.6.3, above, with reference to *Nedbank v Fraser* par 46.
[783]See 5.3.2.3, above, with reference to *FirstRand Bank v Mashiya* par 52.
[784]See 5.4.1, above, with reference to *Standard Bank v Saunderson* par 20; 5.5.2.2, above, with reference to *ABSA v Ntsane* pars 69, 84 and 97; and 5.5.4.3, above, with reference to *FirstRand Bank v Maleke* par 8.
[785]See 3.3.1.1, above, with reference to *Grootboom* pars 21, 38, and 3.3.1.4, above, with reference to *Blue Moonlight Properties* (SCA) par 77.5.4.
[786]See 1.6, 4.4.3.6, 4.7.4 and 5.6.8, above, as well as 6.4.3 and 6.10.6, below.

2, it was a feature of the debt enforcement procedure in the Roman-Dutch legal system applicable in Europe and which formed the basis of South African common law.[787]

As regards the last category of considerations, headed "Alternative accommodation arrangements", it is submitted that specific legislative provision ought to be made to cater for the situation where the court determines that execution cannot be avoided and that execution will render the debtor and his dependants homeless. This would be in circumstances where they are "desperately poor and … in a crisis".[788] This was the situation, for example, in *FirstRand Bank v Meyer*. It is submitted that in such circumstances statutory mechanisms should require the state to provide alternative accommodation for affected persons in furtherance of its duty, as recognised by the Constitutional Court in *Grootboom*, to provide access to adequate housing. In *Blue Moonlight Properties* (CC), the Constitutional Court recently confirmed the duty of the relevant municipality to provide, where necessary and appropriate, emergency accommodation to persons evicted from privately owned property.

While it is acknowledged that this raises further complex issues, given the failure of the state thus far to provide necessary housing for vast numbers of people,[789] it is submitted that there would be no sense in delaying addressing the impending homelessness of the debtor until the eviction stage. Instead, in such circumstances, the provision of alternative, albeit emergency, accommodation should be expedited and legislation should specifically regulate this process. The drafting and the efficacy of a statutory provision of this type would necessarily require the involvement and cooperation of a number of state organisations, including the national, provincial and local spheres of government responsible for housing. It may necessitate amendment to policies and definitions in existing legislation and regulations and other documents such as, for

[787]See 2.3.2, above.
[788]See 3.3.1.4 (c) and 3.3.5, above, both with reference to *Blue Moonlight Properties* (SCA) par 59.
[789]See 4.2.3, above.

example, the National Housing Code.[790] The interface between such a provision and PIE would also have to be spelt out explicitly.

Finally, it is submitted that earnest consideration ought to be given to introducing a limited, statutory home exemption to prohibit, where appropriate, execution against homes of low value and those which were purchased with the assistance of a state subsidy. This is despite the rejection in *Jaftha v Schoeman* of the notion of a "blanket exemption" and the criticisms of it in *Standard Bank v Bekker*.[791] Specialised studies would need first to be conducted in order to ascertain an appropriate value for such an exemption and consideration would need to be given to the interface between legislative provisions constituting such an exemption and other legislation such as the Housing Act. Consideration should also be given to incorporation of equivalent, or at least substantially similar, exemptions in the applicable insolvency legislation. The position, in insolvency, will be considered in the following chapter.

[790]See 3.3.1.4 (c) and 4.2.1, above, both with reference to *Blue Moonlight Properties* (CC) par 47 and, for example, how "emergency" might be defined so as to avoid discrimination.
[791]See 4.2.2 and 5.6.8, above.